

THE BROOKINGS INSTITUTION

JUSTICE STEPHEN BREYER

Active Liberty:

Interpreting Our Democratic Constitution

Monday, October 17, 2005

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1775 Massachusetts Avenue, N.W.
Washington, D.C.

[TRANSCRIPT PREPARED FROM A TAPE RECORDING.]

C O N T E N T S

Welcome and Introduction:

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Moderator:

STUART TAYLOR
Nonresident Fellow
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P R O C E E D I N G S

MR. TALBOTT: Good afternoon everybody. I'm Strobe Talbott and I'd like to welcome you to the Brookings Institution.

Justice Breyer, up where you do your day job and wear your robes, you don't have to worry about cell phones because my recollection is that cell phones are not allowed into the Court, but we're much more lenient than that here. However, would everybody please turn off your cell phones so that we can have an uninterrupted discussion and we don't have to resort the new ejector seats that we've installed here at Brookings here in recent months.

I want to thank all of you for being here for what is a truly special event. All of you who came in here to the Falk Auditorium this afternoon came past the Brookings Book Store. Books are a very important part of what we do here at Brookings, and so it's a particular pleasure to be able to have an event to celebrate a book by a particularly celebrated author.

We're also very, very fortunate to have in addition to Justice Breyer, Joanna Breyer here with us this afternoon. Joanna also has a day job and it's not in Washington. She is a psychologist on the staff of the Pediatric Unit of the Dana Farber Cancer Clinic in Boston, Massachusetts, and she is normally up at work on a Monday, but she made a special effort to be with us this afternoon, and so Joanna, we particularly welcome you here.

I'm going to leave to my colleague Stuart Taylor the honor and privilege of saying a few words about Justice Breyer's distinction as a jurist, and I'm going to

confine myself to just a couple of comments about him in his capacity as a friend of the Brookings Institution and, indeed, a friend of many of here in this room this afternoon.

Justice Breyer has been extraordinarily generous with his time, his advice and his participation in the intellectual life of this institution. That's been especially the case with regard to our Governance Studies Program of which Stuart is a part, and Justice Breyer has also been very active with our Center on the United States and Europe, and I might add, in particular its program on France. He is not wearing his rosette this afternoon, unlike our Trustee Bill Coleman [ph] who I notice is wearing his rosette, but Justice Breyer—

MR. COLEMAN: He outranks me.

MR. TALBOTT: I was not going to put that out. You are, after all, a Trustee, and he is not. But what Bill is referring to is that Justice Breyer was recently made a Commandeur of the Legion d'Honneur. In fact, he is perfectly capable of delivering his remarks to you this afternoon in French. Moreover, I think he would also defend his constitutional right to do so, even in Washington, D.C. [Laughter.]

But he will be I think conducting his conversation with Stuart—I don't know how good Stuart's French is—in English. And he will also after they finish their conversation, as we get up towards 5 o'clock, he's been kind enough to agree to stick around right outside the door that you came in and sign some books for those of you who might be interested in having one with his signature.

I'm going to conclude with a personal recollection about Justice Breyer. He and I traveled together to India nearly 3 years ago, and we did so in our capacity, our exalted capacity, as spouses of my wife, Brooke and Joanna. Brooke and Joanna are on

the Board of Directors of something called the International Center for Research on Women, and so Justice Breyer and I tagged along and learned a great deal.

But he was not always, as it were, in the background. One day during that trip we went to Ahmedabad with an extraordinary facility with a somewhat misleading and not very upbeat sounding name of the Women's Cell. This is not what it sounds like. The Women's Cell is actually an Adjunct Court that gives the women of that part of India a chance to resolve relatively quickly those cases that would take forever in India's notoriously backlogged judicial system.

Justice Breyer was particularly in that setting as you can imagine nothing less than a kind of global rock star, but he did not act like one. He listened, he questioned, he drew the women who were there that day out on their own experiences and was primarily in that mode of learning from them, and they greatly appreciated that. Then at the end of the session he delivered a very moving appreciation of the way that those women had through their own initiative managed to find a way of bringing the law and the dispersion of justice closer to the spirit and the workings of democracy.

That's the topic of his book, and that's the topic of the conversation that he and Stuart will now have. So please join me in welcoming Justice Breyer to Brookings.

[Applause.]

MR. TAYLOR: This is an honor and a privilege. Thank you, Strobe, and thank you, Justice Breyer, for your willingness to put yourself through cross-examination by a journalist. Any urge I had to be journalistic about it is assuaged by the

fact that there are I think members of the Fourth Estate in the audience and they can ask questions, too, as can other members of the audience after I've asked a few.

Let me begin with what constitutional scholar Cass Sunstein write about *Active Liberty*, Justice Breyer's book, in *The New Republic* in a review, "With this small but important book, Justice Breyer emerges as a leading theorist of constitutional interpretation on the highest bench in the land. At last there has appeared a direct and substantial challenge within the Court to the constitutional thought of Justice Antonin Scalia." Of course, this book is much more than a challenge to Scalianism, if I may call it that. Indeed, Cass Sunstein goes on to rank Justice Breyer's book as among the most impressive of such efforts by a Justice in the nation's long history.

But even before the book, Justice Breyer had established himself as one of the Supreme Court's most thoughtful and sophisticated constitutional theorists. Media reports often characterize him, I've done it myself, as a liberal or a moderate liberal or a moderate, but such labels can't begin to capture the complexity of any jurist's philosophy let alone this jurist.

A few salient points: Contrary to the liberal stereotype, Justice Breyer has been a leading exponent of judicial deference to the democratic choices made by the Congress and state legislatures, and I think people have amassed statistics to show it. He has also been one of the most cogent dissenters from the Rehnquist Court's revival of a vision of federalism that for first time since the New Deal has narrowed the powers of Congress to regulate arguably local affairs and to protect various groups from discrimination by states.

He has mounted compelling arguments for upholding campaign finance regulations, about which I'll have a question later. He has championed the hotly debated view that judges and Justices interpreting our Constitution have much to learn from their counterparts across the seas and should even cite them on occasion perhaps.

I'm going to ask Justice Breyer some open-ended questions about the thrust of his book, and then more specific questions of my own. Then I'll invite questions from the audience, some of which may prompt follow-up questions from me.

As to all questions, Justice Breyer has made it clear that it would not be appropriate for him to comment on any of the current issues surrounding appointments and nominations or on any issues currently before the Court. And given the model Chief Justice John Roberts recently set, I'd be surprised if we can get him to comment about any issue that might come before the Court, but we can try. [Laughter.]

First question, we've seen a lot of talk, Justice Breyer, lately about theories and interpretation called originalism and textualism, and we've seen a little less talk until now about Active Liberty which I'm confident will eclipse them soon. Could you please sketch briefly what originalism and textualism are, and then in explain in some detail how the approach outlined in your book is different?

JUSTICE BREYER: Before I say what I was going to say before I say what I'm going to say, I want to thank you for that introduction, and Strobe, particularly nice, and particularly since the first book I ever wrote which there haven't been that many, was a Brookings book and they can still buy it. It's at Amazon.com. It's number 2,186,000. [Laughter.]

I don't know why it's so low. It's very interesting. It talks about energy regulation by the Federal Power Commission. [Laughter.]

I appreciated Brookings funding that book. It didn't pay for itself. And in any case, thank you, and thank you for the introduction.

You have to understand, you do understand, Stuart, that I didn't write this book as a reply to Justice Scalia. I wrote the book because I thought it was important to explain to people not just what we do in the Court, it's designed to give an insight to how at least some of the Judges go about deciding cases, but because I also wanted people to understand the importance of democracy in the Constitution. You say, well, don't they understand that? Every Fourth of July people give speeches about it.

Justice O'Connor, Justice Kennedy and I were at a meeting with Vartan Gregorian, the President of the Carnegie Foundation and others about how to teach high school students about the Constitution. They had asked lawyers all over the country, "What is the most important part of the Constitution?" Some said free speech; others said equality, a few said privacy interests. We all had the same reaction. What they'd put in place number like 20 or 30 was number one to us, and that is that this document is first and foremost about the creation of democratic institutions that allow people to decide policy matters for themselves, and the job of the Court is simply to police the outer bounds of a document that creates institutions for a certain kind of democracy. It's a democracy that does protect basic liberty, that assures a certain amount of equality; that separates power both fundamentally vertically between states and federal, and horizontally, Executive, Legislative and Judicial; that provides for a rule of law. All those things make it a certain special kind of democracy, but democracy is what it is.

And I wanted to explain to people that that after 11 years on the Court is how quite a few of us see this document, and I wanted them also to see how those very basic ideas that sound a little bit a Fourth of July speech can in fact help Judges on a Constitutional Court decide particular difficult cases.

That's the primary object. And then of course it is true that if you take that as an object and believe that that object is important in deciding cases, there is a degree of inconsistency with what's called originalism, textualism, which I call literalism, and to show you the difference, I don't know how much longer you want me to go on on this.

MR. TAYLOR: As long as you choose.

JUSTICE BREYER: Fine. [Laughter.] I'm finding a way to take a pause so you can absorb this, and now I can go on to the next point.

And the next point which is related to originalism is the following. In my opinion, most Judges approach difficult constitutional questions with the same fundamental set of tools. What are those tools? The language of the text.

Everyone thinks language is important: the history, the tradition of what that text has come to mean, the precedents, the underlying purpose or value, and the consequences of a decision one way or the other judged in terms of those basic values. I say every Judge thinks all those tools are relevant to help in a difficult case. Some Judges emphasize first and foremost text, precedent, history, tradition, believing that purpose and consequences in the world are overstated and should hardly be used. That I see as originalist, literalist, textualism.

Other Judges, and I would include myself there, think that the purpose of the provision, the fundamental value underlying the constitutional text, the reason why the protection of speech is written into the Constitution, the reasons are first and foremost primary, the others are relevant, but those are primary, and that we should judge consequences in light of those purposes. It's a question of emphasis. Because I emphasize the latter, it's fair enough to say that somewhere in this book I had to explain why I don't emphasize the former.

MR. TAYLOR: One distinction that I think is fundamental to the book is between what you the liberty of the ancients and the liberty of the moderns. Could you explain that distinction and how it fits?

JUSTICE BREYER: That's a good way of looking at it. There was a lot of philosophical writing around the time that the Framers wrote the Constitution, and that read a lot about Rome and Greece. It's interesting, there was an exhibit of Madison here at the Library of Congress and if you looked at Madison actually was writing at that time, he has in his handwriting there a description of the government of ancient Syracuse. He did that because they were interested in how the Greek City-States were governed. How was Rome governed? What was the Roman Republic?

One of the distinctions, in fact the main one I want to emphasize, is that which some people including some French philosophers who I got it from and certainly you can find it in Jefferson and you can find it in Adams, talk about the liberty of the ancients. What was the liberty of the ancients? The liberty of the ancients in Rome, in the Roman Republic, not the Empire, in Greece, Athens, it was every citizen's right to participate in government. There were a lot of people who were not allowed to be

citizens, women, slaves, but we put that aside for a moment because that was a fairly giant-sized problem that was ameliorated later on. But if you look at the people who were allowed to be citizens, the radical idea at that time was that every citizen would participate in government, and that idea was well known to the Framers.

Later on in the 18th century, many began to realize that that wasn't good enough. Once you saw the French Revolution, you realized letting people do anything they wanted through democratic rule can oppress the minority, and that when I was a child was pretty obvious during World War II in Hitler's Germany: people who were elected could do pretty terrible things. Therefore, it was necessary to have more protection than just the protection of democracy. It was necessary to protect basic fundamental liberties, i.e., liberty of the modern, i.e., the Bill of Rights of the United States Constitution. So you need both.

What I want to say here is you need both, both. Remember? Because if you forget the democratic part, government will wither and people won't make decisions for themselves. But the object of the Constitution is to let them insist that they do so. Of course, if you forget the liberty of the moderns, you can have terrible tyranny by the majority. So, both. That's why I'm making the distinction, and I'm emphasizing the former, but I understood full well the importance of the latter.

MR. TAYLOR: In various chapters in the book you explicate how this would apply to some particular controversies, and I'd like to ask you about three of them that I think kind of bring it down to a level of here's how it works in a real case.

Affirmative action, let's say consideration of race in college admissions. Does your thesis have any impact on how you would resolve a case of that kind?

JUSTICE BREYER: I think that it did. What I argue, and I think it's there in the opinions, is such an interesting case and important case, affirmative action. It was whether the Equal Protection Clause in the Constitution, a clause that says every citizen shall be guaranteed, no state shall deny any citizen, equal protection of the laws.

There are two different theories about what that means and each has something to be said for it. One theory says let's look to the basic purpose of the Fourteenth Amendment. One of their primary purposes was to take people who had been excluded from American society and make certain that they are included, and that means that if you have a program that is race based and is designed to include, perhaps it should not be treated quite as tough as a program that's designed to exclude, i.e., that's a view that's favorable but not absolutely favorable to affirmative action.

The opposite view says the Constitution is color blind. Equal protection of the law means no plus, no minus. Race is irrelevant. You have to take my word for it that there are very good arguments for both of those views. It's not as if one is obviously right and one is obviously wrong. So we have a hard time deciding which theory.

Now bring into that mix the kinds of things that were argued in the affirmative action case. Members of the United States military, businesses, trade unions, universities, all said please, we must have the right under the Constitution to have at least a small degree of race- or minority-based affirmative action. If we can't, there are too many people that will be excluded and the consequence for our institution is devastating in a world where people are made up of many different races, religions, national origins, et cetera.

Read the opinion. The opinion in this case makes quite a lot of that, and it basically is saying that an interpretation of the Constitution which allows those otherwise excluded to feel included, that that's the better interpretation. Why? Because it's ultimately more consistent with the Constitution's democratic objectives. So I say when I want to illustrate the point for a teaching purpose, I'll say let's have James Madison right here, and I say, James, which do you think is more consistent with what you want? An interpretation that will bring into the society feeling as full members those who might otherwise feel excluded? Or an interpretation that excludes them and makes them feel that they are excluded? I think James Madison, were he right here and were we to have the Ouija board which some critics said I was writing with and so that we could communicate with him from beyond, I think he'd agree that the inclusive interpretation is more consistent with his basic point of view. But in any case, whether you agree or disagree, that's basically a way, one way, in which I think the basic democratic objective of the Constitution is brought in or can be brought into its interpretation.

MR. TAYLOR: Another example, you have a chapter on First Amendment issues and a very interesting discussion on campaign finance reform I think and how your concept applies there. Could you summarize that?

JUSTICE BREYER: I don't say this is all my original concept. One great thing about being a lawyer, you never want to be original. [Laughter.]

The most important rule is nothing was ever done for the first time.

It's not my original concept particularly. I try to go back into history to show that many Judges have had the idea in this particular one. Brandeis wrote an

opinion which made clear to me anyway that when you think of the First Amendment and you ask why did the Framers want to protect speech? You always ask why. What's the object? What's the basic purpose?

In large part it is to help make the democracy, the democratic institutions, meaningful basketball you can't have much democracy if people can't talk to each other about what kind of government they want, or if minority views, very unpopular views, are excluded. So political speech becomes pretty important in terms of the First Amendment.

Then we have a difficult case, a difficult case because campaign finance laws prevent people from buying as much speech as they want, and that hurts the First Amendment. On the other hand, they help people by opening the playing field so that it is easier for more to participate in the democratic conversation. So there it seems to me that a reference back to the basic democratic purposes of the Constitution helps me and others to see that First Amendment interests lie on both sides of this equation. It isn't that all the First Amendment is on one side and something on the other. And once you see that they're on both sides, that leads a Court to begin to do careful weighing which I believe is what our Court has done in that instance.

MR. TAYLOR: Just to pursue that, as to the positive influence of campaign finance reform in terms of democratic participation, that's very hotly debated isn't it, whether it has a positive influence of that kind or not, or whether in fact it just multiplies technicalities and makes the system messier than it was before?

I guess my question there is not to get into the depths of that, but how does a Court deal with complicated empirical arguments as to what you think pursues

liberty in fact has that effect when somebody else is saying, no, it has the opposite effect?

JUSTICE BREYER: That is the kind of argument, that is exactly the kind of argument, people to make, and they make them in very, very lengthy briefs. We probably got in the campaign finance cases, I don't know, 30, 40 or 50 briefs. And the first question you'd ask is just the question you asked, how in fact do the campaign finance laws help promote this conversation I've been talking about, for example? There the briefs will have answers. They'll say this is how, and then the other side will have some objections to that, and then they'll reply and the debate goes on.

But ultimately, though not all, of these questions in my view is there for Congress to answer and re-look on to see if they've answered it in a reasonable way. But in that area, not every question would we defer to Congress. One of the things that's written into the opinion is you don't want Congress, or at least one of the opinions, is you don't want Congress to be able to write themselves secure tenure by making it too difficult to challenge them.

So the point is that you basically are right in thinking that it becomes complex and you have to evaluate at some level or other a lot of different arguments, and then you're ultimately weighing it against and balancing and so forth. That's true, it's complicated, and difficult, but that is the nature of judicial review in such a complicated matter where there are constitutional interests on both sides, and I can't think of a better way of doing it.

MR. TAYLOR: At the risk of entering an area that you can't talk about, as I heard you talking about affirmative action, the thought was, probably the biggest

single impediment to meaningful participation in our democracy by large groups of people is primary and secondary education, the fact that people don't graduate from high school. Is there a constitutional issue that comes into focus there that you'd like to talk about?

JUSTICE BREYER: No, I don't want to talk about it. [Laughter.]

You're talking about constitutional rights, education, which is a whole huge subject that there was a case or two on the Court and I didn't write about them, and they could appear in a thousand different ways, and I think you're trying to push me into saying something very, very radical and I'm so conservative that I'm not going to say anything. [Laughter.]

MR. TAYLOR: As I said, we can try.

JUSTICE BREYER: Right.

MR. TAYLOR: The two cases, and I don't think they're discussed in your book, they probably came after it went to press, involving the Ten Commandments this June was fascinating in many ways. One way in which they were fascinating was that you managed to disagree with all eight of your colleagues while controlling the outcome of both cases.

You could summarize better than I could how that came about, but whether you'd like to do that or not, in the Establishment Clause area and in the religion area, but active liberty, liberty of the ancients, liberty of the moderns help the analysis?

JUSTICE BREYER: There I'm using that as an example of why I think it's important to look to purposes, basic purposes, and then try and apply the basic

purpose to the difficult case in front of us, and I'm only talking about a handful of cases that are really hard of which that was one.

In a case involving school vouchers, we went back into the history of the Establishment Clause and how it's been interpreted over time. And in my view in which I wrote, it seemed to me that a basic value underlying the Establishment Clause is the importance of minimizing, you can't avoid, but minimizing the dissent in society based upon differences of religion.

The Founders had seen the religious wars or at least heard about them a hundred years before, and they were terrible, and they wanted to guarantee that each individual could raise his family in his religion and each family would practice it themselves. It's very important to try to allow people of different religions to live together in American society.

We have today maybe 15 different religions. They had a handful at the end of the 18th century. It's hard for everybody to get on together when religion is such an important thing and so absolute in so many people's lives, but we remember that basic value when we're trying to interpret the Clause.

Now in doing so in the Ten Commandments and looking back into the two different factual situations in front of us, what I wrote in that case was in the one case I could see how a Court could come to the conclusion that the effort to put the Ten Commandments into the courthouse had a lot to do with trying to make a religious statement, and that's pretty divisive.

In the other case, in the case of the tablets that had been on the Texas State Court grounds for 40 years without people objecting along with 22 other

monuments or 19 or something that had nothing to do with religion and that had a big sign saying we're trying to illustrate the ideals of the Texans historically, I came to the conclusion for better or for worse, I hope I was right, I believe I was right, but that wasn't fundamentally though it was partly, but not fundamentally religious in approach, and I said in the opinion that if people have to go around and chisel the Fourth Amendment wherever they are in a public building, that itself would be very divisive. So I say that's an illustration of how I would use the basic purposes underlying the Establishment Clause to decide a particular case.

One virtue I think of this approach is it's transparent. Anyone who reads what I've written or anyone else who follows this particular approach—and I think most Judges do, frankly—you can understand what the decision is based on. If those who read it come to the conclusion I'm wrong about the Establishment Clause, they'll write about it, they'll go into it, they'll explain why. In future cases the lawyers will bring it up and I'll have a chance to reevaluate it.

If people believe I haven't applied those values correctly, there will be plenty of people given the nature of the Supreme Court who will be interested in explaining that, too. There is no secret. There is no hidden agenda. What you see is what you get. It's open to criticism. It can be revised, evolve over time. That's a very basic common-law type approach to judicial problems. I think it's a very good approach. I think it's important that Judges explain themselves absolutely clearly and that the reason they give be the true reason that underlies their conclusion in the opinion.

MR. TAYLOR: No discussion of constitutional law would be complete without some question about *Roe v. Wade*, if not 200 questions about *Roe v. Wade*. I'll

just ask one. You don't seem to mention it in the book I don't think, and I'm wondering whether you have anything to say about critics who say *Roe v. Wade* cannot possibly be reconciled with the thesis of the book, it was the ultimate in taking away popular sovereignty over a fundamental societal decision.

JUSTICE BREYER: What a surprising thing thought in this book I chose not to discuss abortion or *Roe v. Wade*.

MR. TAYLOR: I think you've answered it. [Laughter.] I promised it would only be done.

The Federalist Papers were full of concern about democracy run wild, about too much democracy, the dangers of the Athenian Town Meeting, about debtors ganging up to vote at the rights of creditors. I guess the question that raises is do you think that there is much evidence from the founding period of our Constitution that they really had in mind the kind of active liberty that you think the Constitution is designed to promote?

JUSTICE BREYER: I'm not an expert historian. Indeed, one of my points of the book is if we're supposed to decide all our cases in accordance with what some people in the 18th century historically thought on minor issues that they probably never ever thought about, let's hire historians to be Judges because I couldn't do the job.

Having disqualified myself from answering your question, I'd say that I did read the history written by others, Gordon Wood, Bernard Balin [ph], and I've gone into it and it seems to me that Balin, that Gordon Wood, that others come to the conclusion that it is a mistake after, you'd have to ask them, expert historians like scholarly experts I dare to paraphrase even my conclusion, I may get letters for the next

5 months saying I haven't fully understood them, daring to suggest what they say, that it isn't really true Adams thought might be true, that the Constitution was about was copying the British system of government with its House of Lords as Senate and with President as King.

But rather what they were most interested in was providing a workable form of democracy and that by the time the Constitution was ratified it represented not so much a departure from democracy as an effort to make democracy workable with its Bill of Rights to guarantee that democracy itself couldn't take certain rights away from people, with its elected House of Representatives and with a Senate and a President, and there's some argument that even Judges, would ultimately be responsible to the people so that the changes from pure democracy represent not a House of Lords and a King, but an effort to make basically democratic institutions workable.

At any rate, there's enough historical evidence for that that I'm reasonably confident that the historians won't contradict my approach to the problem because I retreat to what Judges can say today, saying whatever it was, that's what it's come to mean.

MR. TAYLOR: George Will as you may have noticed devoted an entire column to your book and it wasn't entirely favorable. I'd like to read a short excerpt just to get you to respond to what is likely to be a criticism of many like-minded people like George might make. He says, "First, Justice Breyer reduces the Constitution to a charter for promoting active liberty as he defines it. Then this reduction becomes a license for important aspects of the current liberal agenda, so Breyer's judicial modesty looks less like a neutral constitutional principle than political special pleading." Why is he wrong?

JUSTICE BREYER: It's not political special pleading. Why is he wrong? He's wrong, I don't know, he certainly is entitled to his opinion. What I'm trying to show here, and people can read it, agree or disagree, what I'm trying to show is a Judge particularly on our Court inevitably faces very difficult problems. These are not clearly one way or the other. Despite how excited people get sometimes on either side, when you finish reading the briefs, when you get through thinking about the argument and listening to it, I guarantee everyone in this room were he sitting where I'm sitting would be thinking this isn't such an easy matter.

Those are the cases that we are supposed to decide, and they have to be decided by somebody in a system that wants to police those constitutional boundaries. Fine. The question, and I think I agree with George Will on this one, is how can you hold Judges responsible, these unelected Judges, in a democracy? How can we be certain that they aren't just substituting whatever they happen to think is good for what the law requires? That's a very difficult and very important question, and the answer is there's no perfect way. There is no perfect way.

But it seems to me you're more likely to be able to do that if you force a Judge after a period of time to look back and see if his decisions do fall into a consistent pattern so that they're consistent with the basic approach to the Constitution. You're more likely to be able to do that if the Judge in the opinion has to explain what that Judge, he or she, sees as a basic value underlying the constitutional text at issue and how he or she sees this case as fitting within it that you're more likely to be able to control that Judge. By looking at the reasons, by seeing if they're valid, by seeing how text and purpose and consequence work together, you are more likely to control subjectivity than

you are by announcing that we're going to look to see what the Framers thought about the Internet.

MR. TAYLOR: I have just one more question before inviting the audience to pose some. I think you were quoted, you said in your recent interview with George Stephanopoulos that the job of being on the Supreme Court is harder than you expected. Could you recap your answer quickly for us?

JUSTICE BREYER: When I first was there I came from a Court of Appeals. On the Court of Appeals we had 300 cases a year to decide, I wrote 45 to 50 opinions and I thought, my goodness, they only decide is it 25 opinions, they're only deciding 80 cases, this won't be all that hard. [Laughter.]

I mean, the fact of the matter is that we go through, it's not just the *certs.*, we have about 8,000 requests for hearings but for a variety that's not as hard to do as you might think because we're looking for a certain kind of case, the kind of case where in fact there has been a division of opinion typically about the rule of federal law so that you need a uniform rule of federal law. We only find about 80 or so. We'd like to find more, but we find about 80, but those 80 are hard.

Those 80 are hard because good Judges have come to different conclusions on the same question of federal law. By definition, they are going to be very, very difficult. The briefing is typically very good and very thorough. In order to be effective at all on the Court, I have to go into the conference pretty much ready in my own mind to figure out how I would actually write an opinion. I have to have thought it through, and it isn't something that you can delegate. We don't delegate to one or

another. Every one of us has thought through that very difficult case, and then there is the discussion in the conference.

So a lot of what doesn't appear on paper can and should take quite a lot of time, and I say really now I've realized the wonderful privilege of being there and it is an enormous privilege. But above all, the personal privileges, it is a job that I think forces you or forces any individual on that Court to give what he or she has to give virtually all the time, and to be challenged in that way in terms of your personal resources and abilities as we get older is a wonderful thing. It's a wonderful thing. It never loses its interest, it never loses that feeling of importance, and it never in a sense lets you let up because if you do let up, something can go wrong. So that's what I meant.

MR. TAYLOR: Thank you. I'm not quite done, but perhaps somebody else out there should have a chance to ask some questions. Do we have any? I'll sort of move from right to left. Yes, sir?

MR. CHUTLEY: I'm Pete Schoettle from Brookings, and thank you very much for coming. My question is, if you look back at some really historic cases where the society now says that the Court made the wrong decision, I'm thinking of *Dred Scott*, *Plessy v. Ferguson*, looking back at those decisions, what did they do wrong using your basis of analysis? Where did they miss the boat?

JUSTICE BREYER: *Dred Scott*, my goodness. I mean, in a way I guess it's awfully hard. You need historians to draw the lessons from history, but I mean if you look back you'd think what a terrible thing. They thought they were saving the country and they destroyed it. I mean, that was *Dred Scott*. Really if there's a lesson

there it's decide the case. Decide it. Don't try to do something that is going to save everybody; in fact, you might hurt everybody.

If you look at *Karamatsu* where 100,000 American citizens were put into camps without trials or anything, they were Japanese Americans, and J. Edgar Hoover at the time said there's no need to do that. That was during World War II, and everybody today looks back and says that was a tragedy, it was a terrible decision, and the lesson I draw from it is I'm not involved in something that would lead people in the future to come to a similar conclusion.

The terrible thing, I guess, about everybody in public life as in private life is you never know for sure, and it's only looking back that people will really be able to tell, but there we are. So you've hit a nerve because I certainly hope that no one today gets involved in such a thing.

MR. TAYLOR: On the aisle?

QUESTION: Mr. Justice, I would ask you quickly about the issue of video cameras in the Supreme Court, if you'd care to comment. You mentioned a minute ago that this issue of holding Judges accountable is such an important one and this might be an area where you can delve into that.

JUSTICE BREYER: I know there are a lot of people who would like to have video. I've talked about it quite a lot. What I've said which I'd repeat is on the one hand having video cameras in there would in fact show a lot of people how that oral argument works, and that would be a big plus. I think they'd see the institution in operation.

As you can tell, I don't think it's the CIA. I don't think it's particularly secret, it shouldn't be secret, and in a way of course it's not secret. We give the reasons in our opinion. What happens behind the scenes if we're writing our first drafts? Who's interested in a first draft? If you're a college student interested in a first draft, your mother, your sister, maybe your spouse if you're married, not many others. What we're doing is writing our first drafts, going through preliminary conversations. What ends up is what we thought.

Why not have the video? There are three concerns in my mind. The first concern is if it came into the Supreme Court of the United States because of the symbolic effect it might be in every criminal court in the country, and there are special concerns. Criminal courts are different, but the pressure might still put it there, and there are special concerns of fairness in criminal trials.

The second thing is that the oral argument is only the tip of an iceberg. Most of what we do is done in writing, most of what we do is based on the briefs, and the oral argument sometimes is important, but it's only a small part of the process. That would be distorted.

But also what we are deciding are cases that have a principle of law that affect millions of people, millions, and they're not in that courtroom, and when you look at a picture you tend to focus on the people who are there. It begins to tell a story.

Are those major objections? The press can write about what the issue is. People can learn about it. So I have to end up with a question mark. I do know that each of us there has inherited an institution that others have made very important in American

life. I didn't write *Brown v. Board of Education*, my predecessors did, and that has helped millions in this country. It's helped the entire country.

I wouldn't want to do anything that for better or for worse undermines that institution. So you have some question marks, you have a lot of uncertainty, and that at the moment I think is why people have not embraced automatically the idea of television in the courtroom.

MR. TAYLOR: On the right aisle, the other side of the aisle.

QUESTION: I'm just wondering what your thought is on the contention with the confirmation process these days and what if anything can be done to change or to help the confirmation process.

JUSTICE BREYER: That's a very good question, and unfortunately that is something given that we're in the middle of the confirmation process is that I think I just have to stay totally away from.

In fact, in the past I've talked about it sometimes and in the future I might, but this just isn't the time for that particular question, though it's a good one, so I'm sorry.

MR. TAYLOR: Let me ask one that's in the neighborhood of that one but maybe not as tough.

[Laughter.]

JUSTICE BREYER: I probably should stay away from the entire neighborhood. Once you start going around a neighborhood, who knows.

MR. TAYLOR: Let me try.

JUSTICE BREYER: All right.

MR. TAYLOR: A lot of people seem to think that the Court is more controversial than it was, that there's more public controversy about it for one reason or another than there was 50 years ago, 100 years ago, 150, 200. Do you think that's true and if so do you have any idea of why it is?

JUSTICE BREYER: Fifty years ago? So you were just a child.

[Laughter.]

MR. TAYLOR: Thank you.

JUSTICE BREYER: Fifty years ago there were all the signs all over the South "Impeach Earl Warren." Have you seen some of the pictures of what happened when people tried to implement the desegregation decisions? My goodness. My goodness. It was terrible, and it took a long time to get those decisions underway and some very courageous Judges, and a lot of others, too.

If we go back to 100 years ago, 100, 150, you're in the Civil War. If you go back to 1834 and you had the famous case of the Cherokee Indians where the Supreme Court of the United States said northern Georgia belongs to the Cherokees and Andrew Jackson sent troops to evict the Cherokees, and send them most of them dying on the way along the Trail of Tears into Oklahoma. And Andrew Jackson wrote, "John Marshall has made his decision. Now let him enforce it," in the early-1830s.

In the early-1960s, President Eisenhower sent paratroopers to Arkansas when Governor Faubus was standing in the courtroom door, or the school room door, and said, "I'll never let the black children in the white school," and the paratroopers took those children by the hand and walked them in.

So we've made some progress. I mean the Court is always in the midst of controversy. Some are more controversial than others. We worry about that sometimes, including now. The country has inherited a great treasure when it has inherited that rule of law which it's taken that 150 years or more or 200 years and all those bad decisions and some good ones and the paratroopers and the Civil War and 80 years of segregation, and over all that time gradually people do learn, they gradually do teach their children the importance of sticking to a rule of law.

That isn't something that's just my inheritance as a Judge, every American has it, and it's just a great thing. It's just a wonderful thing. I can see I'll be on a soapbox pretty soon, but I mean I see that in my courtroom every day, people of every race, every religion, every point of view, and they're in that courtroom resolving those matters under law.

I'll say one thing about abortion, it's controversial, and so is school prayer and so were a lot of other decisions we make, but what you don't hear anymore is we just won't follow it. That isn't a serious threat in the United States, that people won't follow those unpopular decisions, and that in itself I think Americans have come to realize is just a treasure beyond price.

MR. TAYLOR: Yes, on the aisle in back.

MR. MEDRANO: Good afternoon, Justice Breyer, Manny Medrano with ABC News.

Justice, I wanted to ask you with the new appointment of the new Chief Justice, can you give us a sense before that happened and without divulging any secrets of course, was there any sense of anxiety, trepidation, with a new boss coming in

because, obviously, the former Chief Justice was noted for running a tight ship, a very efficient ship, and was greatly admired at least according to the statements by yourself and other Justices after his passing. But can you just give us a sense of that whole process?

JUSTICE BREYER: The average American who works in a company or belongs to a trades union, when they hear a new boss is coming, they get nervous because maybe it'll affect them directly in their jobs. Luckily, we were much luckier than most in that as individuals we have tenure. [Laughter.]

That was my father's advice to me, he said, "Stay on the payroll," and we do, so there is not that kind of trepidation. [Laughter.]

Obviously, every change people wonder, but we understand change is inevitable in human life and it's all working out just fine.

MR. TAYLOR: One hears, maybe it's mythical, that in the Court's conferences that the junior Justice who is you, right?

JUSTICE BREYER: Yes.

MR. TAYLOR: If somebody knocks on the door, you have to jump and answer, if somebody says I want some coffee, you have to run and get it. [Laughter.]

A, does it really work that way?

JUSTICE BREYER: Not quite.

MR. TAYLOR: And B, are you looking forward to the end of that role?

JUSTICE BREYER: No, it doesn't quite work that way. It is true that if someone knocks at the door at the conference, we're there by ourselves, and I get up and open the door, and I've done that for 11 years. [Laughter.]

I'm about the most senior junior Justice they ever had, but there we are.

Now it is also true, though it normally is not coffee, that a couple of months ago somebody came along with coffee for Justice Scalia. We all get on very personally, and I brought him the coffee, and as I did I said, "Here's your coffee." He said, "You've been doing this for a while." I said, "Yeah, I've been doing this for 11 years and I've gotten very good at it." And so he said, "No, you haven't." [Laughter.]

So there we are. It's fine.

QUESTION: Can you talk a little bit about the role of international and its influence on America?

JUSTICE BREYER: Yes. The international, I know that's become something of a controversy, but it seems to me that there is an issue that's very controversial politically and apparently in the press and somewhat less important or less significant, and an area that is terribly important and has not really been very controversial.

The very, very important area that has not been controversial and shouldn't be is the fact that our case mix is more and more heavily weighted in the direction of law from abroad and international law. So if you go back a year or two, out of 80 cases, we had nine that raised significant questions of that sort. Three were Guantanamo. Leave those out.

But the other six involved things such as the antitrust law and how it applies when the plaintiff is in Ecuador and suing a vitamin company in Holland; or whether a firm in Los Angeles, an American firm, could get information from another firm under discovery rules to present to the E.U. Cartel Authority in Europe. They filed

a brief. They said we don't want the information. Or say Mexican trucks coming in and the relation of NAFTA, a treaty, to the environmental law. Or the Alien Tort Statute which said that there can be tort recovery from victims of pirates; that's what it was there for in 1790, and who are today's pirates? Are they the torturers?

Or, for example, the Warsaw Convention involving recovery for accidents in airplanes. Or Ms. Altman who wanted to get six Klimt paintings back from the museum in Vienna which she said had been given them by the Nazis and they belonged to her uncle and she's met with the defense based on the Sovereign Immunities Act.

How do all those things work? What's the right answer? Six at least out of 80. And we had briefs in many of those cases from the Japanese government, from Canada, from Germany, from the E.U. authorities, from France, from all over the place, really substantive briefs, not briefs that just say our view is, but difficult, significant legal analyses. All that reflects, and I think Harold Koh up at Yale counted in the last few years and said there were 19 cases like that.

Well, my goodness, what that reflects is the nature of today's world. The nature of today's world is it's commerce, it's international, and if you're going to do your job I told the law schools, please don't put international law and foreign law in a special course that three students take. Integrate it in the ordinary commercial and other courses because it's going to be part of their lives as lawyers. And the lawyers have to be able to find the relevant law and refer us to it. That's important, and I think that's happening more and more, but I want to encourage that.

The other that's become a huge issue is whether in a certain number of cases involving constitutional law we can refer to constitutional decisions in other cases. I've tended to do that, but I've never thought they were binding. They don't bind us. Nobody thinks they bind us. But more and more we are seeing democracy spreading, the spread of basic protection of fundamental human liberties, the spread of documents that look like though they're not exactly like our Constitution, and the spread of an effort to have independent judiciaries help to guarantee those rights.

So if a person like me called a Judge in some other country with a similar document, similar problem, makes a similar effort to answer it, I'm not bound by what he or she says, but sometimes it's helpful to read it. And sometimes by reading it I can learn something even if perhaps I only learn do the opposite. So that I think is important to be able to do.

Now it's come up in cases involving the death penalty. That was one. And involving a statute concerning homosexual conduct. That's another. Now those two cases as you can see have subject matter that is enormously controversial. So I wonder sometimes, Joanna is a psychologist and she's told me about a phenomenon called displacement, and displacement means you're upset about A so you blame B. And I just wonder if maybe in some of those cases that highly controversial subject matter has led some to think that the references to foreign law or sometimes reading about it and putting some of that in the opinion have a lot to do with it.

I don't think it has an enormous amount to do with it. I think sometimes it's valuable. I think our referring to cases abroad sometimes helps those independent

courts in, say, newly established democracies establish themselves. I think there are benefits from it, and as long as I'm not bound by it, I think it's a healthy practice.

MR. TAYLOR: On the aisle?

MR. HAROLD: Scott Harold, Brookings. Justice Breyer, first let me thank you for coming here to talk to us today.

I wonder if you can help me by thinking through or telling us how to think through a couple of issues that I know you might be reluctant to get into, so I want to give you as much leeway to address them in as broad a manner as possible.

JUSTICE BREYER: Or as little perhaps.

MR. HAROLD: Or as little.

JUSTICE BREYER: Right.

MR. HAROLD: The first is, you've already mentioned the *Karamatsu* case, you've talked a little bit about the there cases in Guantanamo. Can you just tell us how best as Americans we can think about how to balance civil liberties in a time of war?

And second, you've talked about protecting minorities from majorities; you've talked about sexual politics of perhaps interpersonal relationships or marriage. Can you tell us how best to think about the protection of homosexual marriage in certain state—

[End Side A, Begin Side B.]

MR. HAROLD: [In progress] —and it's clearly a very hot topic. Thank you.

JUSTICE BREYER: I don't have special insight in these things. I mean, I have talked about the general problem and probably not much beyond where you are on the matter of security and civil liberties and so forth. I've said which I think probably everyone on our Court has made clear in its opinions that there is a view that in time of war, that was a famous view, in time of war the laws fall silent. I think Cicero said that. I can't remember what it was. I learned it in high school Latin class. It was all in my interlinear translation which is a cheat actually, but don't tell anyone. It was something when the canons speak, the laws fall silent. I said that once and people pointed out the Romans didn't have canons. But still we've more or less rejected that view, not more or less, definitely. The Constitution doesn't disappear in time of war.

And as to balancing, as you say, most people feel that many of the relevant constitutional provisions have balance built in. The Fourth Amendment speaks of unreasonable searches and seizures. What's unreasonable? And we have lawyers to help us, and why do I think lawyers do help us? I know many people think they don't. Well, they do. Why? Because lawyers are trained to ask certain questions. When there is a restriction of what has been thought to be a basic human liberty, the lawyer says, Why? Why is it necessary? And when there's an answer to that, the lawyer says, Why not? Why not do it this way?

Well, if you read our opinions, you will see that they reflect pretty much that point of view, that this is a difficult area, and as I say, it seems to me there is no more important an area for us to hope that we don't make mistakes.

MR. TAYLOR: There are so many out there. The tall gentleman I'm pointing out.

QUESTION: With the eminent domain case of *Kelo v. New London*, when it came out I was just shocked and I couldn't imagine how anyone could vote with the majority because it seemed a clear case of violation of property rights. If I recall correctly, you voted in with the majority that it was a case of eminent domain and that the City of New London could take the property owners' property without their consent. I just wanted to know where you were coming from on that.

JUSTICE BREYER: The best way to see where I'm coming from that won't satisfy you is you have to read the opinions, and maybe you have. But the particular provision at issue in this case is called the Just Compensation Clause and it says no property can be taken for public use without just compensation. And in the particular case, the problem was how do we decide whether the property here is or is not being taken for public use when it has certain apparently public purposes but some of it is being given to private people?

Everybody agrees nobody could do it without just compensation, and the question looking at the particular case is here what's the mix? Is it for a public use? Is it not for a public use? Suppose it were taken to build an Olympic Village. Some of that property might go for a private hot dog stand. Maybe it shouldn't be. Maybe it should be, but I'm giving you the issue in the case.

Then if you go read the opinions, you will see some people thought that this is on balance of public use and, therefore, you can take it provided you give just compensation, and it's called the Compensation Clause. And others thought, no, there isn't enough public use in this.

And that's why I say if you read the briefs in so many of these cases that appear, well, once you see the newspaper it was obviously right or it was obviously right. I have to admit that in cases in which I have dissented, in my heart, though I tended to think how right I am, in my heart I had to admit there is much to be said for the other side, wrong though it may be.

[Laughter.]

MR. TAYLOR: On that eminent domain case, Justice Stevens I think gave a speech this summer, correct me if I'm wrong, in which he said, "Well, I didn't like the outcome in that case either, but the Constitution made me do it." I think he wrote the opinion, and I'm paraphrasing.

Did it surprise you, A, to hear that? Or B, to hear that decision characterized as judicial activism when what you were doing was saying to the town of New London, Connecticut, you can do this if you want to?

JUSTICE BREYER: You're quite right that nothing in the opinion says they have to do it. It's a question of what they can do if there's an appropriate law. That's correct.

Your question is was I surprised. Nothing surprises me anymore. Was I surprised at the nature of the criticism? I am never surprised. People think all kinds of different things. Sometimes when you're the object of the criticism it's hard to see the virtue, but nonetheless, that is the virtue of the system. Some people did feel strongly about it. That's true.

MR. MITCHELL: Justice Breyer, Gary Mitchell from The Mitchell Report. I want to come back to the question of tenure and ask a two-part question, the

first of which is whether this is a subject you can comment on. And second, if it is, what your view is of the risks to democracy if democracy were to decide that Justices and Judges ought not to have lifetime tenure?

JUSTICE BREYER: Lifetime? What do you have in mind? Many countries you know operate with long-term fixed years, 20 years, 18 years, or maybe some period of time after taking office or some other thing. You're not going to get me to say that there's an enormous difference between an 18-or 20-year term and life. If you're talking about popularly elected Judges, I think that would be an error in respect to the federal system.

If you're talking about lengthy tenure, I'm not going to say there's some tremendous threat to democracy. The difficulty there is you'd need a constitutional amendment, I guess. If you're thinking of a constitutional amendment, it's pretty hard to do. You start tinkering with one part of the Constitution and things tend to come unraveled and it's always a risk in that respect. But if you're talking about a long term, other countries do it.

What you want is you want the Judge to feel secure in his tenure to the point where you get independent decision making so that if you are or are representing the least popular person in the United States of America, you will go into the courtroom thinking that you will get a fair trial and the Judge will not fear for his or her own job because he's decided in your favor. That's a tremendous asset that can be done in a number of ways, but it is terribly important that that continue.

MR. TAYLOR: Are there any advantages to, say, an 18-year term? There are a bunch of professors who've proposed that.

JUSTICE BREYER: The professors want an 18-year term? I guess they're thinking if somebody got too old, then it would be an easy way not to be on the Court. I once got a question like this and I said I don't think anyone—everyone seems perfectly capable of carrying out their job. But I see you're wondering suppose we all became too old at once, who would there be to tell us?

[Laughter.]

JUSTICE BREYER: Luckily we have Roberts, you know, who's a lot younger.

[Laughter.]

JUSTICE BREYER: In the Court's history there have been occasions.

There's a famous story, I may not have the names right, I sometimes get it mixed up, but I think it was Brandeis or someone was sent maybe to see Holmes to say 90 was a little old, and so he started out with trepidation saying, Justice Holmes, you remember one day when the Court sent you to see Justice Field to tell him that he'd had many, many, many years of fine service and it was perhaps time to think about stepping down? And Holmes looked at him and said, yes, I do remember, and a dirtier day's work I've never done.

[Laughter.]

MR. TAYLOR: I know that none of these professors have proposed limiting academic tenure as far as I can see.

JUSTICE BREYER: That's right.

MR. CERCONE: Hello, Justice. Mike Saccone with Cox Newspapers. A criticism that has been leveled at the Court by some critics is that there's a left-ward

drift of Justices as they sit on the Court over time. First off, do you think this is true? Secondly, does it show the salience of your ideas in your book?

JUSTICE BREYER: I haven't a clue. It's odd. I go into my office each day, I have briefs to read and I read them. I have in back of me a word processor, I have my law clerks, I sit at the word processor, I write my drafts, I try to decide the cases, and I talk to my law clerks who are doing research and we write like 10 drafts and it goes on and on and on, and then I'm on to the next case, and I don't actually think about whether there's a drift or not a drift. It's just not really directly relevant to the job.

Years ago, Roscoe Pound supposedly when he was Dean of the Harvard Law School said, That Judge is so stupid he doesn't know if he's a member of the empirical logical or the historical rational school of jurisprudence. I said, well, there I am.

[Laughter.]

MR. CHASE: Dana Chase [ph] from the office of Senator Mark Dayton. We don't really know in—generation what the *Karamatsus* or the *Dred Scotts* of our generation are. I'm wondering if you could perhaps speculate a little bit about this and perhaps look at an example that may be more procedural than substantive in terms of outcome, specifically, *Bush v. Gore*.

JUSTICE BREYER: The only thing I would add to that, I don't want to get into a discussion obviously of the merits of that decision where I wrote a dissent in several hundred I thought very well chosen words, I said whatever I had to say about it.

But even that, too, it is remarkable isn't it about how in other countries or here at other times it might had led to people who feel it is terribly much in error, simply

not to accept it. Ultimately Americans decided that it's more important to follow a rule of law no matter how strongly they felt.

And one thing you do feel sitting where I do sit in my work is the country has been here for quite a while, it's survived for a democracy for a long time. We've had lots of ups and downs. There are 280 million people. They do think a lot of different things. And it is a fabulous thing, a fabulous thing that that document and the system we've evolved can and will continue to hold us together, and that's the rule of law. And that as that time passes from *Bush v. Gore* and so forth, that's what I take away and feel the most strongly in favor of. I know it sounds sort of like twelfth grade civics, but you feel twelfth grade civics, you absolutely feel it.

Daniel Bell whom I admired a lot who is a sociologist at Harvard, he said it this way, we were supposed to make predictions around the year 2000, you may know this, they said can you make any prediction about the next 100 years, and he said, I can't predict much, but I can predict 100 years from now in November there will be an election for President of the United States. Probably right. We're not sure for certain. But probably right, and that's the strength of the institution. And whatever the cases, of course you want to avoid mistakes, but the longer you're there the more you see that the institutions of this country are very strong, very strong, and it's a force of habit among citizens, and that's why I feel strongly enough to try to transmit this idea even if it makes only one-eighth of an inch dent somewhere, that people have to participate, that in a democratic system it foresees participation, that the democratic institution is really what is holding us together.

It's a great thing, so that's my reaction.

MR. GARRISON: Dave Garrison here with Brookings. Justice, there are two parts of the process I'd ask you to comment that you follow. One is the oral argument. Have there been examples in your time there either in your own situation or with other Justices where the oral argument actually made a difference in the decision of the case?

Secondly, in the same regard, what role to amicus briefs play in the process you follow? Do they have a lesser value in the way in which you review the materials? Are there situations where amicus briefs have mattered considerably in the decisions that the Court has made?

JUSTICE BREYER: As to oral argument, I think it matters quite a lot. I mean, it doesn't change minds, mine or others, a lot, but it does sometimes. You say, well, 5 percent probably is too small, 20 percent may be too large if you want real changes in outcome.

But what's happening during the oral argument and it's why I said it's like not the whole story, it's only a small part of the story, but small part of the story is still part of the story, and often an important part. The way that I and I think most people make a decision, you'd have to ask business people or others, I start out on a difficult decision, by the time I'd read a question I have a view. I look at that question and I say, I see the answer, but I'm holding myself open to be changed. I read the petitioner's brief. I think the answer is that. I was wrong. I read the other side. It's the famous joke. The famous joke is true. You read the petitioner, you say that's right. You read the respondent, that's right. Somebody says they can't both be right, you say, that's right.

[Laughter.]

But that is how it works. You start going back and forth, you begin to have a view, and by the time of oral argument I have a tentative view, but I'm deliberately holding myself open to be changed, and the argument does tend to change me sometimes. It at least clarifies, and on occasion, not an insignificant number, it really means I'm reaching the opposite result.

Then I'll go into conference, I'll think about it for the day, I'll get my sort of thoughts in order, I'll go over to the conference. Sometimes in the conference my views become more—it's tentative but it's becoming firmer. Conference, too, occasionally will actually lead to a different change of view.

Then after the conference when we're writing drafts, sometimes, but it shouldn't happen too often, but sometimes the Court flips, that's what we'll call it, where we thought it was 6 to 3 one way or 5 to 4 one way, somebody writes a dissent and people are convinced and it goes the other way. That happens a significant number of times, not too many. We couldn't do our job as a Court if it happened all the time. You've got to be making up your mind as you go along.

Then when the opinion is finally written and out, well, do I then think, oh my God, that was such a hard case, I wish I'd decided the other way? No. What you think is it was a very hard case, but I'm glad to have decided it correctly. [Laughter.]

Well, it wasn't that hard. And if enough time passes, I don't know what I was thinking. This is human nature in action.

The other half of what you said was also very interesting, the amicus briefs. I think they're very important in difficult cases, and particularly in cases where consequences particularly matter, and there are some. The right to die case, for example,

where we received about 70 briefs, this was several years ago, about whether there was a constitutional right to die. We had amicus briefs from doctor's associations, nurses, hospice workers, sometimes hospice workers on one side, on the other side, groups who represented retarded people, or groups who represented various people with disabilities, and you found them split. Doctors split, everyone, and the groups were telling us the impact of a decision one way or another upon their lives, I think that kind of thing is very important. I think it's very important.

It isn't always necessary to make an additional legal argument because we have very good briefing often, not always, but quite often fairly complete from the parties and maybe one or two amici. But to come in with legally relevant consequences, facts explaining, I think is often helpful.

In the affirmative action case, we had I think 120 briefs and I felt surprisingly they were not repetitive. Most of them on both sides were talking about from their own perspectives, and that was to me very helpful. We couldn't function if we had 120 briefs in every case. We probably have in a typical case maybe 10, 12, 14. I don't know why they call them brief.

So your answer is, yes, the oral argument is important and sometimes changes minds, and the amicus brief as well.

MR. TAYLOR: You mentioned the conference. I've read many times, and I'm afraid I've written from time to time, that word is that there's not really debating that goes on at your conferences, that it's kind of tallying the votes and assigning the opinions and whatever persuasion goes on between and among the Justices is in writing largely. Can you discuss whether that's about right?

JUSTICE BREYER: No, it isn't. You'll probably get different opinions from the different Justices about the value of conference.

I find several things valuable. First, we have an unwritten rule that no one speaks twice until everyone speaks once. I'm the junior and last, and I grant you that that rule benefits me, but it still is a very good rule.

The second thing that I think is extremely beneficial is that when people around the table, they are not making an argument. They make no argument. What they're doing is they're giving their reasons for coming to the decision that they think is the appropriate decision. And that that means if one of the other Judges says I see why she's thinking that, or I see why he has that in the back of his mind, he's just said it, and now I have something that may in fact influence him given the way he's looking at, they'll bring it out. That way debate is productive.

It's not exactly debate. It's a discussion, and once it degenerates, and I say degenerates, into I have better arguments than you, somebody else can say I have better arguments than you. And once if I were to say but this is so important and I'm sure that it's so important to decide this the way I think, the other person is likely to think yes, you're right, it is important and it's equally more important to decide it the way I think. That gets us nowhere.

When you want a productive discussion exposing the true reason and being able to focus on that I think is very, very important, and those conferences it seems to me are productive, have been, and that kind of discussion also keeps personal feelings among the Judges very good. And we all get on well with each other. I have never heard in that conference room in 11 years a voice raised in anger. In that conference

room I have never heard one member of the Court say anything demeaning about any other member of the Court, not even as a joke. I think it's professional, I think we get to the point; I think the discussion is helpful, and that is not a debate about who has the better arguments.

MR. TAYLOR: Could you give a rough idea in let's say a typical hard case on a matter of significant public controversy, hard meaning there are dissents, about how long it takes; the Chief Justice says we're going to discuss *Smith v. Jones*, how long it takes before the discussion of *Smith v. Jones* is over?

JUSTICE BREYER: I don't know. It depends on what *Smith v. Jones* is. It would rarely take less than probably 15 or 20 minutes, and sometimes it might take quite a bit more. It depends on what the case is.

You can be efficient. It's not going around saying I vote blah, blah, blah, blah, blah. There can be a case that's fairly obvious and everybody just agrees. That can happen. Most of them it's less than obvious and it takes some time.

MR. LASH: Matt Lash [ph]. I'm a law student. I'm wondering, you said earlier you said that you felt that no longer do we have to be concerned about whether the decisions of the Supreme Court will be enforced, but one might be able to think of examples where perhaps there would be a concern. I'm wondering if you could discuss when you come up with a constitutional issue that also has a number of practical concerns regarding the enforceability—I'm thinking specifically of *Booker* and how far the right to jury trial extends, et cetera.

In an issue like that where there are practical concerns about enforceability, how does that jibe with your constitutional philosophy and how do you

attack that problem with regards to the practical concerns versus the constitutional considerations?

JUSTICE BREYER: There are several separate things. One is my thought that people will follow Court decisions; the public generally will follow Court decisions. We've come a long way. I've hedged what I've said. I've said look at how far we've come, and now when I say that people seem to have understood the importance of following the decisions even when they disagree, mentally I'm knocking on wood, I'm saying I certainly hope so, I'm saying I hope that continues and the only way it's going to continue is if people who are not judges, who are not lawyers, but as well as judges and lawyers, teach the government of the United States and the importance of that to their children, to their grandchildren. It's a cast of mind. It's a habit. It's an understanding of the importance for everyone of getting on with people you disagree with; that kind of thing. That's what I say we've come a long way and why I knock on wood 50 times and hope it continues.

Now in talking about sentencing cases and so forth, you've raised a different kind of issue. In my mind, what you've raised is does practical problems of how to implement an opinion enter into the opinion, and I think normally it does. We don't always get it right, and indeed people can disagree, but there won't be a problem with sentencing cases of people trying to follow the law. Nobody is going to rise up in arms about maybe the public shouldn't follow an *Apprendi*, nobody knows what *Apprendi* is. That's not that kind of a problem.

The problem of practical systems of sentencing is a problem, that's a different sort of problem, and that has to do with the nature of the law, and probably you

and a lot of others might say that I or one of the others or somebody else in those rather technical cases, but important cases, got it wrong on that. Of course, like most things I write I think what was probably okay.

QUESTION: I'd like to turn you back to the elegant argument of your book. You set up as really a theme for understanding the Constitution, active liberty. Then at the end of the book you say another competing theme of interpretations are the literalists, and then you explain why the literalists should not carry the day.

I'm curious, are there other themes that you see and think about that unify the document for other areas of the law that are not covered in the cases you use for Active Liberty? We were always taught that neutral principles as a dominant theme of interpreting the Constitution. Are there other themes that you think about in the corporate area or in the sentencing or the criminal area that also you play with as you evolve your interpretation of the document over time?

JUSTICE BREYER: I think one way in which being a Justice of the Supreme Court differs from being a Judge on say a Court of Appeals or a District Court, in a trial court the job is being a trial Judge, and that's very different from a Court of Appeals Judge which has to just both correct errors and try to interpret law, and that again I think is different from a Justice of the Supreme Court. When I ask in what way, it seems to me the answer is that unlike other courts, we have constitutional issues as a steady diet. They have them occasionally, we have other issues of course, too, but we see a lot of issues.

And the fact that you see a lot of issues does tend over time to lead a member of our Court to try to see the document as a whole. And when I try to do that

and describe it to people as simply as I can whether they're tenth graders or whether they're senior citizens, I use the same words. I say the unifying theme of this document is it is an effort to create democratic institutions of a certain kind, of a kind that is protective of basic human liberty, that assures a degree of equality, that divides power vertically between states and federal governments and horizontally between Executive, Legislative and Judicial so that no group of government officials can become too powerful, and that assures a rule of law. That's how I tend to see it over time.

In this particular book, I'm emphasizing the democratic part, but I think those other parts are of course of great importance as well. And there will be many cases where the democratic part is not directly relevant. I'm just trying to show that it's often helpful, not always by any means.

QUESTION: Justice Breyer, running through your comments this afternoon and indeed even through your vocabulary has been a constant theme of health. You've referred to diets. Indeed, the energy of our presentation bespeaks the need for a certain vitality. So how should we think, do you think, about the health of the members of the Court? Should the public have the right to know what their health is periodically?

JUSTICE BREYER: I'm sure they say periodically, and I think every member of the Court looks to me very, very healthy, and I think that's excellent. And they're all getting a lot of exercise, and I hope they're bicycling. But everybody looks fine to me. I mean, they seem fine, and everybody gets to see them on the bench there, and judging from last week where we had our first argument session with our new Chief Justice, it seemed very natural and it seemed very fine and people seemed up in the cases and there was a lot of energy exhibited on that bench I think.

QUESTION: [Off mike.]

JUSTICE BREYER: This week? This week is only Monday. It's just begun. [Laughter.]

I still have my energy from last week. I haven't been out yet.

MR. TAYLOR: In your book you have a chapter I think in which you discuss the originalist, textualist view, literalist as you put it, and why it really doesn't achieve the goal that its advocates claim for it of caving [ph] discretion so that it's not a subject decision, keeping Judges honest so they can't read their policy views into the Constitution, and I think you argue that it's not much help that way or at least sometimes it's not. Could you give an example or two of that?

JUSTICE BREYER: The example I gave, the troubles of talking about legal cases, particularly difficult ones, is that they are very complicated and by the time you get through explaining it to a group that you're trying to explain it to, they're asleep and they don't remember what the point was anyway.

The example that I use which I'll describe to you, because they're very complicated, some are okay and so forth, I have to give an example of why it is I think the approach based on history won't work. So the best I can do is refer to a particular case which I love as an example because it's so truthful. It was a very complicated case. California had passed a statute and that statute revived the possibility of prosecuting people for child abuse 25 years after the previous statute had expired. So people, whatever they had done or not done for 20 years had thought there was no possibility of prosecution, and then California went back and picked up their crimes many years

earlier after the evidence might have been gone, after who could say what the witnesses meant or who was right and who wasn't right.

The question was, was that an *ex post facto* law prohibited by the Constitution, and that happens to be a difficult question. We got into the history a little reluctantly, I admit I did, too, and it seemed to me to turn and it seemed to the Court to turn historically speaking, I had another part where I said the history doesn't answer this question, but I got into the history part, too, what did Parliament mean in the mid-17th century when Bishop Atterbury was convicted by Parliament of a particular crime and vanished, the relevant of that was that Blackstone 100 years later an *ex post facto* violation. And in the late-18th century, early-19th century, the Supreme Court said that Blackstone was giving an example of an instance where a crime had been made greater than it was before and therefore was prohibited by our *Ex Post Facto Clause*.

And does California's law at the end of the 20th century fall within a phase given by a 19th century judge interpreting what an 18th century author had said about a 17th century trial the facts of which were long gone to history? When I looked into it, and we did look into it, I said I think this is an example, and the dissent said, no, it isn't an example, but the truth of the matter which is what I say in the book is, frankly I don't know and I don't think anybody else does either. And if you want to decide cases in this way, then you'd better hire a group of historians because I'm not the man for that job. I don't know what they meant by Bishop Atterbury in the 17th century and so forth and so on, and I don't think it's a very good way of deciding a constitutional case.

That's what I wrote, that's what I think. Other people probably can perfectly well think to the contrary, but my view is it's not.

MR. TAYLOR: I have a question for our host, Strobe. Justice Breyer, as you know, has agreed to be with us until 5:00 if we hold him to that. We've been working him pretty hard. Do you think we should hold him to that? I think I have my answer.

MR. TALBOTT: He's been kind enough to agree to be with us until 5:00. We suspect that there may be one or two people in the room who would enjoy having him sign a book, so we want to save a little bit of time before 5:00. But you're running the meeting wonderfully, Stuart, and take another question or two.

MR. TAYLOR: Let's have two. I see one.

QUESTION: I imagine most new Justices arrive with certain attitudes and viewpoints and even positions vis-à-vis interpreting the Constitution. Have you seen any evidence or do you know historically of Justices who after 10, 11 or a greater number of years changed their attitudes, viewpoints, positions?

JUSTICE BREYER: You say change. I know in my own case when I came to the Supreme Court, the first 2 or 3 years, what am I really feeling; I'm feeling very, very nervous, to tell you the truth. I'm thinking my goodness, this is a new job. I kept saying for a while when I'd give a talk it was like a cartoon that I saw in The New Yorker it had a little dog going out on a tightrope and the caption was, "All Rover could think as he walked out on the tightrope was that he was a pretty old dog and this is a brand new trick." [Laughter.]

It's not easy, it's a different environment, and I think it takes time, it takes time, and for the first 2 or 3 years you're getting a mix of cases that you're not totally used to, and I don't think I was comfortable for several years because I know that the

decisions make a difference, a huge difference, and I also know that I'm new to that job. You try to do the best as any person does, and I'm nervous for a considerable period of time. And then gradually for better or for worse I've adjusted to it and I think, well, I can only do my best and there we are.

But it does take a period of years. So I don't know about changes and so forth. I do know that there is I think a considerably lengthy adjustment process.

MR. TAYLOR: Any others? Yes. Last question.

MR. QUINN: James Quinn [ph]. I'm just a citizen. Much of what you have said today talks about the importance of the process in which the Justices have the opportunity to influence one another as a decision is reached. And yet we have so many groups in our society today who want Justices nominated to the Court who will vote our way in every case. How do we educate some people to the way the Court should function?

JUSTICE BREYER: Whether it's that or there are other matters, I feel in general about the point you raise quite strongly. I think it is important, not just the point directly, but that high school students and before begin to understand the importance of setting up government institutions which we have that depend for their successful functioning upon what used to be called in my third grade class participating and cooperating, working well with others. Didn't you have on the left-hand side of that report card there was a place sometimes for bad conduct is checked, reason, self-discipline, cooperation with others, et cetera? And that's fine.

I had to read this for a reason last year. It's honestly read, not reread. I pretending I was rereading Tocqueville, actually I had never read it that carefully the

first time, so I was really reading it, and you see what this man in 1840 thought of the United States. It's extraordinary. He comes here and he asks the question of a sort that you ask, "Why does it work?" This is a country which really is democratic in the sense that we don't have social classes in the European sense. He said slavery is a big problem and he was right about that certainly, but leaving that to the side he said the democratic will, why doesn't it get into a terrible mess? He says the answer is they learn how to work together.

He thought they learn it in town meetings, in local government, in a hundred different private organizations or ten thousand, and we still learn it. So even if I get depressed they're not teaching civics, I think in the third grade, fourth grade and fifth grade, maybe it's just small groups or maybe it's student government or maybe it's five other things, American children learn how to work with other people. If they don't, we've had it, and that's part of my motivation, to tell you the truth, participating, working with others, making decisions at community levels and other places.

MR. TAYLOR: Before I thank Justice Breyer I'd like to re-announce that we have lots of these excellent books here and that he's agreed to sign up to 20,000, but not a single one more. [Laughter.]

Anyone who would like to pursue that, please stay where you are for the time being, and anyone who is not going to pursue that, please exit through the rear.

With that said, thank you very much Justice Breyer.

JUSTICE BREYER: Thank you.

MR. TAYLOR: I've certainly learned a lot.

JUSTICE BREYER: Thank you. Thank you.

[Applause.]
