

THE BROOKINGS INSTITUTION

MAKING OUR DEMOCRACY WORK:

A CONVERSATION WITH U.S. SUPREME COURT JUSTICE STEPHEN G. BREYER

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PARTICIPANTS:

**Welcome:**

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## P R O C E E D I N G S

MR. TALBOTT: Welcome to all of you and to those of you who are in the overflow rooms as well. I really appreciate that so many of you would come to Brookings on this luminous Indian summer afternoon and you're here for what is going to be a terrific event. We're particularly glad that Ambassador Matthysen could be here, and it's my very great pleasure to introduce a dear friend of many of us in this room, myself included, and also a friend of the Brookings Institution. He is, of course, a great jurist, a great teacher, and an author. In fact, he is a Brookings author.

The first book published by Justice Breyer back in 1974, 36 years ago this month, was published by the Brookings Institution Press. The title was scintillating and exciting, *Energy Regulation by the Federal Power Commission*. (Laughter.) And it is still available on Amazon. In fact, there are 16 used copies available on Amazon, the cheapest you can buy for 58 cents. And there's also one selling, and I kid you not, for \$99.68. And we'll have to look into the discrepancy there. There's something going on in the market that perhaps you can explain, Stephen.

Justice Breyer has spoken at Brookings on a number of occasions. Five years ago he came here to talk about his last book, *Active Liberty*. A year later he participated in a dialogue with the distinguished French jurist, Robert Badinter, as part of our Raymond Aron lecture series. His new book is *Making Our Democracy Work*. Now, it is, of course, as you would expect, a very distinguished piece of scholarship, but it can also be read as a collection of short stories that bring to life the human and political context of some of the landmark decisions that the Court has taken during our nation's history.

Reading this book will give you a sense of who exactly William Marbury was and why his travails mattered to the course of American democracy. The same with

Dred Scott and Fred Korematsu, who brought a suit against the United States on the question of the internment of Japanese-Americans during World War II. And then, of course, Stephen also brings to life the story of the Little Rock Nine and their role in the desegregation of schools in this country.

And speaking of that great issue, we also have here with us this afternoon Bill Coleman, who is a friend of ours and a trustee of this institution and played a key role himself on the legal front of the civil rights movement, especially the desegregation of schools and of other public facilities. Bill, too, is a Brookings Institution Press author. His book is *Counsel for the Situation: Shaping the Law to Revitalize America's Promise*. And by the way, it has an eloquent forward by Justice Stephen Breyer.

Now, back to Stephen's own book. I should note that it was featured at this year's Sun Valley Writers' Conference in August, and Stephen, reinforced by three generations of his family, was a star of that gathering. It also made the *New York Times* Best Seller List. I checked it out on Amazon today. It's number 932. (Laughter.) But it's doing a little better than your last Brookings book, of course, or your first book, which was a Brookings book, which is at 2,285,191. (Laughter.)

We have with us to lead the discussion of Justice Breyer's book, Ben Wittes, who is our resident expert in government studies on the judiciary and American law. The two of them are going to conduct a dialogue for a bit and then, of course, we will open up to question and answer.

Ben, over to you.

MR. WITTES: Thanks much. So a couple of small housekeeping measures. I'm going to ask a few questions and have a discussion -- a bilateral discussion, and then we're going to open it up. When we do, please bear in mind that

Justice Breyer can't address matters that may come before the Court or that are before the Court. So if you bring up those questions, you'll be wasting not only your own time but everybody else's time, too. And I say this because it always happens that somebody thinks they've found a clever way to figure out what, you know, what he's going to do the next time there's an abortion case or something. It's not going to work, so just don't do it.

(Laughter.)

MR. WITTES: I'd like to start -- this is a book that is in significant measure, though not entirely, about an argument for a jurisprudence that's sensitive to legislative purpose and the consequences of different possible judicial interpretations. So I wanted to start by turning the question on the book itself and asking you so what was your purpose in writing it and what do you hope its consequences will be?

JUSTICE BREYER: It's a good question. I want to thank you all first for inviting me here and for seeing -- I see so many old friends here. And some new ones. And it's always nice to be here. And I was trying to do better than 2,286,491. And I don't know why that book has done so badly. It seemed to me very, very interesting. We interviewed George Liidakis. You can find out how rates were set in 1973 in the basement of the Federal Power Commission. Nothing wrong with that.

This particular book, I think when I was first appointed my predecessor was Harry Blackmun. And he told me two things personally. He said, his first words were, you will find this, Stephen, he said, an unusual assignment. It's true. And he said you will also find that Americans have a tremendous desire to know about the Court. He said it's virtually an unquenchable thirst. They know that it has something to do with them. They feel -- it is this sort of way that most people do think about it. It's doing something important. It may affect me. I'd like to know a little bit more about it because I don't really understand it.

Now, that he said you will find a tremendously widespread attitude. And so when you have the chance to tell people about the Court and what you do, tell them. I think, I mean, I'll -- it's not the CIA. There's no reason -- and we try not to be secret. And it isn't some great secret enterprise. You can explain it. The most strong reason why people don't really find out the details is many of the details are sort of boring. And people don't want to read baskets full of opinions. I've written a lot of opinions. Do you want to know what I think about law? You could read any one of these opinions.

But it's rather like the woman who goes to the psychiatrist. "And why are you here?"

"Well, my husband sent me because I like pancakes."

"Well, what's wrong with that? I like pancakes, too."

"Wonderful. I have 19 trunks full."

(Laughter.)

I mean, I have opinions. But the problem, as Harry Blackmun explained, is to communicate to people who don't have a lot of time in an efficient way the essence of what we do. And that's why I wrote this. Why communicate? Because it's necessary to have public support for the institution, not necessarily for the decisions. But it's a democracy, and if people don't want this institution of an independent judiciary, they won't have it. Marshall recognized that 150, 180 years ago. And they have to know about it in order to want it.

Why? Well, Hamilton really gave us the power. You asked me that. We need another question to go into that. I don't want to give a lecture.

MR. WITTES: Well, I mean, so the first section of the book is a sort of historical discussion of how the Court came to be accepted both as the final word on the meaning of the Constitution but also on -- as binding on the other branches. And I'm

wondering if you can sort of walk us through that discussion a little bit and some of the cases that gave rise to it because it sort of sets up the entire subsequent discussion in the book.

JUSTICE BREYER: The first really is part of the answer to the last question. If you read through the Federalist papers, and Hamilton in Federalist 56 explains this perfectly well, why have a group of nine or seven or however many he thought there'd be, justices of the Supreme Court with the power to set aside a law of Congress? It is a democracy. The law was voted. Why should there be some other institution with power to say it's no good?

Well, Hamilton says somebody has to have that power. Why? If nobody has this power you can take this wonderful document, the Constitution, and put it on the wall and we'll send it to the National Gallery. Actually, he didn't know about the National Gallery, but he would have said that. And it'll be like a painting. People can look at it but it won't be effective. Somebody has to have the power to make it effective.

Now, who should that be? The president? Well, he, Hamilton thinks, may have a little too much power anyway. Anyway, he'll become a real tyrant if he has the power also to declare anything he says fine. You say whatever I do is constitutional. There's a risk in that. Well, what about Congress? Now, that's a thought. Let Congress consider whether what they do is constitutional. And he said, well, you smile and sort of laugh a little bit at that but in many countries that's been quite a serious thought. And they're the ones elected. They interpret the Constitution.

Well, he had the reaction you had when you were slightly laughing about it because he said these people in Congress are -- they know about what's popular. They're experts at popularity. And if they weren't, they wouldn't be where they are. But, the Constitution at some occasions protects people who aren't popular. And in enforcing

the Constitution, the institution will have to say these people who are very unpopular; they have the same rights as everyone else. If you're the least popular you have the same rights as the most popular person. And it's very unlikely that Congress, when it's just passed a law which is very popular, will turn around and do the unpopular thing of saying it's no good. So that is too much risk.

But we have over here this handful of sort of obscure bureaucrats. Nobody really knows who they are. They probably know something about law, we hope. These are legal questions of a type and they have no power. It's wonderful. They don't have the power of the purse. They don't have the power of the sword. So they're unlikely to become too powerful. We'll give them the power. That's Hamilton's thought and Marshall picks that up in *Marbury v. Madison* and turns it into law.

But, wait. This is the question. The organizing question of this part. If these people are so powerless, if nobody's ever heard of them, why will people do what they say? And that's the organizing question I have. It's Hotspur's question in Shakespeare. I love that question. In *Henry the IV* you have Owain Glyndŵr who is a Welshman, and as we know, all Welshman are mystics in Shakespeare's eyes. And Owain Glyndŵr says I can summon spirits from the vastly deep. And Hotspur replies, a common sense Englishman, he says, "Well," he says, "So can I. So can any man. But will they come when you do call for them?"

(Laughter.)

JUSTICE BREYER: You see? That's the question. And it took a long time. And many, many years and a civil war and all kinds of things before the country and the Court evolved to the point where we now, it's like the air we breathe, we think that people will follow the Court's interpretations of the Constitution. You can never be sure and it's been a long history. And I want to go into some of that, which I do.

MR. WITTES: Well, let's, I mean, let's do that. And you trace that history through the Cherokee cases in the 1820s and 30s through *Dred Scott* and through the Little Rock Nine case in the desegregation era before you reach the conclusion that we had by the end of the Little Rock Nine case established both the idea that this Court is the final word and that its opinions are binding. That's quite late actually.

JUSTICE BREYER: It is. It's surprisingly late. It is. It is, in fact. You see the first thing that happened that really presented this issue to my knowledge was in the 1830s when the Cherokee Indians owned some land in Northern Georgia. Now, there are two treaties that said this is your land, but there was gold discovered on the land. And I think in the eyes of many Georgians, they saw the gold. They didn't see the Indians. And they suddenly thought, well, why should the Indians have the gold? Why shouldn't we have the gold? Now, there's a bright idea. And they might not want to give it to us but we'll just take it, and they did. And they took the land.

And the Cherokee tribe at that point, they were farmers. They were no longer simply hunters. They had an alphabet. They had a written constitution, and they had a great leader called Chief Ross. And he did what any civilized person would have done faced in such circumstances. He hired a lawyer. (Laughter.) And the lawyer, who is the greatest lawyer of his day, Willard Wirtz, he said, well, we'll bring our case to the Supreme Court. And we're right. We'll win. And a lot went on, but eventually they did get to the Supreme Court and eventually they did win. It wasn't that difficult a legal issue. And the Court said the land belongs to the Indians. It doesn't belong to the Georgians. And that is the case that many of you will have heard of in this way because about that case, the president, Andrew Jackson, supposedly said John Marshall, the chief justice, has made his decision; now let him enforce it.



And Jackson sent federal troops to Georgia, but not to enforce the decision. They were sent there effectively to evict the Indians, which they did, and the Cherokee tribe traveled along the trail of tears, so called because so many died on the way to Oklahoma where their descendents live till this day. That was the effort that the Supreme Court -- and it's a long and very interesting story.

I wanted to talk about *Dred Scott* because *Dred Scott* is such a terrible mistake on the part of the Court, but I also wanted to talk about the *Cooper v. Aaron* but really it began before and many of us remember that. Little Rock. I mean, Little Rock. The Court had decided in '54 and then a few months later in Brown I and II that there would be desegregation. It says -- it says in the Constitution equal protection of the laws. And those of us who were alive at that time, including me, know equal protection of the law, what? Was that what was happening in the South? I mean, if you thought the law was being applied equally to white and black schools in the South, you had to just open your eyes and look and you would have seen what was going -- everyone knew. And the Court said the law means what it says, and we mean equal. And there will be no more segregation.

And do you know what happened the first year after that? Nothing. Nothing. No purse. No sword. I mean, not quite nothing. President Eisenhower did desegregate the District of Columbia schools and there was a little bit going on elsewhere, but next to nothing. And a couple of years went by with nothing. Nothing. And the Little Rock School Board then decided they would integrate Central High. And as many of us can remember, the governor of Arkansas, Governor Faubus, effectively stood in the doorway and he said no, they're not going to enter. These black children, nine, the Little Rock Nine, they're not going to enter this white school, and I have the troops. I have the state militia. I have the police. And there were huge mobs around it

and the pictures went around the world of that white woman with her face enraged because the black girl was going to enter the white school. And people saw that all over the world.

And Eisenhower called, asked, it was arranged, a meeting with him and Faubus. They were up in Newport and Governor Faubus later said, well, he dressed me down like a general dresses down a sergeant. And he told President Eisenhower he wouldn't object to integration; he'd stop. And then he went out and told the press the opposite. And a little tense. And Brownell, his attorney general said we have to go ahead and we're sending troops.

Jimmy Burns, who was the governor of South Carolina, who was Truman's great friend, who had been a member of the Supreme Court and in charge of mobilization of resources in World War II and was not a bigot but was a governor of a southern state, and he said to Eisenhower, if you send troops, you are going to have to reoccupy the South. It will be the Civil War all over again. Are you prepared to do that? And at best what will happen is they'll close all the schools.

And Eisenhower was somewhat shaken by that argument, but Brownell said we have no choice. And he decided. He didn't have to decide that way. The year before a similar thing had happened with Governor Shivers in Texas and he was under court order and did nothing, and nothing is what happened. But Eisenhower said I will send the troops. And he took the 101<sup>st</sup> Airborne and everyone knew who that was at that time. Those were the heroes of Normandy. They were the people who had been flown in. As the invasion took place on the beaches, their parachutes were not quite right for the place. They were sometimes in the wrong place. They were hung up on the steeples and they were just shot down a lot of them by the Germans. And they were the heroes of the Battle of the Bulge.

The 101<sup>st</sup> Airborne spelled something to every American or almost every American. And he took a thousand, put them on airplanes, and the next day they were in Little Rock and they take those black children and they walk into the white school. Very brave of the children and a great victory as the pictures were sent around the world. A victory. A victory for the rule of law. And it was a victory for America. Fabulous. Fabulous victory. I just wish I could say that was the end of it, but of course, it wasn't.

It then went to the Supreme Court and nine, all nine signed the paper. All nine to show we really mean it. Well, you could have had nine. You could have had 900 judges. You could have had 9,000 judges. Well, the next day the governor closed the schools and Central High was closed for almost a year. But eventually Little Rock voted in a different board and they reopened the schools and a lot happened as we know with Martin Luther King and with the Civil Rights Movement and all kinds of things, but in my mind, perhaps because I'm a judge and perhaps because I -- that day of the troops being sent in was key. I'd like to think of it as the day which began to make the difference in terms of enforcement of Brown and desegregation.

So I think Eisenhower did a great thing there, and we had at our Court a Russian paratroop general. He was, at one point, sent there. He was sent there by the State Department because had been in charge of pointing the missiles at the United States and he changed the direction. So he came over here and the State Department called up and said we should be nice to this man. And so he came to the Court and he said what is your favorite course we're talking? And so I told him about this. I said it's one of my favorites. And I said, what does it show? It shows that the paratroopers and the judges must be friends. (Laughter.)

And there is more to that than you might think at first blush because this did happen and eventually I'll say a little bit about *Bush v. Gore* because I heard

something that to me is very interesting. I was in dissent in that case. I thought the majority was wrong. I said that. I said I didn't think they should have taken the case; they should dismiss it. And if they are going to decide it, decided it differently in terms of a recount. That was my view. So I thought it was wrong.

But I heard Harry Reid say at one point, and this is pretty interesting to me because I thought he put it very, very well. He said one of the more remarkable things about that case is something not very often remarked. And that is despite the fact that so many people thought it was wrong, maybe half the country at least, and I'm sure he thought it was wrong and I thought it was wrong, and despite that and despite the fact that it was enormously important, people did not start shooting each other in the streets. Rather than have violence, they followed it. And that, you know, I'll meet -- if I say this and I've said it on other occasions, but 10 percent of the people say, no, it would have been better if there had been violence. So I say, really? Really? Is that what you think? Go turn on the television set and go look at what happens in some of those countries where that is the way of resolving their serious disputes.

And if we go back to the Cherokees and I think you'll see a kind of progress so that do we have this treasure? And of course the Court can be wrong. They're nine human beings. They're not nine angels. And there we are. But this habit or custom is there. Never perfect. That's why I want to explain what really went on in all these cases. So you can see it's a continuous -- it's a continuous effort that people have to make, and they won't make it unless they know about it. And now you have --

MR. WILLES: So one, yeah, one of the things that you talk about as a way that the Court contributes to conditioning that habit is certain norms of judicial behavior, and you talk about *Dred Scott* as, you know, the violation of all of those norms. And so one, I'd love you to walk through that. But secondly, I'm curious whether at this

point you think those habits are so engrained in the culture that we are sort of past the tipping point at which acceptance of the Court's finality and authority is at this point inevitable or whether judicial behavior could push us back in the other direction. I mean, presumably nothing as awful or dramatic as *Dred Scott* but where there's sort of accretions of decisions that people really disagree with over time can kind of erode the sense of the Court as the inevitable final word.

JUDGE BREYER: I mean, no one knows the answer to that question. It's, of course, well established at the moment and I think that's a very, very good thing. And what I really want people to understand, and this is why I say it depends on public support. Not for any particular decision. It depends on public support for the idea of having an institution that will make these kinds of decisions, even if sometimes they're wrong. And part of what -- and so I can't say. I hope it is, and I hope it remains, but it won't remain unless -- and it's not even our job to do the main thing which is likely to get it to remain. It's primarily, which is almost trite to say, it's so trite that people forget how true it is, but it's the job of people who are educating the next generation of Americans. It's a job for the teachers. It's a job for the schools. It's a job for parents. It's a job for everybody. And so when I talk, I get passionate about it. What I become passionate about in this area is the need to teach civics in high school. They say, oh, my God, I had to go to talk to hear a judge say it's important to teach civics in high school?

Well, Sandra O'Connor says it better than I do. And David Souter. And the one thing we all agree about is that. Nobody doubts that. We can't do that. I can write a book as a kind of contribution to this, but, you know, we can't do it. I mean, I want to say that it's our job and so is it everybody else's.

Now, the reason that I want to put *Dred Scott* here, you know, it's not difficult to be against *Dred Scott*. I mean, *Dred Scott* is the worst decision ever made by

the Supreme Court and the only debate is it the worst or the second worst? All right? So it's not very courageous to be against *Dred Scott*. Now, what I would like to show with *Dred Scott* is this. The best thing I could think of if I'm trying to think of what was Chief Justice Taney thinking? And the strongest plus I've ever heard, which isn't much of a plus and I'll tell you why, is that, well, he might have been thinking politically. And this becomes relevant you say. He might have been thinking. He might have thought if we can get this issue of the status of slaves in the new territories settled; if we can make the southerners secure that they won't have their slaves taken away from them, then we'll avoid a Civil War.

Now, there's some evidence he thought something vaguely like that. And that's a political argument. And I want to put that in here because there's a strong tendency to think really what we do on the Supreme Court is we really do politics. We're sort of, you know, Junior League politicians. Now, you scratch behind what people say to my face; that's what they're thinking. And, you know, I don't think that's right. And quite a lot of this is spent explaining why I think that's not right. But this is the strongest argument why it's not right. Because first Hamilton gave us the job because they thought judges weren't politicians. If you want to give it to politicians, give it to Congress. I mean, they know politics.

And *Dred Scott* proves the other half of that. If judges are politicians, they are terrible politicians. What happened after *Dred Scott* was decided? Curtis, who was from Massachusetts, wrote a terrific dissent. He really, in my opinion, took this apart line by line, not in terms of law viewed with hindsight but in terms of law at that time.

Now, that dissent was not some kind of great glamorous buzzwords or what do you call it, sound bites or glittering language which I can't write which Curtis couldn't either. And it was logical going through this argument. I love it. Argument by

argument by argument. His dissent was turned into a pamphlet. It was circulated throughout the United States. It led to quite a few editorials. The New York -- Horace Greeley, the *Tribune* wrote -- in the New York Legislature said if this decision is the law, the next thing you will discover is the slave owner with his manacled gang is going to come and have his slaves there underneath Bunker Hill. That monument of freedom and we can't do anything about it. And it was just, you know, Lincoln picked it up. And Lincoln used it in his Cooper Union address. And that address helped make him the leading candidate of the Republican Party. And the Republican Party became the party that was anti-slavery and they were elected. Hence, withdrawal. Hence, the Civil War.

So, if, in fact, it's a little -- most historians will say it's quite possible *Dred Scott* did have something to do, some deny it. But at best it had no effect, and at worst, it helped cause the Civil War. So if he is a politician and was thinking he was going to do the opposite that just proves my point. It's not just, you know, wrong to hold your finger up to see which way the political winds are blowing, it is mad to do such a thing because you won't know which way they are blowing, nor will you as a judge know what the best thing to do even if you knew which way the wind was blowing.

So part of what's going on here is I want to disabuse people or at least give them a more realistic notion of what it is to use the word politics next to the word Supreme Court. And I think everything -- there are many things going on that tend to give an incorrect or at worst -- at best, grossly exaggerated idea of the nature of those two concepts that one applied to the other.

MR. WILLES: So what there certainly are, if not political differences among justices, is methodological differences.

JUSTICE BREYER: That's much better.

MR. WILLIES: And I want to turn to your methodological discussion

which is -- sort of occupies the second part of the book. If I could broadly summarize it, you emphasize the understated -- the underdeveloped in the common use discussion, a role of legislative purpose and the possible consequence of different interpretations and you argue that text and history, though critical, are often overstated in those conversations.

JUSTICE BREYER: Exactly.

MR. WITTES: And so I was trying to figure out, you know, how big the methodological difference between you and the textualists really is. And so I pulled Justice Scalia's little book on textualism and I was struck by the fact that your argument seems to say, you know, of course when the text is clear you go with the text, and when the history is clear, you go with the text as inflected by the history. But where they're unclear, there's room for consideration of purpose, and Justice Scalia, you know, thunders about the preeminence of text, however, he also seems to leave room for purpose in there. He says, "Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist and no one ought to be. A text should not be construed strictly and it should not be construed leniently. It should be construed reasonably to contain all that it fairly means. When you ask someone, do you use a cane, you are not inquiring whether he has hung his grandfather's antique cane as a decoration in the hallway."

And so, embedded in that, it seems to me, is some acceptance that the text is not simply an arid, stand-alone document, and embedded in your discussion of purpose is a notion that text, where it is clear, is authoritative. And so I'm trying to figure out whether there's really as big a difference as there seems to be, and if not, if it's narrower than it seems to be, what is the core of the difference that remains?



JUSTICE BREYER: Well, if he had only said, when the text is not clear it should be interpreted reasonably in accordance with what the legislature intended, or in the case of the Constitution, in accordance with the values that the framers tended to embody in the particular phrase, it would be a perfect statement. As it is, it's a very good statement, in my opinion, and I imagine he thinks it's a perfect statement.

The difference, I think, is the difference in how we approach something is less than people think. That is, when you have a text that's unclear, whether it's a statute or whether it's something in the Constitution -- what is this word liberty? You know, it doesn't explain itself. Try the freedom of speech. Sure, that's easy to apply in cases where you're locking somebody up because he said I'm for the other candidate. That violates the freedom of speech.

But try it in the cases that really come up, that are hard, that are borderline cases, and those words don't always get you there, but you look to what the value was they're trying to embody, that can help. You have a statutory case.

I put one in because I thought it was funny, that I found in a newspaper in France, which is a true story. It's a teacher, a school teacher who's a biology teacher is taking 20 snails live in a basket on the train and he's going to Paris to where his class is, and the conductor comes up and says, what's in the basket, and he shows him the snails and he says, well, you have to pay fare for the snails. So, he says, why do I have to pay a fare for the snails? He says, right here in the fare book it says you can't bring animals on the train unless they're in a basket, but if they are in a basket you pay a fare. He says, these are snails. He says, well, snails are animals. He says, yeah, but it means cats and dogs. Ah, well, it says fare, it says animals.

All right, so how do we decide? Does animals include snails? All right, that's the kind of case we get. We see cases that are not really clear and to look to the

answer of that I say, let's see -- somebody wrote that fare book. Somebody had an idea. They had some purpose there, maybe to do with insurance, maybe to do -- let's see what the purpose is, and I think the need to look at those purposes comes up a lot, comes up a lot, because if this is so clear, why is it in the Supreme Court? We're only taking cases that by and large lower court judges have come to different conclusions. So, it's very often unclear.

Now, you ask any judge, and when he sits down and thinks about it, I think he'll say that when we have our normal difficult cases, whether it's the Constitution or whether it's a statute, we have certain tools. We'll look to the history; we'll look to the text first. You know, I'm sorry, if it says vegetable in the text, a horse is not a vegetable. I don't care what the purpose is. They are not going to be able to get the vegetable to cover the horse. I mean, there we are, and that's because of the text, and certainly that text is important. So, we look at the text, look at the history of that text, we will look at the tradition. There might be tradition. Suppose it says *habeas corpus*, there's a word with lots of tradition. You will look at the precedent, and usually what you get is some precedent here, some over there, neither too clear, neither of those are precedent, but you look at it and look at the purposes.

Some human being wrote those over in Congress and they had something in mind, and try to figure it out. And then look at the consequences, not any old consequence in the world, but the consequences viewed in light of the purpose. If we come out this way, does it help further the purpose or does it wreck the purpose? The consequences are important too.

Now, some of us, me, for example, emphasize a lot purposes and consequences. And some of us, Justice Scalia, for example, is nervous about that because he is worried that it gives the other -- me, for example -- too much opportunity to

put in things I think are just good generally under the guise of purpose. So, I reply to that, and so he'll emphasize the first four, and so I'll say to him, sure, I guess there is room to act subjectively and not according to law, and that's true whether you're using history, which people argue about, or whether you're using purposes, which people argue about. If you don't want to be a good judge, you don't have to be a good judge. You know, there are a lot of ways to trick people. But tricking is out of the game. If you want to trick people, why be a judge? Let's go into a different profession.

I mean, you see, that's my response, but I think it works better when you emphasize and look for purposes and you look for consequences and judge them in light of purposes. When we're talking about the Constitution, let's try to see -- the values don't change, what changes is life, time, commerce -- in the commerce clause, inner state commerce -- did not include television or cars or the internet, but you apply what were the values in that First Amendment to a world that's changed with the internet, and that's a hard and difficult thing to do and you're not going to find the answer, normally, about how to apply those values to the changing circumstances by looking something up in terms of notes in the Constitutional Convention that took place at the time because they didn't keep notes on the internet.

Now, do you see, what I'm trying to do is show you the difference and it really is a question, I think, of emphasis, and while showing you I defended my own position some, but there was no one else here to do that and so I thought I would. But I'm trying to show you what the differences are and seen from Justice Scalia's point of view, he'll say that he's still afraid that the approach that I sketch out is too open to subjectivity, and I'll then reply, well, I'm afraid that we don't have much alternative to that because the approach that relies for everything on history is not going to get answers, even of the kind that the Framers would have intended if they had been here. And there

we are, that argument is never resolvable. You can get variations on it, you can get arguments back and forth, you can go on and on and on, but ultimately it probably reflects something in nature or values or views about the country and how -- what law is like in relation to the country and people have different views on that kind of thing and that's perfectly fine that they do.

MR. WITTES: So, I'm going to bring up one more subject and then we'll go to the floor. The last chapter of the book deals with the post-9/11 war on terror cases and situates them against the backdrop of the Supreme Court's handling of the *Korematsu* case, the Japanese internment case during World War II, and I was interested in -- this is an area of interest of mine, and I was particularly interested in this discussion because it's an area in which, it has been argued, including by me, that the Court's activity actually produced significant unintended consequences, that is, people, in an effort to bring law and judicial oversight to Guantanamo, the Court created kind of an incentive never to bring anybody new to Guantanamo and to keep people in less visible facilities farther away and actually in detention by proxy forces that aren't even part of our custody at all.

And so I'm interested in the question of where consequences are foreseeable in that regard and where they're not, and how should we think about a decision that creates a real rule of law environment in location A and thus incentivizes the use of location B, which would not be covered. No, no one will ever go to Guantanamo for precisely the reason that the people who are there now were brought there. How should we think about that?

JUSTICE BREYER: I think that's such a good question for the reason that those examples give me the opportunity, or what I try to do, what I want to do, is I want to give people a little feeling for the uncertainties that are there in my job. It could

be me or it could be anybody else who's holding this job, and you're often facing a kind of void where there are good arguments on both sides, and a lot turns on it. And you cannot be certain that you're taking the right view. And that isn't false modesty, and these examples allow me to show that.

The Korematsu, I can remember driving with my mother in--just after the war in San Francisco, past Tanforan Racetrack. I grew up in San Francisco. And Tanforan, she said -- I can remember her saying to me, "That's the place they held the Japanese in World War II, a few years ago," and the voice of approval was not hers. I mean, she was pretty disapproving of that because what had happened is in January, '42, the President signed an order and General DeWitt, the head of the Sixth Army in the Presidio in San Francisco, ordered the Japanese--that means, any American of Japanese origin as well as those who were not American citizens, to report to Tanforan, and to Santa Anita near Los Angeles, and other location places, and 70,000 American citizens of Japanese origin were removed against their will and put in camps in Eastern California in the intermountain states.

Now, by 1944 that case got to the Supreme Court--four Japanese-Americans brought cases and one, the one that's best known is *Korematsu*. I met him, actually, Fred Korematsu, because my next door neighbor in Cambridge, by coincidence is the daughter of a man named Ernie Besig and Ernie Besig was a friend of my father's, they used to play poker, and he was head of the ACLU in San Francisco, and he defended--he defended Fred Korematsu, and the ACLU wouldn't sign the brief. Now, there are a lot of politics behind that, but part of the fact that there was politics behind it shows the difficulty that was going on at that time. Pearl Harbor had been bombed only a few months before.

Now, Fred Korematsu, who I really liked, actually, he's a kind of feisty

fellow and he was--I could see why he brought the case, against his parents' advice, against the advice of the Japanese community there, and he brought it and Besig represented him on his own, said, we're going to get you out. They can't do this. They can't do it.

And by the time the case got to the Supreme Court in '44, the main arguments -- DeWitt had written a long report and he had said, you know, Pearl Harbor, and we were afraid of an invasion, and it is true, I can remember blackout curtains being drawn. We're afraid of an invasion and there's signaling going on from the shore to submarines, and there are five incidents of sabotage that were helped by Americans of Japanese origin and there's just no time, we have to remove them all, it's too dangerous, it's too risky, and he did it.

All right, by 1944 when this case comes to the Court, a couple of lawyers in the Justice Department had grown a little suspicious of this argument which they had read many times, because the head of navel intelligence had written an article in one of the public magazines saying, we had this under control, there was no need to do it. We knew who the people were who were disloyal and they weren't these people we moved.

So, he calls in the Federal Communications Commission and he says this signaling, he says, was it going on or not? And he asked the FBI to look into the espionage and within two weeks the FCC is back in his office, this is Burling and -- I forget the other, whatever--and they're back in the office and they have books like this and the FCC man says, no, there was no instance of signaling. There were 700 and some odd reported instances, we've looked into every one, most of them were just buck privates misinterpreting something on their machines, just been drafted, there was not one, we looked into every one. And he said, well, how did you do this so quickly in two weeks? He said, oh, no, we didn't do it in the last two weeks, we did it at the time, and

we showed it to DeWitt, at the time.

And the FBI said the same, with the five incidents, three of them took place later, and they said that J. Edgar Hoover was totally against it, which he was. And he said, we told DeWitt this at the time.

So, the two lawyers said, well, we can't send a brief up to the Supreme Court where we're underwriting this opinion which is false. And they wouldn't sign it, and then they brought into mediate Herbert J. Wexler, who's a person that some of us know, and he got them to write to agree to a footnote which was so obscure you couldn't understand it unless you read it five times, and then you saw what it mean.

All right, so, fine, they signed it, it went to the court, and Charley Horsky was the ACLU lawyer in the court and he'd read the footnote, and he made absolutely certain that every judge on that court understood what it meant.

Now, Korematsu loses. Three votes against in the dissent--Jackson, Roberts, and Murphy. All right, now, of those three Murphy, I mean, I thought was the best one, and he really said, there's no evidence, there's nothing up, down, and sideways, there is not one reason to do this. He's in dissent. The people who uphold this are not--sort of, history views them as some kind of reactionary judges, Black wrote the opinion. Hugo Black, the greatest civil libertarian on the court, Douglas, Frankfurter. So the question that comes to me which is, I think, why? And I think, as you read that -- this is my construction I put upon what they've written -- why? Because they're thinking, someone has to run the war. Either Roosevelt runs it, or we run it, and we can't. And even if we decide this case, what about the next case? We just can't do it, so we have to give him this authority because we're fighting a war and Jackson said, well, we were fighting a war. It's '44 -- I mean, he has his own theories which we can go into later if you want, but in any case, why did they do that? I think that's why. They were afraid to get

into this.

Now, in my own mind, that poses the problem and the fact that *Korematsu* is viewed as a really wrong decision suggests that it is at least a problem of how this Constitution, which has civil liberties listed, how do you hold a president who has the war power and who is responsible for national security, how do you hold that president accountable in times of national security danger or war? And I think, in my mind, the four Guantanamo cases are an effort to answer that question and they are all decided in favor, really, of the Guantanamo person or the person who was held, for example, Bin Laden's driver, not the most popular person in the United States, and the court held in favor of that driver who is suing the most powerful person, the President of the United States, who lost. And how?

I wanted to put enough in here so people see that partly the answer has been holding them accountable by being very narrow in what you hold, and being very specific, and leaving lots of outs, going to statutory questions first, but ultimately we decided *Boumediene* and we said that Congress could not suspend the writ of *habeas corpus* applicable to the people in Guantanamo and Guantanamo, the Court says, is really part of the United States, and we went through the treaties and all the different things to show that it was really -- the United States had full leeway there, but what we're doing in general in those cases, I would say, is trying to be narrow thereby satisfying, of course, no one, because there are some groups that think we should have been definite and broad, and others who think we shouldn't have gotten into it at all, and so I put that there without too much commentary so that people who read it can compare it to *Korematsu* and ask, is this approach likely to work to the problem of civil liberties and the need for national security that *Korematsu* poses? And I suspect that people, by the time that they're through reading it will think, hmmm, we can't be sure. Oh, you see, with



something like that you can't be sure. Well, you can't. You can't.

And the most you can do, and I think this is why they're quite limited in their holdings, is to make an effort that you then hope as best that it will work out better than the alternatives, and that is very much the job of the Court with very difficult matters such as weighing the genuine need for national security, the genuine concern for civil liberties in time of a real crisis of national security or wartime. And again you can go back to the beginning -this gets us right back -- why in heaven's name should nine people who are not elected decide things like that? The only answer being, the alternatives seem worse. That was Hamilton's answer. And to let the public try to understand both the difficulties of that and the importance of it -- I mean, I see the importance every day in the court where I see people of every race, every religion, every point of view, and they're in that courtroom fighting out their differences under law. You see, we're back to the beginning because I think that's so much preferable than using violence in the streets.

All right, there we are. No good answer, but trying to explain what it's like.

MR. WITTES: Let's go to the floor. Let's start with Darrell. When I call you, please wait for the microphone to show up.

MR. WEST: Justice Breyer, thank you for coming to Brookings and thank you for sharing your views with us.

I was very interested in your discussion of judicial methodology and you pointed out, kind of, various factors that justices should consider in your view. You pointed out text, history, and purpose.

Now, we recall that a while ago President Obama stimulated a lot of controversy when he mentioned that he wanted empathetic justices on the Court, so I'm just wondering if you think empathy is a reasonable factor for justices to consider.

JUSTICE BREYER: It depends, I would say, what you mean by it. I would mean, something like that, is what my wife, who is British, calls imagination. And imagination means this: think of being a judge -- I don't know if you ever wanted to be a judge -- I did want to be a judge, actually, I was a judge in the Court of Appeals for a long time, and you think of the Court of Appeals, what does the judge do? He sits in a room. He or she is in front of a word processor and listening to lawyers, very far removed from others, and by imagination I think it refers to the quality of being able to understand the impact that a decision, one way or the other, is likely to have on people who are leading lives that you've never led, people who have very different kinds of experiences. It's a very big country, 300 million people, and you're not going to know, but you at least have to have the quality of imagination to understand that other people have other kinds of lives and what are those lives like, and often that is relevant to a judicial decision when interpreting how a statute or maybe a Constitutional provision will apply.

MR. COLEMAN: Mr. Justice, I'm embarrassed to ask this question, but after the war I went back to the Harvard Law School to finish and I was told by a professor who at that time had a reputation as good as yours that the difference is that in 1943 or '44, the United States, it decided to invade Italy to try to get to Rome. They first sent in a white division which didn't get very far. The next division that went in was a black division which Wade McCree was a member, and they didn't get over this hill.

Finally, the third they sent in was a Japanese division and that's the one that got to Rome, and I was told by the professor at that time that that made the disastrous end result in the case.

JUSTICE BREYER: Well, that's very -- it's very interesting that Mr. Coleman has told me this point before and I think, as he was -- not most of you know, but he was Justice Frankfurter's law clerk, the first law clerk of color in the Supreme Court. Is

that right? I think so, in the Supreme Court, and so he knows first hand quite a lot of the things that President Eisenhower actually thought.

And in respect to the change of mood in the country, I know what you think and I defer to that, the way in which the battalions -- and there were black battalions then and there were white battalions then, and Eisenhower saw the performance at the Battle of the Bulge, and there was the Nisei battalion which was made up of Japanese-Americans who joined the army to fight against Japan and Germany and they were sent to Italy, they weren't sent to the Japanese front, they were sent to Italy and they performed -- they were the most decorated, I think, of any battalion, and all of those things -- I mean, some of you saw Ken Burns' World War II films and he shows one of the members of the Nisei battalion coming to see his parents and his parents are in one of the camps with the barbed wire around it, and he says to the commander, he says, how is this possible? I'm fighting over in this terrible, terrible situation in Italy, and here my parents are kept in these camps. The commander said, well -- he was sympathetic, but he said, well, this is the army. There we are.

So, there were lots of things that changed the mood of the country. And did the mood of the country have to change in order eventually to get the decisions that we got in the 50s and 60s and so forth? Perhaps. But that is a question for historians. I mean, that is really -- why did Holmes, one of our greatest judges, why did he in cases involving the 15<sup>th</sup> Amendment where he knew perfectly well that black people in the South were not being allowed to vote, contrary to what it said in the 15<sup>th</sup> Amendment, why did he take the view, we better not hear these cases? Because he thought they just wouldn't be enforced. I mean, that's what I think from what I've read.

So you had to, of course, and the historians say that, there are many, many, many things that had to change, but I was focusing on the legal part of that.

SPEAKER: Thank you. Justice Breyer, notwithstanding the fact that Hamilton wrote what he did in the Federalist about the Court being the place to vest the enforcement of the Supremacy Clause, that wasn't put in the Constitution; it was enunciated by Justice Marshall in *Marbury v. Madison*. Do you think that if Marshall had been an originalist he could have come to that same decision?

JUSTICE BREYER: Here I am not an expert, but I did read one book which I would recommend to you and that is Gordon Wood's book on the history of that -- a recent book -- on the history of that time. I read his earlier books -- he's a great historian in history at Brown and certainly as good as anyone writing today. And I asked that question in my own mind and after reading his book, my own conclusion, and I think it's his, but I don't like to put words in any historian's mouth, is yes. If he had been an originalist he would have come to that conclusion because at the Constitutional Convention itself virtually everybody thought that that's how it would work. They thought that the Supreme Court would have the last word in a case presenting a conflict between a statute of Congress and the Constitution.

Now, note, it doesn't say what happens in the next case or whether people outside the case have to follow it, and that matter, which is a little technical here, but important, is not really decided until *Cooper v. Aaron*, which is another interesting part of this.

MR. WITTES: Well, and I suppose, the other component that's not decided by that is the question of--maybe it's the same point--but the question of whether the disposition of the case reflects a rule of decision for the case or whether it reflects a --

JUSTICE BREYER: That's what I'm talking about.

MR. WITTES: -- rule with wider applicability, right?

JUSTICE BREYER: Correct. Does a President or someone else have

to follow the rule in the case when they have in front of it not this case, but something that's like this case? And that, *Marbury v. Madison*, doesn't really say. And do you take it to really mean that, and so forth? And it takes a lot of time and the Court doesn't say it explicitly to my knowledge until *Cooper v. Aaron*, and then it says it's always been assumed that.

MR. WITTES: And is it clear to you that Hamilton's vision of judicial review did or didn't incorporate that idea?

JUSTICE BREYER: No, it's not clear.

MR. WITTES: Not clear either way?

JUSTICE BREYER: To me, you asked to me, I am not the world's greatest historian. What I can do is read these books and--I'd say that whatever virtue there is --these are many subjects that have been written about. All right, I'm reading mostly the opinions and the accompanying books of history, and so what you're seeing is -- these old opinions being read by a person who lives later and so may not have the same view but holds a similar job.

And so since I hold a similar job when I read, say, Curtis' descent. I think, oh, that's rather interesting, maybe that's the kind of problem that would have been put to me in a case. And would I or would I not have reacted the same way, and how would I have, and I think -- I like to hope I would have. But you're seeing it viewed through the eyes of a person with similar responsibilities. And that's where I'd say I have a comparative difference, not because I'm the world's greatest historian.

MR. WITTES: Yes?

SPEAKER: Mr. Justice, as a non-lawyer looking at the legal system, one of the things that bothers me most is the old saying -- I don't know who said it -- but "Justice delayed is justice denied." And when I look at the system, and I see how long it

takes for individual cases to be settled and the years in many cases, it seems to me that a lot needs to be done. I'm just wondering what do you think about it? And what about whether you think the Supreme Court should take a leading role in trying to make changes, even it means getting a little involved in politics to get some of these changes made?

JUSTICE BREYER: No, but that's a good question because on the merits, of course, you're right in my opinion, and it's expensive and the average person in a civil case can't do it. He can't afford it. And there are all kinds of systems, and we can talk about it and have talked about it. There are very few of us, I think, who haven't. I'm tempted to say everyone does. But I was -- this was explained to me a long time ago by Lee Campbell who was one of my colleagues on the First Circuit. And he said "Be careful, a judge is a person who has a lot of power in a very narrow area." And that's even true much more than people think on the Supreme Court. So he said "When you start talking outside the area of the case in front of you, and you just give your general opinion, even about the legal system," he says "The lawyers will listen, and they'll nod politely, and they'll say how interesting. And they'll go outside the room and say there he goes again." You see? So be careful. People will not necessarily -- because they don't have to -- listen to you when you talk. Now that doesn't mean that on your subject we can't talk. But I'll say we have, and beware of becoming involved in politics. And the reason for that is I think it's not being involved in politics to talk about the legal system and its needs, and the problem of representation and keeping the courtroom door open to the average person. And what Sandra O'Connor's been doing is talking about the need for civics education, which I certainly will, and also talking about certain problems of campaign contributions and elections of judges. There are a lot of things we can talk about, but beware about straying too far from those subjects because you don't want the

public to think you're involved in politics. And the only way to do that is not be, and be careful when you talk about matters even like you don't get your expectations too high. But with those two rules in my mind, it works out all right.

MR. WITTES: One of the issues, though, that the court has traditionally been a little bit involved in, but been reticent about getting more involved in, is nominations to the court and to lower courts. The Chief Justice has traditionally written a report saying judges -- nominees should be treated more fairly. It has been treated with - - more by negligence than in observation, both under the last Chief Justice-ship and in this. Occasionally Justices have spoken out in defense of nominees who have refused to answer certain questions. I'm wondering as the nominations process gets more and more contentious whether the court institutionally will need to have more to say about it by way of protecting the ability of people to stay quiet in the context of nominations hearings.

JUSTICE BREYER: Remember that we are the nominated people. I've said this a lot. We are not the people who do the nominating. We are the people who are confirmed if we're judges, and not the people who do the confirming. In one typical compromise in this matter, the Constitution both gives, in effect, tenure to judges and makes it very difficult to get rid of them. At the same time, it provides for a degree of political input when they are nominated and confirmed. So that means the way to change the process, if you don't like the process, is through the political system, not really so much through the judicial system. And it isn't so clear that the Congress or anyone else will listen to the judges in that area where you're talking about something as sensitive as nominations. I used to think, when I was confirmed, I went -- I suppose it was much easier then -- but still, you have 17 Senators on one side of the table, and I'm on the other side. So how did I feel about that? Stressed. Very, very much. And you don't

know, I mean, what will happen. People can say, "Oh, this is a very sure thing." Maybe. People watch you on television. Luckily in my case I was quite boring, and they turned it off. But if the American public says they don't like you, then probably those Senators are going to vote "no." And that's what -- if I'd like to think that if I hadn't been confirmed, I don't know if it had been a happy ending for me. But I would have been mature enough to understand this is an effort to get political input into an appointment of a person who will have power over to say what Americans have to do, and he will be very hard to remove afterwards. That's a kind of compromise. So the way I'd put it in a phrase -- because I like to turn it into some kind of slight humor -- is I say "Asking me about this is like asking for the recipe for chicken ala king from the point of view of the chicken." It's important to remember that. So we're very cautious in that area.

MR. WITTES: The gentleman in the red shirt has been very patient, right over here.

SPEAKER: Hi. Thank you very much for your presentation. I was wondering about whether or not in that French example if they were charging for body lice, but that's not my real question.

MR. TALBOT: That is typical of the question that the judge could ask, in fact, if he had the --

SPEAKER: But the real question is this. Since this is a forum on democracy -- you did touch on it, but not expand, I wish you would -- on the fact that the corporations have such overwhelming power in our culture in both the presidential area and the legislative area, who gets elected. Now those two groups then come together to appoint the judges, so the problem becomes how do we ever get free of the corporations and the big powers if basically they are so embedded in the whole system that we can't get free? And I refer particularly to the interpretation of the Fourteenth Amendment,



giving them the right as a person even though they're not citizens, and also in this recent ruling which just opens the floodgates for more and more money. So our democracy is rotting from this, and how can we ever get away from it if it's so embedded in all the branches?

SPEAKER: Do we have regulatory capture in the judiciary?

JUSTICE BREYER: What you're really interested in is the last question I suggest, the last part of it, and you're bringing it in first because you don't really think the corporations appointed me to my job. I don't think that corporations appointed me to my job. I think President Clinton perhaps when I was first made a judge, and President Carter appointed me, and I worked on the -- I'd been a professor most of my life and that probably had something to do with it, and I'd worked for Senator Kennedy. So the -- but you're not thinking so much of that, you're thinking of this last decision. And what is it I can say about the last decision? The decision Citizens United is that the court held 5-4 that in a certain area, which is rarely -- you'd have to go to the decision to decide what that is -- in a certain area of independent expenditures that the Congress couldn't regulate the independent expenditures for a candidate on television in the last 60 or 30 days of a campaign made by corporations or labor unions. It's both. And what can I say about that? I was in descent. I thought it was wrong. John Stevens wrote 75 pages. I agreed with all of them. The way that we can punish the majority is not to be angry, although we might internally. We all get on very well. We're never rude to each other, and we never raise our voices. In conference, I've never heard a voice raised. But we can write long descents, and then they have to read them. So that was a very long descent. They read it. Now, what I find myself doing here usually, because I've gotten this question before, is try to show you that even the majority has a point. And I don't like to be too successful at that, but the people who were in the majority, you see, for the

most part they've thought throughout, those who have been there for awhile, throughout that any effort to regulate the amount of money given by anybody to a candidate is contrary to the First Amendment, which protects the freedom of speech. Now if I can sort of encapsulate their argument, it usually is of this form. Money is not speech. But you try to run a political campaign without money. You cannot get your ideas across. And, therefore, if, in fact, you want communication of ideas, which we do in a political campaign, you've got to let people have money. Now once we say what the source can or cannot be, you're in the business of censoring somebody. And you are in, what learned hands said, is this very, very dangerous thing of saying some people cannot speak so that other people can speak. And the danger of doing that for judges or Congress or the President or anyone else is terrible because that has a terrible effect on free speech. Now, I've put to you the argument I don't agree with because I think there is a countervailing argument. And the countervailing argument you maybe have extremes where certain expenditures are such and so great in amount that they can shutout the kind of conversation among individuals whom were supposed to talk to each other in a campaign about ideas. And that idea of a local state or national conversation is a basic value underlying the First Amendment and at least sometimes can overcome that first argument. Now why do I put both? I put both because, as you see, I tend to agree with the second thing that you said, that you're more on my side probably from what you've said. But I want you to see that even in these areas where I feel quite strongly, there normally is something to be said on the other side. And it is true, when I got to the court, you know, I'd been -- I gave you a little bio -- because I'd spent a lot of time growing up in San Francisco or some time and then I'd lived in Cambridge, Massachusetts. You know, I mean that's a city with its own foreign policy. I mean, I lived there for quite a while, and I thought I'd seen a lot of disagreement, which you do see in the academic world. But I

got here and I saw a lot of disagreement of kinds that I'd never seen before. And I thought for awhile, gee, I don't know how they can think that. And then I thought that's a good thing that they think very different things. It really is. And this isn't just phony, it's really true. There are 300 million people in the country. They do think a lot of different things, and they've worked out ways of living together. And the Supreme Court is an institution where probably over time different Presidents will appoint different members. And a President who thinks that member's going to agree with him all the time is really wrong. But if the President wants someone of sort of very general philosophy that he might share, he has a better chance, and that means over time you'll get people of different points of view. And ultimately, it's a healthy thing for a country of 300 million people to have people of different views and even if that means, hard as that is to swallow, sometimes they won't agree with you, sometimes they don't agree with me. And I don't like it, but there we are. And I think that the generality overcomes the specific, and ultimately I -- you see why it's so hard? Because I have to sort of try to convince people. I want you to support an institution, the existence of which means that they will sometimes decide things that are very unpopular. And they will sometimes decide things that are not only unpopular, but they're rightly unpopular because they're wrong to which I put your category. Okay?

MR. WITTES: Stuart Taylor from the front.

MR. TAYLOR: Justice Breyer, Stuart Taylor. I write for *Newsweek*. I'd like to go back for a moment to what Lincoln said about the *Dred Scott* decision and whether it has some broader relevance to the principle of judicial finality you were discussing. The Lincoln quote I'm thinking back to says this: "If the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made the people will have ceased to

be their own rulers.” And the question is whether judicial finality can and perhaps has gone a little too far in that direction?

JUSTICE BREYER: Lincoln is faced with *Dred Scott*. I mean, Lincoln, you know, he called *Dred Scott*. He said “That’s a legal astonisher.” And I’ve read, I think, something either very much like or various things you said. And the other thing that he was faced with was a really tough one, the decision in *Ex Parte Merryman* where during the Civil War, Taney again says that Lincoln cannot suspend the writ of *habeas corpus* because it says Congress can suspend the writ, and Lincoln had suspended it so that he could arrest people in Maryland who might be part of an army of people fighting against the United States or, you know, they might be giving them aid and comfort. And that’s where he said “Shall all the laws but one go un-enforced and reduced to a shambles” or whatever it was, “Lest that one not be enforced.” So he was in a difficult situation. What I got out of that was he’s doing his best. He’s doing his best to protect the rule of law and following the court and saying really, “People do follow the court. They do have to follow the court. But draw a deep breath. What do we say about *Dred Scott*? My goodness.” And even there he can’t quite bring himself to say “Don’t follow it.” He says just what you said. That’s my -- that’s how I read that in the context. I think I put some of it in there. So I said “Why did the court in *Dred Scott* push people to that degree when they were wrong?”

MR. WITTES: Gary?

MR. MITCHELL: Mr. Justice, I’m Garrett Mitchell and I write the *Mitchell Report*, and I want to ask a question that I think is a civics education question. Twenty years ago or so, Bill Moyers did, as you may recall, a series of programs with members of the court and particularly with your predecessor on the Constitution. And in one of those discussions between Moyers and Justice Blackmun, the observation was made that “The

Preamble breathes life into the Constitution.” And my question to you is two-fold. A, is that -- would that be your description? Is that a -- would that be your description or something like it? And second, what would the Constitution be without a Preamble?

JUSTICE BREYER: It's an interesting question. I can go this far. I've thought about just to this degree. The first words of the Constitution are "We the people." They're not "We the states." That's how the Preamble begins. And I think that's what makes clear something that Madison said which is obscure otherwise. He said, "The Constitution is a charter of power granted by liberty, not as is true in many European countries then, a charter of liberty granted by power." Now what does he mean? He means that if you look back -- England, France -- it's the center that has the power. Since Louis XIV, it's the King. The King has the power. That's where -- and you still can see that in juris prudence in many European countries, that the power is there at the center of the government. And they might give a lot of liberties to the people, but that's where the liberties come from. And Madison is saying we have the opposite, that legitimacy, the foundation of the law, sovereignty, the ultimate authority in the United States, is not the center. The ultimate authority is the people. That's why it says "We the people." So we the people have freedom, and we delegate to the center whatever powers they may have. And that, he says, is a very fundamental difference. And does that make a difference today? Yes. Why does it make a difference? To me, it makes a major difference. By emphasizing the importance of when you get to difficult questions of the Constitution, difficult questions of what does the equal protection clause mean, difficult questions of whether Seattle even could have an affirmative action program of a certain kind, difficult questions like that. Remember somewhere in the back of your mind that democracy is at the heart of this, that there is a preference for individual freedom, that there is a preference for local decision making, that there is a preference when

you're interpreting a lot of phrases in the Constitution that seem to have nothing to do with it, interpret it in light of that democratic preference for the individual. And I have some chapter and verse in the other thing I wrote, but maybe later. I'll give you some chapter and verse later if you want.

MR. WITTES: We have time for one more question. The woman in the -  
- back there in the black. Wait for the mike.

SPEAKER: Thank you very much. I'm very honored to be asking not just a question, but the last question, so I hope it's a good one. In listening to your discussion of the *Dred Scott* decision and how the argument that, you know, by deciding the case in such a way that, you know, was supposed to be very definitive that it might avoid a civil war, I was wondering how you would distinguish between a political argument like that and a practical argument like in deciding a case about criminal procedures, you know, what might happen -- how the decision could open the floodgates of, you know, appeals and other litigation or, you know, to what extent a judge should use his or her imagination to think about the practical implications of a decision.

JUSTICE BREYER: Good question.

MR. WITTES: But particularly in a situation where you're arguing for consideration of consequences, but not political consequences.

JUSTICE BREYER: And then there I'd have to go to chapter and verse because the law in general is supposed to work out in my view. It's supposed to in general matters, supposed to work out for people fairly well, and many, many, many, many rules, laws, statutes, and so forth have practical consequences in mind. So if you run into a rule of civil procedure and it has two interpretations, and under interpretation one the trial's going to last forever -- I'm exaggerating -- but it's really going to get tangled up in knots. And under interpretation number two it'll just work out pretty well. You can

be pretty certain that the purpose of that is to facilitate, not hinder, trials, and so let's go with the one that works -- the second one. But if you look at *Dred Scott*, nothing in what he was interpreting, nothing -- it was a whole vision of the Constitution. It was so radically different that that kind of argument just didn't have a place. I mean, I think that Taney is seeing the Constitution in order to reach that result as a kind of Articles of Confederation. He's seeing the Constitution as a document where the South has a veto on laws that would affect slavery. And there's no way to get to that result under this Constitution, even as written then, without radically changing its nature. So I don't think that that pretty political argument, which was just which way the wind was blowing, even you give it its best light, I don't see how you get it into that particular case. But it'll work -- your thing -- what's permissible and what isn't. It's chapter and verse. But the judge will know and the intelligent reader will know and the lawyers will know. And so don't hold your finger up to the wind, and the place that the newspaper editorial telling you it's popular to do this or do that belongs in an opinion is zero.

SPEAKER: Thank you.

MR. TALBOT: Before I ask all of you to join me in thanking Justice Breyer for leading us in what has certainly been a high-class conversation, I want to do just a couple of other things. First, I want to thank all of you for participating in that conversation. I recognized the Belgian Ambassador at the beginning of the proceedings. I see that the Ambassador of Norway, Wegger Strommen, is in the back of the room, and it's a great pleasure to have him with us as well.

We are going to have an opportunity to have books signed by Justice Breyer. Those of you who do not yet have books and would like to buy them and thus elevate it, of course, on the Amazon list -- I think I can be just that commercial -- can go pretty much when we give a round of applause out the back door. The signing is actually

going to take place in the Saul-Zilka Room, which is right next door, and I would ask those of you who want to go next door who already have books -- like the Belgian Ambassador's got two -- very good -- to wait for just a minute so that I can lead Justice Breyer across the way and get him situated, and then Melissa or somebody will signal when it's okay to go next door.

So please join me in thanking Stephen and, indeed, Ben as well.

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I, Carleton J. Anderson, III do hereby certify that the forgoing electronic file when originally transmitted was reduced to text at my direction; that said transcript is a true record of the proceedings therein referenced; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, furthermore, that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

/s/Carleton J. Anderson, III

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