THE BROOKINGS INSTITUTION

PROGRESSIVE VISIONS OF JURISPRUDENCE: A DEBATE

Washington, D.C.

Monday, July 18, 2011

PARTICIPANTS:

Introduction and Moderators:

E.J. DIONNE, JR.
Senior Fellow, The Brookings Institution
Chair, *Democracy* Editorial Committee

BENJAMIN WITTES
Senior Fellow
The Brookings Institution

Panelists:

DOUGLAS KENDALL
Founder and President
The Constitutional Accountability Center

GEOFFREY STONE
Edward H. Levi Distinguished Service Professor
The University of Chicago Law School

* * * * *

P R O C E E D I N G S

MR. DIONNE: Welcome everyone here today. This is a very distinguished group of people we have gathered together in this room to hear an argument and a discussion between two very distinguished people.

I always like to begin rather than end events by saying thank you because many times events are so engaging that I forget to say thank you at the end. First of all, I want to say this is -- I want to thank above all actually my Brookings colleague, Ben Wittes. Ben and I with -- and I want to thank in the process Seymour Weingarten. With support and encouragement from Seymour we are trying to encourage a conversation about alternatives to the conservative judicial view, a view that has become quite powerful and we want a discussion of what the future of an alternative -- some would say progressive or liberal -- jurisprudence might look like.

I also want to thank Emily Luken, Christine Jacobs, John Seo, Doug Pennington, and at the Constitutional Accountability Center, also, the VP – our VP at Governance Studies, Darrell West. Thank you all very much.

It seems to me that what we're talking about today sits at a very interesting intersection. It scores very high when you combine two -- if you could put numbers on it, if you combine two numbers. One, a debate that gets -- that is usually important to the future of our country and then the other high number is a debate that tends to get ignored and not covered enough. And I do think that the future of how we read the Constitution and how constitutional interpretation will affect everything else that we try to do in public policy is a usually important debate in our country.

And what we have here today is I think a seminal exchange between Doug Kendall and Geoff Stone on where an alternative to conservative jurisprudence, particularly originalism, lies. And if I may puckishly quote my favorite commentary on

originalism, it comes from the constitutional law scholar Garrett Epps who once said that Justice Scalia's view of originalism is, "Trust me. I knew the founders. I know what they thought."

Now, we -- perhaps there are folks in the room who have an alternative view which I would encourage you all to speak up. This exchange actually is -- that we're having today is building on an exchange in *Democracy* magazine. And I want to mention an endeavor I am also involved with and I want to honor and welcome Mike Tomasky, the editor of *Democracy*, who is seated at the back of the room; also Albert Ventura. And it was Mike and Albert who first brought our two guests together to have this debate. And I think all of you have either a copy of the current issue of *Democracy* or a copy of their exchange. I think we ran out of issues of *Democracy*. It's always better to run out of issues than to have huge stacks lying around the office.

And so without further ado we're going to, by agreement of our participants considering this was consensual, we're going to have Doug go first and Geoff go second.

I want to say one other thing. I think that Doug and his colleagues make a central point that liberals have to join the battle for American history and the battle for the meaning of the Constitution. And I think Geoff and, well, Marshall who is here, make a powerful counterpoint that liberals should not pretend that honest answers to vexing constitutional questions can be gleaned simply by staring hard at an ambiguous text. And I think that this is sort of -- I think that this is a case where I find parts of myself agreeing with both of our presenters. That's actually a happy circumstance.

Doug Kendall is the founder and president of the Constitutional Accountability Center. It's a think tank, a law firm, and an action center dedicated as it puts it to fulfilling the progressive promise of our Constitution's text and history. He is the

co-author of three books, lead author of numerous reports and studies. He launched and helped direct, with Earth Justice, the judging of the Environment Project, a comprehensive effort to highlight the environmental stakes in the future of U.S. Supreme Court appointments and appoints to the federal bench. He blogs on Huffington Post. He received his undergraduate and law degrees from the University of Virginia. And since my wife went to UVA Law School I have an even higher opinion of you now.

Geoff Stone is one of our most distinguished law professors. He's been a member of the law faculty at the University of Chicago since 1973. From 1987 to 1993, he served as dean of the law school. And from 1993 to 2002, he served as provost of the University of Chicago, which produces some of our most brilliant students…but I am assured by my friend David Brooks that the University of Chicago is also where fun goes to die. (Laughter) But I'm sure that's not true.

He teaches primarily -- David, as you know, is a Chicago grad. He teaches primarily in the areas of constitutional law and evidence rights in the field of constitutional law. He has written many books, including the most recent *Speaking Out! Reflections on Law, Liberty, and Justice*. He received his undergraduate degree from the University of Pennsylvania and he had his law degree from the University of Chicago where he served as editor-in-chief of the Law Review. Geoff has clearly held every important job that University of Chicago grads hold except President of the United States. But maybe that's somewhere. Grads or teachers. But that may be somewhere in the future.

Let's start with Doug Kendall. And again, I really want to thank Ben, who has done some extraordinary work here at Brookings.

Let me just introduce Ben just so you know. I think many of you know him. He's a senior fellow in Governance Studies here at Brookings. His research

focuses on the Supreme Court judicial nominations, confirmations, and legal issues surrounding the War on Terrorism. He is the author of many books. Ben is becoming one of those people who writes books at the speed that I write newspaper columns. It's very impressive. I guess his most recent is *Detention and Denial: The Case for Candor after Guantanamo*. Or have I missed the more recent publication, Ben?

MR. WITTES: No, thank God.

MR. DIONNE: Okay. But there's something coming soon.

Anyway, Doug Kendall.

MR. WITTES: Well, actually, let me jump in for just a moment.

So I'm going to keep my role moderating this to a minimum on the theory that the more you hear from me, the less you will hear from the people in the discussion that actually matter.

But I do want to situate the discussion just a little bit. There's a -- I think it's fair to say as sort of radical asymmetry in the debate over the judiciary that as we practice it in the United States, in which one side over the last 30 to 40 years has developed a sort of remarkably consistent narrative of its expectations of the courts. And the other side has not. And I think one of the things that you see in both of the articles -- both sides of the debate is a sort of frustration with that state of affairs. Why that has happened is sort of an interesting historical and sociological and political question. But the question that it also begs is is it a necessary condition? Or is it one that has just sort of developed for the reason -- for whatever reasons it has?

And one of the things that I was interested in about this debate and was interested in sort of presenting was how similar and how different are the competing theories that vie for primacy and contention with what we have come to think of as sort of conventional conservative jurisprudence. I am slightly awkwardly positioned to moderate

this discussion because I'm actually probably more sympathetic to conservative jurisprudence than anybody else on this platform, and maybe more than anybody else in this room.

But the way we thought of structuring this is to have each of the presenters talk for no more than 10 minutes. I will then ask some questions of each and then we will try to involve you guys as much as possible. So think up your questions and with that I'll turn it over to Doug.

MR. KENDALL: Thanks, Ben. And thanks, E.J., for the terrific set up to this conversation. And thanks to the people here at Brookings for holding this conversation.

As E.J. mentioned, this debate derives from a published debate in Democracy Journal. And the introduction to that debate, which may have been written in part by E.J., has --

MR. DIONNE: Mike did it.

MR. KENDALL: There's a very arresting sentence right up front which says for a generation or more the American right has controlled the terms of the public debate over the Constitution. I don't think anybody on this stage would disagree with that statement. I think we all agree that that's the case. And it's a huge problem. It's a huge problem for progressives because the Constitution is America's civic bible. It's our Magna Carta. It's the most important document in American life. And to a great extent progressives have ceded that document, its text, to conservatives. And I think part of that problem I think is a glaring disjuncture, difference in the way conservatives and progressives talk about constitutional interpretation.

Conservatives led by Justice Antonin Scalia say that constitutional interpretation is easy as pie. You take the Constitution's text, presto change, and you

come out with conservative results. The progressive response to that has been to challenge and rebut Justice Scalia's purported jurisprudence of originalism and to explain, no, no, no, constitutional interpretation is much harder than that. The text is almost always ambiguous. It doesn't answer the most important questions. History is indeterminate. And what we really need are smart and wise judges who will rule based on their deepest values and concerns based on practical realities of the day, based on broader jurisprudential theories such as judicial restraint or political process theory.

This has been the argument made by Justice Stephen Breyer in a series of debates with Justice Scalia across the country. You hear it echoed in the statements of candidates, including Barack Obama on the campaign trail in 2008. And I think it's more or less the argument that Professor Stone has made in his two contributions to *Democracy Journal*.

I'm just going to read the penultimate paragraph of Professor Stone's essay entitled *The Framers' Constitution*. "Constitutional interpretation is not a mechanical enterprise. It requires judges to exercise judgment. It calls upon them to consider text, history, precedent, values; changing social, economic, technological and cultural conditions; and the political realities of the time. It requires restraint, wisdom, empathy, intelligence, and courage. Above all, it requires a recognition of the judiciary's unique strengths and weaknesses, a proper appreciation of the reasons for judicial review, and a respectful understanding of the nation's most fundamental constitutional aspirations and how we hope to achieve them."

Whew. That's a lot. It's a lot to ask of judges. And it's a lot to ask of the American people. And what polling shows is that the American people side with the people who say that they just want judges to follow the damn law. In poll after poll, by huge margins, polling shows that the American public prefers conservative judges over

progressive judges in bedrock tasks such as deciding cases before them and interpreting the Constitution. It's why even with a progressive president we're not getting the progressive judges we think are indispensable to the progressive legal project and it's why we're losing the debate over the Constitution.

Now, let me say up front that every part of the standard progressive story about constitutional interpretation is partly correct. The Constitution's text doesn't answer every question. History is sometimes indeterminate. Judges will inevitably, and particularly in the hardest cases, consider the practical consequences of their ruling. And there's a role, although somewhat limited, for broader jurisprudential theories like judicial restraint and political process theory.

But I also think that the standard progressive account of constitutional interoperation is also partially wrong. A careful consideration of text, structure, and history will produce much more guidance about a much broader range of constitutional debates that many progressive will let on and will often admit. And more importantly, or as importantly, strategically and politically it is suicidal for progressives to emphasize how ambiguous a constitution is rather than how many ways it points to progressive results.

The two essays in *Democracy Journal* that I authored with Jim Ryan, who is a law professor at UVA, lay out an approach to constitutional interpretation we call new textualism. Jim has written an article that will be published in the fall in the *UVA Law Journal* called "Laying Claim to the Constitution: The Promise of New Textualism" that lays out new textualism in a little more detail. I'm just going to give a thumbnail sketch here today. The political debate and media accounts of constitutional interpretation remain mired in the death match between living constitutionalism and working originalism that played out in the 1980s.

But as Jim explains in the article, constitutional theorists have more or

less moved on. What we call next textualism is a growing consensus among academics across a political spectrum on what is right about originalism and what is right about living constitutionalism. Like originalists, new textualists think that constitutional interpretation starts with a determination based on text structure and history about what the constitution actually means, what the text in front of them actually means. Like living constitutionalists, new textualists believe that while the Constitution's meaning is fixed, the application of particular provisions and principles can change as circumstances evolve.

So a very quick example, flogging may have been cruel and ubiquitous at the founding. It's cruel and vanishing rare today and it's entirely appropriate for us -- for judges to rule that flogging is cruel and unusual and unconstitutional today. That's the point that we're recognizing there.

New textualism also rejects the parts of living constitutionalism and originalism that deserve to be permanently discarded. To the extent that living constitutionalists believe that there's no fixed meaning in the constitution and judges can interpret and remake the Constitution to meet the present realities, we think that's wrong. To the extent that originalists think that the original intent of the framers or the ratifiers trump the words they ratified, it's wrong and should be rejected. New textualists look carefully at history, both the enactment history and the broader historical events that brought about the need for the text but we don't let history trump text.

Now, none of this should be very controversial but it seems to a lot of progressives that the idea of taking text and history seriously is about as attractive as eating spinach. Aw, mom, do I have to? I was having so much fun playing with my newfangled theory of constitutional interpretation. But here's the payoff. Those sources are on our side. That's a part of Jim's article that I think should be so inspiring to

progressives. The last 10 pages which articulate, which chronicle a large and growing body of scholarship, that applies constitutional text, structure, and history and makes a persuasive case for progressive reading of a broad collection of constitutional provisions starting with Article I and going through the Twenty-fourth Amendment.

Using and building upon that scholarship, Constitutional Accountability Center is writing briefs, op-eds, and reports every day that document the progressive promise of the Constitution's text and history. And with the constitutional nonsense we're hearing from the Tea Party every day it's a target-rich environment. We're showing day by day, clause by clause, brief by brief, that the Constitution is not ambiguous; it's progressive.

And so my question to Professor Stone is if the Constitution is a progressive document, as we both believe it is, what could possibly be wrong with new textualism and rooting progressive arguments first and foremost in the Constitution itself?

MR. WITTES: I just want to say that the loser of this debate I can promise will not be flogged. (Laughter)

Geoff.

MR. STONE: Thanksfor inviting me here.

I think progressives need to take on at least three fundamental questions if they're going to address the problems that Ben outlined at the outset. That is the sense of disarray that the left has with respect to the role of the judiciary and the damage that that disarray has done to the courts and to the country.

The first thing we need to do is to debunk originalism. And that's not hard to do. In fact, the quip that E.J. offered at the outset about Justice Scalia captures more than a little of the critique accurately. And I'm happy to talk about the reasons why originalism is largely bogus, even though I think it's well intentioned as a methodology.

But basically one thing we have to do is to make clear to the American people among other constituencies that the idea of originalism, although attractive in the abstract, is a fraud in practice and is inevitably a fraud in practice. If we don't achieve that, then the simple answer that conservatives have sold to elected officials, to the public will be untouchable.

The second thing that we need to do is to explain that the actual jurisprudence -- and Ben said he likes conservative jurisprudence which in the contemporary world I would say is an oxymoron -- but to explain that the conservative decision making processes, particularly in the United States Supreme Court, are completely incompatible with any principled conception of constitutional interpretation. Conservatives trumpet the idea of judicial restraint, yet there is no one on the current Supreme Court who comes close to being an advocate of judicial restraint. They trumpet the idea of originalism. And with the occasional exception of Justice Thomas, and less often Justice Scalia, originalism really has nothing whatever to do with the vast majority of the work of the current Supreme Court.

What they are is selective aggressive conservative activists, that is they use the power of judicial review in an extremely activist manner, not in a way that can be reconciled in any principled way with the coherent theory of the Constitution or constitutional interpretation, but to be candid, in a way that enforces conservative, or even to be more direct, republican political values. And the way to see that is simply to look at the cases in which the court uses an activist approach and those in which it uses a more restrained approach. And what you'll find more often than not is that you cannot reconcile them with any principled theory of the Constitution.

So judicial activism to enforce the rights of gun owners, to enforce the rights of corporations to spend limitless amounts of money in the political process, to

enforce the rights of the Boy Scouts to exclude gay scout masters, to override the election laws of the State of Florida in the 2000 presidential election, to hold Affirmative Action unconstitutional. Those are all examples of conservative judicial activism. While at the same time turning a deaf ear to claims of African Americans, of women, of Hispanics, of persons accused of crime, to the enforcement of their rights is a situation where they have been completely judicially restrained. There is no theory that you can articulate.

I've asked this question to many of my conservative friends. What's the theory? And they all say I'll get back to you and never do. But there is no principle on which you can reconcile what Ben likes as conservative jurisprudence. It's totally result-oriented and unprincipled and we need to expose that and make clear that it's not about calling balls and strikes. It's not about applying the Constitution in the way it means. It's not about originalism. It's not about judicial restraint. It's about raw judicial power to achieve preferred outcomes. And that's a real problem. We need to do both of those things to debunk the myth of the current judiciary.

The third thing we need to do is to offer an alternative approach to how we should, in fact, interpret the Constitution. And more specifically, what role courts should play in the enforcement of the Constitution. Now, here's where Doug's theory of new textualism comes in. What it offers is an approach to constitutional interpretation from a progressive perspective that is meant to be an answer to judicial restraint, to originalism, to Justice Breyer, and the like.

I happen to agree with the very basic premise that the Constitution is a progressive document and it should be interpreted in that light. But that's about as far as I can get with new textualism. The truth is, as Doug accused me of saying, the text of the Constitution is unbearably ambiguous. Congress shall make no law abridging the

freedom of speech or of the press. Congress shall make no law respecting an establishment of religious. There shall be no cruel, unusual punishments. No state shall deny any person equal protection under the laws. No state shall deny any person life, liberty, or property without due process of law. You can stare in that text from now till doomsday and it will not decide any case of interest. It is not helpful in interpretation. It offers boundaries of what could conceivably credibly be within the protection of those provisions but that's all it offers.

Now, the only other source, the only other two sources I think that Doug identifies are history. And I agree the history can be useful and should be taken into account, not in the crabbed way of Scalia or Thomas, but as a source of understanding the goals and purposes and aspirations of the framers when they wrote these words. What did they have in mind? What were they trying to accomplish? That helps a lot to give concrete meaning to these phrases. I also think the precedent is very useful as a practical matter in helping to give meaning here.

But there are two critical questions that I think need to be addressed in figuring out what is a viable method of -- and I think the problem with Doug's approach with new textualism is that however sincere that this group is in its advocacy of this position, ultimately it's result-oriented, it's incoherent, it's vague. It will not persuade anyone who doesn't agree with it or doesn't agree with the outcomes that it's actually doing anything other than findings results that they want to reach. And they're using these very open-ended sources to justify those results. And I think beyond the abstractions of it's a progressive vision of the Constitution, I don't think you get very much out of new textualism.

So what can you do then? Well, one thing you can do is ask: why do we need court. Right? What is the function of the judiciary in interpreting the Constitution?

The framers were acutely aware of this question. When they decided to add the Bill of Rights there was a serious issue about whether there was any point to adding the Bill of Rights to the Constitution because as Madison asked, well, there are just going to be parchment barriers. Who is going to enforce them? The majority are just going to do what they want in the democratic process and it doesn't matter whether we list a bunch of rights. And what Madison came to realize and what Jefferson and Hamilton advocated strongly is that courts can play a critical role in dealing with majoritarian dysfunction. The framers wanted a majoritarian democratic government, but they knew that majorities could be dangerous and there needed to be a check on those majorities. But the problem is that majorities will check majorities. So you need somebody else and an independent judiciary was critical.

So central to the idea of judicial review is the idea of judges correcting for majoritarian dysfunction. And if you look in American history you find that in *Carolene Products* decision in 1938, the Supreme Court clearly annunciated a theory of judicial review that focused on this idea of majoritarian dysfunction. It basically said that there are two situations in particular where courts need to act aggressively to intervene. They need to act aggressively to intervene when traditionally subordinated groups, minorities, are being further oppressed or subordinated in society because we know from experience that majoritarian government is not particularly good at giving a fair shake to those groups that are regarded as outliers or outcasts in society. And courts need to intervene in that situation to correct for that dysfunction.

And the second situation is the risk of capture that a temporary majority in a majoritarian government can make rules that will effectively perpetuate their power. And that's a serious danger that threatens to undermine the democratic society and courts need to be particularly aggressive in stepping in in those circumstances.

And so the Warren Court, if you look at the decisions of the Warren Court and you lay them out, all of the liberal activist decisions of the Warren Court fit within those two categories. The Warren Court had a clear, principled understanding of what it thought the role of the Supreme Court was. It was to address those two problems, whether it be *Brown v. Board of Education* or one person, one vote, or protecting the rights of other minorities or the rights of criminals. Everything the Warren Court did was designed to address those two concerns.

And that, I think, is the right approach for saying -- for interpreting the Constitution courts must use heightened scrutiny in dealing with laws that fall into those two categories. In other circumstances, we then do need to turn to text and precedent and history and values and aspirations and practical consequences and so on to determine what level of scrutiny is appropriate in a much more ad hoc manner. I think that's unavoidable given the ambiguity of the Constitution. But the central thing we can do is to say that there is in fact a principled, coherent, and compelling justification for a particular function of the Supreme Court which was manifested in the Warren Court and which is the appropriate central -- appropriate role of the Supreme Court of the United States.

Thank you.

MR. WITTES: So before we move to questions, for people who are sitting way in the back or standing against the wall, there are actually quite a lot of seats up here which you should feel free to move up and take.

I'd like to -- so let's -- for each of these questions both of you should try to answer briefly and then the other should feel free to respond. I'd like to start with a question for Geoff. In the framework, the conservative critique of the Warren Court was that there was nothing that would ultimately constrain judicial discretion. And as -- and

that clearly developed a lot of salience with the public in the late '60s and early '70s. I'm curious what you think the answer to it is. Was the Warren Court -- the Warren Court always seemed to me to be a very plausible response, a reasonable response to a particularly dramatic set of circumstances but very hard to sustain in the long run as people start asking well, how do nine Justices get off doing that and running this area of policy and this area of policy. You're proposing something like it as a permanent feature of jurisprudence and it seems to me that begs the question of what will bind judicial discretion if not text and history? I'm curious how you respond to that.

MR. STONE: Well, first of all, I do believe text and history should balance judicial discretion. I think -- what I suggested is that the court should take those very much into account in its interpretation of the Constitution. But beyond that any judicial activism by definition is telling majorities – whether it's conservative activism or liberal activism it makes no difference – it's telling majorities that you can't do what you want to do. And majorities don't like that. Inevitably, they don't like that.

So what constrains the judiciary is the need to maintain the respect of the citizenry. If it goes too far, if it runs amok, it will itself become a source of concern in the political process. Political candidates can run against the court and that will cause the court to reign itself in, to limit itself, or it will wind up with changes in the makeup of the court that reflect a more restrained approach. So I think there is in fact an external constraint on the Justices that does operate in a very real sense and that the Justices are acutely aware of. So I don't think the risk is as great along the lines that you suggest because Justices don't want to put themselves out of business.

Now, the response to the Warren Court is actually interesting. So the immediate response to the Warren Court of, say, Richard Nixon, was that the Warren Court Justices were judicial activists. And so what we need are judicial pacifists. Judges

that believe in judicial restraint. The right approach of the courts is to be deferential to the government, not to be -- not to scrutinize carefully the actions of the government. And so the idea of a conservative Justice in 1969 was a Justice who would not be assertive in the exercise of the power of judicial review. And when Nixon appointed Burger, Rehnquist, Powell, and Blackmun, he was appointing four very conservative Justices at that time whose conservativism was a purported commitment to judicial restraint.

Now, what's happened since then is that version of conservativism has disappeared. There is no longer a commitment to judicial restraint. Now what we have is conservative activists who are way off the charts relative to Burger, Rehnquist, Powell, and Blackmun in terms of their understanding of the role of the Supreme Court. So what we've gone through is this interesting progression. This is what we've lost. This is how progressives have lost the public debate is that we've gone from the Powell-Blackmun-type Justice to the Alito-Roberts-type of Justice which is a completely different spot on the political and ideological legal spectrum. And it's moved from conservativism to radical conservativism.

But the answer to the question about constraint is that there isn't any constraint. History and text and precedent are constraints on the court and the political process is a major constraint on the court.

MR. WITTES: Doug?

MR. KENDALL: Well, I'm curious about Geoff's statement that text history and precedent are a restraint on the court. I heard him first say that text was hopelessly, or I don't know exactly the adjective but it was something really strong, ambiguous, that it just was -- it answers almost nothing. So I'm not sure if that's your view on text, what it constrains in any sense.

I guess in terms of the Warren Court, I think the landmark rulings of the Warren Court -- Brown, Gideon, *New York Times v. Sullivan* -- are unquestionably right as a matter of text and history. I think where the Warren Court got into a little trouble, and I'm not really blaming them for it. They were kind of dealing with a situation in the court they had. But in cases like *Heart of Atlanta Motel* where they upheld the Civil Rights Act and they did so based on the commerce clause, which is a plausible justification for it but not the best. Certainly, I think everyone or most people would recognize that the strongest basis for the Civil Rights Act of 1964 was Section 5 of the Fourteenth Amendment which is about enforcing civil rights, but it was gutted. Section 5 was expectedly gutted by the post-Reconstruction court. And the Warren Court didn't go back and revisit those precedents.

And so in a number of cases like *Heart of Atlanta Motel* you can argue that the Warren Court got the right answer for the wrong or not the best reason. And I think over time doing that in a fair amount of cases, the Warren Court kind of developed and just as the leaders of the Warren Court -- Justice Douglas in particular, but also Justice Brennan -- developed a bit of a cynical count-to-five view of what the law is about that is one of the things that the right successfully fought back against. And I think one of the parts of what the Constitutional Accountability Center, what scholars that are in this kind of field of new textualism are trying to do is kind of build a stronger textual and historical foundation underneath the progressive legal project. And I think that's incredibly important if we're going to defend the innovations and the landmark rulings of the Warren Court against the Roberts Court. And if we're ever going to have a court that appropriately moves in a progressive direction in the future.

MR. STONE: Can I say one thing about *Heart of Atlanta Motels* that I think is really interesting?

MR. KENDALL: Please.

MR. STONE: So this is the case where the court upholds the Civil Rights Act, which is a federal law that prohibits private individuals from discriminating based on race. Okay? And so taking a new textualism approach, Doug argues that the court should have upheld the legislation based on Section 5 of the Fourteenth Amendment. The Fourteenth Amendment provides no state shall deny any person equal protection on the basis -- equal protection of the laws. Section 5 of the Fourteenth Amendment says Congress shall have the power to enforce this amendment with appropriate legislation.

So the question is if the amendment prohibits only state discrimination, how does Section 5 textually give Congress the power to prohibit private discrimination which is explicitly not covered by the text of the Fourteenth Amendment? That's why the court uses the commerce clause. Now, you can argue about that but I don't see how any textual analysis leads you to the argument that the court should have used Section 5 of the Fourteenth Amendment which deals only and explicitly with state discrimination to uphold the law dealing with private discrimination.

MR. KENDALL: Yeah, no, I mean, we've written -- there's actually a great deal of history that kind of refutes what Geoff has just articulated.

MR. STONE: The text is wrong? I said the text wrong?

MR. KENDALL: The, I mean, the framers of the Fourteenth Amendment. I mean, it says "No state shall." And what was happening in the South in the Jim Crow era that the Civil Rights Act drilled against was state enforcement of segregation. And I think if we have a narrative called "The Shield of National Protection" that David Gans in the audience wrote that kind of goes through why Section 5 of the Fourteenth Amendment, why the Fourteenth Amendment generally casts -- is broader than or allows

you to go at private discrimination, I think it's a pretty persuasive case.

MR. WITTES: So I want to turn to a point that Geoff made in his initial presentation which took a little bit of a dig at you. But some of your own -- some of the things that you've said have -- give rise to the question as well, which is, are you building a legal foundation for pre-existing results here? Or is this a principled exercise or is this a tactical exercise? You described what you were trying to do and then you said, I think it's because it's right but it's really suicidal to argue. And so…we should…defend stuff on the basis of a kind of open-ended text. And you mix that sort of tactical rhetoric with a principled rhetoric.

And I'm curious. What happens when you look honestly at the Constitution? There are some issues you look honestly at the text and history of the Constitution and gosh, Thomas is right. What happens then and what's the posture? If you adopt a sort of new textualist approach or an old textualist approach, sometimes the text does not reflect what you want it to do. And what happens at that point for you and for a progressive movement that sort of signs on to this?

MR. KENDALL: I think, I mean, the base answer is that we think progressives are having the wrong fight with conservatives. We're fighting over judicial interpretation when we should be fighting over the meaning of the Constitution itself. And so it is tactical in that we think we're having the wrong fight. It's principled in that the fight we should be having is over the meaning of the Constitution. And so, yeah, there are times when Justice Thomas is right. I think in the *McDonald* case, as we argued, he's right that the way you incorporate the Bill of Rights against the states is through the privileges or immunities clause. He gets that answer right. We filed a brief with scholars ranging from Jack Balkan to Steve Calabrese.

MR. WITTES: Unpack the case a little. Describe a little bit.

MR. KENDALL: So *McDonald* is -- sorry. The *Heller* case is the case that recognized that there is an individual right under the Second Amendment to bear arms. That's a very controversial ruling. I think Justice Stevens and Justice Scalia had a fight to a draw about whether that's the right answer as a matter of what the Second Amendment means. The *McDonald* case is the next case which says does the Second Amendment apply against the states? In a series of rulings for the last 100 years the Supreme Court has said that the substantive provisions of the Bill of Rights, which originally only protected against federal action, apply also against state action. So limit the law states can pass regarding guns.

The Supreme Court in the *McDonald* case had to deal with whether the Second Amendment was incorporated against the states and by a 5-4 vote they said it was. We filed -- the Constitutional Accountability Center filed a brief in that case saying -- taking no position on the *Heller*, whether it's a Second Amendment right, but arguing for incorporation against the Second Amendment against the states because, one, it's the right answer. It's -- every other provision of the Second Amendment is incorporated. There's no sense in saying that the Second Amendment isn't. And second, because progressive have a great deal at stake in the doctrine of incorporation and the idea that the Bill of Rights provides protections against the states.

And so there's both principle and tactical advantage. And yet you also see in that example what I would think many progressives would see as the pitfall. Which is that the gravamen of your brief ends up being yes, if the Second Amendment protects an individual right then that is a right that a state can't violate either, i.e., enhanced gun rights relative to states. I mean, isn't there a cost there from the point of view of presumably a body of the progressive movement that's enthusiastic about gun control?

MR. STONE: There's both costs and benefits. The costs are, yes, the

Second Amendment, like every other substantive provision of the Bill of Rights applies against the states. There's no question that that limits state gun control laws to the extent that the court says provides a robust protection for individual rights under the Second Amendment. The benefits are, one, you build a stronger foundation under the doctrine of incorporation, which is an incredibly important doctrine or idea. And second, the privileges or immunities clause, which is another one of these provisions that was wiped out by the reconstruction court, is the intended vehicle by which the Constitution protects some fundamental substantive rights. And so the rights that progressives celebrate from reproductive choice to sexual autonomy, the cases like *Roe* and *Lawrence*, the strongest textual foundation for those rulings is the privileges or immunities clause of the Fourteenth Amendment. You don't learn that in law school. You don't learn that unless you actually study the text and history of the Constitution seriously.

And that's what -- I mean, the thing that I think is most frustrating about the exchange with Geoff is we're not just making these arguments up. We're basing this on this whole body of scholarship that has developed over the last 10 years that I think progressives should find incredibly exciting. It explains across all these areas of law why the document and its history are progressive in their most fundamental form.

And so while it doesn't always point to progressive results, why there are areas where we should recognize that the conservative side has the better of the arguments, it proves the Constitution at its most fundamental basis is a progressive document. And I think we should all take that scholarship to heart and use it more in terms of, I mean, I don't argue that text and history answers all questions. I only argue that it answers some and a lot of questions in a way that we should embrace and build off of.

MR. WITTES: Geoff?

MR. STONE: Well, I agree with everything that Doug just said. He's absolutely right about the privileges and immunities clause. My law school students do learn this by the way. (Laughter)

And it's absolutely right, both that the privileges and immunities clause is the right place for this and I agree completely that as progressives, if we want to be effective we need to build a principled argument. And a principled argument means sometimes you don't get the result you want because the principle doesn't always lead you to your preferred political outcome. So even if we don't like the invalidation of gun laws and even if we thought *Heller* was wrong, the fact is that *McDonald* was right and the Second Amendment should apply to the states. And there's no principle progressive argument that, in my opinion, that would lead to another outcome. So I agree completely.

MR. DIONNE: Can I -- just on the gun case -- I don't want to get into it. This is because I didn't go to law school. I never saw why liberal law professors should insist that a misinterpretation of the Second Amendment should be made to apply to the states. But we don't need to go there.

I have a question -- a two-part question for Doug and one for Geoff. To Doug, you talk about text and history and it seems to me there are many cases where they don't necessarily teach the same lesson. Specifically, when you actually look at the writing of the Constitution, Gordon Wood, the great historian of our early republic talks about how the founders did a lot of their thinking on the run and a lot of these provisions are deliberately ambiguous. They were designed to gloss over problems, fundamental disagreements, because they were trying to get things through.

And so when you look at the history you say actually this document guides us less than we might think. And Ben and I have talked about this. My favorite

example is I think we would agree that Madison and Hamilton had a major role in this document and yet within three years they were disagreeing over whether the bank Hamilton wanted to create for the country was constitutional. And indeed, throughout our earliest time people used their view of the Constitution in political fights on one side or the other. The same thing happened to Henry Clay with internal improvements.

And so it does seem to me that this is not as clean as you suggest. And I can't resist. I think you mentioned, or maybe Ben mentioned Justice Souter. Souter said something that I thought was really valuable. He said the Constitution is rooted not in any single value but in a pantheon of values and a lot of hard cases are hard because the Constitution gives no simple rule of decision for the cases in which one of the values is truly at odd with another. So that's my question for you.

My question for Geoff is, the part of Doug's argument that appeals to me most, I think, is that the originalists seem to want to read the Constitution as written in 1987 and kind of gloss over the Civil War Amendments and the Progressive Era Amendments except when the Fourteenth Amendment can be used to stop the counting of votes in Florida. But we won't go there either.

And therefore, a kind of textualist argument that says, hey, wait a minute. If you want to be a good originalist you better pay attention to these developments since. So those are my questions for each of you.

MR. KELLER: I don't disagree with you, E.J., that there's times when the text and history can point in different directions. I do think though that looking at text and history comprehensively can inform a lot of debates, including hot button debates that we are facing right now. Health care, I think, the constitutionalist of health care is a perfect example of that.

If you look, and there's been great histories on this including popular

histories written by people like Ron Chernow, who goes back and studies the life of both Hamilton and Washington and has written definitive biographies of both men. And if you look at the history that he recounts and the history not post-ratification but at the Constitutional Convention and before, the things that led up to the creation of Article I of the Constitution and you look at what the founders were trying to do, it thoroughly and fundamentally rebuts the central argument of the Tea Party. It just blows out of the water the claim that the founders were all about trying to set up a limited government that has no powers to solve the national problems. It completely undercuts that argument.

Does it get you to the point of is the individual mandate -- did they say somewhere that I think an individual mandate on the health care law would be constitutional? No. But they rebut the entire thrust of the argument that it is unconstitutional. And so it's an area where I think text is informed. An analysis of what the Constitution's commerce clause means is informed by an historical analysis which goes back to the convention. There's great notes about the convention taken by Madison and others that talk about what the instructions to the Committee of Detail at the Constitutional Convention were and the instructions were to basically create -- to enact powers that allow the federal government to solve problems that states can't solve inseparably. And that's like the narrowest part of the instruction.

And so, the idea that the commerce clause is supposed to be limited in a narrow sense to trade is just blown away by the history which I think informs the words and shows kind of how powerful text and history can be in terms of shaping debates over hot button constitutional topics of the day. Those are the arguments we make in the briefs that we filed in just about all the health care cases across the country. And I don't think they answer the question but boy do they help point to an answer.

MR. STONE: I want to say a word about that. And I was so enthralled I

forgot the question.

To the extent that history can in fact illuminate, it's extremely value and important. On the other hand, if we were sitting at a Federal Society meeting at the moment and the same issue came up, you would have someone there saying the history is clear. It's obvious that Congress has gone way beyond what it was ever intended to have the power to do. And this is just another example of federal authority violating the basic understandings of the framers. And you have two people sitting around invoking different documents. They'd be invoking different statements by different people made at different times or even the same person made at different times. And judges are going to resolve this question? I don't think so.

What they're going to do is then decide what they thought the framers should have meant. They're going to do exactly what E.J. said about Scalia. They're going to basically say, well, the framers were reasonable people. I'm a reasonable people. They would have done what I would have done because they're going to say the history is all over the place. And so…the point is we're not in a very good position to decide who's right. And judges are not in a very good position to decide who's right. So in the end, you don't wind up with anything that helps terribly much with resolving the question.

Now, what was your question?

MR. DIONNE: My question was that there's -- the promise is -- when I look at what Doug is talking about and what his promise is, and I do agree by the way that the basic question, was the Constitution written to create a strong federal government or the Articles of Confederation? It was created to create a stronger federal government. That's persuasive. But the other part of Doug's argument that's interesting is the critique of conservatives for not taking seriously the Civil War amendments --

MR. STONE: Oh, right.

MR. DIONNE: Because one of the tricks to me of originalism is that it often tries to glide over the actual changes to the Constitution made particularly after the Civil War, but to some degree also in the progressive years.

MR. STONE: I agree that to the -- well, it's an interesting question. How do you discern the understanding of the frames? Right? So one of the reasons why conservatives are so apoplectic about other Justices invoking foreign law to understand the American constitutional law is they say that obviously had nothing to do with it but the framers understood at the time they adopted the Constitution. It's completely irrelevant. It has nothing to do with understanding what the framers meant or what our Constitution meant when it was adopted.

And of course, if that's the right question, then they're right. It obviously had nothing to do with what it meant at the time because it didn't exist yet. Right? So then the question about the subsequent amendments requires us to ask, well, what are we trying to determine? Are we trying to determine the understanding of the framers of the first eight amendments, for example, which did not have the benefit of the Civil War and the Fourteenth Amendment? Or are we trying to determine the intentions and understandings of the framers of the Fourteenth Amendment. Well, yes. There we want to look into what they thought. But the question then is, well, what's the relevance of what the framers of the Fourteenth Amendment thought to the meaning of the first eight amendments?

And there it depends on what the question is. If the question is what did the framers of the first eight amendments think, it's irrelevant. If the question is how should we think about our Constitution more broadly? It's definitely relevant. So it really depends on what you mean by what's the source of authority. And it's not relevant if

you're interested in the understandings of the original framers. It's definitely relevant if you're interested in understanding the overall larger meanings of the Constitution.

MR. DIONNE: Geoff, I want to return to your proposition that the *Carolene Products* footnote, which is, you'll recall in the audience, refers to discrete and insular majorities. And Geoff sort --

MR. STONE: Minorities.

MR. DIONNE: I'm sorry. My apologies. And --

MR. STONE: That's the conservative in you.

MR. DIONNE: Yeah, yeah. It's actually going to get to the substance of my question. A Scalian slip.

And Geoff proposes as sort of a guiding principle of judicial review. One of the things that strikes me about that is that different constellations of judicial majorities will find different minority constellations more and less worthy of protection. And I wonder if that actually functions as any more of a constraint ultimately on judicial policy making than does text or history in the sense that if you're a property rights enthusiast, the individuals who own property in New London, Connecticut, will tug at your heartstrings in exactly under the *Carolene Products* footnote or they will tug at your heartstrings under a historical understanding of what the takings clause means. But I'm wondering, do you -- doesn't that just raise the question of what the groups are for whom you have the most solicitude?

MR. KENDALL: Just on that, I was thinking as you were saying that, billionaires are a rather small minority. And so it just goes to Ben's point. At what point are they the protected class?

MR. DIONNE: And in a more, a very high salience now there are a lot of Christian conservative group that have really spent a lot of energy trying to present

orthodoxy -- religious orthodoxies of one sort or another as a kind of discreet and insular minority worthy of warranting heightened protection. Twenty years ago we would have thought of as a majority culture that, from which a discreet and insular minority requires protection. And so I guess aren't you simply turning over to the judiciary, you're translating what had been a textual instinct into who are the beleaguered groups that we care about.

MR. STONE: No. In the passage that Doug read at the outset from the piece Bill and I wrote it said constitutional interpretation is not mechanical. And nothing we do can intelligently make it mechanical. So you can't avoid the need for judgment and sound reasoning and intellectual rigor and honesty and so on. So no standard on any issue of any interest is going to eliminate judgment. Okay? That's number one.

On the other hand you can narrow the scope of judgment and focus it in certain areas. So if the idea is a minority who is likely systematically to get the short end of the stick in the political process and has historically gotten the short end of the stick in the political process, then you can argue of course about what the boundaries of that are. But that's not all that hard. Again, that isn't to say people won't disagree about the outsize. It will not include your billionaires. It will not in our world include the property owners in New London.

MR. DIONNE: But that was exactly the way --

MR. STONE: They weren't systematically historically oppressed.

MR. DIONNE: But it was exactly the way they presented that case to the Supreme Court.

MR. STONE: No, they said we are losing in this particular community. And that's not the same thing as being black. I'm sorry. They're losing on a particular law. That's all. Lots of people lose on particular laws. That doesn't cut the mustard in

this respect. So that's the point about being systematic and about -- you find at every turn you lose, not just on a particular issue you lose. That doesn't qualify.

So I think this is like the idea of suspect classification under the equal protection clause. So, black, that's pretty easy. Women, that's a little harder, but not too hard. Religious minorities, absolutely. Aliens, well, arguable. Illegal immigrant children, maybe, maybe not. Gays, probably yes. But you have a draw a line and that's what happens. Judges do that. This is no different than that. So I don't think there's anything particularly incoherent or unusually hard about this. It's about as good as the Constitution will ever get.

MR. WITTES: Okay. Doug?

MR. KENDALL: Oh, I mean, I'm a fan of political process theory. I think that John Hart Ely's book, *Democracy in Distress*, is probably one of the best books on constitutional interpretation that's ever been written. I think it has a role in, as we said at the outset, that it's a role in constitutional interpretation. But I think it's a fairly limited one. I think it, I mean, first of all, from a progressive perspective I don't see how it does get you protection on the basis of sex, I mean, at least today. I mean, maybe in the turn of the century when women couldn't vote it does but at this point women are the majority in the electorate. I don't see how political process theory gets you to cases like *Rowe*. And I think that's one of the limits of it. I think we do need to explain why the Constitution protects substantive fundamental rights like the right to reproductive choice. And I think that's what -- I mean, that's what Geoff and I are both talking about, is the importance of something of exploring something like the privileges or immunities clause which was just gutted out of our Constitution and taking that text seriously.

But I don't, I mean, I think that the idea that judges have a role in making sure that the democratic process functions properly and stepping in where it's not is one

of the most inspiring ideas about the law I've ever heard.

MR. WITTES: Let's take some questions from the audience. Please wait until a microphone comes around before you start speaking.

MR. LAZARUS: I'm Si Lazarus. I'm with the National Senior Citizens Law Center.

And I'd like to ask primarily Geoff but both of you to just comment on an observation. And that is both of you seem to be looking at the same basic set of facts but have in mind different audiences and perhaps different speakers who would use the approaches that you're respectively urging. It seems to me that Doug is primarily concerned with, how do we make arguments about this set of facts that will lead, generally speaking, to the results we favor with public audiences or with courts or with politicians who are concerned or reporters who are concerned with dealing with things in the real world in a different way. And Geoff's message that judging and interpreting the Constitution is very complicated which no one would deny, seems to me to be -- he seems to be thinking about what would make sense in a classroom or in an academic journal more. And, I mean, just for example, E.J. wrote an excellent column on July 5th for July 4th about why Rick Perry was wrong when he said that the framers meant the federal government to be the agent of the states. And he said that's actually not true. And that was an originalist argument. He was arguing directly from the Constitution and I think that that's quite effective. That just happens to be me.

But in any event, so I would like the two of you, and Geoff in particular, I suppose, to comment on this point.

MR. STONE: No. My interest here has almost nothing to do with the academy. It has much more to do -- it has to do with teaching the next generation of lawyers and judges. And it has to do with the public and the media and with judges. It's

not about academic work. It's a relatively -- in fact, a relatively simple argument. And as I said, it has three prongs. It debunks originalism. It identifies the reality of the decision making process of the current Supreme Court, and it argues that courts should always be activists when they're dealing with these situations of majoritarian democratic dysfunction. And those are all pretty accessible arguments, I think. I hope they are anyway.

And the idea is to get people to recognize those three important facts. And that doesn't decide everything under the Constitution. It leaves lots of stuff unresolved but it does take a long -- it does take people a long way towards having a better appreciation of what the appreciation of courts is and to show that the existing majority in the court has no close.

MR. DIONNE: Does that mean, by the way, a certain minimalism in other areas? Because looking at this as the problem we face now it seems to me the problem we face now is an exceptional kind of conservative judicial activism that we probably haven't seen since the gilded age courts. And therefore, deference to democratic branches of government which was an old progressive position in response to those gilded age courts seems to me to make an awful lot of practical sense. And I think potentially principled sense now. I'm curious because -- in other words, the question is, are your prongs limiting the cases in which the courts intervene?

MR. STONE: Well, this is something Bill and I continue to wrestle with. So the question is if judicial activism is necessary in the situations that I've identified involving minorities and capture, what happens everywhere else in constitutional law? And as I said, Bill and I have wrestled with this question. The politically liberal expedient result given the nature of the world today is to say everything else is minimalism because we don't want from a purely parochial personal perspectives, conservative Justices being

justified in acting in conservative activist manners. And we're willing, at least theoretically, to throw overboard the liberal decisions that would happen with a different court but which aren't going to happen anyway.

But the truth is we're trying to come to a principle account of all this. And so we're resisting that temptation, recognizing that if we were serious about that approach we would also have to throw overboard a lot of decisions that we think are pretty important in our constitutional culture. And we don't think, tentatively at least, that there's a compelling way -- I'm sure that Doug will -- but we don't think there's a compelling way to distinguish between the decisions we like and the ones we don't like in that realm. And therefore, I think at the moment -- this is an ongoing discussion -- at the moment what we're thinking is probably the reality there is it depends a lot on all those things you read in that paragraph about text and history and values and so on and that there is no simple answer to those questions. Heightened scrutiny might be appropriate in some of them and not. The presumption should be no because these are not situations of a dysfunction. But it doesn't mean that everything is minimal scrutiny either.

MR. WITTES: Do you want to respond, Doug?

MR. KENDALL: Well, just a little bit. I think the only plausible way of fighting the activism of the Robert Scalia Court is by convincing them that we are right about what the Constitution means. And so the classic example --

MR. DIONNE: Convincing them or convincing --

MR. KENDALL: Convincing them. Yes. Convincing judges like Jeff Sutton. Judges like Jeff Sutton, perhaps the most conservative Bush II appointee on federalism issues, that he has to uphold the constitutionality of the Affordable Care Act. The only hope we have is by arguing strenuously from the sources that they purport to care about that they can't do it. They can't be activists in this way and it won't work all

the time but at least when they don't we'll have their arguments, their sources to throw back in their face. And sometimes it will and it did with Jeff Sutton and that's transformed the debate. And that's what -- we've got to believe a little bit in the law. We've got to believe a little bit that we can win these battles not based on politics, not based on getting judges that we want because we probably won't have them for a while. But based on what the law requires. And that's until we do that we're going to, as long as we view this as counting to five, when we don't have five we're going to lose.

MR. DIONNE: Doug, I love that argument about Jeff Sutton, and I would make it if I were sitting in this seat. But from this seat I have to ask you, he's a Federal Appeals Court judge and you had some pretty good precedent in that case. If he's a Supreme Court Justice and you're up there, none of those precedents are ultimately binding. And Geoff's argument that you are in a land of much more radical indeterminacy with respect to the -- with respect to the shackles that you are operating under, assuming you're right that Sutton was as cynical as you describe and yet bound by precedent, his bosses which --

MR. KENDALL: Conceding.

MR. DIONNE: -- I'm not being cynical. But let's assume he's chomping at the bit to strike this statute down and he just can't do it. That is not the case at the Supreme Court. Right? The Supreme Court, if you're chomping at the bit to strike it down and you really want to do it and you really want to do it, you can do it if you can count to five. And so what -- why not take very seriously the count to five? I mean --

MR. KENDALL: Well, obviously five matters at the Supreme Court. That decides who wins cases. And obviously, you have to argue to get the votes of either Justice Kennedy or any other Justice that you think could swing to your favor. I mean, the Affordable Care Act. I mean, if you take seriously Justice Scalia's concurring opinion

in *Raich*, he should uphold the Affordable Care Act. If you take seriously Justice Kennedy's decision to join Justice Stevens' even more sweeping majority in *Raich*, he should uphold the Affordable Care Act. I think that Judge Sutton's opinion, which I don't -- cynical is the wrong word. I mean, Justice Judge Sutton is a very conservative member of the federal judiciary. I read his opinion and I was struck by how fair and thoughtful it was throughout and how it took every argument that was made by both sides and kind of said exactly what is right and exactly what is wrong with it. I think that opinion will be a powerful marker that people like Justice Kennedy and Justice Scalia have to overcome if they want to find it. And I think it -- I don't know that they will after that opinion. I don't know after reading Judge Sutton's opinion in that case that conservatives on the court will go there.

MR. WITTES: Well, I don't know either. And in fact, I think Justice Scalia's opinion in *Raich* gives me some reason to doubt whether he wants to go there as a preliminary matter. I was just taking your assumption that the default position of the conservative judge in that situation is to want to get there. And my only point is if you want to get there and you're a Federal Appeals Court judge, that's a much harder proposition in the face of binding precedent than it is at the Supreme Court where that precedent isn't really binding even when it seems to be.

MR. KENDALL: I guess the only thing, and I'll just say this quickly, I mean, the only -- the thing that at least some of the conservatives say is binding is the text and history of the Constitution. And so if we're going to win arguments before that court we better take those arguments -- take those sources damn seriously.

MR. DIONNE: Do you remember the same urban line if the law is against you, pound the evidence. If the evidence is against you, pound the law. And if they're both against you, pound the table.

Could we take a few at a time just to make sure we get some folks in?

MR. WITTES: Sure. Well, we've got a group of one, two, three -- let's do these three and then we'll move on.

MR. BIRNBAUM: I'm Norman Birnbaum, a non-lawyer who taught at Georgetown Law.

What the panel across all differences has proposed is a brand new national dialogue of an educational or pedagogic kind in which the citizenry would be educated or re-educated as to the real nature of the judicial process and its relationship to democratic tradition and reflectiveness. One difficulty which is I think more than technical is that whatever else we can say about the American people, most do not spend much time reading either the *Law Review* or the collected works of Stanley Fish. And --

MR. STONE: Both of which show good judgment. (Laughter)

MR. BIRNBAUM: We face with respect to public understanding of the judicial process much the same difficulties we face in international affairs and environmental studies, questions of the political economy. That is to say a highly -- an intellectually and culturally stratified population in which the stratification -- some people are barricading themselves in for reasons which are certainly well known. So the left or the liberal left is really now suffering the long-term consequences of a certain amount of unreflective populism. How we get out of that I don't know. But it seems to me that we want to face it.

MR. DIONNE: Okay. I just want to put in one word for reflective populism but we can go there later.

Go ahead.

MR. SHAPIRO: Ilya Shapiro from the Cato Institute.

First of all, I'm glad that progressives are now interested in both the framers' Constitution and text and history for the first time, so that's a great thing.

My question is though,is all of this kind of much ado about nothing? I want to know on which issues or cases would your different perspectives produce a different result. And relatedly, on which cases or issues would they produce results that you don't like?

MR. WITTES: Thank you. Is there a third? Garret, do you want to --

MR. MITCHELL: Sure. I'm Garrett Mitchell and I write the *Mitchell Report*.

I want to start with a premise which is that if this audience had been full of people who signed a pledge saying I'm an originalist, I would argue that nothing that's been discussed today would have changed a mind or a vote. The reason -- and that is not a commentary on the quality of the discussion. The reason I posit is that what originalism -- Scalia, Alito, Thomas, et cetera -- offer is the same sort of thing that Rush Limbaugh or Ollie North or Sarah Palin or, God rest his soul, Paul Harvey offer, which is clarity and simplicity, often wrapped in symbols which stand for values.

So it is a message that appeals to emotions and it seems to me the arguments that we're hearing today are all of the intellectual variety which says that the likelihood of the messages that you're talking about getting through are somewhere between slim to none. And so it raises this question for me. One is which audiences or audience would you have in mind, would you put as primary? And second, having made the argument that the Constitution is predominantly a progressive document, could you take us through the document itself and say this particular section or this particular amendment is progressive and here's why? And do you think there's a chance that that case can be made any stronger for progressivism than the conservative point of view?

MR. WITTES: Okay. So there's a lot of stuff on the table. I'd actually like to start by having each of you address Ilya's question of are we really arguing over -- are there different case results, outcomes that yield from your different methodological propositions here or is this largely a semantic discussion? And if there are, what would they be? What are the areas where if Doug is right, important values you're going to lose and vice versa?

MR. STONE: Almost all progressives think *Citizens United* was wrong. I think *Citizens United* becomes an extremely difficult case to criticize from the standpoint of a *Carolene Products*-type view of the constitutional law.

MR. WITTES: Meaning? I'm sorry.

MR. STONE: Meaning that it's a capture problem. That when you have elected public officials making laws that fundamentally shape the political process, the process by which they are elected, then there's a great -- there should be great concern that this is about perpetuating their own political power in the sense if it's one party making the laws you can be damn sure the laws are going to reinforce the power of the party making it and even if it's not one party making the laws, you can be pretty sure it's going to reinforce the power of incumbents. And so I think that that's a case where a very high degree of scrutiny is necessary in order to guard against the risk of capture.

MR. KENDALL: But wouldn't an original -- wouldn't a progressive originalist view make the same case? I mean, I think with Stevens it had a very powerful dissent saying if you look at the founders and their concern about corruption, I thought when he faced off with Scalia he did a much better job with what the founders thought than Scalia did. Now, obviously, I agreed with him but I thought even if you didn't it was a heck of an originalist case he made against *Citizens United*.

MR. STONE: Everybody was on the wrong side in that case from this

perspective. Right? A conservative who was either an advocate of judicial restraint would have upheld the legislation. A conservative who was a true originalist would absolutely have upheld the legislation. And a liberal who believed in the dangers of capture would have been inclined to invalidate legislation. So all nine were on the wrong side.

MR. KENDALL: Right. So if I'm hearing that correctly, we would have been -- we filed a brief and *Citizens United* argued very strongly on the original side that the framers would have been aghast by the ruling in *Citizens United* and would have, from the dawn of the republic we treated corporations -- corporations have constitutional rights, but not the precise same as we the people. And that was kind of echoed. So I think that is one example.

I guess if I can go into the other two questions which were a bit of a theme, I think there's a remarkable disparity in the country out there about making -- in terms of making claims on the Constitution. Just about every plank of the conservative platform is something that's rooted, however disingenuously or not, in some provision of the Constitution -- property rights in the takings clause, guns in the Second Amendment. The limited government and enumerated powers. Everything that conservatives talk about they start by making a claim on the Constitution.

Progressives are doing that successfully really in one place and that is about marriage equality. They're talking about equal means equal and it's take a conservative lawyer named Ted Olson to kind of teach us how persuasively to do that. And so I think what we see is in terms of trying to influence the public debate over the Constitution, how important it is to have politicians, have our leaders, reflect on, talk about, make claims rooted in our constitutional text and history. That's the only way the arguments that we're making get beyond the *Yale Law Journal*, get beyond the

conversations that we're having at the Brookings Institution and go to the American public and influence the way people view our Constitution. But if we give up on that Constitution, we're done unless we start. And I think progressives have atrophied in our ability to make claims on the Constitution. Until we start again we're going to be losing this debate.

MR. DIONNE: Just -- the question on why the Constitution is progressive, because I believe that as well and the reason I believe it is if you look at what the founders said about what they were doing, we forget how adventurous and radical what they were doing at the time was. And to use their Constitution to bring us back to 1787 is exactly the opposite of what this whole enterprise was, which was to do something that actually was quite willing to break with the past. But I'm curious where you --

MR. KENDALL: No, I mean, I think that the central story that the Constitutional Accountability Center is telling about the Constitution, which is also the central story that comes from a great book that I'd recommend to everybody in the audience called *America's Constitution: A Biography,* written by Yale law professor Akhil Amar. The central story is of a constitutional republic established in 1787 which was the greatest world charter in history, but a deeply flawed document that was broken and failed at the Civil War on account of slavery and had to be rebuilt in the Reconstruction amendments which profoundly changed the document in ways that the Supreme Court has yet to realize, followed by a series of amendments that have expanded the right to vote six or seven different times, that have expanded the federal government in about eight different ways, that make us the republic we are today.

And so it's this arc of constitutional progress story which is the answer to the Tea Party story. Go back. Find all the wisdom with the framers. Yes, the framers

were great. We can't give up on the framers. The framers are the people everybody reads about in their biographies and their books. But we also have to celebrate the Reconstruction founders, the Progressive Era founders, the women's suffrage founders, and the people in the Civil Rights era that passed the poll tax and youth vote amendments. We have to celebrate all of our framers. And that's the progressive story. That's why the Constitution is at bottom a progressive document and we've got to claim it as such.

SPEAKER: Here, here. That's what I'm talking about. A story.

MR. WITTES: We have time for one more question and then we'll -- the two of you line them up and we'll close on that note.

MR. CAMPBELL: Hi. I'm Woodrow Campbell from Johns Hopkins University. And my question is about the role of the courts in the debt ceiling debate.

A recent poll by *Roll Call* found that 39 percent of House Democrats and 85 percent of House Republicans don't consider a failure to raise the debt ceiling to be catastrophic. Essentially, two-thirds of Congress members don't understand the effects of voting no on any kind of deal. And I was just wondering if the 35,000 lobbyists in D.C. don't take a week off from their pet issue and try to educate members of Congress on the consequence of a default is there any way that the courts can help to try to prevent a financial crisis?

MR. LAMAN: I'm Pierre Laman with the Alliance for Justice. I have two really quick and related questions.

New textualism tries to tether the constitutional holdings of the courts more to the text. And my question for Professor Stone about open textured constitutional provisions is twofold. Aren't we sort of taking away the democratic power of the general public to fill in their policy preferences, something like *Brown I*, which is clearly tied to our

constitutional role, versus *Brown II*, which is here, this is how you're going to do it. And then durability of those constitutional roles. It seems to me that the more tethered you are to the actual text, the more durable that role would be. I mean, we saw with *Lochner* it pretty much faded away within 20 years. *Roe* has been substantially undermined to the point where there are states where there won't be abortion clinics. So by treating it as so open textured, it also makes it easier for later courts and later political factions to overturn those rulings. So isn't there a benefit from a progressive standpoint to tethering holdings more to the text and letting the general public fill in those voids and producing changes more durable in the future?

MR. KENDALL: On the first question I think that's probably a little bit beyond the scope of what we're talking about here. You do have to have a lawsuit before a court can get involved.

The second question --

MR. LAMAN: That would be too late.

MR. KENDALL: -- seems more directed at you. I'm not sure I always want that particular -- it depends on who is educating when you're talking about judges.

MR. STONE: On the second question I guess I would say yes, in general. The further the Court goes from solid ground in terms of its interpretations of the Constitution, the greater the danger to the Court itself in terms of the acceptance of the people of the legitimacy of the decision. And so, yeah. I think that's a good rule of thumb that Justices undoubtedly wrestle with. I mean, they're conscious of that and they again, they're very jealous of the authority of the Court. And they do think, in fact, about exactly this kind of a question and sometimes they make a mistake but for the most part I think they're pretty aware of this issue.

On the other point about the framers, the other thing I want to say about

this is it's important to understand about a progressive constitution that the framers themselves not only over the arch of time -- arc of time but that the framers themselves were visionaries. When they put into the Constitution phrases like equal protection of the laws or make no law bridging the freedom of speech or the press, they didn't know what they meant. They really did not know what those phrases meant. They knew that they had some immediate applications, but even with the First Amendment 10 years later there was a huge debate over the Sedition Act of 1798, 8 years later, in which the majority of the Congress took a very narrow view of the First Amendment which we today look back on and say how could they possibly have thought that? The reason they could have thought that is they had no idea what they were enacting when they enacted it. They never lived under a First Amendment or an equal protection clause.

So they knew that they were worried about race or discrimination against newly freed slaves and they knew they were worried about political expression, but beyond that they had no conception. So what they were putting in the Constitution in these open textured phrases was aspirations. They were looking for a better nation and they were hoping that these terms would be given meaning over time that would be consistent with those aspirations, even though they didn't know what that meaning would mean, would be. And I think that's an important part of what the aspirational constitution is.

MR. WITTES: We're going to close on that point. Thank you all for coming. (Applause)

CERTIFICATE OF NOTARY PUBLIC

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

Notary Public in and for the Commonwealth of Virginia

Commission No. 351998

Expires: November 30, 2012