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THE CONSERVATIVE LEGAL MOVEMENT AND THE FUTURE OF LIBERAL JURISPRUDENCE

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P R O C E E D I N G S

MR. WITTES: My name is Benjamin Wittes. I'm a senior fellow in governance studies here, and I want to welcome you all to what I hope will be a genuinely interesting and disruptive discussion.

So, I want to take a couple minutes on the theory that the hosts and moderators who, you know, moderate least, moderate best, I'm going to keep these remarks very brief. But I want to sort of talk a little bit about the issue that we're here to talk about, and then sketch out a little bit the logic of the day and how we're going to organize it or how we have organized it, hopefully.

So, we're here to talk about a set of, I think, quite dramatic asymmetries in the way jurisprudence is talked about by, respectively, the liberal and conservative movements, and how they have developed in kind of dramatically different paths over the last, really, two generations. So, the asymmetry is brought -- and I know from the responses that I've gotten to the way E.J. and I described this event, that even to describe these asymmetries is to invite controversy.

But here's the way I would describe them which is, you know, on the one hand you have a political movement and a philosophical movement that has really done a lot of work to coalesce behind a few relatively simple, relatively easy to explain ideas that have played enormously well in the public and political space. And on the other side, you have a quite fractured philosophically set of approaches that are much harder to explain and talk about in the political arena. And the liberal world has actually, I think, been much less effective in talking about jurisprudence in the public sphere.

Now, whether you see that as an example of, you know, as Yeats would say, the best lack all convictions while the worst are full of passionate intensity, or whether you see it as an example of the proposition that, you know, the truth is simple and the people will understand it if you just hue to the truth, to the reality that you can talk about it and the wisdom of the public will catch on over time. It's, I think, really a matter of one's own personal political predilections and sort of instincts in this area.

But I think what is safe to say is that you have on the one hand a very pronounced elite anxiety about the conservative judicial movement -- pronounced -- you know, dominant in the academy, dominant in the press, dominant among opinion leaders. And at the same time, you have a quite dominant -- sorry, a quite dramatic mass opinion anxiety still to this day about liberal jurisprudence. And so if you look at public opinion data and you ask -- and there's actually a fair bit of

polling on this over the years. And you ask people, do you want -- is the Supreme Court too liberal, too conservative, or about right? The too conservative category is -- you know, many fewer people sign on to that than the too liberal category, even though the Court is, you know, dominated by conservative appointees.

And so, the purpose of today is to sort of figure out and sort of chew through these asymmetries. Why has this developed? Is it persistent? Is it an effect that, you know, we are fated to live with? Or is it something that is really a matter of political will and energy?

So, I want to describe a little bit the structure of the day and how we've sort of laid it out, because there is actually a logic to it, though it may not be evident entirely from the agenda.

We're going to start with Noah Feldman, whom E.J. will introduce momentarily, who will I think present a strong iteration of the liberal anxiety and frustration at the direction both the substance of the conservative movement, but also the reaction of the liberal movement. That will be followed by our initial panel, which will look at sort of the history of how the conservative judicial movement developed, what it was responding to, why it developed the way it did.

The second panel, which is an effort to highlight what E.J. and I think of as the sort of diversity of possible liberal responses and a sort of sense of -- to try to give some sense of how liberalism has not -- you know, has posed a lot of alternatives but has not really coalesced behind any one of them.

And then our lunch speaker, J. Harvie Wilkinson who is a judge on the Fourth Circuit is -- you know, I will have much more to say about him later when I introduce him, but I think has been one of the most interesting and disruptive voices to come out of the conservative judicial world; who has, I think it's fair to say, not in any sense renounced any of his anxieties about liberal jurisprudence but has developed significant anxieties about the direction that the world that he comes from has taken.

And then finally, our last panel will look at the question of under what circumstances judicial movements have in the past generated significant backlashes, political backlashes, and what are the circumstances that give rise to those? And what are -- and we'll look at the question of, are we in any sense approaching such a moment now?

So, you know, the format for the day, other than our two standalone speakers, the

format of the day is that E.J. and I -- who actually come to this, I should say, question with very, very different priors. You know, E.J. -- I think I can speak for E.J. on this. E.J. is much more anxious about the conservative judicial movement than I am, and so I think we are going to jointly moderate all of the panels. And we will try to keep statements initially relatively brief so that we have as much time to involve all of you and ourselves as possible.

And with that, I will turn it over to E.J. for some additional remarks and to introduce Noah Feldman.

MR. DIONNE: Anxious is one word. Angry, upset, repeat-after-me, *Bush v. Gore, Citizens United*. So, yes, he got my take, broadly speaking, correctly.

It's a great pleasure to be here. I am really, really excited by today. A distinguish jurist -- I want to quote a distinguished jurist in saying, I think today is an intellectual feast. This is an extraordinary group of people that we have gathered today, and it think the battle over the future of jurisprudence is really one of the most important arguments in our politics, in our public life. And yet it has often been confined -- it's only rarely central to our political campaigns, and I think that we in Washington at policy think tanks such as this one need to pay more attention to it.

I'm very grateful to Ben. He's right, we have somewhat different views, but we share a passion for this subject. And analytically, we do share some views about it.

I just want to start -- I'm doing this on behalf of both of us. We had a division of labor here. I want to start by thanking, first, all of the distinguished folks who are joining us today on the panel. And I want to note that for the panelists as we go along in this discussion, in my view none of you has enough time to say what I would love to hear you say. But if we had allocated for that, this would have been a four-day conference. So that, I want to invite you during the other panels to join in. We will give you sort of preference to join the discussion. But I am really grateful to you all.

I am very grateful to Seymour and Kate Weingarten for encouraging us to have this event and for supporting us in all our work. I'll get back to Seymour and Kate in a moment, but we are very grateful to you.

I want to thank Darrell West, our vice president and director, for his thoughtful support and encouragement. And putting this very distinguished group together was not an easy thing. And my enormous thanks to Emily Luken, to Ritika Singh, to Anna Goodbaum, to Robert Briar, Christine

Jacobs, and John Seo. And of course, my thanks to Ben.

I cast the questions we confront this way. On the conservative side, did they have the better argument or did they simply have the most sound bite-friendly argument? Or were they simply more willing to use judicial power to force their vision upon us? Liberals, comparable questions? Did they have a less-compelling argument or did they have too many arguments? Were their arguments not sufficiently sound bite-friendly or were they less willing to use judicial power to force their vision on the nation? How did we go from the New Deal settlement, which was a period that was seen as a period of liberal dominance, to where we are now?

I just want to offer a few quotations to suggest to us that this argument about what the Constitution says is as old as our republic. One of my favorite facts from our history is that within three years of the ratification of the Constitution, James Madison and Alexander Hamilton were arguing about what it actually meant as regards to the creation of a bank of the United States. You could say that the originators of the Constitution were not originalists, since they didn't believe three years later what the original meaning was.

FDR had some important things to say, and Noah and Jeff Shesol know a lot about FDR's views. The Constitution, FDR insisted, was a layman's document, not a lawyer's contract. It's ambiguities, he said, had created an unending struggle between those who would preserve this original broad concept of the Constitution, and those who cry "unconstitutional" at every effort to better the condition of our people. The United States, FDR insisted, could not afford to sacrifice each generation in turn while the law catches up.

We forget that his cousin, Theodore Roosevelt, actually proposed to force referenda on whether or not judges' interpretations of the Constitution should be sustained. The historian Jill Lepore argued -- has said recently, originalism is hardly the only way to abide by the Constitution. Setting aside the question of whether it makes good law, it is generally lousy history. It is possible, she said, to cherish the stability of the law and the durability of the Constitution as amended over two and a half centuries of change in one Civil War, and tested in the courts without dragging the Founding Fathers from their graves.

Which brings me to my friend Garrett Epps' famous quotation, which I had to bring up here. A serious legal scholar, he argued that at times he thought Justice Scalia's view of originalism

was, I knew the founders, the founders were friends of mine, I know how they think. (Laughter)

And lastly -- and this is a truth that I think we're going to grapple with all day long -- Robert Gordon in a review of two books by participants today said, judges who are really keen to reach a certain result will reach it, whatever obstacles of precedent or their own principles or past practice may stand in their way.

So we are very grateful to have Noah setting this up. And this is where I want to get back to Seymour. One of the seeds for this conference was planted by Noah's article in the *New York Times* on this subject some months ago. And Seymour, who has collaborated with us on a number of projects, just called up and said, wouldn't it be a good idea to have a discussion on all this? And that set us off on our quest and on gathering these distinguished folks here today.

Noah is the Bemis Professor of International Law at Harvard Law School, where he specializes in constitutional studies, with particular emphasis on the relationship between law and religion, constitutional design, and the history of legal theory. Before he joined the Harvard faculty, Noah taught at New York University School of Law and Yale Law School. He was a Carnegie scholar; he was a constitutional advisor to the Coalition Provisional Authority in Iraq.

He served as law clerk to Justice David Suitor, to Chief Judge Harry Edwards on the U.S. Court of Appeals. He received his B.A. from Harvard, his D.P. from Oxford, and his J.D. from Yale Law School. Talk about elitist, Harvard, Oxford, and Yale.

He is the author of several books. *The Fall and Rise of the Islamic State; Divided By God: America's Church-State Problem and What We Should Do About It,* a book I assign to my students in my religion and politics course every year; *What We Owe Iraq: War and the Ethics of Nation-Building;* and most recently *Scorpions: The Battles and Triumphs of FDR's Great Justices.*

MR. DIONNE: I am happy and honored to introduce Noah Feldman, who will kick off our series of provocations and disruptive provocations, to quote Ben, today.

So, thank you, Noah.

MR. FELDMAN: Thank you, Jay. Thanks, Ben. Thank you all for coming, and thanks for saying that I'm allowed to be disruptive and provocative. I try to be both of those things all the time, but usually I feel like I have to apologize. Today I won't.

The primary theme of what I would like to say this morning is that things are both

substantially worse from the standpoint of liberal jurisprudence than is generally recognized even by scholars of the field and also substantially better than is usually recognized. And this has to do with my general sense than most, though perhaps not all of us -- and by "us" I mean people who work and focus a lot of our effort on liberal jurisprudence -- are focused on the wrong sets of issues.

So, what are the wrong sets of issues? I'll say a word or two about that, but I want to begin with just a word of history about these two what I take to be the two sound bites, to use I think Ben and E.J.'s phrase, through the core of contemporary conservative jurisprudence, and those are judicial restraint and originalism. Those are both originally liberal ideas.

Judicial restraint first comes into existence as a theory out of Felix Frankfurter's clever reworking of bits and pieces of Louie Brandeis, Oliver Wendell Holmes, Jr., and the academic James Bradley Thayer's work. He comes up with this idea over the course of the '20s and '30s specifically to make the argument that a Supreme Court populated by property-protecting conservatives is overstepping its bounds when it strikes down legislation that's aimed either at economic redistribution or at regulation.

So, again, the two core elements of progressive legislation here are to the two Rs -- redistribution and regulation -- and conservative property-protecting Supreme Court is in the business of striking down this kind of legislation. Frankfurter develops a theory of judicial restraint to make the argument that that should not happen anymore.

The second, originalism, is Hugo Black's distinctive and quirky attempt to do something that is an alternative to judicial restraint that will nevertheless achieve the same goal of explaining why the property-protecting jurisprudence of what is sometimes called the Lochner era -- named for the case *Lochner against New York* -- of the Conservancy Report is wrong.

And Black, who was a quirky figure himself in almost every possible way, began to develop these ideas when he was still sitting Senator, which is the job he had immediately before Roosevelt put him on the Supreme Court, and these are ideas that grew at least in part out of his religious practice as a biblically literalist protestant. Samuel Levinson made that point probably 20 years ago. It remains an excellent and important point about Black. And the core of Black's argument was that the Constitution, read in terms of the original meaning that it afforded, did not authorize the conservative property-protecting jurisprudence of the Lochner era.

So, again, to achieve the same goals as Frankfurter was setting out to achieve by using a different methodology than Frankfurter.

So, the first point that I want to make is that a lot of our focus on theories of interpretation, which is something that law professors like and almost nobody else finds that interesting, is partly mistaken insofar as the same theories of interpretation can clearly be used to achieve opposite political ends. Judicial restraint and originalism can be wholly liberal theories, or they can be wholly conservative theories.

So, a lot of our focal time spent on arguing about what's the right theory of interpretation is, I think -- I wouldn't say it's misplaced, it's an important thing to talk about, but it's not germane to the question of which jurisprudence will win. That's, I think, the first point to make.

Now, how then did these theories of jurisprudence come to become seen as conservative? Well, to explain that, I just want to spend one more minute talking about what happened to liberal jurisprudence between the New Deal and *Bush v. Gore*, broadly speaking.

At the time of the New Deal, liberal jurisprudence was almost totally uninterested in civil rights and civil liberties, which came subsequently to be the core of what most people think liberal jurisprudence ought to be. And if you want any proof of that, you could look at the way Roosevelt's liberal dominated Supreme Court justices responded, say, to the Japanese internment during World War II. They upheld it. It was 6-3 vote, or really a 6 to 2 to 1 vote because Justice Robert Jackson, who did descent in that case, did not descent on the grounds that he thought that the Japanese-Americans shouldn't be interned but on the grounds that he thought it was bad to put that principal in the Constitution. They should be interned, but the court should wink and allow the internment while thinking it was unconstitutional. It's really a 6 to 2 to 1 case.

So, the core point that I want to make here is that liberalism in its earliest form of constitutional jurisprudence was interested just in coming up with a constitutional theory to explain why the courts should allow liberal, progressive legislation again on the redistribution of regulation affront.

Over the course of the later 1940s and then the '50s, first civil rights and then civil liberties came to be crucial components of the liberal constitutional picture, and then they grew to become broader and broader and more and more central pieces of the liberal theory of jurisprudence until they came essentially in the terms of the popular reception of liberal jurisprudence to dominate

the field. And I would say they even dominate the field within an academic conception of what liberalist jurisprudence should be.

It was during that period that judicial restraint and originalism fell away from being liberal theories and became conservative theories. They fell away for a pretty straightforward reason. Liberals had won the argument that the court should step aside and allow redistributive and regulatory legislation to be enacted. They therefore were not very well placed as theories to argue for the expansion of civil rights and civil liberties.

There were attempts to do this. Hugo Black, for example, who believed in free speech very strongly, tried to use originalism to expand free speech, and it went very badly for him, because it turned out that when historians investigated what the founding fathers had in mind when they spoke of freedom of speech and freedom of the press it was a much more constrained vision that what he wanted.

So, he had to shift -- and this is something that originalists do all the time, it's the best trick in the originalist book -- he had to shift from originalism to literalism, muttering to himself as he wandered around his office, "Congress shall make no law means Congress shall make no law," in order to sustain his civil libertarian vision on free speech. That, by the way, is a problem for all originalists.

You can see Justice Scalia doing it all the time. He'll begin as an originalist and then shift to literalism, and I don't, by the way, consider this to be a criticism of Justice Scalia's approach, but I love the fact that Justice Scalia actually states a jurisprudence. I have huge respect for the fact that he states his philosophy, because then he can be criticized when he deviates from it. A lot of other justices don't articulate a philosophy at all, so it's much harder to criticize them.

So, in this period of the expansion of liberal jurisprudence to cover civil rights and civil liberties, really, the two other leading theories of constitutional interpretation emerge, one of which is broadly called living constitutionalism. It's broadly the idea that the Constitution should be interpreted circumstantially to expand individual autonomy rights and equality rights. And the other is constitutional pragmatism, which is basically a view that the Constitution should be interpreted to work. And the stronger the form of pragmatism, the more honest one is about how the text and the history and the jurisprudence in the past don't matter at all.

So, the two people who have been most explicit about that in our history are, first, Justice Jackson himself, who in his famous Youngstown concurrence -- that steel seizure case -- said, "The doctrine is useless. The text tells us nothing. I'm going to make up three principles." And then the other person who's been most explicit about this is Justice O'Connor, who in her summa of affirmative action said that the Constitution neither prohibits nor permits affirmative action; it allows it for 25 years. (Laughter) That is literally the holding of her summa on the subject. That's pure pragmatism.

These two views emerged. Pragmatism, unsurprisingly, can go either way. It can be frankly -- pragmatism can be frankly liberal or frankly conservative. It depends on what you think is pragmatically demanded. Living constitutionalism of course in principal could also still become conservative one day. That just hasn't happened yet, but it's quite easy to imagine circumstances where it could happen.

Now, up until the formation of the Federalist Society, which we'll hear about, I imagine, at some length in the next panel, it was plausible to look at the picture of constitutional law and say that the expansion of civil rights and civil liberties, mostly through some living constitutionalism theory, was winning. And again I won't spend time on it, because it will be discussed by my betters, but there was a plausible movement made by the Federalist Society, I think it's fair to say, as part of a broader conservative movement, to say let's do something about this and let's use originalism and judicial restraint as core elements of our argument against. And then at the moment that *Bush v. Gore* was decided, there was a panic among people interested in liberal jurisprudence, and there were meetings, and I was at some of the earliest meetings, to found something called the American Constitution Society, which was sort of the self-consciously supposed to be an anti-federalist society. The meetings went, like, how do they do it? Well, we should do it this way. I think the program today speaks of envy somewhere, or if it doesn't it's being polite, but the content is some conception of envy.

Then the question is what happened next? How deep has the reversal of these expansions of civil rights and civil liberties been, and is this what we should be worried about? I mean, this is the main point I want to emphasize, and this is where I want to be the most disruptive.

So, the first thing I'd like to say is I think the attempt to reverse civil rights and civil

liberties decisions has gone quite poorly for the conservatives and I think the successes of a federal society on this side are wildly exaggerated by liberals. We're talking basically about anxiety that was real, that in the end I'm not blaming anybody for the anxiety that people felt over this. But it turns out that anxiety was not realized, that the fear that that anxiety captured was not realized.

So, take the affirmative context. There was a real move to limit affirmative action, and there have been some -- there were significant inroads made, and yet the Supreme Court reached, because of Justice O'Connor, the compromise that I mentioned earlier.

In the case of the expansion of the civil rights of gay people, we see a directional Wiggish progress towards the decision in the gay marriage case, which at this point I think very few serious observers believe will not reach the conclusion that Justice Scalia already said it had to reach when Justice Kennedy declared that there was a constitutional right to choose one's sexual partner. Justice Scalia said well, Justice Kennedy's already decided the case. Gay marriage is now constitutional, de facto obligatory, and Justice Scalia was of course right. And I think most observers -- at least my view is -- think that it's going to go in that direction with a very high degree of certainty.

With respect to reversal of other civil liberties issues, worry for example that Miranda would be overturned, not realize the person who wrote the definitive opinion was, you guessed it, Chief Justice Renquist was in many ways the central figure in the conservative legal movement in action, a real pragmatist judge, and his pragmatist opinion said -- and I'm exaggerating only very slightly, you can't overturn Miranda, people know about it from television. (Laughter) He referred to television in the opinion. Even though he had previously, by the way, committed himself to the view that Miranda was merely -- that in fact the Miranda rights were merely statutory and could, therefore, be overturned or merely prudentially announced by the courts and could never overturned by statute, he ultimately was not willing to go down that route.

With respect to abortion rights, there has certainly chipping away -- very significant chipping away at *Rowe v. Wade*, and it's perhaps the case that maybe we're headed for death by a thousand cuts for *Rowe v. Wade*, but I seriously doubt it. I think especially the justices who are presently on the conservative wing at the Supreme Court, if they had the votes, which of course they do not now, but if they were to have the votes would think long and hard about the political consequences for the Republican Party of openly striking down *Rowe v. Wade*, and my guess is that

continued slow weakening remains their preferred strategy.

So, inroads, yes; big conservative victory, no. Successes of the federalists, nowhere near as great as would have been imagined. And I would say the greatest success of the Federalist Society, institutionally, in its history, was the blocking of Harriet Miers' nomination. And the rationale, so far as I can make it out was twofold: one, we don't think she's very smart; but, two, we're not sure of her, and we are sure of the people who we have raised up from pups, and we want those people to be on the Supreme Court, because the odds of them becoming, say, Tony Kennedy -- i.e., a person who turns out to be a--a Reagan appointee who turns out to be an important liberal theorist of the Constitution, vast exaggeration might be one way to experience -- vast expansion of individual autonomy rights, comes down on gay rights as the definitive figure, comes down on Guantanamo extending Constitutional rights where they were never extended before -- this is Justice Kennedy we're talking about. If you've known someone from the time that they were in college, it doesn't eliminate, but it reduces the odds that that person will go this way.

So then you think it's unlikely that Justice Alito will become Justice Kennedy. It's unlikely that Justice Roberts, Chief Justice Roberts, will become Justice Kennedy. Nothing's impossible in life, but it's much less likely. If we know this person Harriet Miers--we just don't know her. She's not one of ours.

So if this is the case, why do I think things are actually much worse than is generally perceived from the standpoint of liberal jurisprudence?

I've got, I think, five more minutes, and I'll say that in those five minutes, and then I'll take challenges, questions and -- I hope, from my law professorial colleagues -- the statement that I'm just flatly wrong on everything I've just said. Because that's how we do. (Laughter.)

If you think back to one of the intellectual monuments of the birth of the progressive era, the essay is called *Chapters of Erie*, by Charles Francis Adams, 1871 essays, that are basically essays that, in content, observe that in New York State the big players in railroad ownership, who are also the big players in the stock market, have taken over the state legislature and the state judiciary completely -- capture, as the political scientists call it, is complete. And whatever they want to do, they do.

The response to Charles Francis Adams, who was a scion of the Adams family -- the big Adams family -- has to this, is that we are in a disastrous moment, where capital is now more powerful than the republic -- where the institutions of capital that have been built in early industrialization -- it's only 1871. There's still a lot more industrialization to come -- are so big and so powerful, the accretions of capital are so enormous, that the republic can't stand up to them. He sort of draws on the Adams family's great New England Jeremiad tradition to say: the end of the world is nigh. And the reason it's nigh is that capital can now control government. It's just too powerful to control the institutions of government.

And the answer that he offers is the proto-regulatory state. The idea is that the state itself needs new tools and new technologies to defend itself against capital. And the one-word answer that emerges from that is regulation.

So if capital hates regulation, there's a reason for that. Regulation is born in the United States as a tool to constrain capital in order to protect republicanism -- small republicanism. Okay. That's a potted history, but there's something to it.

Where the conservative Supreme Court has been tremendously successful, in my view, is in shaping the constitutional doctrine to authorize and require limitations on those features of regulation that, at present, are designed to constrain capital from controlling democratic political processes and outcomes.

Now, Citizens United is a great headline for this, because it captures, in some way, the essence of what's going on. The greater the requirements of the First Amendment -- the free speech clause of the First Amendment -- to allow corporations to spend in elections, the greater the capacity of those corporations to affect electoral outcomes. The greater the capacity of capital to control electoral outcomes, the greater the greater the threat to republican political institutions. Really that simple.

It's not in the story -- a story that money is evil. Very far from it. It's just a story that the corporate form of government is the greatest technology ever invented by man for increasing capital accumulation. And it is. And thank God we have it.

But it will, following its own legal logic -- and it's, in fact, obligated to follow this legal logic, typically, in a corporate situation -- continue to try to do everything that it can legally to do to

maximize its own accumulation of capital. And that naturally includes controlling electoral outcomes to the extent that it can legally do it.

Now, it's not that the holding of Citizens United gets you all the way to the picture that I'm describing. Nor is it the case that Citizens United should be seen in isolation. It's part of a much broader set of trends, both in the free-speech law and, more broadly, in what Pam Karlan and he colleagues very importantly have called the law of democracy, that changes the rules of the game in such a way to facilitate greater influence, broadly speaking, of capital -- by which I just mean accumulated money. Nothing Marxian here -- just accumulated money on electoral outcomes.

Now, here is the fundamental problem from the standpoint of liberal jurisprudence. Number one, this should be the focal point for liberal jurisprudence. But it hasn't been. Instead, civil liberties and civil rights have been our focal point.

Number two; liberal jurisprudence is ambivalent about this, because it's been framed as a free-speech question. So, as all of you know, the ACLU intervened -- intervened is the wrong technical term -- but they filed a brief before the lower court in the Citizens United case on the same side as the corporate speakers -- right? So the civil libertarians are themselves ambivalent about how free speech should operate in this context, because of a fear of admitting that the point of capital accumulation is to accumulate more capital. Somehow civil libertarians of saying that.

The idea that speech and money are interpenetrated is an idea that has entered into constitutional thought, to some significant degree with liberals equally responsible to conservatives.

Next problem -- the key to liberal jurisprudence, when it comes to laws regarding regulation and redistribution, which are, once again -- and I don't need to say this because it's so obvious -- these are once again the focal point of liberal thought, and there are people sort of occupying Harvard Yard and Wall Street and various other places. And one of the many inchoate things that they would like to be saying, if only they could say it, is, I think, that the power of capital is such that it is difficult for republican institution to counteract that power. Something like Charles Francis Adams' concern. I don't claim that's the only message, or even the central message, but it's a message that I think could plausibly be affiliated with this, broadly speaking, this movement.

And yet, remember that for liberal jurisprudence, there's never been a good way of saying that the Constitution ought to be interpreted to redistribute wealth, or to regulate capital. The

liberal position was only that the Constitution should not be interpreted to block the government when it tries to do these things.

So you're not going to get -- certainly not at the federal level -- you're not going to get jurisprudence that demands regulation, or demands redistribution. Perhaps at the state level -- Willie Forbath has written very interestingly about this, and I'm sure he'll speak about it, too -- perhaps at the state level, there might be ways for certain kinds of redistribution in, say, education to be facilitated a liberal jurisprudence. And I respect that tremendously.

But at the federal level, we're not going to see regulation or redistribution coming out of the courts. All you'll get from the courts from the liberal side is stand back.

That means that what we're hoping for from liberal jurisprudence -- if what we're hoping for is to reverse the course of this shift in power between capital and the liberal democratic state, or the republican state -- is not going to come in the form of constitutional holdings, that is to say, affirmative constitutional holdings.

Where it could come, and where it ought to come, and where it needs to come, and where the attention needs to be focused, is in shifting the doctrine so that it's no longer the case that plausible constitutional arguments can be made that say that the state has to allow the accumulated capital to influence political processes in the way that it does.

Now, that is an extremely tall order. Because, as Pam can tell you far better than I can, we're pretty far from that situation, doctrinally. It doesn't mean we don't have the resources there, but we're actually pretty far from it, doctrinally.

More importantly, that hasn't been the focus of what liberal jurisprudence has been focused on. So now we're at a moment where finally the public, the liberal public, has shifted its attention from civil rights and civil liberties to the more foundational, underlying structural issues. It has done it, as is its wont, in an inchoate and unclear way. But it at least has begun to do it.

And now it's the time for liberal jurisprudence to focus on those spaces.

A last coda to this. Were the Supreme Court, for example, to strike down the mandatory-coverage bit of the health care bill, that would be a heads-up that we needed to get back to a -- significant heads-up that we need to get back to a kind of judicial-restraint theory of liberalism.

And about a year ago, I thought that might be what the Supreme Court was inclined to do. And maybe this would provide a necessary wake-up call to push liberal jurisprudence in that direction.

But it turns out, reading the tealeaves that Justice Kennedy is not going to do that. He gets it. Justice Kennedy is not going to push and provide that kind of an excuse for liberal constitutionalism.

Now, if you really think the health care bill is terrible, and maybe you're sad that it's not being struck down as unconstitutional -- but that's actually not what's going on here. In fact, it's better for the Republicans to have the health still constitutional during the electoral cycle so they can attack it in the public square. It's a good issue for them in the election. So that's not the end of the world from the conservative standpoint.

That means that the focus from the liberal standpoint has to be on making as clear as possible to the public -- and within the jurisprudential context -- that those tools of constitutional jurisprudence that protect the status quo are the problem.

Because even if we manage this time around, as was managed during the progressive era, to get public support behind the idea of shaping legislation that will regulate the political process to reduce the capacity of capital to swamp it -- even if we get that, that's a big if -- there remains the real possibility that the crucial components of such progressive regulatory legislation could be struck down by the courts. Okay?

Here endeth my provocation. And I'm eager for comments, questions, and objections.

SPEAKER: For which we have time for only a very few. So why don't you take two questions, and then we can go on to the next panel.

MR. FELDMAN: Two it is.

Stuart.

MR. TAYLOR: Noah, to the extent that you see the Supreme Court --

SPEAKER: Wait for the mic.

MR. TAYLOR: Hi. I'm Stuart Taylor.

To the extent that you see the Supreme Court's campaign finance decisions as creating the problem of no limits on corporate capitalism and so forth, how do you account for the fact

that all of those decisions have come during a period when lamentations over corporate capitalism ascendency have been waxing and, in fact, the Golden Age was before, say, the 1970s, and there were no campaign funding restrictions -- or not many -- before the 1970s?

MR. FELDMAN: And I'm meant to take two questions -- right? Or am I meant to respond directly?

SPEAKER: (Inaudible.)

MR. FELDMAN: So I don't think that those, that the series of decisions that have gotten -- so, first of all, I agree with your assessment of the chronology.

We've seen technological changes, as it were, in elections. The method of the use of funds, the technology of the use of funds to affect electoral outcomes has shifted a lot, even just in the last 25 years.

And that has everything to do with -- one of the tools available to capital for shifting elections' being financial. And that technology is still shifting. So, you know, before the last election, I would teach my students in my First Amendment class that it would be very difficult -- that one could expect there to be some party-line judgments on these questions, because it would be easier for Republicans to raise capital for electoral outcomes, because it was difficult to find a rational way to generate $100 and $200 contributions from Democrats. That was an orthodox view. It was in all the literature. It was also totally wrong. The Obama Administration shifted the technology, and by raising lots of money through small contributions it shifted the game.

So we're in a period of rapid technological change. And I don't just mean the physical technology, but I mean just the tools of the trade continue to change.

And that's also way I don't think this is all about the electoral mechanisms, though that's a part of where it is. I think, at the most fundamental level, the problem of the influence of capital is also connected to the rise of the markets as definers of political options for the President. And this was very clear, already, during the Clinton Administration, when, you know, under Bob Rubin, quite reasonably, there was a judgment made that keeping the markets happy would be good for economic growth. And that shifted the power structure in a significant series of ways. It was quite right, as a descriptive matter.

So I'm pointing to this just as a -- Citizens United and the campaign-finance question -- as a, a piece of evidence about the shift in power.

MR. MITCHELL: I'm Garrett Mitchell, and I write the Mitchell Report. And I hope I can make this into a question.

If there is anything that concerns us as a republic today it is what appears to be the increasing incapacity of us to do and accomplish big things, and even the small ones. Political polarization, moving at a speed and in a direction that is not good.

My question is whether, and to what extent, those same factors may be creeping into our jurisprudence -- if that's the right question? And thinking about Justice Breyer's latest book, in which he, I think, is really addressing the concerns about the importance of the Court having public support so that people will support decisions, even if it's *Bush v. Gore*.

I guess my question is what appears to be happening between -- in the first and second branches of government, creeping into the third? Or is that just foolishness?

MR. FELDMAN: Well, it's not foolishness. But I would say roughly a quarter of the decisions that the Supreme Court renders in a given year -- I should say, the increasingly shrinking number of decisions that the Supreme Court renders in a given year -- roughly a quarter are five-four decisions, over the last decade.

Most of those break down along what look like -- quote-unquote -- party lines. And almost all of them have Justice Kennedy in the majority, wherever he decides to come out.

There is some kind of polarization of a similar type. That polarization, though, was also there during the period where Justice O'Connor was the swing vote, in roughly the same percentage of all the cases decided. It might have been slightly lower then, because the Court decided a larger number of cases, which means it decided more cases that were not deeply political.

So, you know, within the Supreme Court -- now, if you say in constitutional jurisprudence, I think a disproportionate number of the cases that are five-four are constitutional cases -- right? Because the Supreme Court doesn't only decide constitutional cases. I'd have to look at an exact breakdown on that to give you a precise number on it.

So, on constitutional issues, there is, I think, a significant amount of polarization. And that reflects the fact that, as de Tocqueville observed, difficult political questions in this country tend to become constitutional questions.

What I would say is that that's less of a problem in the jurisprudential context than it is in the political context. Compromise is a crucial value in legislation -- at least in a two-party system. In a non-parliamentary system you need to have compromise to get anything done.

That's not true on the Supreme Court. You can have checkerboard jurisprudence. It may not be very attractive, and it may not be very pretty, and it might be a challenge for people who make up the casebooks. But you can have jurisprudence that goes different ways on different days because Justice O'Connor thought that the median voter wanted it. Or because Justice Kennedy thinks that dignity resides with Group X as opposed to with Group Y. And we have that.

So we have incoherence in our jurisprudence, in terms of the results, because of this kind of polarization. And we can continue to function on that basis.

MR. DIONNE: So to keep ourselves from running too far behind, let us have everybody associated with our second panel who has a name tag up here come up forthwith. Thank you very much, Noah.

So while they do come up, I'm going to introduce our panel. So I'm going to do this very briefly as most of them, all of them, really, need very little introduction and I think you guys have their bios there.

But just very briefly, Pam is the Kenneth and Harle Montgomery Professor of Public Interest Law at Stanford Law School where she also directs the school's Supreme Court litigation clinic.

Lee Liberman Otis is Senior Vice President and Faculty Division Director

of The Federalist Society. And Steve Teles is an Associate Professor of Political Science, Johns Hopkins University, and for present purposes, I think more importantly is the author of the book The Rise of the Conservative Legal Movement, which came out a couple of years ago and is a really, just terrific treatment of the subject.

So the panelists themselves have decided on the order in which they are going to speak. So without further ado, I'm going to turn things over to them.

MR. TELES: All right. So Robert Novak famously said once that if you're not a source, you're a target. Well Lee Lieberman Otis is a source. I should admit that for the book, but I don't want to have that implied that Pam is a target.

So at the beginning of Chapter 1 of my book, which has been generously mentioned, I quote Steve Skowronek's famous line from his book, Building a New American State where he says, "Whether a given state changes or fails to change, the form and timing of the change and the governing potential in the change, all of these turn on a struggle for political power and institutional position; a struggle defined and mediated by the organization of the pre-established state.

In short, political action never begins at year zero or in something like a vacuum. With the exception of God on the first day of the creation of the world, there was always something before. And therefore, to understand any movement, we need to understand the state against which it was mobilizing and also the movement that it defined itself in contradistinction to.

And my brief, yes brief, on comments will sketch out briefly what I call in the book the liberal legal network; that is the movement against which the conservative legal network was mobilizing and the modern administrative state, since they provided the challenge that the conservative legal movement was presented with.

And one of the main objectives in my book was to get over what I call the

myth of diabolical competence, the idea, I think, where liberals invert their own self-presentation as being incompetent but benevolent and they see in conservatives in the opposite of themselves.

I think when you actually look at the history of the development of the conservative movement that it doesn't all look like there was a grand plan all hatched at the Mayflower and then carefully acted out. There were a lot of movements back and forth, things tried that didn't work out, and I think that's a very important cautionary tale against the way that the conservative legal movement is usually discussed. Okay.

So again, it's hard to underestimate just how much the legal profession changed in the 1960s and '70s, and I think this is important background for understanding why the conservative legal movement acted the way they did.

While mostly lawyers were doing more or less what they were doing before, during the 1960s and '70s, something definitely changed. The ABA, for example, was a remarkably conservative organization up until the end of the 1950s. In fact, in 1955, the ABA distributed a report written by Phyllis Schlafly criticizing the Supreme Court for being too soft on domestic communism, and it regularly joined, for example, with the AMA and arguing against the expansion of the role, the state in medicine and lots of other things.

But a mere 10 years later, the ABA shifted quite radically, pushing aggressively for a stronger federal role in the provision of legal services, and later on, supporting throwing the doors to the courts open to public interest litigation.

In the 1950s there were very few public interest law firms, apart from the ACLU and the NAACP LDF. By contrast, by the end of the 1970s, with substantial funding largely from the Ford Foundation, there were a number of copycats of the NAACP LDF for other groups, women, other minority groups, along with the

Environmental Defense Fund, National Resources Defense Council and a growing network of consumer law firms.

In the early 1950s, there were almost no clinics in law schools. And again, with the support of Ford, by the beginning of the 1970s there were clinics in almost every law school, many of which were explicitly focused on public interest law.

Together these changes created something like a track in public interest law that literally did not exist before. But perhaps the biggest change was the shift in American's law schools.

Up through the 1950s, America's law schools were generally under-resourced. Their student faculty ratios were high; the standards of scholarship were low, and the faculty's politics relatively moderate, and some places actually quite conservative.

By the 1970s things, again, had changed quite dramatically. Law schools had become vastly wealthier. Teaching demands had dropped. Expectations of scholarship were going up. And at the same time that they were hiring so many more faculty members -- and there was a massive increase in the number of law faculty in this period -- the ideology of the new legal professor had shifted decisively to the left. Law schools were under pressure to be relevant and curriculum and clinics changed accordingly.

Taken together, these changes produced what I call in the book the liberal legal network, an impressive liberal network that connected liberal activism and elite professionalism. And at the same time, the American state was changing. It became increasingly more centralized, more technical with growing bureaucracies operating often hand-in-hand with growing congressional subcommittees in an increasingly aggressive federal judiciary.

Both courts and regulatory processes became more open. Rules of standing, for example, were dropped, and indirect forms of subsidies like private Attorney General provisions in legislation made it easier to get cases into court.

In this new state, elite mobilization often counted for as much or more than raw electoral power. The new structure of the state turned out to be particularly well suited for the skills and organization that the liberal legal network had, and as it turns out, conservatives lacked.

In the last couple of minutes, I just want to talk about how conservatives responded to this, responded to this challenge that the state and the liberal legal network presented.

Conservatives, especially the business community, found the new structure of the state and this newly aggressive liberal legal network frightening. A business community used to working with a government that they had effectively captured suddenly found the state, and in particular, the courts, suddenly turning against them.

Businesses in the west found that they could no longer engage in resource extraction with no concern for its environmental consequences. Businesses throughout the country found their internal processes, from hiring and firing to the conditions in the workplace and the kinds of products that they could sell, suddenly under greatly heightened and often quite uncertain supervision.

Beyond these costs these changes imposed, businessmen used to a free hand saw these changes as a direct affront to their place in American society, and they sought to do something about it. But just what they would do was not all together obvious. Two responses emerged, one which was generally successful, and the other which was not.

The first, which I'll only talk about briefly, was that in the early 1970s, a group of relatively angry and frustrated conservative businessmen began to create a network of geographically structured public interest law firms, starting with the specific legal foundation in California and soon spreading to include regional firms throughout the country, including the mountain states' legal defense fund headed by that noted legal scholar, Secretary of Interior, James Watt.

These firms, which got very substantial resources -- and I think this is another piece of evidence that shows that simple counter-mobilization of the deployment of resources doesn't always translate into outcomes -- generally were remarkably unsuccessful, given the amount of money; and why was that?

Well, one -- these were organized geographically. They were the mountain states' legal defense fund or the pacific legal defense fund. They were organized geographically at a time in which the law was becoming more functional, when what really mattered was not having geographic roots but having expertise in particular areas of law, relationships, networks to regulatory agencies.

And second, these organizations, precisely because they were dominated by business, were remarkably unsuccessful at affecting the tone of general intellectual debate in a period in which the public interest was an important totem, to the degree to which they were seen as simply shields for business. Their ability to actually capture the idea of the public interest was lost.

The second intervention, the last thing I'll talk about, was law and economics, and this implied a very different theory of how to engage in counter-mobilization. This was lead by a number of scholars: you know Richard Posner.

But in terms of actual organizational mobilization, the most important actor was a man named Henry Manny, who created a series of seminars for judges, later

on for professors. He tried doing it for the clergy -- that didn't particularly work out -- on economics, and especially to applications to the law, in addition to creating liberty fund conferences, which went through particular areas of the law and tried to figure out the applications of law and economics.

And Manny's strategy for change recognized that legitimating conservative ideas was the most important problem. Liberals, he recognized were not successful just because of raw power, but because of the sheer dominance in the term of the academy, the hegemony of their ideas. Weakening that was a necessary adjunct to raw power.

And so, in that sense, the law on economics movement recognized that unless it could claim the mantle of the public interest, all conservative successes in the courts would be ineffective, even when they had tried to transfer that power to the courts.

MS. OTIS: Thank you very much. First of all, I want to thank Brookings, generally, and E.J. and Ben specifically for inviting me to participate on this panel.

They actually made a big effort to make sure that someone from The Federalist Society was here because, in talking about the conservative legal movement, they wanted to make sure to include someone in the conversation who was actually, in some way, a part of the conservative legal movement, and I really appreciate this effort.

As most of you probably know, The Federalist Society works pretty hard to try to include different points of view in our programs, which we do for a number of reasons; you know, one of which it's just that it makes for better programs, but it's also because we want to make sure that we're grappling with real arguments that people are making, for example, about why originalism wrong and not with an imaginary person of the arguments.

And I think one byproduct of this approach is that it contributes to serious

and civil discussion of ideas, which I think is not always easy in our Nation's Capital in the heat of political battle; and in some ways, it's harder now in this era of sound-bytes and internet rants.

Brookings has been a haven for this kind of serious and civil conversation for as long as I can remember, and so I was particularly pleased to be invited to be part of your conference today.

I'm also delighted to be on this panel with Pam Karlan and with Steve. Pam is one of the most thoughtful people writing about constitutional issues from a, sort of, vaguely left perspective.

MS. KARLAN: Not so vaguely.

MS. OTIS: Not so vaguely.

SPEAKER: That was a compliment.

MS. OTIS: And as for Steve, as some of you can imagine, when I got a call some six or seven years ago from a political scientist saying that he was working on a book on the conservative legal movement and he'd like to interview me about it, I was not entirely thrilled about this. But bearing in mind Steve's rule about the source target thing, I agreed to meet with considerable trepidation, having no idea what kind of book Steve was going to produce.

But, in fact, what he produced is not only a very fair book that lays to rest a lot of myths about the conservative legal movement and The Federalist Society in particular, the one from which I've learned a lot. In fact, when I was reading it, I had these Misère Jurdan moments from time to time, probably.

You all know the wonderful scene in the (inaudible) when one of his tutors who's trying to explain to him how to, you know, talk in a manner appropriate to the gentlemanly class he's aspiring to says he has to write something either in poetry or

prose. He says, "Well wait, wait a second. I just want to write it." And the tutor says, "No, no; you don't understand. When you just write it, you're speaking in pros. And Mr. Jurdan says, "Oh, that's so wonderful. All my life, I've been speaking in pros without having any idea of what I was doing." And, you know, "I'm so grateful to you, Mr. Tutor, for explaining this to me."

And when I was reading Steve's book, you know, I found myself thinking to myself on a number of ways; "So that's what we were doing and that's why it worked." I guess these political scientists really know something.

So, let me talk for a couple of minutes about the beginnings of The Federalist Society, which I was involved in starting back in the early '80s.

At the time, I was a law student at the University of Chicago and the other people who led the effort to start The Federalist Society were also law students, and a few recent graduates from Chicago Yale-Harvard.

I'm very fond of Steve's phrase about the myth of diabolical competence, and it certainly applies, in many ways, to theories about how The Federalist Society got started and so on; because, to tell you the truth, we had no real idea of what we were doing at the time. I mean, we knew that there were a series of ideas about law that weren't getting discussed at our law school, even at the University of Chicago.

You know, the situation there was a little different, but even there all the student organizations were on the left. And at the other law schools, at Yale and Harvard, that was also, you know, very true of the faculty, by and large.

And so, what we thought we were starting when we started these groups were actually individual groups at -- in the case of Chicago, something that we called the Chicago Federalist Society; at Yale, something that they called the Yale Federalist Society. And then we discovered there was a preexisting group at Harvard called the

Harvard Society for One Public Policy that had started a law journal, and so we had decided we'd hold a joint conference and we decided to hold it at Yale.

And so, at that point, when this got a little press, we started getting letters asking us how do we start a chapter of The Federalist Society. Well we hadn't been thinking about chapters at all, but we figured, "Okay, well I guess we'd better answer the mail." And so that's essentially how The Federalist Society got started as a national student organization.

You know, and once we decided to start a national student organization, we did think that there would probably eventually be a lawyer's division, since we all knew we were graduating fairly soon, but you know, that took another 10 years to really get established.

And again, the real purpose of starting it was not so much to push any particular positions, as it was to try to bring about a discussion of some ideas that just were not getting talked about, about law.

So let me say a few words then about one of those ideas, which is originalism, which I think is something that The Federalist Society has correctly viewed as helping to bring to the floor to the conversation about the courts, and a few reasons why I think, over the past 25 years ago, originalism has become a serious part of the discussion about constitutional law and about the role of the courts.

One thing about originalism is it's not actually a theory about the role of the courts; it's an idea about how to interpret the Constitution. It is, however, important to the discussion of the role of the courts for a fairly simple reason, which is that, fundamentally, it treats the Constitution primarily as law that is binding on everyone, including the courts; not as something that the courts just kind of make up as they go along and are free to shape as they see fit.

And so, I think the idea of the Constitution as law, you know, has a lot of real residence to it. I think it's hard to actually understand what the courts are doing if the Constitution isn't law, and law in somewhat the same conventional way a statutes are law. That is to say we read it and we apply it.

That was actually the argument that John Marshall gave in Marbury against Madison as to why the courts not only can, but must strike down on constitutional laws, because the Constitution is a higher law that they are bound to follow.

He didn't say, you know, "We the courts are charged with, you know, shaping the country in a way that will make it the best country it can possibly be," and, you know, that's why we're striking down on constitutional laws.

And I think, by contrast, the competing ideas that were out there that emphasizes a primacy of the courts in shaping with Constitution have more serious problems than the problems that the Constitution is law in the conventional sense have. And I think that's basically an idea that, you know, The Federalist Society has been working on developing over the past 25 years.

And I think that, by contrast -- and I think it comports with how Americans actually think about these things which is, in contrast, I think, to the notion that the Constitution is just something that the courts shape as they need to.

That's not to say that there is nothing to the idea. You know, there are some ways in which, undoubtedly, you know, it has some validity. But I think that in order to address some of the difficulties that some folks at least believe that liberal (inaudible) is having, I think that my advice would be that it needs to come to grips, you know, more thoroughly with the notion of the Constitution's binding law.

MS. KARLAN: Well it's an honor to be here. Lee probably doesn't remember this, but I was actually invited to be at the first meeting of the Yale Federalist

Society. I don't know if I had gone. I was a freshman counselor at the time and I had to deal with freshman bulimia so I wasn't able to go. But if I had been able to go, I don't know whether it would've changed me or changed them or neither, but my life has been intertwined with the rise of the conservative legal movement since I began law school in the fall of 1980.

Jacques Barzun said that who would know America must know baseball. And so I have two main points here that I'm going to make briefly, and I'm going to caption each of them with a famous baseball phrase from a famous figure in baseball.

The first, I'm going to call the Branch Rickey point, in honor of his observation that luck is the residue of design and his position as the creator of the first great farm system in any American industry.

The second, I'm going to call the Tug McGraw point after the Philadelphia closer, Philadelphia being where the Constitution was initially drafted, and his cry that you got to believe: so the Branch Rickey point.

Today it's tempting to tell a story about the rise of the conservative legal movement as the inevitable consequence of a combination of strong ideas pressed by charismatic public figures backed by tremendous resources.

To be sure, conservatives have very skillfully played the hand that they held, but contingency has played a major role too.

If you go to The Brookings website to look for their description of the conference today, you'll see a description that says, "The conservative legal movement has shown remarkable success at defining the terms of the debate over jurisprudence while the various visions of liberal theories of law that confront conservative orthodoxy have struggled to gain currency in the political sphere.

Conservative legal theorists of present a relatively compact a politically

effective set of ideas while their liberal critics have offered a diverse series of responses. In the face of conservative victories, can liberals forge a coherent response or will differences among liberals get in the way? What events might shake up the state of debate?

Now if some other public policy organization were to have held a conference in, say, 1968, it could've taken the same paragraph, swapped the words conservative and liberal and held a parallel discussion to the one we're going to be holding today.

Now in Julius Caesar, Brutus observes that there's a tide in the affairs of men which, taken at the flood, leads onto fortune, omitted all the voyage of their life is bound in shallows and misery. Now, I don't actually think all the voyage of my life is going to be bound in shallows and misery, but right now that's where we are. That tide, it's cyclical quality and the need to catch it when it's coming in is true of legal affairs as well.

Conservatives have been as lucky as they've been smart. And to quote another great piece of literature, Pippin: here is a rule that every great man knows by heart; "It's smarter to be lucky than it's lucky to be smart."

Two slight tweaks of history and everything might be really different. The first tweak; Jimmy Carter and George H.W. Bush. They were both one-term presidents. Jimmy Carter got no chances to put a justice on the Supreme Court. George H.W. Bush got two and used one of them to nominate Clarence Thomas, in many ways, the most radical conservative jurist to sit on the Supreme Court in our lifetimes.

Turn that around and consider where we might be if Justice Thomas' seat were held by one of the judges Jimmy Carter appointed to the Court of Appeals; say Patricia Wald or Betty Fletcher or, to drive terror into the hearts of conservatives, Steve

Reinhardt.

Second tweak: imagine that Al Gore rather than George W. Bush had been elected president; in fact, he was, but imagine for example -- and I'm not going to talk about *Bush v. Gore*, but imagine that 10 percent of the boobies and zaties who pushed the wrong chad in Palm Beach County had voted the other way; then Al Gore would've been president. This is kind of the butterflies' ballot as Cleopatra's nose.

It might well still be that we would have a chief justice who was a former administration lawyer, a Hogan & Hartson partner and a D.C. Circuit alumnist, but it would be David Tatel, not John Roberts.

Imagine that we would have somebody who had cut their teeth as a young lawyer in an administration and had gotten a golden resume as Chief Justice, it would be Elena Kagan and not John Roberts.

Supreme Court nominations are intermittent events and their relationship to the political process is profound. Moreover, the conservatives have been extremely successful since the 1980s in building a strong bench -- this is the second part of my Branch Rickey point -- that is, they nominate people who are extraordinarily young to positions of great authority, and thereby put them in line to get nominations later on.

There's a wonderful calculation that’s been done by a young political scientist of the average age of democratic nominees versus republican nominees to the Federal Bench, and democratic nominees are something like five to six years older on average. Well if you multiply that by the number of nominees and the number of years they sit and everything, you can see a really big difference in their likely influence on the law. The younger you get to the major leagues -- this is a Bill James point -- the younger you get to the major leagues, the longer your career is likelier to be.

Now the Tug McGraw point: This morning I got up before I came over

here for the conference, and I took my little folding bike and I took a bike ride to get the heartbeat flowing and the blood pumping and the like, and where did I go? I went down the Mall to the FDR Memorial and the Martin Luther King Memorial. And the key point that I draw from them is the following; which is, liberals have strong ideas that are simply put as well. But during the time in which the conservative movement has risen, liberals have not clung to those ideas. They've not held fast to them.

So if you go to the FDR Memorial, you see carved on one of the pieces of stone. And this is the point; liberal ideas can be carved on small pieces of stone that can be read by regular citizens standing far away. The FDR Memorial has let us move forward with a strong and active faith. And the Martin Luther King Memorial has, out of a mountain of despair, a stone of hope.

The conservative movement has been, during my lifetime, part of a consciously ideological push against an opposing point of view that's failed to be self-consciously ideological. The left, to the extent there is one, has become ashamed of calling themselves liberals.

I'm always amazed at the number of people who are afraid of the "L" word -- the "L" word there being liberal as opposed to some of the other "L" words but -- and so they call themselves progressives, which is a problem for the following reason; and I think Noah alluded to this in his opening remarks.

The progressives believed in kind of technocratic merit and elitism as the way that government should be conducted, rather than retaining the passion for common people for justice for opportunity and the like. So there has not been really, since the end of the great society, a positive articulation of the alternative to conservative legal thought.

And idea that government works and government can make people's lives better, the egalitarian institutions are better than hidebound traditions and the like.

And that failure of the left and of liberals to articulate their point of view and their vision is a large part of what has allowed the conservative legal movement to seize on the opportunities that its had and to entrench itself without a persuasive response.

But I think -- and this goes back to my Julius Caesar points and to the point that, unless you are a fan of the Chicago Cubs, your team's time will come -- is that I think we're starting to see a change; that is, I think that originalism in its strongest and most robust forms has failed. And you can see this from the fact that no one is backing, for an example, the original originalism, what I used to call the WWJMD theory. You know, you wear it on a little wristband and you ask yourself, "What would James Madison do?" People don't do that anymore, and there was actually laugh.

And you can see "laugh" in the transcript of the Supreme Court when Justice Alito asked that question in the violent video games case, you know; "What would James Madison think about violent video games, you know, horse and buggy, you know, grand theft horse and buggy. I mean, what would he think about video games?" It doesn't make much sense.

And you see this also in the reaction to when Justice Scalia said in a recent interview that he didn't think the Fourteenth Amendment has anything to say about gender equality. That is not something I think that the American people would believe. And so there's been a kind of retreat and a softening down to a kind of fainthearted originalism in which everybody now uses originalism the way we've all started to use phrases like cellophane an aspirin that started out as trademarks and no longer have a meaning other than we all kind of agree it for painkillers and things that should be transparent but covered and the like.

And so I'll end by saying that I think the circle, in some ways, is ripe for a time to turn, and quote my last and most famous and favorite baseball philosopher,

Satchel Paige who says, "Let whom so ever wish, sit around recollecting; I'm looking down the line."

SPEAKER: Well thank you. Thank you so much.

(Applause)

SPEAKER: Can I start this round and you start the next one? First, I loved Pam Karlan before this, but I love her even more for her understanding of the singular importance of baseball to our public and our democracy. Thank you so much. I also want to thank Lee for her graciousness and the American Constitution Society, which has been really helpful to us and actually helped us make contact with Pam.

I have two questions I'd like to start with. The first is to -- well, I'll ask if anyone can answer this. I was struck by the fact that both Noah and Steve laid heavy stress on really the power of business and the importance of capital, and that this debate is, in very significant part, about controlling the power of business and money in our republic and the dangers to our republican system from that. Yet, so often, the debate about liberal jurisprudence does not focus on those questions. It strikes me -- this is my own view -- that the real crisis is much more about Lochnerism than about *Roe v. Wade* that we're facing going forward.

The second question is about republicanism. There was what was known as the republican revival in the '80s and '90s in legal thinking as well as historical thinking, and I was much taken by it. I have to reveal that my wife was at UVA Law School where Pam Karlan was one of her very, very, very favorite teachers, and she came home one day with an article by Cass Sunstein, his famous article from Law Review and just gave it to me and said, "You'll like this," and she was right about that.

And I'm curious why the -- and I heard the echoes of the republic argument in Noah -- why has that idea of republicanism come back to strengthen a liberal

argument or -- and I agree with Pam: liberals; if they don't have the guts to call themselves liberals, won't have the guts to defend anything -- has that had an effect, or has its power kind of dissipated?

So capital and business on the one side and republicanism on the other. Pam, do you want to start?

MS. KARLAN: Well, I'll start with the capitalism and business one, which is for those of you who are interested in reading really great Law Review articles. There is a fabulous article, many years ago by Tom Jackson and John Jeffries that makes essentially, and in an extremely persuasive way, the point that the First Amendment and commercial speech doctorates have become the new form of Locknerism, that is that the arguments for protection of business turnout not to be ones from substantive due-process anymore, but often turnout to be arguments from the First Amendment. So I highly commend that article to you.

I do think one of the places where you're seeing this play out is, for many years, the thought was the Federal Government was the protector of individual rights and the states were places to be worried about. And so the state's rights, if you think back to the kind of claims of state's rights during the Civil Rights Movement and the like, they were acclaimed by southern states that they shouldn't have to adhere to national standards of equality and fairness, and the Federal Government was in there to vindicate people's right.

I think what we are now seeing is, we have moved from red state federalism to blue state federalism, and I think this is going to be one of the most interesting developments over the next 20 years. Because one of the places where you now see, for example, a lot of liberal experimentation is state consumer protection law, state environmental laws and the like. And what business now does is comes in and

argues for preemption. And so that's an area where I think liberals have to come up with a theory of why it is that the National Government hasn't preempted these protections by states and, perhaps, even a theory at some point of why the National Government shouldn't be permitted to preempt, if in fact it does.

So I think it's not just about the First Amendment versus Lochner, but it's also about how we think about doctrines like federalism now, and how do we think about questions like the marriage question which is coming up; is that something to be resolved nationally or is it something to be resolved state-by-state?

It would be very interesting to see if the first of the marriage cases that gets to the Supreme Court is the DOMA case, how the court deals -- and especially how Justice Kennedy, who has cared so much about federalism throughout a large part of his career on the Supreme Court -- thinks about whether the Federal Government should be forced to recognize marriage as the state chooses to recognize or not. So I think those are going to be the big developments; the use of the First Amendment as a kind of modern day Lochner, and the question about the change in state's rights and federalism with respect, in large part, to preemption, but also some of the social issues.

SPEAKER: I was going to say one thing on this, which is, I think some of the imbalance on economic issues that Noah brought up earlier is rooted also in the same phenomenon that I think leads to the point that Pam mentioned about the fact that liberals have a hard time actually explaining their deeper foundations, which is that liberalism got the degree of success that I described earlier largely by assimilating itself into elite institutions, into law schools, universities, professions. And the way it did that was often to re-describe itself as pragmatism, as what works, as what's good legal practice. And that gave it enormous strength, the fact that it was able to do something that was effectively ideological while not speaking a language of ideology. But I think

only recently has it become so clear what a devil's choice that was on the degree to which --

You know, once you have committed to that way of speaking, it becomes very hard to actually turn around and speak at a much more forthrightly ideological way, and again, also, to speak in a much more clear way about issues like class and business power, that is the institutions that liberalism embedded itself into make it very hard or seemingly, in congress, to speak in that kind of language.

And I think, in some ways, the thing that liberals have been grappling for has been to find an organizational way to mobilize themselves that allows them to separate themselves simply from the organizational interest and constraints of the places they happen to be embedded. This is true of, you know, even of law professors feel this constraint that they are both -- you know, they have some general ideological predilections. But there are also law professors that are supposed to be teaching students and that puts limits on them, and I think one of the bigger questions for liberalism.

We all are interested in these doctrinal questions, but I think an equally important question is the organizational question: how do you actually create organizational structures that allow you to make the kind of arguments that you would need to make if somebody like Noah is right?

SPEAKER: I actually want to follow up on that with a question for Lee. And then we'll go to the audience, I think.

So when liberals talk about The Federalist Society, one of the asymmetries -- to go back to my original formulation of the issue of the day -- one of the asymmetries is the way the different movements think about the organization that you helped create. And, you know, when liberals talk about it, it is kind of a secret cabal of

people who got together in some dark and presumably smoke-filled room and plotted a revolution and executed with, you know, as both you and Steve have said, diabolical efficiency.

When conservatives talk about The Federalist Society, it's as an organization that does programming mostly on campuses. I speak regularly at Federalist Society events at law schools. I mean it happens -- I don't know, like a week and a half ago, for example. You know, I gave a Federalist Society talk up at Yale.

SPEAKER: That was after he emerged from the smoke filled room.

SPEAKER: Yeah, but I'm not in any sense part of the revolution. And so I --

SPEAKER: Right. It's so efficient that even the participants are ignoring. You know, one of the roles that the organization has certainly played is the one that Steve alluded to earlier, which is both a networking function and a function of being a place that allows and churns ideas in a way that causes effective propagation over time. And I'm interested in your sense of to what extent, early on, there was a broad objective, and to what extent it was simply just an effort to diversify programming on campuses and then in sort of non-campus settings.

When did it acquire and how did it acquire these sort of larger networking and institutional functions that it's really come to play?

MS. OTIS: So before I answer that question, I actually want to talk for a few seconds about this whole business capital thing.

I think it's a mistake to think that the problems that liberals are having on the business capital side of their arguments have much to do with the courts at all, honestly. I think they have to do with, you know, economics and with public choice. That is to say, I think that it does turn out, not terribly surprisingly, that if you come up with

governmental regulations that affect business, business is going to try to capture the regulatory agencies and use them for their purposes. That's the public choice out of the equation. And I think that's the nature of the beast and there is nothing you can do about that.

And therefore, the whole strategy of the Government can be stopped, you know, from being captured by these things and can stop from being used to pick winners and losers in the business world, you know, is a fools errand, and I don't think the courts are the cause of that at all.

And then, as an economic matter, I think the other reason that it encounters difficulty is that when you redistribute wealth, you affect people's incentives to create it, and therefore, it's not clear at all that it helps people whom you're trying to help. And that's the other problem I think the liberals are running into. So I think putting that on the courts for conservative jurisprudence, you know, is a little bit farfetched.

Now turning to the actual question I was asked; I think Steven actually, you know, does a very good job of explaining this in his chapter about The Federalist Society and I commend it to everybody. He does a better job of explaining it than I think we ever did, to tell you the truth, so we've now just adopted his explanation of it.

We did have as our objective to try to get discussed, at law schools and then in the broader legal community, ideas that weren't being discussed. We thought that, as a byproduct of that, people would get to know each other; they would come up with ideas of things that they wanted to do, you know, ways they wanted to affect the world, and that one thing we would be doing by creating this forum in which people would meet each other would be to facilitate that. But that was a byproduct. It wasn't the program, if you will.

And so what happens is, that a lot of the things that came out of the

byproduct get attributed to The Federalist Society. You know, people say The Federalist Society is doing, you know, things that various of our members are doing, but actually not all of our members would even agree about those things. And we deliberately decided we weren't going to get into the business of doing anything other than talking about ideas in terms of what we would be doing.

As Steve explains -- and this was my Misère Jurdan moment -- network providers shouldn't be content providers. And so we really don't say, you know, "This is The Federalist Society position on this, that or the other thing and we're going to go out and try to use this network to sort of bring about that, or we're going to argue for that particular thing." We couldn't do that and still do what we do, which is provide a forum for discussing those things and for essentially people trying to work out what they disagree about. So is that an answer?

SPEAKER: Very much so; thanks. Ben could we -- I'd just like Pam -- a quick chance to answer the business thing, because I do think that's going to be important all day long, what Lee said about business.

MS. KARLAN: I think there are a couple of points in what Lee said that I disagree with; one is the question of just what economics actually tells us about redistribution and the like. That is -- you know, I don't want to spend a lot of time up here discussing economics and I don't purpose to be a super expert in it, but there are arguments about, at some level, of course -- if you have a 98 percent marginal tax, changes are people are people are going to trade of leisure for work or the like. But the question whether if you have moderately progressive taxes, people will trade off as different; the question whether a rising tide makes it more possible for many people at the top also to have their boots rise; that is, a country in which you have a strong middle class is a country that's more likely to buy the products and services that rich people want

to sell them through their businesses and the like. And so, I think that economics is very complicated.

Lee is a hundred percent right that, of course, any regulated entity, whatever it is, would love to capture the regulator. And the only question is not whether they would love to capture them; of course they would. You know, people are not stupid.

The question is, what mechanisms do the other 99 percent or the other 51 percent or the 40 percent, or whatever number you want to put in there, have to combat that and to argue for regulation that's in their favor? And that's where I think some of the issues come to a head.

Now I think Lee is also right; this is not mostly about the courts in the first instance. And this is one of the things that I think has always been important for liberals to understand. And this goes back to Noah's point a little bit about self-restraints, judicial restraint and the like; which is, most of the major progress that's been made from a liberal perspective in the United States while it has been enabled in some ways by courts and the like has not been caused by courts.

So just to give my favorite statistic about this, under the special provisions of the Voting Rights Act that provided for Federal civil servants to go south and register black voters, more voters were registered in two years than were registered under litigation using the Fifteenth Amendment in the previous hundred years.

There was no prospect at any time, I think, in American history, you know, unless everybody was killed by a neutron bomb except for three or four left theorists that the United States Supreme Court was going to recognize a constitutional entitlement to healthcare, and yet we have a healthcare bill through the legislative process and the like.

So my claim is not that liberal jurisprudence should be focused on what

the Supreme Court does, but I do think -- and this goes back a little bit also to answer a point that comes out of Ben's question to Lee -- that most cases don't go to the Supreme Court.

Actually, if the Supreme Court enforced the statutes that were on the books right now the way I would like to see them enforced, we don't need a whole lot of new civil rights laws. We don't need a whole lot of new environmental laws.

But a lot of what goes on under the radar is district courts and circuit courts decide cases in very conservative ways, and that's because -- I don't think The Federalist Society met in a dark smoke-filled room -- they certainly wouldn't have invited me if that's what they had been about -- but I do think they are an amazingly effective pipeline in a way that liberals may almost be disabled from being, by liberals' belief that things should be A-political at a time when conservatives don't believe that.

So if you compare conservative nominees to courts to liberal nominees to court, the liberals nominate people either because of identity politics or because of moderation or because the person has a golden resume, or whatever, and the conservatives look for people who are utterly reliable. And the result of that is, you will have drift over time towards the right in the same way that I think with the current administration.

You have drift toward the right because if one side wants to compromise and says, "We'll me you have way," and the other side says, "We never move from our position," you can see where the compromises is going to occur. And so I think --

You know, I still remember that first meeting at Yale of the National Federalist Society, or whatever it was, like 1981, was it?

FESPEAKER: '82, yeah.

MS. KARLAN: In '82? Well here is just a really salient point about it.

Robert Bork was there, Ralph Winter was there, Dick Poser was there and they were all chatting up young law students.

If you talk to students at Stanford where I teach, who are in The Federalist Society, they say they get emails from judges saying, "I'm looking for somebody to be a law clerk. Help us out and figure out who that person would be." Liberal judges don't actually contact liberal organization about this. They might call some liberal law professor, but they are much less self-conscious about this.

And the last example I'll give, because it's not in the judiciary -- and I think Lee is right that we focus perhaps a little too much of judiciary -- is just read the Inspector General's report about hiring in the Justice Department's Civil Rights Division during the George Bush years, and you will see what it means to have a conservative legal movement.

That's not The Federalist Society but a conservative legal movement that is self-consciously trying to seed the bureaucracy with people who share an ideological predilection in a way that, now, the Justice Department honors hiring program has gone back to being something run by the career lawyers, right? It's not that the liberals do exactly the same thing. It's not a tit for tat strategy in that way.

MS. OTIS: One quick -- just what this looks like. You know, coming at it from a slightly different perspective, I think, first of all, the people whose votes are in doubt on the Supreme Court about this healthcare thing are not the four democratic appointees, right? So the notion --

SPEAKER: And at the lower courts.

MS. OTIS: Well the lower courts, you know, mostly it's been kind of, you know, a little bit both ways. So I'm not sure -- you know. And so the notion that the left has been less canny about these things is not as clear to me, perhaps, you know, if

canniest is seeking predictable results, at least.

I think the only person whose vote is pretty predictable on that is actually Thomas'. I think everybody else, we'll see, among the conservatives, you know, which is not to say, you know, it could be five/four but we'll see.

And I don't think you would find a lot of conservative clerks hired by the people who you think of as liberal justices. I think you will find the occasional, if not more than occasional liberal clerk hired by the conservative justices. So it may just be that if you pull a law student out of a hat from one of these tops schools, it will turn out that they're liberal, but I'm not so sure about that. And likewise, I think you'll find remarkably --

You know, I think somebody actually looked at this, and there don't seem to be any conservatives getting hired in the Civil Rights Division now. Again, maybe this is just completely, you know, the product of merit selection, but I think it might have something to do with what people are trying to do.

SPEAKER: Steve?

MR. TELES: Yeah, just briefly. And again, I want to go back to how different structurally these movements are. And when we compare them, I think, how easy it is to make a mistake -- and I think some of this has come out already.

I mean, one of the ways that they're different is that -- for the most part, conservatives, at least the ones that I know, get recruited into some version of conservatives and through some general idea, right? They think of themselves as libertarians or social conservatives or whatever it is, right? And then they find something to do with that later on, right? Whereas most of the liberals I know, people in colleges -- I have a student here who's in the back -- they get recruited through doing something specific, right? They think of themselves as an environmentalist or interested in gay rights or interested in racial equality, and they kind of develop whatever ideological

structure they need to do that.

And I think that also particularly explains why liberals are so bad at explaining themselves, right, is that -- the thing that conservatives cut their teeth on is usually arguing amongst themselves. And I think that, in some sense, I have any disagreement with all the prompts we were given here, it was all about how conservatives are this, you know, monolith who all agree with one another.

I mean, again, the foundational experience of most conservatives that I have talked to is internecine conflict over first principles. And then, often, there is agreement pragmatically about something in particular, right, whereas most of the liberals I know are often very hesitant to address those first principles, right? Because to some degree, modern liberalism -- and I don't say this; I say it as a liberal -- is a kind of logroll where you have environmentalists who have agreed to support with what the people who do civil rights do and they agree to support what the people who do economic regulation do.

And in some sense, addressing those first principle issues is dangerous because it threatens to upset that logroll in often uncertain and unpredictable kinds of ways. So in that sense, I do think there really is a basic structural obstacle to liberals being able to get good at having these larger debates and being able to address conservatives head-on.

MS. KARLAN: Can I just add one thing to that?

SPEAKER: Sure. I was actually going to add one thing to it, but please go ahead.

MS. KARLAN: The one thing I'm going to add is something about odd coalitions, and I think of them as like the biathlon, you know; you're supposed to shoot and then ski around in a circle for a while.

So the new deal coalition was an odd coalition of northern liberals and southern conservatives made possible in part by the disenfranchisement of black people. The modern conservatives movement is also, if you think about it, an extraordinarily odd collection of people because Steve says, "Well, you know, you have the libertarians and then you have the social conservatives."

The social conservatives want to be in people's bedrooms; the libertarians want to be out of people's bedrooms. And you end up with therefore a set of policies in which will keep people out of the board room -- keep Government out of the board room but put them in the bedroom versus, on the other side, keep Government out of the bedroom but put them in the board room.

And one of the questions is, that I don't have an answer to is, why the conservatives have been more successful at putting together a very unlikely coalition that enables them to govern than liberals have been at creating a new, somewhat odd coalition that will allow them to gain political power? Because, I think there is nothing consistent about having people who are libertarians and people who are marriage traditionalists and social conservatives uniting behind candidates for office. There's nothing inherently natural about that. Instead, it's a product of skill of various kinds, and perhaps a greater hunger for getting into power on one side than on the other. But given that, you know, we're in a somewhat odd world in which both sides are trying to cobble together coalitions. It may be one side starts with foundational ideas, but those foundational ideas seem to me to be, in some ways, deeply contradictory with one another.

SPEAKER: I just wanted to add to Steve's point. I mean, I think they may be contradictory, but I do share Steve's sense very deeply that there is a discontinuity between when you ask very committed liberals how did you come to believe

what you believe. The answer tends to be more involved with granular activity than when you ask a committed conservative, "How did you come to be a conservative," there does tend to be this sort of, "Well, you know, I read this book that really kind of moved me, you know."

And so I'd like to go to audience questions if people have some, as they clearly do. Please wait for the mic, which will come and find you. And this is directed to everybody: please start by saying who you are and what organization you're from, if any.

MR. PIERS: My name is Todd Piers. I'm here on military duty but from the State of Minnesota, I'm a State of Minnesota employee.

I will first admit that I was once a member of The Federalist Society. So, in part to an answer to what you just discussed, but also to get in my question, I'll say that I was under the delusion at that time that American conservative jurisprudence meant defending the Constitution, which incorporated the classical liberal principles that it did. And it seems to me that since 9/11, the mask has been ripped off that, you know, presentation.

Thankfully Adrian Vermeule and Eric Posner have really helped doing so in their talk about why we need to set aside the Constitution, in various ways they put it. And in fact, Mr. Wittes too has help show me the similarity of what, so-call the conservatives, are now working toward is going to really -- (inaudible) we have to go back to source; Carl Schmitt. And Carl Schmitt, as everybody here knows, I'm sure, was a Nazi legal theorist, but also the representative of the military class in Wiemar, Germany and was really trying to bring about a military dictatorship. The Nazi sort of intervened really.

SPEAKER: I'm going to ask you to get to a question please.

MR. PIERS: So my question is why haven't the liberals -- why haven't

liberals yet taken -- I mean, now that the mask has been ripped off, or pulled off by polls and the likes of them, to really point out the similarities to the jurisprudence that conservatives are working toward, and that is authoritarianism, not conservative. It's not representing American conservatism, but rather, say, (inaudible) conservatism.

And isn't it time -- when they're willing to admit now that, you know, Carl Schmitt is a source of their jurisprudence, it's time to start calling them what they are --

SPEAKER: Thank you.

MR. PIERS: -- American authoritarians. And we've now got the situation where we, in the Senate, have declared the United States itself a battlefield.

SPEAKER: Okay. Let's --

MR. PIERS: But anybody knows -- a battlefield does not have room for civil liberties.

SPEAKER: I mean, I'll leave this open to any member of the panel who wants to address it. I think neither Adrian Vermeule nor Eric Posner would represent themselves in any sense as representative of modern conservatism. But, you know, if any member of the panel wants to address the question, have at it.

SPEAKER: Thank you. May I suggest we collect several questions? I would love somebody to talk about Carl Schmitt at some point, but could we collect several questions just to get more of the audience in --

SPEAKER: Sure, sure.

SPEAKER: -- and then the panel could respond? Let's go to that gentleman right in front of you, Victoria.

MR. ALTMAN: I'm Fred Altman. I'm retired. The question I have is with the accumulation of wealth. If you already have wealth, it makes it easier to accumulate more wealth. In other words, you have positive feedback loot, and eventually it's bring

down the whole economy because of the concentration in wealth. Obviously, they'll be some intervention before it gets there. At what point do we get a reversal to get an intervention for that?

SPEAKER: Thank you. There are some hands over there, please.

MS. FREEMAN: My name is Jill Freeman. I'm a senior scholar with the Woodrow Wilson Center.

Now I'm a political scientist with a law degree and my reading of Supreme Court history is that they are remarkably responsive to public opinion when it's expressed in a rather overwhelming sense.

And given the rise of public opinion we are having currently against the unequal distribution of income, do you think this Supreme Court is likely to listen to that or do you think they are so embedded in their own conservative views that they will be impervious to it, even those past supreme courts have listened to public opinion?

SPEAKER: Sure. Why don't we just go down from Steve to Pam and address any aspect of any question that engages you.

MR. TELES: Yeah. And I guess I fundamentally disagree with that, although you've got one degree on me, so I shouldn't -- you know. I'm just a mere political scientist.

I mean, I don't see any evidence. I mean, I think, in some ways, if the court was to look out at the pattern of mobilization, it would simply say that that pattern of mobilization was replicating what it would see through elections and everything else; not that there was some up-swelling of social movements or mobilization on one side that was clearly against something the court was doing, but that that pattern of mobilization was simply replicating everything else about American society, right, which is that we've got two very deeply organized camps on either side of the political spectrum.

And, so I think if they were looking at that, they would say, you know, "That's business as usual," right? What we see in the streets is the same thing we see in the Senate, the same thing we see in the House, the same thing we see all through the rest of American society.

And so I think the idea that somehow that pattern of mobilization of Occupy Wall Street, and that which, again, is still a microscopic number of people out in the street when you compared it to other kind of movements in American history. This isn't the kind of thing where the court might think the very foundations of the stability of the state are threatened and we have to respond in that way.

So I guess I think that the assumption that, somehow, if the court didn't, you know, didn't respond to that, it would be ignoring public opinion doesn't sound right to me.

MS. OTIS: Right; and let me add; does that mean that the court would be ignoring public opinion if it upholds the healthcare bill, which was sort of the genesis, at least in significant measure of the Tea Party Movement? I don't think so.

I think one point -- I mean, this is something I think the political scientists talk about and I'm not a political scientist. But I think there's a real question whether the court responds to public opinion or to elite opinion also. I mean, I think that there is probably a fair bit of evidence that it is more responsive to elite opinion than to public opinion; so that's just one reaction on that.

MS. KARLAN: I agree with Lee that the court responds more to elite opinion, by which, I mean that justices are products of their times and their products of their class and their products of their education and the like. And so the Supreme Court in essence is a little bit like a rubber band.

Over time, the Supreme Court is quite responsive to public opinion but

it's not mostly that individual justices change their views in response to public opinion; it's who the justices are, changes in respond to public opinion, because winning elections has consequences, and one of those consequences is you get to nominate and confirm members of the judiciary. And so, in that sense, the Supreme Court is never all that far behind or, perhaps, all that far in front of where public opinion is going.

I will say, the younger the justice and the longer the justice stays on the Supreme Court -- in the old days, the harder it was to predict where they would be on the salient issues of a later date. And the example I always love to give about this is, Franklin Roosevelt, great man in many ways, his Supreme Court would not have decided *Brown v. Board of Education* in favor of the Plaintiffs, most likely. Why? Because he nominated people for the Supreme Court on the basis of what they would do about the constitutionality of the new deal and he was sort of indifferent to what they would do about race. That's how we got Jimmy Byrnes who, by the 1950s, was the governor of South Carolina defending racial segregation in the Carolina schools. We're just lucky he found being a governor better than being a justice on the Supreme Court.

The other point I want to make, which is just a very brief point about Adrian Vermeule and Eric Poser's work is, I think this is a sign of some change in the tide; that is, the conservative legal scholars who were the progenitors of the modern conservative movement had relatively simple -- by which I don't mean simplistic -- but relatively simple straight-forward ideas that it was easy to instantiate once they got into power; textualism or originalism or markets or traditional values.

What you're now seeing on the right, perhaps -- because I do think of Adrian and Eric as conservative legal scholars rather than liberal. They're certainly not liberals, so whatever else they are.

SPEAKER: Although, Adrian specifically disclaims being a conservative

and calls himself an authoritarian.

MS. KARLAN: Yeah. But that's my point, is; what you're now seeing on the right hand side is something that you started seeing on the left hand side during the '70s -- and maybe Steve will have a response to this -- which is what I think of scholarship that is cleverer than it is wise, and that we are novelty and innovation and looking outside of the American experience in various ways plays a huge role, and that scholarship does not generate a political movement 20 years down the road. And that was part of the problem, I think, for liberals at current times, and it will be part of the problem for conservatives in the next generation.

SPEAKER: Could I just make one quick observation? Lochner happened in 1905 as the progressive era was hitting its stride. And it really wasn't until 1937 that the court shifted in a conservative direction, which means to the gentleman's question about how concentrated we have to get before there's a reaction. You could see a shift toward egalitarianism in the political sphere economic egalitarianism and have the court lag way behind, because I think that is -- the legal scholars can correct me, but I think, to a significant degree, that's what happened the last time around, or one of the last times.

SPEAKER: More questions? In the back?

MR. LAZARUS: I'm Simon Lazarus. I'm with a liberal public interest law firm, the National Senior Citizens' Law Center, and I have an actual question for Lee.

SPEAKER: Amen.

MR. LAZARUS: -- for Lee. And it's about one of the most prominent divisions within the conservative legal movement between libertarian views and what I guess we could call mainstream conservative views about judicial restraint, and so forth, and about Lochner, really.

Up until the Affordable Care Act was passed and challenged in court, libertarian views, as far as I could tell -- though they were expressed by some very distinguished and prominent and vigorous individual academics, for the most part, and some (inaudible) here in Washington -- were very marginalized. And the view expressed by Robert Bork and others that Lochner, no less than *Roe v. Wade* or Dred Scott, were illegitimate examples of judicial activism, that seemed to be the, overwhelmingly, the mainstream view.

A lot of people seem to think that the libertarians had captured the playing field the way the Tea Party seem to be capturing the political playing field.

Up until the appellate courts started dealing with the Affordable Care Act litigation, it seemed very prominent conservatives were reasserting the traditional mainstream fondness for judicial restraint on the right. And I'd just like to ask Lee, who would be in a position to know about these currents, what is really going on. Is the libertarianism of Saint Randy Barnett or Richard Epstein enjoying some enormous upsurge in conservative legal circles, or is it just a boomlet? And I don't ask you to predict what's going to happen on the Supreme Court, although I agree with you when you say that the people who are in doubt are on the right of the court for that reason.

SPEAKER: That's a great question. Should we have a couple others before we have to close?

MR. GLUCK: Thank you. My name is Peter Gluck and I'm retired from the academy.

I think it was LeeLee Reminotus who characterized Justice Marshall as an originalist. And my question is, in Marbury v. Madison, by invoking the supremacy clause to strike down the Judiciary Act -- but the constitution doesn't give that power of judicial review to the Supreme Court. It was enunciated by Justice Marshall in his

opinion, and in that sense, he's not an originalist. Do you see a contradiction there? Or maybe my reading of it isn't correct.

SPEAKER: Do you want to pass it down to Stewart?

SPEAKER: Yeah. And let's make this the last question, and then we can rap up.

MR. TAYLOR: Stewart Taylor again. A question for Pam Karlan, mainly. I think you've talked about how the liberal judicial movement hasn't articulated itself as well as it could have. As far as I can tell, the conservatives have not yet taken over the law schools. And so the question would be, if the liberal movement hasn't done as well as it could in making its case, where are they all?

SPEAKER: So let's actually take those questions in reverse order. Pam, if you could address Stewart's question? And then, Lee, any thoughts you have in response to the other two will rap us up, okay?

MS. KARLAN: I think the incentives in the academy are such that, although the overwhelming majority of law professors are democrats in the studies that show where do they give money, show that they give money to the democratic party.

The incentives in the legal academy are not, right now, incentives on the left to be engaged in public discussion or to make your ideas accessible to the public. I mean, this is part of the reason why Goodwin and Chris Schroeder and I wrote the book the way we did was so that average people could read the book which, by the way, is free if you want it. It's free download of our book, Keeping Faith with the Constitution. And you just go to the ACS website, which is acslaw.org, and you can download it for free.

But I think a lot of it is that a huge incentive in the academy in recent years has been to write esoteric scholarship that isn't engaged with the problems of

everyday Americans. I keep thinking I want to teach at some point a course called the law of working people. I mean, I've done all this law of democracy, I mean, just the law of working people, you know, because we don't teach things about the Fair Credit Reporting Act or about consumer bankruptcy or the like in law schools in the way that we teach -- or at least some of my colleagues teach -- you know, theories of medieval price restraint and the like.

And so, some of it is that there isn't that kind of public engagement of the kind there used to be, and that's why -- although the faculties are liberal in their own personal politics, a lot of them seem very disengaged from public policy and the like.

MS. OTIS: I very much agree with Pam. I also agree about the risk of scholarship being more clever than wise.

There's a very good Law Review article. I'm not remembering who wrote it from maybe 10 years ago -- although these things are always longer ago than one remember these days -- against brilliance. Do you know who that is?

MS. KARLAN: Many people could've demonstrated it.

MS. OTIS: Yeah. That's exactly right -- that's exactly right. And I do think there's certainly a danger for conservatives in academia about that too; I mean, no doubt about it.

On Marshall first, I guess, Phil Hamburger has a book called Law and Judicial Duty that I think, pretty persuasively, explains first of all why judicial review is probably the wrong term; but second, how the invalidation of law is unconstitutional is just part of what people understood the judicial duty to be, which was to apply the higher law as against the lower law and a hierarchy of laws. And they did this with the charters, for example.

And I think, when you think about the grant of the judicial power to

decide cases in controversies, I think Marshall's argument holds very nicely as an original proposition.

The judicial restraint libertarian, et cetera -- relatedly -- judicial restraint does not mean that there are no unconstitutional laws, you know, if you buy the Marshall argument as an original proposition. So the question is which ones are they and which ones aren't they.

And I don't think that that's -- I don't think -- this is where I think it's easily actually for libertarians and conservatives to coalesce around something, which is what the actual answer to that question is as opposed to what you'd like it to be.

And I think the Affordable Healthcare Act will either, you know, be decided as a doctrinal development along the lines of the Lopez case where the court said, you know, "We're not going to overturn all of these past precedents, but we don't have a precedent that takes the doctrine this far and we know that the constitution contemplated limited powers and that's it," or it's going to go the Silverman direction of, "The doctrine is developed this way; it's gone this far and we can't see a good limiting principle, you know, it's stopping here." But I don't think it's going to be based on libertarianism, whatever it's going to be based on.

MR. DIONNE: On that note, we are going to break.

SPEAKER: Can I just say one thing before you announce the break?

MR. DIONNE: Yes, please.

SPEAKER: I just want to thank all these panelists for not paying any attention to that article against brilliance. Thank you so much.

MR. DIONNE: We're going to break. We're going to reconvene in an effort to make up a little time in about five minutes and with our second panel. So if our second panelists could make their way up here over the next five minutes, that would be

great.

MR. DIONNE: Thank you very much. That was a great first panel, and we're going to have a great second panel. I'm introducing in the order that the speakers agreed, I think if I get this right — I think I have this right. I'm introducing in the order the speakers have agreed to speak.

William E. Forbath, Willie Forbath, began teaching at the University of Texas in 1997. He is the Lloyd M. Bentsen Chair in Law, the Associate Dean for Research, and a Professor of History at the University. . He is the author of *Law and the Shaping of the American Labor Movement*, and the forthcoming *Social and Economic Rights in the American Grain.*

Jeff Rosen is a Professor of Law at the George Washington University, Legal Affairs Editor at the *New Republic*, and the Nonresident Senior Fellow here at Brookings, where he heads the Brookings project on technology and the Constitution. He is an editor of the recently published *Constitution 3.0: Freedom and Technological Change*. He has a whole lot of other excellent books. He's the author of some of my favorite legal one-liners, but I'll leave those to him.

James E. Ryan joined the faculty at the University of Virginia Law School in 1998 after a two-year public interest fellowship in Newark, New Jersey. He's author of a forthcoming textbook on education, law, and policy, and the author of *Five Miles Away: A World Apart*, which was published in 2010 by Oxford University. He clerked for J. Clifford Wallace, then the Chief Judge on the 9th Circuit, and for William Rehnquist, the late Supreme Court Justice.

And David Strauss is the Gerald Ratner Distinguished Service Professor of Law at the University of Chicago. This fall, he is the Felix Frankfurter Visiting Professor of Law at Harvard Law School. He has published many scholarly articles. He

is the author most recently of, appropriate for our day, *The Living Constitution*, published by Oxford University Press in 2010, and is at work on a book on constitutional interpretation. He's argued 18 cases before the U.S. Supreme Court. In deference to Pam Karlan, I will ask him what his batting average was.

And we are just so grateful to have you all with us today. And I think, Willie, the agreement is you will begin. And stay a little closer to the mic.

MR. FORBATH: All right. My thesis -- well, first, no, my thanks. My thanks to E.J. and to Ben, and to all of you at Brookings.

My thesis now, it's a simple one, and it echoes much that both Pam and Noah have had to say. And it's that progressives have forgotten how to think about the constitutional dimensions of economic life -- work, livelihoods, opportunity, material security and insecurity, poverty and dependency, collective bargaining, workplace democracy. For generations of American reformers, the constitutional importance of all those subjects was self-evident, laissez-faire, unchecked corporate power. The depravations and inequalities that they bred weren't just bad public policy. For much of the late 19th and almost all of the first half of the 20th century, they were all constitutional infirmities. And yet today, with the important exception of employment discrimination, these concerns have vanished from progressives' or, let me say, liberals', constitutional landscape.

So, you will see immediately that I am at once agreeing with the Noah about what the important issues are, but disagreeing with him about how one ought to understand and characterize the liberal or progressive tradition in American constitutional politics. And in the grip of a great economic crisis like this one, I think this forgetfulness has to change.

Constitutionalism is the language Americans outside the courts in the

first instance have used to talk about the basic rights of citizens, the basic duties and purposes of government. And the constitutionalism of social movements has been the seabed of the constitutionalism of Congress and the courts. And, by the same token, the highbrow oppositional constitutionalism of the Academy and think tanks like this one have been dress rehearsals for the arguments and policies of lawmakers and courts when the political tides turn in the right direction.

That's how, for example, the right to join a union started out, as a constitutional right that workers claimed in streets and union halls, and academics and policy mavens on blocks like this one defend it in those terms, and courts and employee scorned and suppressed. And then, it became a right that Congress and state legislators embraced in validly constitutional terms, and one that the courts finally treated as fundamental for a season, and somewhat against the grain of what Noah was suggesting about the New Dealers and their Constitution.

That was so in respect of all the important New Deal legislation. So in the constitutional spheres outside the courts, and FDR and the New Dealers, including Senator Black, didn't only say the courts must stop and get out of the way. The Constitution rightly understood, doesn't authorize their impediments to the laws we must enact.

They also said the Constitution obliges us to interact these laws. So, Roosevelt set himself a task. He not only said the Constitution is a layman's document, as E.J. said earlier today, but he then expounded it and a story about it in his radio fireside chats on the radio and elsewhere. And there, too, he said the old precepts, the idea that equal common law rights guarantee equal opportunity and the opportunity to earn a decent livelihood, those precepts demand new readings today, said he, and that was the narrative underpinning, if you want, of the Second Bill of Rights.

And the Second Bill of Rights was a host of affirmative right to a decent livelihood, the opportunity to earn such a livelihood, various forms of social provision and the like, which Roosevelt and Hugo Black in the Senate, for his part, said the Constitution didn't merely allow, but obligated lawmakers, not the courts to sort of embroider out of whole cloth, but lawmakers to enact.

So today, as with every one of our past economic crises, the air is thick with the Constitution talk again. But unlike the past crises from the Panic of 1837 to the Great Depression and the New deal, all the Constitution talk is on the right.

Cy was asking this morning about the sort of burgeoning libertarian constitutionalism that's made its way in a remarkably short time because of the winds of change. A remarkably short time from the right wing libertarian intelligentsia into lower court opinions into legislative debates. Many of these, let's say fair revivalists are also originalists. For them, history obliges us to return to Lochner.

In my opinion, that the originalist theory of constitutional interpretation is bunk, but I think the originalists are correct in their practical understanding of constitutional politics, question. Movements for basic change need an account of constitutional contests and commitments that add up to a vision of the kind of nation the Constitution promises to promote and redeem. And their Constitution promises to restore and America fundamentally committed to rugged individualism, godliness, personal responsibility, and private property. And this story has aroused citizens, judges, and lawmakers to act boldly. This is Pam's you got to believe point.

The most important progressive responses to all this have been defensive ones. First, progressives have focused much of our fire on originalism as a method of interpretation, and they've made trenchant criticisms of it. And they've made good arguments for rival theories of interpretation. Some, like Jim Ryan, have also

offered superb examples of how texts in history, the originalist stock and trade, often may support liberal constitutional views.

But too often, all these arguments over method are isolated from substance. The main reason conservatives dominate the national public constitutional conversation, in my view, is not so much they have a killer theory of interpretation as they have a clear and bold narrative about the kind of America the Constitution promises to restore. And progressives lately haven't had a very good or cogent counter narrative.

They declare that the Constitution just doesn't speak, except in a discredited reactionary, let's say fair way, to the shape of our political economy, or the rights and wrongs of economic life. All of that, the standard liberal line, has been, all of that the Constitution leaves to the give and take of ordinary politics. This is all understandable. As Noah says, this is one way to read the New Deal, although I think it's a reading of only a portion of what the New Deal was about, as I've said, because I think the New Deal arguments for restraint were enveloped in an account of what the Constitution obliges government to do as well as an account of what it allows.

But in any case, what's left is what Noah offered you -- economic life, regulation, redistribution. Take it or leave it. It's a matter for the give and take of ordinary politics, rather than it's something the Constitution compels political actors in the democratic process to sustain over time.

So, I think as a matter of fact, Americans don't believe the Constitution is silent about economic power. I think they expect their Constitution and lawmaking under it to shape the play of economic power in our society. Whatever their politics, they expect lawmakers and judges to attend to the Constitution's promises of equality and liberty in the way that they make, say, competition policy, education policy, jobs creation policy.

And had we time, I could describe for you in needlepoint detail, historical

detail, just what is distributive tradition of constitutional thought and practice has had to say about all those spheres -- work, education, competition. How when the Sherman Act, the Antitrust Act, is passed in Congress in the 1890s, the Senators are not simply saying under the sort of inherited division between federal and state power, we have the authority to pass the Antitrust Act. They say the Constitution's promise of equal rights compels this measure as a statutory enactment of that promise.

So, I could go into historical detail. I could go into philosophical detail. But I'll spare you. I'll spare you. My point is simply that progressives long did possess a constitutional vision that speaks to economic life, and it's just as simple. It says roughly this: the Constitution promises real equality of opportunity. It calls on all three branches of the national government to ensure that all Americans enjoy decent education, a real chance to earn a decent livelihood, a measure of freedom and dignity at work, insurance when they can't work, a real chance to engage in the affairs of their community and the society at large. These are key parts of the liberty and equality America promises everyone.

Congress hasn't only the authority, but the duty, to govern social and economic life to undermine these promises, and the judiciary has the duty to ensure that the vulnerable aren't callously excluded. This broad, simple narrative is no less venerable and resonant then the Republican story of rugged individualism, free enterprise, and the rights of property. And like that conservative vision, in the hands this progressive narrative can flow and, in the past, has flowed from the broader realm of constitutional politics and culture into the interpretive judgments a liberal makes as she decides not only headline grabbing constitutional issues, but, equally, or more important, questions of statutory construction, federal preemption, as Pam suggested a moment ago, and the like.

In other words, the federal preemption issues that Pam flagged for us, whether the efforts of state legislators to work through various kinds of not only environmental protections, but workplace protections, will stand or fall, will depend on whether Lochnerism imbues the statutory constructions in the federal preemption issues, or whether the kind of narrative I've suggested instead is brought to the fore. Whether that happens, in turn, will be played out in the political sphere in the first instance, but there is plenty of work that the kind of broad and seemingly non-doctrinal, non-judicial narrative I've laid out is in play in the courts or not.

So, constitutionalism isn't a toolkit of economic policy proposal, but all the plausible progressive ideas to solve our current impasse face severe political headwinds. Progressives need to be arguing their constitutional stakes in overcoming our economic problems. They need to demand that we address our unequal and unfair society as felt our constitutional democracy depends on it, because, after all, it does.

Thank you.

MR. DIONNE: Turn on your mic.

MR. ROSEN: Thank you so much. Ben and E.J., thank you for including me.

So, I agree with Willie that conservatives have understood ever since the 1980s that when it comes to forging a successful legal movement, substance is much more important than methodology. It's more important to figure out what you want the courts to achieve than which and particular interpretive method should be used to achieve it. And liberals have not yet learned that lesson.

What I want to do is identify the three or four substantive strands of legal conservativism and liberalism over the past 30 years, and ask with you why it is that the conservative strands have all converged under a single interpretive banner, namely

textualism and the originalism, and why liberals have been more reluctant to do that. And then, I want to suggest that there's a way that liberals can learn the conservative lessons.

So, when it comes to conservatives, as we saw on the last panel, there are at least three substantive political movements over the past 30 years or so: first, social and economic libertarians, second, Tea Party conservatives who unite social conservativism with economic libertarianism, and third, and most importantly, pro-executive power, pro-business conservatives.

And when it comes to judicial appointments, the last category, the pro-business, pro-executive power conservatives, outnumber the other two categories at least three to two. We have three pro-executive conservatives and On the Court, Chief Justice Roberts and Justices Alito and Scalia, while the Libertarians have only one Justice, Kennedy, and the Tea Party conservatives, one, Thomas.

Nevertheless, despite their profound substantive differences, all five of these justices loosely unite under the banner of textualism and originalism. They differ in some degrees, but they're happy to use this broad methodology to pursue their very different ideological goals. All were appointed because of their ideological goals, not because of their methodologies. And they've been quite true to their ideological commitments over the course of their tenure, and that's why, if these groups remain true to their ideological commitments, then the health care bill will be comfortably upheld, because the pro-executive power conservatives have committed themselves to a broad vision of commerce that will encompass it, as Judge Silberman and Judge Sutton showed in their very principled and consistent opinions.

But what about liberalism? Why is it that we can identify different strands of legal liberalism over the past 30 years, but none of them map up nicely with the methodological debate?

So, you might slice the pie in different ways, but I'd identify four broad substantive groups of legal liberalism over the past 30 or 40 years or so. First, traditional Great Society liberals, who think the most important thing is to protect basic civil rights and to work out the features of the social safety net. These are Hubert Humphrey Democrats in 1968 and health care reform liberals today. Second, we have neo-progressives. This is the Obama, Cass Sunstein wing of the Democratic Party. They want to promote a rational view of government through the rule of experts. They're not especially civil libertarian. They're not redistributive welfare statetists. They're nudge style egalitarians. Third, there are civil liberties liberals, the ACLU wing. They're in favor of the First Amendment, campaign finance. They want to protect the right to burn the flag and to make animal crush videos. They're my crowd, but they don't have a very broad national constituency.

By contrast, the only one of these four groups that now does have a mobilized national constituency is the fourth category, economic populists, represented recently by the Occupy Wall Street movement. They are strongly egalitarian like the progressives, but they also have a lot in common with the Republican populists. They're not enamored of arguments for the rule of experts. Their political representative is Elizabeth Warren.

During the Warren era when these different wings were ascendant on the Supreme Court, they were eclectic in their constitutional methodologies. So, both William Douglas and Hugo Black were economic populists and libertarians, but Douglas was a romantic living constitutionalist; Black was a liberal textualists. Both got to the same place. Once President Reagan came in, as the previous panel discussed, and originalism was on the ascendance, liberals got thrown into a defensive crouch. They started focusing on the rule of law and precedent, and became lost and methodological

debates, forgetting the importance of having an ideological vision to begin with. And that's why, when we think about the methodologies that are ascendant in the Academy today, it's remarkable that not a single one can clearly map on to the views of the current liberal justices on the Supreme Court. So, again, you may come out with different categories, but I'd identify four methodologies. First, Warren Court liberalism, and I think I heard some of that in what Willie was endorsing, the idea that judges should expand and protect human dignity. The representatives in the academy are distinguished. It frequently doesn't forswear the compliment; I would say people like him, like Larry Tribe, like Erwin Chemerinsky, like Ronald Dorkin. On the Court, their avatar used to be William Brennan; today, they have no one. There's not a single justice empathetic to this vision.

Second, there are, there are common law constitutionalists, of whom David is the most distinguished exponent, and you will hear in a moment his persuasive and principled vision of constitutional incrementalism, and the importance of reasoning from existing precedents. On the Court, the only Straussian constitutionalist maybe was David Souter, although he wasn't wise enough to pick up the banner.

MR. DIONNE: That's the light Straussian. We should just --

SPEAKER: The left side, yeah.

MR. ROSEN: Very, very much so. You know, a hint of doctrinal or some in Elena Kagan or Sonia Sotomayer, but I don't think that they, for better or for worse, would carry the banner either.

Third, we have the popular constitutionalists, who think that courts should be broadly responsive to the currents of public opinion -- Larry Kramer, Barry Friedman. In the hands of people like Robert holds there's a wrinkle; it's called democratic constitutionalism. The courts should be partners rather than simply reflective

of the political branches and can nudge or pull back a little bit, but ultimately should be responsive to the broader political scene. On the Court, popular constitutionalists, no one at all.

And then finally, and I think most significantly, there are the new textualists. They recognize that it's strategically useful to beat the conservatives at their own game by making arguments about the importance of text and history. They argue the text and history honestly interpreted can lead to liberal as well as conservative results. In the academy, their most distinguished exponents include Jim, who'll you'll hear from in a moment, as well as a Akil Mahr [inaudible - 23:28], Jack Balkan. Doug Kendall at the Center for Constitutional accountability is doing very important work, bringing their work to the attention of the courts in a series of briefs.

My strategic sense is that regardless of your own methodological commitments, liberals have to realize that new textualism is strategically the way to go. They have to learn the conservative lesson, put aside the small differences. In the end popular constitutionalists, even common law constitutionalists, can recognize the importance of reasoning from text and history. Like the conservatives, some can be a little more scrupulous about their textualism than others, but united under a single banner, I think, in terms of galvanizing the public, who are willing to march on the wall. As both the Tea Party and Occupy Wall Street shows, carrying copies of the Constitution, is the most effective strategic choice to make.

But why is it, I want to ask, that when we think about the current justices, not a single one either maps up neatly with the methodological categories in the Academy, nor do they map up neatly with the broad substantive categories of liberalism that have defined the Democratic Party over the past 30 years.

I think for the reason that Pam astutely identified in the last panel, that

liberal Justices are chosen because of their resumes, or because of identity politics, or because of their moderation, their pragmatism, not because they mirror the ideological commitments of the president who appointed them. So, of the past four liberal justices who have been appointed, only one, Ruth Bader Ginsburg, clearly could be identified with the substantive ideological commitments of the Democratic Party, pioneering ACLU liberal, as well as the Thurgood Marshall of the woman's movement. The other three justices -- Stephen Breyer, Sonia Sotomayer, and Elena Kagan -- are brilliant technocrats, perhaps. There are differences among their visions, but they were not appointed because they mirrored the substantive commitments of the president who appointed them.

What I want to argue is that when you look at history from the Warren through the Roberts Court, you see so powerfully reinforced -- Willie Forbath's point -- that methodology is less important than substance. Hugo Black was great not because he was an originalist, the first originalist who invented the idea of liberal textualism, but he had a clear view of what he wanted the Constitution to be when it came to free expression and economic liberty. Brennan was great, too, not because he was a living constitutionalist, but because he was an expansive Great Society liberal.

In the end, we think of justices as great not because they're good at following precedent or they have a particular clever methodology, but because they had a substantive vision of the country that future generations would come to embrace.

So, the lesson for Democratic presidents as they think about whom to appoint in the future is they need justices who believe something, who share their substantive commitments, and are willing to argue for them. For methodology, I've said, the most promising, I think, is new textualism, but that's far less important for a president than figuring out what he wants the courts to achieve. And in that sense, President

Obama, if he is reelected and if he has another appointment, has to decide what kind of Democrat he actually is. Is he, as his heart seems to be, a Cass Sunstein progressive technocrat, or is he willing to embrace the one movement in the Democratic Party that is currently commanding a national constituency and inspiring people to take to the streets, and that is the economic populist wing of the Democratic Party.

And in this sense, I want to close by commending to you and plugging my hero, who combines a methodological integrity with a substantive vision of economic populism, and that, of course, is who? Which justice in the 20th century was the greatest economic populist?

SPEAKER: Brandeis.

MR. ROSEN: Brandeis, of course. There should be pictures of Brandeis in the Occupy Wall Street tents. It was Brandeis who coined the phrase, "the curse of bigness." He understood the risks that bankers can take with other people's money. He was pioneering in defending the antitrust laws and demanding economic justice, but he pursued this vision, not in the old-style, Great Society way that I heard Willie Forbath endorsing, but instead by combining scrupulous judicial deference and restraint when it came to economic affairs with a path breaking civil libertarianism and commitment to constitutional translation when it came to issues like free expression and privacy.

He was a living originalist, and today he'd consider himself a new textualist. His economic vision resonated, and I can't think of a better model for a Democratic president in choosing a new nominee. And that's why Obama should recognize, as Brandeis did, he unites the strands of liberalism and a single vision. And as Brandeis said, "If we would guide by the light of reason, we must let our minds be bold."

Thank you so much.

MR. RYAN: Well that was great, as was Willie's.

My name is Jim Ryan. I want to start by thanking Ben and EJ for inviting me to this event, and inviting me to join this really impressive panel. In fact, it's so impressive that the nursery school jingle, "One of these things is not like the other," keeps running through my head.

The truth is, I'm mostly an outsider to these debates, and only an occasional participant. My scholarship is mostly focused on law and education, which only sometimes intersects with the Supreme Court and these issues.

I'm here because I've done some work with Doug Kendall, who started the Constitutional Accountability Center, and because I recently wrote a paper about new textualism that was published in the *Virginia Law Review.* Like Pam's book, it's free and downloadable. And in that article, describe what I see as a convergence towards some basic ideas regarding constitutional interpretation, which I'll talk about in a moment. But for better or for worse, I have a somewhat unsophisticated, or relatively unsophisticated, view of this topic.

Given the limited amount of time, I'm just going to make three points, not defend them very much. And then in the question and answer session, I'll refuse to answer questions about them.

The first is, and at the risk of seeming like an ungrateful guest, I want to push back a little bit with respect to the way this conversation has been framed. I think it buys too much into the conventional view that conservatives are largely on the same page when it comes to constitutional interpretation, and liberals are all over the map. They might all reside in the squirreling world of living constitutionalism, but they're in different locales. I think that conventional view is wrong for a number of reasons, and I fear here this has been discussed, but I came a little late and I apologize for that.

The first is, I don't think conservatives are that united. If you just look at the Court, Justices Scalia and Thomas are quite different from Justices Alito and Chief Justice Roberts. And conservatives disagree on what form of originalism they believe is best.

I also think it's wrong, because there isn't an increasing convergence, I think, among liberals and conservatives, at least in the academy, around the simple idea that the place to begin in constitutional interpretation is with the meaning of the text itself; that is, the first step is to try to figure out what the text actually means by looking to the language, to the looking to the structure, by looking to history, to try to get a sense of what do these words mean. It doesn't mean that that's always going to answer every single question or answer every single case, but that's where you start. And that might not sound like an important idea, but I think it is an important moment in the legal academy.

What it means is that you don't start by asking, for example, how would the Framers have decided this particular issue, and you don't start by asking what would be the best answer morally or philosophically, regardless of whether you can connect it back to a plausible interpretation of the text.

The framing is also wrong, I think, for the related reason that more and more liberal academics are not only accepting this view, including prominent constitutional law scholars, like Akila Mahr [inaudible - 32:06] and Jack Balkin, but I think they're also reconsidering the conventional liberal view that the text is hopelessly vague, up for grabs, and ever-changing. I think that a more extreme version of living constitutionalism has largely been rejected in favor of an increasing recognition that the Constitution often talks in terms of general principles -- equal protection, due process, cruel and unusual punishment. Those principles themselves don't change, but because

they are general principles, their application might change over time. And, again, I think that's an important shift.

The second point, and this picks up on both Willy's comments and Jeff's comments, and, again, I don't mean to sound like a whiner, but I want to push back a little about the title of this conference, about liberal jurisprudence, which draws attention to issues of methodology and theories about how to decide cases, adjudicative theories. I think these are important. I think they're important to help courts figure out what to do when the text runs out or is ambiguous. Do you defer to legislative process? Do you look for defects in the legislative process and take a closer look if you think there has been a defect? Do you consult your inner philosopher?

But the antecedent question, I think, is also important; that is, what does the Constitution mean? And it's important, in part because, as Willie explained, there's a robust public debate right now about what the Constitution means, spurred most recently by claims of Tea Party activists about what kind of country the Constitution establishes. And this debate is not directly connected to cases or methodology, although sometimes they intersect, as with the health care case. And it's fundamentally a debate about what does the Constitution mean.

And I completely agree with Willie that what the liberals have been missing is a vision of what the Constitution means, an articulation of whether the Constitution at a fundamental level is a conservative document requiring a remarkably weak federal government, protecting the private market, and reserving its individual rights protections, mostly for gun owners, or is it a progressive document that not only protects liberty, but also promotes equality, and provides ample tools to both the federal government and the states to pursue progressive policies.

The third point, and it's related, is that I think that this is a debate that

liberals ought to engage in, and I think it's a debate that they can win. And here I think that liberal academics ought to be more engaged in this public debate. I agree with Pam's observation about the incentives and the world of the legal academy. But I think more legal academics ought to join this public debate.

And in order to succeed, I think that liberals need to embrace the Constitution, not downplay it. And I think that they need to be willing to argue about what it means. They need to argue about what it means in whole and in part, because if they don't, you're effectively giving in. If your response is, well, you know, it's all just hopelessly vague, you can't tell anything about what the Constitution means, you're effectively saying in response to claims by, say, a Tea Party activist, that, well, I suppose you might be right, because no one can tell what it means, so your answer is as good as any.

One thing I'm pretty sure about is that's not a winning answer. Thanks.

MR. STRAUSS: My thanks also to E.J. and to Ben for the invitation, and to all of you, and especially to my co-panelists.

Let me first try to describe what I think is the liberal constitutional vision, and then say some more things about how it has fared. I think there is a liberal constitutional vision. I think it is much more coherent than anything conservatives have on offer, and I think we have seen it put into practice in recent history. So here it is.

The liberal constitutional vision is, we live in a democracy. The most important decisions about the nature of our society and about the economy are to be made through democratic processes, and the job of the courts is to get out of the way. But there are some people and some groups who don't get a fair shake in the democratic process. And if there are groups of people who don't get a fair shake in the democratic process, the courts are the only ones who can step in to protect them. Of course there's

going to be disagreement about just what a fair shake is, but that should be the question. That should be the premise for overturning the decisions of the people's representatives.

The paradigm example of a group that didn't get a fair shake in the political process, of course, is African-Americans in the pre-Civil Rights era South, who were disenfranchised and subjected to various forms of organized pressure and violence. There are other groups like that today, and the Court's job is to protect those groups.

And that's the liberal vision: that we live in a democracy. Sometimes democracy doesn't do its job. When it doesn't do its job, and only when it doesn't do its job, that's when the courts should step in.

I say, you know, like the preacher, you know, this hackneyed story of the preacher, do you believe in infant baptism, and he says, believe in it? Hell, yeah, I've seen it done, you know, we've seen this done. This was the Warren Court. This was the Warren Court view of its role, that its principal job was to facilitate the operation of democracy and to get out of the way, but there were groups -- African-Americans, criminal defendants, political dissidents -- they weren't treated fairly by the political process, and that's when the Warren Court needed to step in on their behalf.

In some senses, of course, the Warren Court was a target of Richard Nixon's the 1968 presidential campaign, and the Warren Court has had about it a little bit of an air of a failed liberal experiment. I think that is a complete misconception, driven partly by the Association of *Roe v. Wade* with the Warren Court. A favorite sort of game to play that some of us liberals play with our conservative friends when they start railing on the Warren Court is to say, okay, quick, name me three Warren Court decisions you want to see overruled. *Brown v. Board*? You don't want to overrule that. One person, one vote? Come on, no one wants to overrule that. *Miranda*, you guys are totally on board with *Miranda*. Prayer in schools? You don't want to put prayer in schools, right?

So, come on, three decisions. Come on, come on, come on. And sometimes they come up with, you know, *Harper v. Board of Elections.* Okay, fine. If states want poll taxes in state elections, okay, fine, you can have your poll taxes. Is that really what upset you about the Warren Court that three southern states were not allowed to have poll taxes? Whatever.

But you get the point, that, in fact, the Warren Court project was immensely successful. The markers that the Warren Court put down in our constitutional law have endured. They were intensely controversial at the time. They have endured. No one today attacks one person, one vote. No one today attacks *Brown v. Board of Education*. No one really wants to put prayer in the form, which existed in public schools back in public schools.

If you look at the decisions of the Warren Court that have been eroded, in some cases really overruled by subsequent conservative courts, those aren't the decisions. What are the decisions that conservative courts have overruled? They're the ones that open the door to congressional action. Those are the decisions that have come under attack in conservative courts, decisions that empowered Congress to solve problems. That's where the conservative courts have cut back on the work of the Warren Court, because, as I said, a central theme of the Warren Court was, this is a democracy; the Court should get out of the way when the democratic process is addressing problems. And that's a piece of the Warren Court heritage that conservatives had trouble with.

To my mind, this is way more coherent than anything that conservatives can't put forward, as I said. Are conservatives in favor of judicial restraint? Well, only sometimes, not when it comes to the affordable care act. Apparently, not when it comes to guns, not when it comes to affirmative action. Are they in favor of federalism? Well,

as long as the states aren't solving problems related to gun control and aren't engaging in affirmative action, then they're not so fond of federalism. Are they libertarian? Well, if you overlook Gitmo, yeah, they're libertarian. I think that the liberal vision is much more coherent.

So, okay, so the next question you might ask is, all right, if it's such a wonderful vision, why has it not succeeded? Why is it not around today? Why does it seem, as the premise of this panel was, the premise of this symposium was, conservatives are winning the fight? I think it is a true perception that that liberal vision has lost out, and, as Jeff said, is really not apparent, even in the justices of the Court today.

There are a couple of reasons for this. Part of it is, as Pam said this morning, just the fortuity of who made the appointments. We had a string of appointments by Republican presidents that were just happenstance. That's part of the story. Part of it, I think, it's a small point, but it occurred to me in a discussion of the previous panel, there is a small group dynamic going on in elite circles, which is in elite circles, I think, conservatives. I should say at least elite academic circles.

Conservatives with considerable justification, I think, think of themselves as being a picked on minority, that they are viewed discreditably in academic circles, I think to a degree, frankly, that's unfair on many academic circles, and as a result, have sort of formed a cohesive block in a way that liberals don't in academic circles, because they dominate. The same is true, by the way, of religious people, who I think in academic circles are often looked down on unfairly.

Now, what's happened is, these groups have kind of convinced themselves they're victims in society at large, which is crazy. But in academic circles, they have a point, and I think that's contributed to this cohesion and what Pam was

talking about, about the farm team and the systematic use of judicial appointments.

But I think that the principal thing that's going on here is something Ben averted to in his opening remarks, which is asymmetry between liberals and conservatives. If you look at the issues, conservatives care about, a lot of them are Court-focused issues. You know, they care about trying to deregulate, trying to cut back the power of the government to regulate the economy. They care about religion, getting religion into public life. They care about property rights. They care about gun rights. They want to cut back on affirmative action. These are things you can do through the courts. If you look at the liberal agenda, it is health care, education reform, energy, the environment. These are things that really don't lend themselves to judicial solutions.

So, if you're a Democratic president, and you have a choice of where to invest your political capital, do you invest in getting, you know, someone who's really going to push a liberal vision on the Supreme Court, or do you invest it in getting an energy bill or education bill or health-care bill passed? I think that's an easy call for a liberal president. You spend your political capital on the issues you care most about.

And I think that's why we see this dynamic of getting democratic appointees who are a first rate quality, but don't have a well-defined intellectual agenda, and you get Republican appointees, who also by and large our first rate intellectual quality, but do have a well-defined agenda. I think it is just an asymmetry in where the parties are at this point in our history.

Notably, if you look at the 40s and 50s, the asymmetry in some degree operated in the other way, where the civil rights groups were an important part of the Democratic coalition, and the Republican Party did not have a particularly Court-focused agenda. And, to some extent, that's what generated the Warren Court. I think that's a big part of this, and it shouldn't be overlooked.

It's not the whole story. It is also the things that Pam and others have pointed to, and it's also, to some degree, Robert Frost's crack that a liberal is a guy who can't take his own side in an argument. Some of that's going on, too. But I do think there is a structural factor here that is just not something that can be a trust on the level of intellectual visions or rhetoric.

Speaking of intellectual visions and rhetoric, the debate outlined ably by Jim and Jeff about originalism within constitutionalism, the common law view, which I subscribe to, I agree with what Jeff said, that that is secondary. It's giving it too much weight and public debates. I think those debates -- I think they're important academically. I think that's what academics ought to do is try to figure out what our system is. My own view is our system is not a text-based based system. I think our system is a precedent-based system for the most part. There are critical textual provisions, but they're not the provisions that give rise to controversy. And I think there is a way to present that publicly that is not vulnerable to some of the criticisms that are made.

Often, the debate about originalism is framed as, well, do you believe in the text, do you believe in the Constitution, or do you think that anything goes? Well, I mean, if that's the choice, I mean, come on. But I think you could say, look, our Constitution is the work of many generations. Yes, it's the work of James Madison and the framers. It's also the work of Abraham Lincoln, and it's the work of Franklin Roosevelt, and it's the work of Martin Luther King, and it's the work of all these generations. They all have contributed to our Constitution. And it's all part of our Constitution. It's not just the framers. I think that's an effective way to put it, and does not leave people who want to see, want to defend the dynamic and evolving Constitution open to the criticisms that they are saying anything goes.

But having said all that, I do want to endorse what Jeff said. I think these

debates do not play that pinnacle role in public discourse. It may be true that the way strategically for liberals to frame things now is some version of original is him and textualism.

Here's what I think accounts for the ebbs and flows of originalism. I think originalism is what you resort to when you're trying to overturn the established order, because if you're unhappy with where the tradition is going and you want to get rid of the tradition, what do you appeal to? You don't have the tradition to appeal to, so you go back to your version of the original principles. This is, you know, the Protestant Reformation. Martin Luther understood this. He was unhappy with the tradition. What he wanted to do was attack it. Where do you stand when you're attacking well-established tradition? Well, you say it's a betrayal of the original principles.

So, who's an originalist? Justice Black attacking their tradition of the nine old men in the Lochner Court. He was an originalist. Justice Alito attacking the tradition of the Warren Court, he's an originalist. More recent conservative appointees to the Court, Chief Justice and Justice Alito, they're not originalists. Justice Alito even made fun of Justice Scalia for his originalism. Why are they not? Because they grew up in a conservative tradition that they're comfortable with. And so, what you're seeing, you're seeing a revival of liberal original is on to try to attack the conservative tradition. And I think that's what Jim was referring to. I think that's the dynamic.

This may be the most effective way to frame these issues. I have my doubts, but I think it is a framing question.

Okay, so last point. Where does this leave liberals, people who believe in a liberal vision of the Constitution, or it leased something of the kind I defined? It's not the case that there that there are no longer people who aren't getting an unfair shake in the political process. There's plenty of stuff going on out there that the political process

can address. There's massive economic inequality, much more economic inequality than there was in the Warren era.

I don't know of anyone who thinks our criminal justice system is functioning the way it should. That's an obvious instance of a malfunction in the political process. These are not issues that the doctrine or the personnel on the Court is in a position to address very sweeping constitutional rulings. But as a couple of people have said, and very insightfully, there's more going on than just the Constitution. There's a whole level of statutory and regulatory measures where this liberal vision of let's look out for the people who can't defend themselves in the political process, where that vision can be used constructively, and it can be kept alive for when the wheel turns again.

And there's another, again, an opportunity to do what I think the courts, the one role that I think the courts can play in a democracy, which has, as I said, to look out for people who otherwise would be left defenseless. Thanks.

MR. DIONNE: Thank you all. I would like to start this off by pushing back hard against all of you.

SPEAKER: You would do that, wouldn't you?

MR. DIONNE: Well, you know, somebody has to.

I mean, with the exception of David Strauss's opening where he talks about the vision of the Warren Court as reflecting this being a democracy -- stay out of the people's business unless there's some failure of democracy -- we had talked of a lot of things over those four presentations. One of them is not restraint. And I believe that one of the reasons that the conservative judicial movement has been so successful is that there is actually a meaningful connection between popular acceptance of movements and perceptions of those movements as limited in some sense, particularly when they involve people who have lifetime appointments and are not elected.

I think one of the very striking things is how simply, and this is just to put it in the political context, but I think it plays out in non-political intellectual context as well. One of the things that in the local context, you always see in presidential debates is, the Republican presidential candidate will face the camera right in the eye, to mix a metaphor, and say, I'm going to be looking for justices who will interpret the law, not make the law, and who don't want to legislate from the bench. And then there will be a full stop. And the Democratic candidate will struggle to articulate what he is looking for. And the thing that one has that the other does not have, in my view, is a vocabulary that acknowledges the value of restraint.

And so, I'm interested in all of your senses of where restraint, as a value, fits into the philosophical systems and approaches that you've just described.

MR. ROSEN: I'll start just because it was at the center of the vision that I described. It was the vision of Louis Brandeis and the avatar of restraint, whose judicial philosophy was premised on the idea that only through self-governance on a small scale could democracy be preserved, can go head-to-head with the conservatives any day. When you compare the record of conservative activism with the vision of Lewis brand toys on matters ranching from campaign finance, healthcare, affirmative action, all of which Brandeis would have upheld, the conservatives have struck down in ways inconsistent with their own textual vision.

Democrats can clearly, if it were politically advantageous, march under the banner of restraint. And they have done that. Our first constitutional law professor President, Obama, wrote a book about the Constitution. He has a whole chapter endorsing a vision of restraint in which he said that liberals in the Warren era relied too much on the courts, and instead should realize that political change comes from political activism and community organizing, not from charges. He repeatedly repudiated a

Warren Court vision. And not only did he embrace this vision rhetorically, he acted on it, because when he chose justices, he was more interested in restraint that he was about what they actually believed. You could say what you like about Obama's two appointees, but they are within the scope of democratic thinking. They have a restrained view of judges. They vote to strike down fewer laws than their conservative colleagues to, according to neutral surveys.

So, I think President Obama and the Democrats have cared too much about restraint. Restraint has no political balance. It's a useful rhetorical trope by agreement, nice for Republican presidents to be able to distract attention from the intensity of their ideological commitment by using this rhetoric about interpreting a law, not make it.

And, you know, Democrats can do that, too. Obama, in the next presidential debate, can go to Romney and take the position you just did and say, I'm the real party of restraint. Look, my judges are deferring and yours aren't. But it's an important debate, and we should discuss it at this conference, but that has no political balance at all. People are going to be voting in the next election, to the degree they care about the courts at all, about the fate of *Roe v. Wade*. And although it's been alarmist and foolish to be focusing on *Roe V Wade* for the past, whatever it is, 20 years, this year it's not because if Romney wins, *Roe* actually might be overturned, unlike the previous four elections or five elections when Democrats have claimed that.

So, that, more than abstract notions of restraints is important. And, therefore, with respect to your insight descriptively, I just think that Democrats have cared too much about restraint, not too little.

MR. FORBATH: Can I pick up on that? Can I take Brandeis as text, too?

MR. ROSEN: Please.

MR. FORBATH: So, there's another side. From the point of view of where restraint fits into the sort of constitutional vision of economic life that I was trying to sketch, Brandeis gave a famous talk. I think he was the first Jew to give a talk at Faneuil Hall.

MR. ROSEN: And there hasn't been any since.

MR. FORBATH: Right, hasn't been anyone since. So, July 4th, Brandeis is talking at Faneuil Hall. He's expounding the Constitution. He has two things to say, and only one of them is judicial restraint. The other thing is, what is the constitutional promise -- and these are virtually his words -- of liberty, equality, and he used the pursuit of happiness, even though he knew full well it wasn't there. But it was in his Constitution as it's in many textualists' Constitution these days.

So, what does it mean? Today, says he, it means the right to some form of social insurance, says Brandeis, the right to form unions. And he sets out the kind of progressive, affirmative vision of government regulation and provision question. And that combination seems to me essential and in the American grain. You can't, as a Democrat fast forward from Faneuil Hall, 1914, to today respond to the Republican claim that Obamacare is a bridge too far in federal power simply by saying, as liberals have been wont to do, and even in the otherwise excellent book by Pam and Chris and company, their wont to say, we're not going to get into government duties.

It's enough to say government has ample power to do this, as opposed to telling the kind of story. Brandeis would've told, or Roosevelt would've told, about why government is obliged to do this. So, you don't say to Americans, give the federal government another increment of power without explaining what its duties are and what kinds of rights it's answering in exercising that new increment of power.

So, and you don't find justices who will restrain from innovative, particularly in a moment when there is some support and traction for a new kind of Lochner activism. You want a constitutional story about what promises and duties government is fulfilling in this new exercise of regulatory or redistributive power. And that is what undergirds the restraint. Restraint doesn't come out of nowhere, you know. And in times of, you know, sort of contestation, it isn't sufficient for it to come out of pragmatism or have tracked ideas of restraint alone. It has to, from a substantive constitutional vision. That's where restraint fits in my story.

MR. RYAN: Could I make one follow-up? I don't mean to take too much time, but for Brandeis, those economic liberties would have, not from the courts and not from the federal government, but from the states.

MR. FORBATH: Right.

MR. ROSEN: And in that sense, he represents something, which is not represented in the modern Democratic Party, civil libertarian federalist. So, the right to organize for unions, and the right of punitive taxation against corporations had to come from the states. He opposed the second New Deal because of its emphasis on centralized federal regulation. He might well have opposed Obama's health care reform. So, to the degree that Democrats are going to be embracing economic populism, they do have to decide which body of government is best equipped to actually defend the rights of people.

MR. RYAN: So, in terms of restraints, I think at the political level, it seems to me your observation is right, Democratic candidates will often struggle. I'd like to see them say in response to Republican claims that they want to appoint judges who will follow the law and not legislate from the bench, I'd like to see them say, me, too; now, let's talk about whether the judges you would like to appoint are actually restrained, or

that conservative judges that are there actually are actually restrained.

And here's, again, why I think debating the meaning of the Constitution matters. I was struck by something that we said in the prior panel, which, in the discussion about judicial restraint, was even if you're in favor of judicial restraint; it doesn't mean that no laws are unconstitutional. So, what that means. If you're a conservative is, well, I have a few of the Constitution and what it means, and if I think this law is unconstitutional -- health care, for example -- I don't think it violates notions of judicial restraint.

Well, I think the most defective response would be, well, that's not what the Constitution means, or it's not clearly what the Constitution means. And so, you can't claim to be restraint. If you're striking down legislation without a secure basis in the Constitution.

MR. DIONNE: May I just follow up with you about that?

MR. RYAN: Yeah.

MR. DIONNE: Because, I mean, one possible answer to that question, and actually, Justice Scalia has mused about this in public, that, you know, if Congress is very aggressively passing categories of legislation that, in fact, in hinge on the Constitution, however one defines it, then he would have to talk about it in the language of congressional activism or congressional aggressiveness. And we can all imagine categories of legislation where, you know, the Congress would be very aggressive, and you would see the courts as, well, that's the courts doing their job.

And so, as one possible response to your point would be, okay, let's have a sort of mutual disarmament pact, which is, everybody agrees to defer, and this a hypothetical, not a realistic political settlement. But everybody agrees to defer to things that are in their constitutional visions at the margins of constitutionality, and so you simply

have a greater judicial posture of deference to the legislative branch.

I don't see either broad political movement having any interest in that this settlement right now, but it does seem to me to be something that arguably follows from, you know, the description you gave at the outset of an increasing focus and convergence and the two political movements on meaning and text.

And I'm curious whether you see that as a possible or plausible out, as we all come to agree that meaning of text is really important, whether the logical conclusion from that is the text is actually quite permissive in a lot of directions. And so, you don't to yours, and I won't do mine.

MR. RYAN: I think in general, I'd be perfectly happy with that, in large part because I agree with Pam that a lot of progressive victories over the last century, if not more, don't come from the courts, but from the legislature. So, I think, from a political perspective, judicial restraint would be quite fine.

You know, I think judicial restraint is more of an attitude than anything else. It cuts across any kind of methodology. And I think that it's something that is outside of the judicial process. Believe it. There might be wrinkles and it. I think David pointed to one that you might think a time to be less restrained is if you think the political process has been defective and has effectively picked on a minority, which might justify less restraint, or you might have another wrinkle or two.

But I think in general, you know, focus on the meaning of the text would lead you, I think, pretty ineluctably, to the position that courts ought to be restrained because oftentimes there are a number of plausible answers to specific constitutional issues. So, I think it would be a natural consequence of really paying attention to the text to say, you know, we're not in a position say that this is clearly unconstitutional. The problem is that judges like to do things. And so, convincing those with a lifetime

appointment that they should just give a pass, is really the challenge.

So, I think that politically, there is a good deal of support for it. I think that it's a hard thing to persuade judges and justices of once there on the bench.

MR. DIONNE: I would like to bring in David on the restraint question because in a sense, his vision of the Warren Court is a Court that was actually very substantially restrained in the series. I just have to respond to Ben.

I think conservative candidates promise to appoint justices who won't legislate from the bench in order to appoint justices who then proceed to legislate from the bench. But I could give you a list of cases. But we can restrain that.

And I think one of the questions on the table here is, Ben has a plausible argument that the power of the conservatives comes from their advocacy of restraint. I am more inclined to agree with Willie that the power of the conservatives comes from the substantive goals they are trying to advance, and restraint is a tactic in order to advance those goals, which they abandon when it doesn't work that way.

But I'd love David to come in on the restraint question, but also there are a lot of tensions here that sort of speak to the formulation that Ben came up with a long time ago, which is, in a sense, is it possible to bring together, if you will, a Forbathian vision which is significantly less restrained than the Justice Brandeis vision, with the Warren Court and the textualist position, or have we just seen the liberal problem, which is, these are all excellent arguments that are at odds.

I'd just love the panel to address the, you know, overarching question that Ben put on the table long ago when we started discussing this. But, David, if you could come in.

MR. STRAUSS: Yeah, thanks, E.J. A couple of things, and E.J.'s questions is, of course, critical, and I think what we just said does raise the issue of

whether there's a coherent view.

First, this business about enforce the law, not legislate from the bench, it's a sound bite. I mean, every judge says he's enforcing law. Every judge, I think, truly believes he or she is enforcing the law. So, I think it's just a sound bite.

For some reason, and this is interesting, but Ben's question actually raises lots of interesting issues. For some reason, that sound bite seems to me to resonate more with conservatives than with liberals. So, if a liberal were to say, well, me, too, somehow it just seems lame, doesn't it? And not just because it's a me, too, but because something about that sounds insincere coming from a liberal.

And I think it has something to do with this idea that law is really law when someone is getting screwed. I think that's what's going on, that, you know, when you get tossed out of court because you didn't file [inaudible - 1:05], that's real law. If someone makes an exception and says, come on, you've got to consider principles of equity and fairness, that's not real law, I think something like that is going on. But I think that's why it's an effective sound bite for the conservatives, but sound bite it is.

Second, so what would be a counter sound bite? I think a counter sound bite would be something like, no, no, you would appoint judges who would cater to corporate interests; I will appoint judges who enforce the law and look after the interests of real Americans, something like that. But I'm not good at sound bites. But I do think that's what's going on here.

Second, as far as restraint, you know, I like the way Ben formulated it, which is, you know, in case of, you know, give every doubt to what the legislature has done. Don't overturn what the legislature has done unless, given your vision, it is really quite clear that what they've done is unconstitutional. I think that's the right way to formulate it.

A couple of points about that. I don't think it fits with textualism. I think the opposite. I think the more you focus on text, the more you're inclined to say, well, it says right there: no law abridging the freedom of speech. And, in fact, the way these things tend to break is that textualists on both sides of the divide tend to be more interventionists -- Black as opposed to Frankfurter. Black was a textualist; Frankfurter was the tradition guy. Scalia as opposed to Rehnquist, where Scalia would say, no, it says it in the Constitution. And I think that text leads you to anti-restraint, not to restraint.

Third, while restraint -- and this issue, you know, is the Court doing it or is the democratic process doing it -- that's important for us to think about, and important for, you know, to debate when we're thinking about these issues. I don't know how much resonance it has with the public. And I can think of a couple of instances in which the idea that courts were doing this instead of the legislature just got completely lost. One is this case called *Key Low* [inaudible - 1:07], where the New London City Council wanted to take some property and the issue was whether it was taking it for a public purpose, which the Constitution requires.

Justice Stevens upheld what New London did. He wrote an opinion that said, now, listen, I'm not saying this is a good idea. I'm just saying this is for the political process to decide, not for the courts. The people who didn't like that decision, most of them conservatives, still went crazy. They didn't buy that at all. They thought the Court should step in, and that gained resonance with the public.

Gun rights is another example. People who believe in gun rights would not be satisfied by the answer, no, this is for the democratic process. If the people in Chicago want to have restrictive gun control laws than people in D.C., why can't they? That argument just goes nowhere. It's we have a right. So, I'm not sure restraint has that much resonance with the people.

As far as why Democrats can't be the party of restraint, part of this is *Roe v. Wade*. I mean, that is part of what's going on here, and maybe that's right and maybe that's wrong, but I think that is a barrier to the Democrats sort of being that party. Whether they could do that and sort of turn it into an effective sort of rhetorical strategy, I don't know, but conceptually I think that's the issue.

Then finally, on the question of whether this divergence among us has really shown that there is no liberal vision, I'm not sure it does. I mean, I think those of us on this panel formulate it in different ways. But I think, you know, it's sort of the idea that there's a responsibility in society to look out for the weakest members of society, and whether you see this as an era in which the courts can do that or this is an era in which the legislature should do that and the courts should get out of the way, you know, I think there's a lot of common ground among us, although whether we sort of attribute it to the text, or attribute it to our traditions, or attribute it to general principles of judicial restraint, I think that's a difference. But I think, you know, to carry on the theme Jeff and others have put forward, if you keep your eye on the substance, I think the substantive vision is pretty coherent.

MR. ROSEN: I agree with David that there are no more significant differences among the substantive wings of liberalism than a conservatism, and no reason that liberals can't loosely coalesce under the banner of new textualism.

So, the conservatives disagreed fundamentally. The difference between Anthony Kennedy's libertarianism and Clarence Thomas' Tea Party social conservatism is the difference between upholding gay marriage and striking it down, between the issues involving prayer in schools and federal power, yet they can still speak the same language of textualism.

So, if we try to figure out, though, E.J. is this going to be a restrained

vision or not, let's just ask, what do these various strains of liberalism actually want the courts to do? So, broadly, as Pam and others have said, the main thing they want the courts to do is get out of the way and uphold progressive legislation from campaign finance to health care. In terms of what they want the Court to strike down, there are some civil liberties, like the global positioning system case that I'm following so avidly, where they want protection for the right to privacy. But those are the kind of cases where I hope there'll be substantial conservative support as well, and it's a sort of Brandeisian vision to say it's such a clear violation of the text of the Fourth Amendment to be subject to ubiquitous surveillance that the thing has to fall.

The rubber will hit the road on a question like gay marriage, and that's why I think David is right to say that *Roe* is an awkwardness for liberals. Without *Roe,* you might not see the Court requiring gay marriage in the next few years. With it, I can't imagine the liberal justices not voting to support gay marriage. If they wait until the majority of the country is behind them, maybe there won't be a backlash, as we'll talk about on the afternoon panel. But gay marriage is a rebuke to the idea that the whole vision is restrained.

But then finally, there's a category of cases where some liberals, and particularly Warren Court liberals, want the Court not merely to defer or to strike down, but to require. And when it comes to affirmative duties, like equalized access and funding for education and health care and so forth, this is something that I do think the Democratic liberal constitutionalism is going to have to abandon, both because there's no popular support for it, and because it's so inconsistent with the generally restrained vision of the other wings.

So, David formulated it as well as anyone, but if you take his idea that generally the Court should stay out of the way except in cases where some people are

just left out, it's a restrained vision. It can unite under new textualism. And I think it's a winning formula.

MR. DIONNE: We're just about out of time on this panel, but I did want to go to a couple of questions --

MR. WITTES: Willie wanted to come in. Noah wanted to come in.

MR. DIONNE: Let's do that.

MR. WITTES: Sorry, I just happened to see them.

MR. DIONNE: Willie, go ahead, and let's get Noah a microphone.

MR. FORBATH: I'll try to be terse. I think in a characteristically gracious way, Jeff was taking a gentle jibe at my notion that the Constitution speaks to distributive issues, and health care, and social provision and the like. There we come to the difference between what some con law mavens call the adjudicated Constitution and the legislative Constitution.

As David said a while ago part of the problem when we're talking about the adjudicative Constitution for liberals is that much of what liberals want to see has to come to the legislature. Pam made this point early this morning. That doesn't make it, from my point of view, any less a constitutional matter. It didn't make it any less such a matter for the great Justice Brandeis either. But it did make it a matter for law makers.

And my point is a modest one. It has to do, if you want, with framing or with constitutional politics and culture, but it does have to do with the fact that the adjudicated Constitution and the legislative and popular ones are not hermetically sealed from one another. And sort of getting traction for those extra judicial commitments and having them upheld, if you want, having the courts reliably stay out of the way, and having an articulate philosophy that will warrant getting out of the way when government is flexing its muscles, requires a constitutional narrative that speaks to those matters.

Finally, why is there some tension between what I'm saying and what David is saying? And David, I'd say, not I, is the sort of noble upholder of the Warren Court tradition. The Warren Court tradition rested on the assumption that distributive issues had been taken care of for white working class guys, that the New Deal had done that work. They had framed it, as I reminded everyone perhaps too often, they framed it as a constitutional matter, but it was done. It was taken care of. Indeed, some of the justices on the Warren Court had helped take care of it in the Senate and in the executive branch.

Today, that's no longer so. Today, we're seeing the project, therefore -- let me just finish -- was to get minorities into the act, was to get women and minorities into that New Deal settlement where these guarantees of decent work, decent pay, a broadly, you know, distributed sort of commonwealth had been taken care of. Now, that's all unraveled. But we've forgotten about the time when those distributive issues were also a constitutional moment. That's my story.

MR. FELDMAN: Two quick points. First, on Ben's question about the sound bite, it's a great question, but it's a straightforward explanation of the problem. Sound bites in a presidential debate are aimed at the media and voter, and most of the Democratic/liberal preferences, until very recently, in Supreme Court matters, are counter-majoritarian. It's just that simple.

You know, you want gay marriage? Well, you can't get it legislatively in every place at this point, so what you want is you want the Court to do it. So, you can't say don't legislate because you want the Court to legislative. You want the Court to legislative in the counter-majoritarian fashion, to protect the rights of minorities.

Insofar as it's the position of liberal jurisprudence that it wants to protect the rights of minorities, and that's one of the most important things that the courts can do,

no sound bite in a presidential election will ever fill the bill, because that point will always have to be a counter-majoritarian point, which will not appeal to the median voter. And I think you just have to own that fact from the standpoint of liberal jurisprudence, insofar as what you're really focused on are civil rights.

Civil liberties are subtly different because often it's not a legislative action. Sometimes it's just an enforcement action by the police in a given situation, and that's one of the reasons that Jeff and others have done a great job of helping to shape and create a kind of bipartisan consensus on privacy issues and on the civil liberties issues that are specifically connected to privacy and free speech issues as well, where, again, there are independent reasons for conservative inherence, but there is pretty much a bipartisan position on civil liberties. That's the first point.

The second point is, with respect to the question of whether there is a unified liberal position, to the extent that we think about redistribution and regulation, and civil rights and civil liberties, as broadly speaking the four big issues from the standpoints of liberals, there could be differences in emphasis, and we see that across the panel. I think in Jeff's excellent taxonomy, you saw the differences in emphasis there.

The question is, can common ground be made among liberals, because there are different emphasis among conservatives as well. And that, I think, is where the rubber meets the road. I think the answer is probably yes; there probably is the possibility of practical consensus. And if you look at the Supreme Court, as it exists, that consensus has pretty much existed. The four liberal justices, whoever they are at a given moment, have more or less stuck together on most of the crucial issues. And when they can get that fifth vote from the swing player, they pull it off.

What you won't have is intellectual consensus on either the theater of interpretation or even a theory of what's the most important. But I think you may not

need that, and I think we've had a good reminder today that on the conservative side as well, what matters is that the four vote together rather than that they have the same motivation for what they vote on, or that they have the same set of priorities.

And so, there I think we're not so badly off. What passes for party discipline on the Supreme Court works pretty well on both sides, and then under the current configuration that came down to a game of once O'Connor and now Kennedy.

MR. DIONNE: So, we are essentially out of this time for this panel if people are going to have a chance to eat.

MR. WITTES: Can we get Pam in? Can you just -- I'm sorry, I know I'm delaying lunch for everybody, but I'm willing to --

MR. DIONNE: Well, you're not just delaying; you're eliminating it.

MR. WITTES: I'm being a moderating activist here, I apologize. I just couldn't resist hearing from her.

MS. KARLAN: So, I have two very brief points. The first is the get out of the way point, which I think is a mistake for liberals because of the point David made, which is, if we're going to have a lot of activist statutes that give people a lot of rights, courts can't get out of the way. And the problem is that the way they interpret the statutes is problematic.

So, a lot of our problems in recent years have been the way the Court interprets the Voting Rights Act, interprets Title VII, interprets labor law, interprets environmental law. And so, I think an idea of judges as totally passive is problematic.

Second point, which responds to something Noah said, let me just read you a list of five justices, and then you'll see where I'm going with this: Justice Blackman, Justice Stevens, Justice O'Connor, Justice Kennedy, Justice Souter. Those are the Republican nominees, but the part of the Republican Party that produced Justice

Blackman, Justice Stevens, and Justice Souter no longer exists. That's the kind of moderate to liberal Midwestern Republican Party. Those folks are not going to be appointed again if Republicans win the presidency again.

Justice Kennedy and Justice O'Connor pre-date the time of the establishment of the farm team, and so at that point there weren't a lot of people for President Reagan to appoint. And he tried to appoint somebody more conservative than Justice Kennedy and failed because the moment wasn't right, and because the guy he nominated was not the best witness in a television age.

But you can't rely on that kind of consensus anymore, and I think it's important to understand that when we think about where the Supreme Court might go in interpreting statutes and interpreting the Constitution later, which is why I disagree, at least slightly, with David's point that a Democratic president, because he cares about legislation, can ignore the Court. He could do that when the median voter on the Supreme Court was Justice O'Connor or Justice Kennedy. I'm not sure, you know, if President Cain is the next person up there that the 9/9/9 won't end up being, you know, no, no, no in German, to go back to the Karl Schmidt point. And the 9/9/9 is likely to be to the right of anywhere that Democratic statutes place us.

MR. WITTES: I defer to you.

MR. DIONNE: No.

MR. WITTES: And now, on to lunch. I'm totally deferential now.

MR. DIONNE: There is lunch through the side doors. We will reconvene in 10 minute, which means you will need to bring your lunches. Some of you will either eat quickly or bring your lunches back to your chairs.

Let's thank our panel.

MR. WITTES: So this next introduction is a personally very gratifying one for me. I've known Judge Wilkinson for many years now, I think since I was a cub reporter at *Legal Times* in the early '90's. And I think, you know, this will come out as more flattery than I normally want to dish out, but, you know, I think there are a lot of people who have spoken very eloquently over the years about judicial restraint, and there are many, many fewer who, when tested, have actually demonstrated it.

And, you know, in that sense, there's a lot of continuity with some of the discussion on the last panel, and what I think Judge Wilkinson is going to talk about in this talk. For those of you who don't know him and don't know his work, he comes out of the conservative legal world. He remains one of its leading lights.

I think it's fair to say across a range of issues, he has actually demonstrated the sort of restraint that is more often talked about than demonstrated, and specifically has -- that in some of the prior panels, a number of our speakers have complained about the conservative movements sometime frequent or pervasive depending on the point of view of the speaker, lack of fidelity, too. I first became aware of this anxiety in Judge Wilkinson's work. I don't remember the date of the opinion, it was when I was at the *Washington Post*, and the question of what the Commerce Clause meant in the way of federal power in the wake of two very important Supreme Court opinions, one concerning the Violence Against Women Act and one concerning the Gun Free School Zones Act, the Lopez case, and the question arose in the 4th Circuit as to what this all meant for these new restraints on federal power under the Commerce Clause, what this all meant in terms of the application of the Endangered Species Act to species that might be -- exist exclusively within the zone of a single state, and could you prohibit specifically, again, I'm working from memory here, the taking of red wolves I think in North Carolina, and there are only red wolves within -- they don't travel across state

lines, you know, and this was a, you know, this is largely now settled by race, but this was a very contentious issue within conservatism.

And over the years since then, and Judge Wilkinson's opinion, which is why I raise it, was sort of a -- a really wonderful document on the meaning of how far that doctrine could and couldn't go.

In the years since, he has written very passionately about where the conservative judicial movement, if it is truly committed to restraint, can't go, talked about, for example, a great deal of suspicion of the idea of use of the Takings Clause to prohibit all sorts of federal regulations. And more recently, been very critical of the Heller decision with respect to the Second Amendment. And all of this coexists with, I think it's fair to say, no lack of criticism for liberalisms adds lack of restraint, as well.

And so he has written a new book that I think has just showed up literally the other day in my office, a galley's copy of it which I'm very excited to read, but which I think he will describe, but I think it's fair to say is a very deep seeded expression of discontent at the absence of restraint across many political movements in the contemporary setting. It's a great pleasure to have him here. And please join me in welcoming Judge J. Harvie Wilkinson.

JUDGE WILKINSON: It's such a great pleasure to be here. And Ben and E.J., I want to thank you so much for organizing this conference and inviting me. Ben, you and I have been friends for many, many years, but it isn't just friendship that moves me to express my respect of the contributions that you've made to the legal profession and to legal doctrine.

You've written books and articles in many areas, but I think one of those that I respect so much has been your commentary after 911. I think you've been a voice of balance and moderation, you've shown great respect for civil liberties, but you've never

underestimated the serious and continuing threat that we face. And your book, *The Longest War*, is something that I have referred to and repaired to on many occasions, and so I literally think the country owes you a debt of gratitude for the way you've stepped forward in the event of that -- in the aftermath of that tragic day.

There's someone I want to especially acknowledge and thanks for coming and that is my colleague, Barbara Keenan, who sits with me on the 4th Circuit Court of Appeal. She has been a member of all levels of the state judiciary. She began in her '20's as a trial judge and served on the Intermediate Court of Appeals and on the Virginia Supreme Court, and then came from the Virginia Supreme Court over to the 4th Circuit. And I can tell you that every member of our court appreciates the wisdom and the insight and experience and truly the goodwill and good humor she brings to our deliberations. We're a mighty lucky court to have someone of her caliber.

And these days, any father with a professional daughter that's destined to become an ardent feminist, and my daughter, Porter, who is here today, she and Judge Keenan are great friends, and against that formidable alliance, what chance do I have of slipping into chauvinism?

So it really is a pleasure to be with all of you. And I come with the view that we may actually be at one of those rare moments in constitutional history where it is good for America and advantageous for both liberals and conservatives to actually make common cause. It's now in the interest of our country and I think of both liberals and conservatives to restore the role of courts as conservators of cultural tradition and practitioners of restraint. And this doesn't mean for a minute that courts should pursue a conservative or liberal ideology. All my plea involves is a mutual recognition that judges on all sides of the constitutional divide have engaged in what I would say are repeated and ill-advised forays into activism.

And the time has come to make sure that this trot does not become a gallop, that we spur the damage to our traditions of self-governance. I recognize that in suggesting that liberals embrace a vision of restraint that I am coating against the grain of living constitutionalism, which many have embraced in good faith and for a good period of time.

Patron saint of this theory, as was mentioned earlier, was Justice William Brennan, who encouraged judges interpreting the Constitution to ask what do the words of the text mean in our time. Rather than heed the original meaning of our founding document, Justice Brennan advocated that judges keep the Constitution on the cutting edge, that we update the Constitution to overcome political failings and to protect human dignity. And the forceful exposition of this theory by an utterly engaging and charming man has attracted numerous followers. But the idea that judges should update our founding document in accordance with the temper of the times is no longer a tenable position to begin with, and this is greatly to its credit. I think living constitutionalism has, and various versions of it, have recently fallen victim to its own success.

In conjunction with the efforts of the political branches, living constitutionalism has succeeded in making America a more inclusive and a more welcoming society. While this process of inclusion remains incomplete, it has reached a point where the political process is now responsive to the aspirations of racial minorities, women and gay Americans in a manner that it never was before.

Beginning as early as the Civil Rights Act of 1964, the political process has become increasingly sensitive to the ideal of non-discrimination in all of its forms. And America I believe is now at the point where the updates can be democratic rather than judicial.

There's another reason that I believe that living constitutionalism and

anything like its Brennanesq incarnation is on the run. Now, the fundamental prentice of law is that we exchange rule by guns and bayonets for rule by words and text. I think what makes a decision like Roe v. Wade so problematic for conservatives like myself is that it forsakes the constitutional text and thus impairs the social compact that replaces brut force with the power of enacted words. It is not that advocates for reproductive choice lack arguments, but those arguments should be presented in a representative forum and not a judicial one. The topic of this conference is the Conservative Movement and the Liberal Response. I suggest with the greatest respect that any assault on conservative activism will gain traction only if and when the assailants embrace the textural fidelity of their own.

I think there are additional reasons for courts not to lead change, but to temper it. The culture has changed to the point where an institution that is a little gray, a little reserved, a little stuffy and a little stogie may not be a bad thing. Why else do you think I wore this boring dark suit today?

It has been said many times that we live in a culture of celebrity, athletes and entertainers often set the tone, and the internet culture increasingly puts a premium on the breaking of news rather than the thoughtful digestion of it.

Talking heads and public figures now share a symbiotic culture of sound bites. New technologies add to an informational glut, an overload, without improving our ability to sift data and to make sense of it. So to have an institution such as a judiciary in our society that still wears black robes and tries to hand down reasoned rulings in the fullness of time is a good thing. This formality in the midst of an increasingly informal and chaotic culture will relieve pressures on courts to exist on the cutting edge of social change, for change is all around us and it will occur with all its benefits and liabilities without courts and the vanguard.

So living constitutionalism has had a long run, and what to replace it with? In urging an embracive judicial restraint, I do not suggest that judges blind themselves to contemporary developments, far from it. We saw recently in the Jones case that new technologies such as GPS or bird dog tracking of vehicles presents serious 4th Amendment questions. And if the advance of technology can pose a threat to 4th Amendment privacy rights, regulation and litigation over online speech can seriously threaten 1st Amendment values.

Often there will be tensions, 1st and 4th Amendment values will collide, and the judiciary of society's last generalists cannot escape informing and immersing itself in the most novel and scientifically demanding issues of our time.

But even here, even on technology's frontier, it is important to exercise restraint, to recognize that Congress and executive agencies play a vital role. Agencies are versed in these highly technical subjects in a manner that judges are not. And Congress has used hearings and constituent input to enact legislation that achieves the most informed balance of competing values. Take, for example, Congress' efforts to regulate wire tapping through the Foreign Intelligence Surveillance Act, or Title 3 of the Omnibus Crime Control and Safe Streets Act, or consider its more recent regulation of internet domain names that comports with the traditional features of trademark law codified in the Lanham Act. As helpful as they can be, the amicus briefs that flood the courts are no real substitute for the kind of information gathering tools that Congress and the agencies have at their disposal.

There's a larger point. Restraint has become an invaluable institutional quality at a time when excess has become so much a hallmark of our government. It is impossible to witness mounting deficits, both at home and abroad, without believing that Americans of varying persuasions would welcome restraint as a feature of our public life.

Perhaps the judiciary can now set an example of institutional restraint, not institutional self-indulgence. After all, our greatest presidents, George Washington and Abraham Lincoln, embodied self-control and restraint in a manner that has endured through the ages. Americans still admire them for this. And over the long run, they will admire the judicial system for displaying these qualifies of self-control, as well.

But there is an even more fundamental need why liberals and conservatives should seize the moment and embrace restraint as a model for the judicial role. I think many of us have watched in dismay at the polarization that has seized the political culture and have come to the conclusion that this is not something we wish to emulate in the federal judiciary.

Judicial activism enhances polarization within the third branch because it exhibits the pretense that there is only one right answer to a question, my way or the highway, my way for every state in the union, my way, unless those who disagree with me can perform the impossible feat of amending the Constitution. Does America really need more of this sort of high handedness?

Restraint by contrast recognizes that there are two sides to an argument, the very things that the political process was meant to negotiate and compromise upon. In exercising restraint, the courts have the opportunity to do something that is rarely done these days, to actually recognize that both sides have a point.

The fact is this country needs a republican party. The fact is this country needs a democratic party. We forget this when we fight like cats and dogs. But by recognizing both sides to an argument, judicial restraint just may help Americans recover common ground.

Conservatives once believed this, many still do. Conservatism has flourished on the quarrelsome, but productive union between John Stuart Mill and

Edmond Burke, between libertarianism and traditionalism. But there is change in the air. Whether the conservative movement is changing politically, I will leave for others to judge. But I fear it is changing judicially in a manner that is not to the good. And the irony of ascendant conservative libertarianism, handing a democratic liberty over to new judicial masters, is almost too painful to ignore.

Now, my friends, both on and off the bench who embrace conservative libertarianism, desire to ensconce their views in the Constitution and to arm wrestle with living constitutionalism for constitutional supremacy.

Both sides in choosing activism have abandoned the traditional view that the states and the political process may come up with more nuanced, more tentative and more varied answers to a problem, the approach one would think the often complex and challenging problems of our day require.

In embracing unenumerated or unambiguously enumerated rights, both conservative and liberal activists risk embracing a charter of novel individual rights that will over time erode and diminish the remnants of our sense of community, the innate recognition that our lives and destinies as friends, neighbors and citizens are inextricably intertwined. Let me give you some examples. The ideas advanced at the Fair Labor Standards Act which sets hourly and wage and overtime rates for large numbers of private and public workers violates, among other things, the constitutional right to contract.

A cogent argument can be made, in my view, that FLSA regulations are simply bisontine beyond belief, and that their requirements are sufficiently onerous to operate as a real drag upon employment.

But there is another side. The counter argument is that the act provides some fair measure of subsistence to low-income workers and that it has helped to create

the broad and prosperous middle class upon which American strength relies.

But these are ultimately economic arguments, they're not a constitutional one, and the idea that the judiciary's view of contractual rights would trump popularly enacted laws is not only a blow against self-government, but a prescription for its own form of chaos. Let the people and their representatives decide.

Take same sex marriage, many believe that it is quite wrong for our country to embrace the enormous contributions of gay citizens, and yet at the same time to deny them the ability to participate in our society through the institution of marriage. On the other hand, however, marriage has been understood to be a union between a man and a woman for a millennial, and this view enjoys the deep respect of many good and intelligent people. Judges should be the last ones to attempt to resolve this difficult and deeply divisive issue for the entire nation, especially when their only support would be an open ended and highly contestable constitutional text. If the judiciary will only allow them, Americans will move toward a more just and a more inclusive social order on their own.

I have and would make the same point with respect to firearms regulation. The Heller decision has held that there is an individual right to firearms possession independent of militia service, but it left open the opportunity for regulation of that right, and it is now in that debate that the rubber meets the road.

People can fervently and legitimately disagree as to whether this or that gun control law will inhibit or promote the incidents of crime. So let the political process have at it. Let's hear from law enforcement officials, and let's hear from hunters, and let's hear from gun owners, and let's hear from crime victims, and then let citizens make up their own minds.

Let's hear about what weapons are and are not acceptable in what

private and public places. But this is a poor place, indeed, for judges to do the deciding. We do not have the background for it. And matters of such life and death consequence are not something the court should leap to rule upon. Let the people and their representatives decide. The same holds true for any number of issues. Consider the battles between environmentalists and developers of private property. There was a powerful argument in my view that owners of real property should have broadened rights to do with that property what they see fit. I understand the frustration that owners must secure permits from government to do any tiny, little thing, while government, for its part, is free to tax, regulate and diminish the value of realty in a manner that only government can do.

But should we move aggressively to constitutionalize this frustration through the due process and takings clauses? Is there not an equally powerful point that zoning regulations and environmental protections are essential to preserving a community's health, natural and aesthetic resources, tourist economy and quality of life? Fine, let's have at it. Let the people and their representatives decide.

One can proceed through many of the issues, but I hope you get the point. Law office history is often used as a derisive epithet and law office legislating doesn't strike me any better. But there's a way out. And I think, perhaps naively, that liberals and conservatives might just find some common ground here. A position which embraces judicial self-restraint and popular self-governance can both seize the populous mantel and also draw attention to the many strengths of the judicial branch in interpreting the law, ensuring the liberties enumerated in our Constitution, and promoting a decent order and prosperity through the rule of law as enforced by impartial courts. The judiciary can accomplish these essential aims without extending, as has happened over past decades, the unsupported positions of an unelected elite.

The courts of this country are a great institution and I hate to think where we would be without them. One need only reflect on the rule of law in America and on societies that disregarded it, most notably, the monstrous tyrannies of the 20th century and Hitler's Germany, Stalin's Russia and Mao's China.

We properly draw from those frightening regimes the paramount lesson that courts must play their part in checking the gravest abuses of executive overreach. We must also draw, however, the lesson that all branches of government, including courts, do best when they discipline their own appetites for power and recognize the place of others in our republic and the fact that the beliefs and contributions of others are as sincere and often as well founded as our own.

I recognize how tempting it is to stand up and cheer when courts take an aggressive course of which we happen to approve. Doggone it; I've done it myself. But the next time an activist decision goes your way, please remember that tonight's celebration can be tomorrow's morning. I understand after the events of this past summer, the debt ceiling negotiations, I understand just how -- the frustration with the political process runs high. And yet when I look past the present debacle and think of where democracy has brought this country over centuries, I would not lose faith.

Today's losers must be given the hope that they can be winners tomorrow. The peace and health of our society depends upon it. The political process affords them that hope. The judicial process must less so because it is simply out of reach to voters, especially those who are not lawyers.

We owe our fellow citizens the hope and prospect of democratic change, not the message that their views have been constitutionally condemned and their opponent's views carved in the stone of our founding charter for some long, indefinite span of time.

Restraint has much to commend it as a judicial value, the least of which is that it extends the hand of tolerance and respect to those whose views we may not share, but whose citizenship we do share and whose love of family, community and country burns no less brightly than our own. I thank you. And I'll be happy to take questions if anyone would like to ask them. Yes, sir.

MR. SHAPIRO: Ilya Shapiro from the Cato Institute. Thanks for your remarks, Judge. The theme of the conference so far seems to be to push back on what speakers are saying, so I want to continue that here. And I'm wondering if judges are restrained, aren't they, in effect, advocating their constitutional duty to maintain their part of the checks and balances? And so if it's always simply let whatever the political branches or the administrative agencies decide, whether that be conservative or liberal at any given time in history, you know, some might cheer it again at different parts of history, different people will do that, but ultimately, you know, the judges are, you know, falling down on the job and essentially taking the easier course by not inserting themselves, by saying, look, my hands are tied, I'm just going to step back, whereas the debate really ought to be, well, when you did insert yourself, was that the correct interpretation of the Constitution or not.

JUDGE WILKINSON: Actually I think, in showing restraint, we're not taking the easier course, but we're taking the harder course, because we're doing what comes -- we're going against what comes naturally to human beings, which is to ride their own views to whoever knows where.

So in terms of whether it's an easy course or a hard course, it's hard sometimes to refrain from striking down or misinterpreting a law with which you profoundly disagree. Now, the question is, does this make us rubber stamps? In no way, shape or form. The judiciary has an extraordinary job to do in resolving diversity

disputes, which present difficult common law questions sometimes. We, for example, have a more difficult job to do than ever before in interpreting federal legislative and administrative -- federal law and administrative regulations. Maybe in the old days that was a little bit easier. But when you get the kind of statutes that are coming out, you know, you just take one, ERISA comes pretty quickly to mind, these are very complicated statutes, they have all sorts of cross referencing, they have -- particularly when Congress comes out with a new statute, it takes us ten or 15 years to digest it.

In addition, the last time I checked the Code of Federal Regulations was not shrinking, and we've got to look at those, and we've got to decide whether they demand deference or whether they're inconsistent with the statute as it's worded.

And finally, there are enough clearly enumerated rights, the great First Amendment right protecting our rights to freedom, freedom association, freedom of speech, freedom of religion, great trial rights in our Constitution that are clearly laid out. There's the right against self-incrimination, the right to counsel, a right to cross examination, great 14th Amendment rights that embody the ideal of non-discrimination, and interpreting and applying these different rights and the permutations that they go through when new technologies come on the scenes, believe me, we're not going to run out of work, and we're not going to be rubber stamping anything. There's plenty for the judiciary to do and none of it involves being a rubber stamp without going and creating novel and unenumerated rights that have no basis and text to history. Yes, sir.

MR. MITCHELL: Judge, thank you. I'm Garrett Mitchell and I write *The Mitchell Report*. And I want to -- I pose a question that sort of has come to me in this way. We began this session this morning when Ben Wittes pointed out that within three years after the adoption of the Constitution, Madison and Hamilton were at odds over various issues, including a bank, et cetera, which seemed to me to be as succinct a way

to say he who thinks he or she has a grasp on what the framers intended is probably engaged in some form of self-deception, that would be my interpretation, not what Ben offered to say.

This is going to help me because I think I've forgotten whatever I was going to say, but I'll try to get back on track. It seemed to me you started out by saying that living constitutionalism and Justice Brennan's point of view about, you know, keeping pace with and being on the cutting edge were at odds with the notion of restraint.

And if that is the case, it seems to me that it presumes that you can't be in the business of wanting the Constitution to keep pace, you have to know what the framers really intended. And so I wonder, if you are someone who says we have to do what the framers intended, and there is a lot of evidence to suggest that even the framers didn't know what the framers intended, then is insisting on being in the business of doing what the framers intended restraint or is it an ideological point of view in sheep's clothing?

JUDGE WILKINSON: That's a good question. And I think my own point of view is, I'm very skeptical that any of these cosmic theories floating around today are going to lead us to a position of principal restraint. The great flaw of living constitutionalism is that it's interpreting very open ended and capacious constitutional phrases, and the phrases themselves give the interpreter an awful lot of leeway. And so I think if ever there was a philosophy designed for activism, it would be living constitutionalism.

Now, David Strouse has made the point both in his book and here today that, yes, that these broad phrases are hemmed in and limited by decades of precedent. But without a commitment to restraint, people can be awfully creative with precedent and distinguishing it here and there.

And the idea that -- it's often said now that, yes, we no longer adhere to living constitutionalism in its full throated Brennan variety, but what we do is, we adhere to a more diluted form of it, and either Cass Sunstein's minimalism is one form of it, and then the other form of it would be common law incrementalism. I mean common law incrementalism and Sunstein minimalism have a lot of the same things in common. But, to me, those two philosophies or those two approaches have basic flaws if liberalism is seeking to rid itself of sheer -- of an activist image, because to analogize constitutional common law incrementalism to what judges like Cardozo were doing seems to me flawed, because the common law -- the great common law judges like Benjamin Cardozo could always be overturned by legislatures. And the present common law incrementalists who are doing it with the Constitution are virtually immune from any legislative correction because of the difficulty, among other things, of the amending process.

And this whole idea that we're going to revisit Brennanism in a sort of a minimalism, you know, the destination doesn't change, you're going to end in the same result, you're just going to take baby steps to get there. And so I don't think these are legitimate fallback positions, and they don't seem, to me, to cure the inherent difficulties with the living constitutionalism, so it doesn't -- that provides me, that and its oil shoots provides me no confidence that what I think would be an aggressive activist course would not be taken.

By the same token, after having thought about originalism, originalism doesn't provide me much assurance that activism isn't in the -- always on the horizon. The Heller decision confirmed it for me. But even before then, the problem with originalism is a constraining force. It's very difficult. You offer the example of Madison and Hamilton disagreeing three years out, which is an interesting point. Well, think how well equipped we are 200 and some years out to divine with any confidence what the

intent of the framers were.

Sometimes there's all too little evidence, and sometimes there's way too much. And if there's all too little evidence, you're sort of searching around for clues to something that the framers probably never contemplated. And if there's all too much evidence, then you're in the position of selectivity, where the judges just get to take this snippet and that snippet and the rest, and then as Justice Scalia said about legislative history, get to look over the crowd and pick out your friends.

And so we had a diluted version of originalism called hot and cold originalism. What the heck is that supposed to mean? You know, I have the same problem with that that I do with minimalism and common law incrementalism. I mean hot and cold originalism, and the phrase that's used is, you know, well, originalism when it suits. And so these are all problems with it. I mean you have to give all these theories credit. I mean originalism has done a great job in attracting interest to the views of the founders, and it's helped to lessen historical illiteracy, and those are huge achievements, and I think you have to give the originalists great credit for that. But, you know, on the other hand, judges are just not very good at detailed, complicated historical projects extending into the late 18th century.

You know, we're trying to find out the answer to something at the same time that we have, you know, 55 other cases requiring our attention. You know, a professional historian is able to concentrate on history exclusively. We've got 55 other cases. And we're not trained to be professional historians. Our law clerks, as wonderful as they are, aren't trained to be professional historians either.

So we assumed the mantel of the historians, and we engaged in the kind of ill-fated historical exercise that I think Judge Brennan engaged in in Fay v. Noia or the court engaged in in Heller. You look at some of these long historical exegesis that the

courts have engaged in and the historical profession takes real exception to them.

Even Justice Black's incorporation doctrine, which I really agree with and I think that it's -- absolutely, the Bill of Rights should be incorporated, but his historical analysis isn't particularly persuasive. I mean Justice Harlan shot him out of the water with the help of Professor Thurman from Stanford. And so the idea that we have the equipment to carry out a philosophy of originalism from the bench is one that meets with skepticism, and I guess that's why I wanted to give this talk today is, I am just disillusioned with living constitutionalism, with originalism, with all these various theories that are floating around, because none of them, none of them provide any assurance that restraint is going to be carried out on a consistent basis day after day, month after month, year after year. Yes, sir. E.J., do you have a question?

MR. DIONNE: First of all, thank you so much for being with us. And as I told you before, I really admire the principal position you've taken, it's shown a lot of courage on issues like Heller, and very few of us actually have principals that we actually are willing to live by all the time, and so bless you for that.

I have two questions. The first is liberals would argue for judicial intervention when the rights of minorities, for example, are affected, and they would argue it's not reaching far to say the courts have to intervene against the majority, because I'm very sympathetic to the democratic principal.

Our friend from the Cato Institute would say the same thing about property rights, and probably have the courts intervene farther than someone like I would arguing that majorities can also interfere with the rights of property owners. So my question is, and your proper answer might just be read my book, is, how can you determine what constitutes restraint versus what constitutes fidelity to the job I think a judge has to uphold fundamental rights?

The second question is either more complicated or simpler. I have enormous affection for the communitarian strain of conservatism, which I heard lurking in the back of your talk. I wonder if you could talk a little bit about the underlying sort of, if I'm right that there is a kind of conservative communitarianism that sits beneath some of these assumptions. And again, thanks for joining us.

JUDGE WILKINSON: Yeah, on the rights of -- I think it would be -- it's a difficult question to answer without the specific context. But the question that -- there's some questions that ought to be asked as a preliminary matter, and one is, when a judge approaches a case, you say, you know, it's not -- the first question that leaps to your mind, and I'm just giving a way of approaching this, is not how should I decide, but may I decide.

And the second question that should reach a judge's mind is, now, I feel so strongly about this, and I need to be sure that I construct in my own mind or have law clerks act as a sounding board or something to find what is the strongest possible argument against what I'm doing, and does it, you know, does it make sense. So you have to ask, you know, not how do I decide, but can I, in fact, do I have any business deciding, that's question number one. And then question number two is to check your own impulses with the strongest argument, which you, yourself, have to construct on the other side.

Now, the very interesting point about the tension between communitarian traditionalism and thinkers like Edmond Burke and Russell Kirk, who've kind of gone out of fashion today, you know, not with me, but in a great many instances, and I've always thought, you know, that a grounded perspective had a lot to commend it.

And I've always been very nervous about abstractions imposed from on high. And the problem I have with activism is, it strikes me is it an abstraction. And often

an ill informed abstraction imposed upon people who are dealing with very difficult daily problems and intractable problems and the other thing, and yet as blueprint is handed down from somewhere in the tower, and it seems to me to be a poor way to go about it, because I think our constitutional scheme is designed not to provide one answer, but many, many answers from different states, from different, you know, from different congresses that review the work of the prior Congress and adjust it and modify it, and from states that have the chance to learn from one another, and from constant plebiscites, constant voting.

I mean I think democracy is a glorious thing because elections and votes are taking place all the time. And on some of these problems, you're just not going to get a clear, clean cut answer, you're going to have to be satisfied with compromise, you're going to have to be satisfied with muddling through, and that ain't half bad. And that sure beats me, beats, you know, beats just blueprinting things, you know, on a 5/4, or the Court of Appeals, a 2/1 vote.

It doesn't cover a broad enough spectrum of views and backgrounds and experiences to make it as persuasive as all these different state legislatures and the Congress and executive agencies getting together and trying to wrestle through what are really hard questions. Yes, sir.

MR. MOTLEY: I'm Joel Motley. Earlier this morning we touched on the Brown case and the one man, one vote. And just to follow up with E.J., in your view, are those examples of restraint or activism? Can you characterize those that have, you know, become real settled parts of our law in either of those categories?

JUDGE WILKINSON: Yeah, and that's a good question. And one of the things, you know, I noticed, one of the things that struck me in a comment that David Strouse made that I really agree with, and that is there's a lot of the Warren Court's

tenure that was actually a very successful enterprise. And so you ask, why was that, and I think for several reasons. The Brown decision was, it seems to me, firmly anchored in the idea of equality for all citizens, and it had as a particular focus the travail and the historical travail of African Americans, so I'm fond of saying, you know, basically we're American -- we're human beings, we're all human beings in the eyes of God, we're all American citizens in the eyes of the law.

Brown v. Board of Education really seems to me to be number one in that spirit and number one to pick up directly on the chief concern of the framers of the 14th Amendment. I think it's a magnificent decision. The only debatable point about it is whether that or Marbury vs. Madison is the greatest American judicial decision handed down, and that's a fun debate to have, and there are a lot of ways to talk about it.

As to why the Warren Court was, to some extent and to a considerable extent a successful enterprise, when you look at many of the landmark decisions, they were really firmly anchored in constitutional text. People could look at it and say, yeah, this is something that judges ought to be thinking about.

Look at Miranda v. Arizona, intensely controversial at the time, but it was -- whatever else you could say about it, it was anchored in the values of the Fifth and the Sixth Amendment. Brown v. Borre we talked about as another example. A third example is New York Times vs. Sullivan, which was, I think you can agree with it or disagree with it, pretty firmly anchored in the First Amendment. And people could look at it and say, yeah, that's something that the judiciary ought to be talking about, freedom of speech, sure.

The same thing with school prayer, you know, that's, again, it has a resonant in the religion clauses of the First Amendment. So I think the reason that the Warren Court succeeded relatively, and some of the later decisions have not gained the

kind of resonance that the Warren Court decision did.

(Applause)

MR. WITTES: So we are -- in a moment, a dramatic event is going to happen, which is a screen is going to drop in back of me and I hope to beam in Michael Klarman from far away.

In the meantime, if our last panel, the rest of -- the parts of our -- the corporeal presence of our last panel could join us, and we will do our last panel -- start momentarily.

Here we go. Oh, I thought the screen was coming down in back of me so can you hear us?

We can't hear you and you can't hear -- okay, our tech people are working on this.

In the meantime, let me introduce this panel. This is an intentionally speculative component of this discussion, and we wanted to wrap it up for we plucky few who actually stayed in for the last panel. Thank you all very much.

So the question that we're thinking about now is under what circumstances -- judicial movements have in the past produced political backlashes, and whether modern judicial conservatism is on the verge of doing that or not.

Now this is a matter on which E.J. and I have gone back and forth a little bit. I will let E.J. speak for himself on his assumptions, his priors about this, but I want to be candid about mine, which is that I think that the conservative movement has actually been quite careful not to cross public opinion in the profound, deep-seated ways that actually produce political backlashes. And that could change, but that the areas that have generated real elite anxiety in conservative jurisprudence have generally not generated significant public anxiety as measured by public opinion polls.

And so my working assumption is that there is not -- we're not actually on the verge of a major backlash. I suspect -- I think E.J. may disagree about that, and I will certainly let -- I don't want to characterize his views.

To discuss this with us, we have Jeff Shesol, who writes for the West Wing Writers Group, but more importantly for our purposes, the author of a truly magnificent book about the Court-packing Plan in the 1930s and the political backlash associated with the New Deal Era court.

We have Dahlia Lithwick, whom I hope all of you read regularly on "Slate," because if you don't, you are missing the basic fact that great insight about law and good humor actually go hand-in-hand, which is not an intuitive point, but it's one that there is at least one career that stands for that proposition overwhelming.

And finally, if he can now hear us -- or if we can hear him -- Michael Klarman is a professor at Harvard who couldn't be with us today, but thanks to the magic of technology, we can at least see -- and I hope by the time it is his turn to talk, we'll be able to hear. Professor Klarman has really done, I think broadly speaking, two bodies of work that are very directly relevant to this discussion.

One actually concerns the circumstances of political backlash to judicial movements, but the second is a body of work -- I think it was in the late '90s or mid '90s -- concerning the relationship between the court and public opinion, and to what extent judicial doctrine really is as counter-majoritarian as we think of it, and to what extent it actually sort of follows the election returns.

So I am going to, with that introduction, turn it over to our panelists, who will speak -- do you want to say something?

MR. DIONNE: All I want to do is ask Professor Klarman -- do you hear us up there? Can you hear us?

PROFESSOR KLARMAN: Yeah, I can hear you great.

MR. DIONNE: Oh, excellent.

MR. WITTES: Oh great -- and we can hear you, so welcome.

MR. DIONNE: Yes, excellent.

PROFESSOR KLARMAN: Excellent. Thank you.

MR. WITTES: So the panelists should speak in whatever order they feel moved. Who wants to start?

MR. DIONNE: You want to start, Jeff -- and since --

MR. WITTES: Yeah, start --

MR. DIONNE: Since you covered the last -- since you -- well, covered -- you're not old enough -- since you wrote so eloquently about the last backlash.

MR. SHESOL: I feel as if I may have covered it.

Well, first, I want to thank Ben and E.J. for inviting me to join all of you here, especially since there's a disclaimer that I probably ought to begin with, which is that in these circles, I'm which is charitably known, I think, as a non-lawyer. So I will speak to this from a historical perspective and then look blankly at any of you who ask me any legal questions.

As Ben indicated, my book "Supreme Power" is about Franklin Roosevelt's court-packing fight and, more broadly, about the conflict as it was seen between the New Deal and the Supreme Court, or the New Deal and the Constitution, depending on how you look at it. And there's a conventional way of looking at this fight, as maybe the purest example of a backlash that worked.

The court, it was said, bent before the storm. We all know about the switch in time that saved nine. And whether it was the court plan itself or, as I argue, the general political atmosphere and political pressure on the court, some of it presidentially

driven, that actually caused Owen Roberts and therefore the court to change.

Bottom line is that we had, in the middle of 1937, suddenly a very different court, a different kind of decision from the court than we had been having prior to that point, and this endured largely because of the appointments that followed.

Now Franklin Roosevelt's view on this, it won't surprise you, was that in his words, it would be pretty stupid -- I'm paraphrasing. I think his word was naïve. It would be pretty naïve to imagine that there's not some kind of connection between the political pressure on the court and the decisions that we suddenly started getting in this moment of Constitutional revolution of 1937.

And Owen Roberts, the swing Justice, kind of conceded as much later in his life, when he said, "Looking back, it's difficult to see how the court could've resisted the popular urge for what it, in effect, a unified economy." Now he always denied that the political pressure had caused him to switch on a given case, but here he seems to be conceding that the popular pressure had something to do with the direction that the decisions took.

Now that's the conventional understanding of what happened in the court fight, and I'm not going to dispute any of that. I actually hold to that. I am not now, nor have I ever been, a revisionist. But I do think that there's a corrective and another way of looking at this.

And that is to look at this over time and to understand that if we really did reach a point in 1937 where the court flipped, in part or fully in response, to the political environment, this took a long time, a lot of pressure, a lot of decisions that all flew in the face of public opinion. It took banner headlines. I mean, I'm sure some of you are familiar with the history of the decisions that went against the New Deal. They were played out on the front pages of American newspapers like wartime headlines, screaming

fonts that the NRA had been struck down, that the AAA had been struck down, that a minimum wage in New York state had been struck down and so forth.

And so if indeed the court yielded, as a lot of us believe, it took a hell of a lot of pressure and a lot of time, and a lot of dots that all had to be connected to create a pretty distinct and obvious shape to everyone. You had, over this period of time -- Roosevelt likened it to the nullification decrees.

You had over the two terms, beginning in 1935, almost an ACA-level decision every six or eight weeks. I mean, it was a constant, constant source of conversation and controversy and concern, with an understanding that the court was deciding the gravest matters of state upon which the economic health of the United States would rise or fall, and if it fell, it would make the Depression look like a cakewalk and we would have the emergence of a dictator, as we had seen at that time in Europe.

So I will speak very briefly about today because I know that is going to be the balance of what we talk about. What does any of this history tell us about this moment? Well, I think it underscores something that Ben said here at the outset, which is that I think we are very far from a meaningful backlash against the court.

I've been doing these sort of panels for the last couple of years. We've been talking a lot -- as I'm sure you've all been talking a lot -- about Citizens United. Mostly recently, the court has given us more to talk about in the Wal-Mart decision and others that I imagine Dahlia will talk about, having written so effectively about.

And I've been hearing more and more folks of my progressive persuasion telling me and saying publically at panels like this, "This is the moment. Everybody's agitated about Citizens United. Didn't you see the Washington Post poll that showed that 80% of the people polled thought it was a bad decision and it's bad to have more money in politics?"

They show me polls of their own from their own organizations saying people get that this is a corporate court. They point to Adam Liptak's excellently researched front-page piece, which I'm sure you all read several months ago, saying this is a Chamber of Commerce court in a meaningful way. Howell won, as he laid out that plan back almost 40 years ago.

But I think that ultimately, when you take those assertions and you look at it in the political realm, I think there's a lot of wishful thinking that goes on. We have yet to see, in my view, any meaningful evidence that we're on the verge of a backlash that could change much of anything, let alone the behavior of any Justices.

I think there's a lot of interest -- and maybe you talked about this earlier. Maybe we'll talk about it a little more. I know E.J. and I have talked about the recent Gallup poll that indicated that public support for the Supreme Court is lower than it's been. It's still at 46 percent, which is Washington constitutes Mount Rushmore territory compared to a Congress that's at -- what, is it nine percent?

But here's -- to me, this is the interesting thing in the Gallup poll, and it goes to the topic of this particular panel. And that is that there is far greater traction to the idea that this Supreme Court, which all of my progressive friends think is the most conservative court that we've seen in a generation at least -- or since the 1930s. And I've said such things myself -- that there is far greater traction to the idea that this court is too liberal than that it is too conservative. Among Republicans and independents, there is a far stronger belief that the court is too liberal than Democrats and independents believe that it's too conservative. You've 50 percent of Republicans who think that it's too liberal and only 37 percent of Democrats think it's too conservative. Even 15 percent of Democrats think that this current court is too liberal. Go figure that one.

So I think that there may be a lot of reasons for this. We'll talk about this.

I'm wrapping up here, but I think that it may well be that what we see on the right is kind of a rolling and contained chronic backlash, that the Republican Party is well conditioned to call the judiciary liberal and to see the judiciary as liberal in the same way that it sees the media as liberal, even in the face of the rise of these sort of conservative media organizations.

And so I think that if we're thinking about the ACA -- and I'm sure we'll get to that topic -- it may be that there's a greater likelihood of a backlash on the right if the court upholds the ACA than there is going to be a backlash on the left if there's an adverse decision. And even in that case, I think we are unlikely to see what I would call, in historical terms, a meaningful backlash. There will be grumbling. There will be fulminating. But will there be the sort of backlash that can change much of anything? That's a question, and I'm skeptical on that.

MR. WITTES: Professor Klarman, do you want to --

PROFESSOR KLARMAN: Do you want me to go next?

MR. WITTES: Yeah, why don't you go be the disembodied voice from Cambridge next?

PROFESSOR KLARMAN: Okay. Thanks for having me. I'm sorry I couldn't be there. Bobby Valentine's doing this press conference at Fenway Park and I had to be there for that. So sorry I couldn't be there in person.

So I'm going to talk some about liberal court decisions that produce backlash, and then I'm going to talk some about the factors that I think predict backlash, and then I'll talk a little bit about conservative activism and whether there'll be a backlash against it -- although I think I agree with Ben and Jeff that I wouldn't predict it, at least from any of the conservative decisions that we've seen recently or are likely to see soon.

So there's several liberal decisions in the second half of the 20th century

that have produced pretty dramatic political backlashes.

On the short term at least, Brown v. Board of Education had a huge effect in radicalizing Southern political opinion -- actually made it harder in the short term for African-Americans to vote in the South, made it harder to desegregate sports competitions, for example, and directly advanced the careers of extreme segregationists like Bull Connor and George Wallace.

Miranda v. Arizona, second example, combined with rising crime rates, taken advantage of by Richard Nixon to be a principal issue in the 1968 presidential campaign.

Furman v. Georgia, 1972, by threatening to strike down the death penalty, produced dramatic increases in support for capital punishment, led to 35 states passing new death penalty statutes within four years.

Roe v. Wade generated a politically potent right to life movement which had not previously existed, at least in national politics, played a significant role in electing Ronald Reagan President in 1980, and continues to affect American politics in pretty dramatic ways.

Finally, Goodridge -- the Massachusetts decision in 2003 protecting a right to same sex marriage under the state Constitution -- resulted in 30 states adopting state constitutional amendments barring same sex marriage, had a profound effect on the 2004 elections, cost a couple Democrats like Tom Daschle their seats in the Senate, and arguably determined the presidential election in Ohio, where George Bush won by two percentage points and the same sex marriage ban passed in a referendum by 24 points.

So those are prominent examples. What are the factors that seem to predict backlash?

Obviously the most important is going to be contravening dominant

public opinion. 2/3 of the country opposed Miranda, according to opinion polls at the time. 2/3 of the country opposed Goodridge when it was decided in 2003.

Second factor -- and I think this ties in with something that Jeff was talking about -- has to do with the intensity of preference among the losers being greater than the intensity of preference among the winners.

In Brown, 3/4 of Northern whites thought the decision was rightly decided from the day it was handed down, but only about five percent of whites outside the South regarded civil rights as the most important issue in their lives. Within the South, 90 percent of whites thought that Brown was wrongly decided and something like 40 percent of them saw the issue as the most important one. So for whites in the United States in 1954, it was those who saw Brown as egregiously wrong, who actually cared about it? Those who saw it was right actually were pretty tepidly committed to it.

Same thing with same sex marriage. In 2004, the country was divided 2:1 against same sex marriage, but of the 1/3 that supported it, only six percent said they would make it a voting issue, whereas among the 2/3 who opposed, 34 percent said they would make it a voting issue -- and among Evangelicals, that number actually goes up to 55 percent. So again, given that huge disparity in intensity of preference, not surprising you would get a pretty dramatic backlash.

Third factor has to do with the way that opinion sometimes breaks down along geographic or regional lines, and how that feeds into a political dynamic that I think accelerates backlash.

With Brown, obviously the North and the South were very divided. Most Northerners thought Brown was right. The overwhelming majority of white Southerners thought Brown was wrong, and African-Americans in the South, for the most part, weren't allowed to vote so their commitments didn't matter very much politically.

This has the effect of giving Southern politicians like Orval Faubus the incentive to play the massive resistance card. They become political heroes for doing so, but it simply ratchets up repulsion in the North. Northerners are offended by the idea that a governor would call out the state militia to prevent middle class black kids from attending a desegregated school so they support President Eisenhower when he sends in troops. But that just makes Governor Faubus even more of a martyr in the South. He becomes invincible in Southern politics and somebody like George Wallace watching from Alabama decides he's going to mimic or even exceed Faubus in his extremism.

It's a similar sort of breakdown of opinion on same sex marriage -- not between North and South, but between urban and rural or small towns, and you see this, I think, in the phenomenon of Mayor Newsom in San Francisco becoming a hero locally -- seeing his approval ratings going up to 85 percent -- for illegally marrying same sex couples after the Goodridge decision. That's a very politically profitable thing for him to do, but when there are images on national news programs of same sex couples getting married and kissing on the steps of San Francisco City Hall and that's shown to middle America, people in Kansas or Nebraska are repulsed by that and they come out in favor of a federal Constitutional amendment.

So there's no reason in theory why conservative activism won't produce backlash. There's nothing intrinsically liberal about judicial activism. There's no political valence at all. Historically, most activism was from the right. Denunciations of judicial activism in American history mostly came from liberals denouncing conservative activism.

It's a historical activism that we're in a different era today, and there's nothing intrinsically conservative about backlash. The court decisions -- liberal backlash against conservative court decisions is possible. Jeff has written about the most famous one -- the Supreme Court struck down too much of the New Deal and then the New York

minimum wage law. Of course that was going to produce a dramatic backlash against the court.

But if you go back to the 19th century, a couple of slavery decisions -- Prigg v. Pennsylvania, striking down Northern personal liberty laws has a backlash effect. It increases support for abolitionism in the North. And Dred Scott's a little complicated, but Dred Scott also has the effect of mobilizing Republicans after the Supreme Court declared their party unconstitutional.

So there've been lots of examples of conservative activism in the last couple decades. I assume you've been talking about that this morning. One thing that's amazing to me is how few people identify how much conservative activism there is still in the popular press. The conventional image is activism is something liberals do.

But in fact, there's been lots of conservative activism -- striking down race-based affirmative action in minority voting districts as not defensible simply based on text or original understanding.

The Second Amendment decisions are extremely activist, I think -- based on the best readings of the original understanding of the Second Amendment.

Striking down campaign finance reform is an extraordinary expansion of the meaning of the First Amendment -- historically unprecedented. Only in the last 35 years, would anybody dream that was unconstitutional.

Dale in the court inventing a right to expressive association, to allow the Boy Scouts to exclude gays in the face of a New Jersey public accommodation law. That was inventing a First Amendment right I'm not sure anyone had ever heard of before.

And of course, Bush v. Gore, one of the least defensible Constitutional interpretations in the history of the Supreme Court -- that's an example of conservative activism.

Those decisions didn't cause backlash -- I think mostly because the decisions are actually pretty popular -- or at least they divide the country in half -- and/or because intensity of preference is all on the side of the people who won.

Affirmative action almost always loses when it's put up to a vote. Ward Connerly has put it up for a vote in a bunch of states -- referenda in Michigan, California, Washington. It almost invariably passes because most people won't vote for race-based affirmative action.

On the Second Amendment, all the court's done so far is to strike down the most extreme instances of gun control -- the Washington law, the Chicago law. We don't know what would happen if the court struck down a law against concealed machine guns, but I don't think there's any reason to think this court is going to do that -- plus on gun control, all the intensity of preference is on the other side. It's the NRA -- even if they're a majority for more gun control, all the intensity of preference is on the people who oppose it.

Striking down campaign finance reform's interesting because of these polls showing 80 percent opposed, including 80 percent of Republicans as well as Democrats. President Obama, a former Constitutional law professor, certainly thought there was a backlash out there to be mobilized. He talked about it in the State of the Union address. He talked about it when he nominated Elena Kagan to the Supreme Court. I think the problem is there just isn't that much intensity of preference.

People who don't like same-sex marriage and don't like Roe are much more intensely mobilized than people who are outraged by Citizens United.

Bush v. Gore -- as I said, may be one of the least defensible Constitutional interpretations in American history, didn't produce a backlash. Half the country supported it in opinion polls -- the same half that voted for George Bush and that

thought the Florida Supreme Court was trying to steal the presidential election. In addition, probably not that much intensity of preference among Democrats in support of Al Gore -- plus it's an unusual case, in that it really doesn't involve a controversy. It's not like abortion, school desegregation, the death penalty. The issue was whether you count hanging chads or not. That's really not something that's going to provoke a lot of backlash in the long term.

Striking down health care is the interesting question. Recent opinion polls show the individual mandate not necessarily all that popular. Country's probably pretty much divided down the middle on that. My guess is striking down the individual mandate's not going to produce any great political backlash. It's not, as Jeff said, like standing up to the President's economic agenda when the President is so popular that he just won one of the biggest landslides in American history. We have a President that's 50/50 whether he's going to get reelected so it's a very different scenario from 1936.

Overturning Roe, followed by states like South Dakota and Mississippi maybe forbidding abortion in most cases -- that's the scenario where you start to, I think, contemplate a real possibility of backlash.

I don't think any conservative court on which Justice Kennedy is the fifth vote is going to do anything that's that likely to provoke public opinion.

MR. WITTES: Thank you. Just one logistical matter -- what time do you turn into a pumpkin up there?

PROFESSOR KLARMAN: It's not clear anymore so I might get kicked out at 3:35, and I might be able to stay until you're done -- so I just don't know.

MR. WITTES: Okay. Well --

PROFESSOR KLARMAN: They've told me inconsistent things.

MR. WITTES: Well, after Dahlia talks, we will direct the initial questions

your way so that the questions that are meant for you get to you before you disappear.

PROFESSOR KLARMAN: Okay. I appreciate that.

MR. WITTES: Dahlia?

MS. LITHWICK: Okay. Well, I also want to say thank you so much to Ben and to E.J. and Brookings for hosting this event, and to say only somewhat snarkily that this is a public conversation that only usually happens about 15 minutes before a confirmation hearing. I mean, progressives are so bad about having this conversation until -- Kagan's going to testify in three days. Let's figure out what we can message.

And so I really think that one of the things -- and I think this goes to Michael's point about the intensity gap -- is that we have done a really pretty lousy job of having this public conversation and having a really thoughtful public conversation about liberal judicial interpretation.

On the question of backlash, I think -- and I speak now as a journalist. I'm not a political scientist. I think that you need two things to have a backlash -- and here I think I'm probably just culling from the best of Jeff and Mike -- but I think you need a coherent message. Here's what you should be outraged about, public, and I think you need a public that cares.

And we talked a lot this morning -- I think Jeff did a great job of saying we're not messaging at all. We are doing a dismal job of saying this is what you should care about. This is what progressives do that's different. And I think, as Jeff points out, we're not arguing on the streets about the Supreme Court. We're not talking about the judiciary at all out on the streets. This is not the New Deal getting struck down. This is most Americans don't know what the court does and don't much care, and it doesn't affect their lives.

And the intensity gap that Mike talks about is so profound here because

conservatives care about the court. They have been laser-focused on the court for decades. And progressives sort of just hit the snooze button sometime after the Warren Court era and said, “Hey, we won,” and forgot that this is an ongoing dialogue, and it’s something that they have to be concerned about.

And I want to just point out one paradox that we flicked at this morning, but I don’t know that we talked about explicitly. And the paradox is this. It seems to me that most Americans actually want liberal Constitutional results, for all the reasons we talked about this morning.

Polling shows -- and I think Doug Kendall does this at the Constitutional Accountability Center -- but polling shows that Americans generally want liberal results. What they don’t want is the methodology that you heard Judge Wilkinson talk about, and you’ve heard other people talk about this morning -- the notion that progressive judges just make it up as they go along, that they’re just swinging from the chandeliers half-naked, inventing the law as they go along. And you think I’m joking, but that really is the thing that terrifies Americans.

And I think this goes to Ben’s point this morning about restraint. We talk about restraint as a value. I think the need to constrain the judiciary in this country is so powerful right now. I think Americans are terrified about the judiciary. And I’m surprised we didn’t talk a little bit more about how the attack on liberal jurisprudence was in fact an attack on judges and judging, period -- and that for the last couple of years, we have seen a concerted, I think, conservative effort to say that when judges do anything, they are activist judges. I mean, the opposite of being an activist judge, I think, is a dead judge.

And so it seems to me that one of the things that progressives have failed to do is to answer that, is to say here’s what judges do. Justice Scalia, with all due

respect, it's not easy -- because he likes to say it's easy. My cat could be a judge. It's so easy. All you do is look at the Constitution and what it says. It's not easy. It's not automatic, and it's not calling balls and strikes.

And I think that the reason that language is so salient and so powerful -- and when Chief Justice John Roberts testified about just being an umpire and calling balls and strikes, I swooned -- it sounded so good. I mean, America fell in love with the idea of a Justice who, at the very, very best, does almost nothing at all.

And so I think one of the things that we need to talk about is how this sort of absolutely profound demonization of the judiciary as a whole has shaped this conversation the last couple years. It is not an accident that every single Republican who is running for the presidency, with the exception of Huntsman and Romney, have an elaborate plan to take every single tooth out of the federal judiciary, including shutting down the Ninth Circuit and term limits and forcing judges and Justices to come testify before them about opinions they don't like.

So think about that as compared to the message that President Obama has given about the judiciary -- crickets. Crickets -- four years of not knowing what it is that he would do to the judiciary, why, if he believes deeply in a judiciary, he does, if he doesn't believe in a judiciary -- and I agree with Jeff. I think he doesn't believe in the judiciary of Brennan and Marshall -- why not?

Instead, we've had virtually nothing, and I think this does go to the intensity gap that Mike is talking about. When you have one party who talks obsessively about how bad judges are, how dangerous they are, how we constrain them, how important it is to back them down, and another party who has no response -- or if there is a response, I've yet to hear it. And I think that all you need to think about in this context is the judicial elections -- because I know we've been talking about federal judges.

But if you look at what's going on in the states, all of the political pressure is on defanging the judiciary. It's not on having a powerful judiciary that does anything. So it seems to me that public sentiment is very, very anti-judge right now, and we need to think that through.

Now the only other thing I want to say -- because I want to hear from Michael some more about why I'm wrong about this -- but I think the other thing I want to say is on this question of messaging. Jeff made the point this morning -- and I think it's really important -- that the messaging has to come from the top. FDR would give fireside chats about the Constitution. The reason people were fighting about the Constitution on the streets was because from the top down, they were being told, "Here's what the Constitution means. Here's the judiciary's role in enforcing and protecting that."

We haven't had that -- not just from the President. We haven't really had it from the judicial branch either. I find it fascinating that the most poignant and powerful defense of liberal Constitutional thinking that has come from a jurist on the Supreme Court came from David Souter at a speech he gave at Harvard after he stepped down from the bench -- after -- whereas Justice Scalia, I think, gives that speech every day at the dinner table. I mean, he is not in any way abashed about selling his Constitutional worldview.

It seems to me there is not a lot of that going on on the left from the bench, for the reasons that Pam talked about this morning. There's a real hesitancy in the academy to be an outspoken advocate for judicial Constitutional thinking.

And so I want to just end with a little mental slideshow. We're going to go even more virtual than Mike Klarman. And I'm just going to walk quickly through the four confirmation hearings that I have covered as a reporter and tell you what I think the messaging -- where it is and where it's going, and where this backlash question goes.

So the first was the Robertson-Alito hearings. And I thought it was really interesting to listen to Democrats on the judiciary committee try to frame the thing that they were looking for in a judge in cardiologic terms. In other words, we heard unremittant questioning about what is in your heart. What is your heart -- you wanted to wheel in the MRI machine and just -- there it is. It works. But literally, that was the extent to which they could articulate what it is that liberal jurisprudence is. And I thought, "Oh my God. Kill me now if this is the best we can do."

We came to the Sotomayor hearings -- slide three -- and we had, as you may recall, an amazing 14-second public conversation about judicial empathy. And this is when Barack Obama says, "I want a judge who is going to be empathetic," and he gets pilloried and clobbered and pounded into a pulp, and so he says not so much. And when Sotomayor is asked, "Are you empathetic?" she was absolutely willing to throw empathy under the bus, and we never talked about empathy again.

And I thought the other thing that was fascinating about the Sotomayor hearing was watching Democrats on the committee completely unclear on what it is that they wanted in a Justice. And so you had some of the Democrats on the judiciary committee saying, "You're a tough law and order prosecutor, right? You're a neutral umpire -- balls and strikes," to which she answered, "Yes." And then others kind of going the cardiologic route. "But you'd probably put your thumb on the scales for a little guy." "Yes."

So there you are. We have a real kind of schism between -- even as among the Democrats on the committee about what it is they want to say.

Fast forward to the Kagan hearing. Really interesting thing happens at the Kagan hearing, where the Democrats on the committee seem to have aligned around a message. And the message is the courts are shutting their doors to regular people.

The ordinary American is getting shafted here. Exhibit A, Lilly Ledbetter. Exhibit B, Citizens United. And they're all making the same point. And I thought that's sort of interesting. I don't know if that's going to resonate.

Fast-forward a year later, and that's the message of we are the 99 percent, I think -- I think purely accidentally. The judiciary committee gave voice to a sentiment that we are now seeing at Occupy Wall Street. Now I want to be really clear that there's only seven people at Occupy Wall Street holding up signs that says, "Citizens United." But it's really interesting to me that that message, that the court has systematically made it impossible for ordinary Americans to get justice -- and at the same time, has put a heavy thumb on the scale for big business -- has really, really been the message that I think has carried into the Occupy Wall Street protest.

So I guess I just want to close by saying whether it happened accidentally or on purpose, that vision of what it is that progressives should do -- and I think it's a little bit David's vision of have your thumb on the scale for the guy who doesn't have a chance here. That seems to be what has really bled into some of the conversation about the court now.

And I really think it's worth thinking about the fact that the relationship between the Tea Party and their conversation about the Constitution, and Occupy Wall Street and their conversation about the court and the Constitution have so many parallels, so many places that we can intercept, that I do think Judge Wilkinson's quite right -- this might be more of a moment to talk about common cause than a moment to pick a fight.

Thank you.

MR. DIONNE: Wow. Thank you so much for that, Dahlia. I've been such a fan. I have always wanted to meet you so I'm so glad you did this panel.

Pam Karlan clearly set the tone when she started talking about baseball. I've been trying to find a metaphor that would involve the infield fly rule, but I couldn't figure it out. But the umpire business -- just one point and then a question which could go to Michael but really to everyone because it really picks up on Dahlia's last point -- because I was very struck by the same thing at the Sotomayor hearing.

So it was the first time you ever saw, really, at one of these hearings, a coherent alternative liberal progressive argument.

First, I just note that Dahlia notes there's an attack on judges. There's also an attack on the media. And it just struck me that what it is is a consistent attack on umpires from the conservative side -- that is an intriguing -- it's just an intriguing point that I think is beyond the scope of this conference, but it's worth exploring.

Why no backlash against the conservative court so far? One, because activism is a charge that has been used against liberals since Brown v. Board. That's 57 years. So the word liberal and activist when it comes to judges is almost as automatic now as ham and eggs are, Abbott and Costello.

And so question one would be is this in part a question of knowledge and consistent argument? That is to say, because conservative activism on the courts -- which we all agree -- even people who are conservative who might agree with the decisions would agree -- is more of a habit now among conservatives, probably just because they have the power. It's just unknown.

So the question is, is there an obligation to make this known in a way that it's not?

And then the second is right on Dahlia's point, which is, it does seem to me -- and this kind of unites, really, Forbath with Jeff Rosen and David Strauss -- this whole business about corporate power. I mean, it was Al Franken and Sheldon

Whitehouse in particular who really pushed that narrative -- and it is a narrative that, as Henry Kissinger might say, has the additional benefit of being true to at least a significant body of facts.

So my question is, is one -- is there no sense of conservative activism simply because people are totally unfamiliar that this exists?

And two, is this corporate align of a certain kind of -- small D -- democratic populism the most likely sort of avenue through which this is backlash, if it materializes comps?

Michael, could you take that maybe first, and then --

PROFESSOR KLARMAN: Sure, I think especially focusing on the first part.

So I think there are two things that liberals could probably do better.

One is, it's just extraordinary to me that somebody like Scalia can profess an aversion to activism but still strike down race-based affirmative action, strike down gun control legislation, strike down campaign finance reform, tell the Boy Scouts that they don't have to take gays because the New Jersey public accommodation law is unconstitutional and intervene in the presidential election, telling Florida courts that they're not the authoritative interpretation of Florida law.

I don't know how you can be committed to those positions and profess that you're a textualist and originalist, and that you're not engaging in judicial activism. So I don't think the liberals have been good enough at just calling conservatives on that.

The other thing that I think liberals could do a lot better is pointing out that most of the results that everybody in the country thinks are obviously right are not defensible on the conservatives' jurisprudence of textualism and originalism. Brown is obviously wrong as a matter of original understanding, yet everybody in the country

thinks Brown is right. Baker v. Carr, Reynolds v. Sims, one person, one vote -- obviously wrong as a matter of text, original understanding and precedent, yet I don't think there are a lot of people today who think one person, one vote's a bad idea.

Most Americans would be repulsed by the idea that women are not protected by the Equal Protection Clause. There's no originalist understanding of the Equal Protection Clause that would protect women. The idea that you can cut off peoples' ears as a punishment -- that's perfectly consistent with the original understanding of the Eighth Amendment. Most Americans would be repulsed if you told them the Constitution has nothing to say about that.

So I think liberals need to do a better job on both, pointing out that nobody on the Supreme Court is calling balls and strikes. Everybody is engaged in an active interpretation that goes beyond calling balls and strikes and doing textualism and originalism. And second, a lot of the decisions that we value -- indeed, treasure -- and 90 percent think are right, are not defensible in terms of the originalist-professed methodology.

Those seem to me like winning arguments, but I'm not a political strategist.

MR. WITTES: May I push you on whether those really are winning arguments? So first of all, I think the meme that conservatives have their own brand of activism, that once they had occasional five votes to implement, got implemented with some degree of regularity, depending on which decisions one doesn't and doesn't consider activist -- very regular, somewhat regular or sporadic -- but certainly occasional at a minimum -- is widely stated and restated, propagated and re-propagated and doesn't actually catch on as a matter of civic mythology.

And I perhaps -- I don't know -- I'm not sure if I'm actually committed to

this view, but I'm going to state it in a strong form for purposes of being provocative. I think the reason for that is that people admire Scalia's commitment and statement of an aspiration. And when Justice Scalia says it's easy, he's talking to people about the way that a lot of people feel it should be.

And even just as when conservative politicians turn out -- some of whom then run for President and do well among social conservatives -- turn out to have had serial infidelities of one sort or another, it somehow doesn't encumber their family values credentials in some way because there's some understanding that the flesh is frail and that speaking for the value has intrinsic value of its own.

And I wonder if part of what is going on here is similar to that, that speaking for the value of -- different use of the word fidelity -- Constitutional fidelity has an intrinsic value of its in the public sphere. And even with an understanding that people don't actually necessarily live it every day in their judicial lives, people prefer those judicial and Constitutional philosophical figures who profess it than those who state a loss of faith in it.

So I throw that out there as an intentionally provocative thesis that I'm not sure I buy myself, but I would be interested in your response to.

MR. SHESOL: I just want to say -- I can't believe I may have heard Ben either accuse Justice Scalia of hypocrisy or analogized his behavior to serial infidelity, but --

MR. WITTES: No, to be clear --

MR. SHESOL: I don't think that was your intent, but that is what --

MR. WITTES: -- because this is being recorded, Justice Scalia actually talks -- I'm sorry. Justice Scalia actually talks in a language of fidelity. It's a word that -- and of keeping faith and of honoring law that was propagated by the founders and of

fidelity to that.

The question is, to the extent that one can reasonably, as Mike Klarman just did, point out incidents in which his judicial behavior is not fully consistent with the reflecting of mind meld with the founders -- to the extent that one can do that, why does it not, as Mike Klarman suggests, undermine the philosophical position, despite, I think, having been repeatedly pointed out by large numbers of people?

And I'm suggesting that there's some value to a lot of people in the articulation of the belief, even in the absence of full compliance 100 percent of the time.

PROFESSOR KLARMAN: So I don't know if I have a great answer. I mean, maybe people need to be educated about what sort of results that everybody agrees are right -- you couldn't have with that commitment to a sort of simplistic methodology of textualism and originalism.

That worked in defeating Bork, right? I mean, Bork was defeated for a bunch of reasons but one is, he wasn't prepared to defend an outcome that everybody pretty much thought was right, which is that people have a right to privacy under the Constitution.

So make Scalia defend Brown v. Board of Education. It can't be defended on originalist grounds. He actually just says it's defensible as a matter of textual interpretation, but that's not very persuasive because for 80 years, that's not what most people thought equal protection meant.

I think American people are absolutely committed to the idea that Brown is right, that we ought to have one person, one vote, that women ought to be protected under the Equal Protection Clause. I would simply try to educate them that a simplistic commitment to originalism and textualism is not going to get you those sorts of results.

If that doesn't work, I don't really know what to say, Ben. I mean, it's a

good point. When the liberal Justices like Souter and Stevens explain their methodology -- for example, in a case like McDonald, the Second Amendment incorporation case, and they point out, "We don't limit ourselves to history. We look at evolving notions of rights. We look at international norms. We look at political process theory. We look at all sorts of things, but that's somehow something other than the subjective interpretation of judges," I think most people see through that as nonsense. I think it's nonsense.

But of course judges' subjective opinions are influencing their interpretations. There's never been a time that wasn't true. It's true of John Marshall interpreting the necessary and proper clause in Marbury. It's true of John Marshall inventing judicial review in Marbury v. Madison. Anytime you've had judicial review in America history, it's involved judges making controversial value choices not clearly ascertainable in text and original understanding and precedent.

That's a hard lesson to learn. Maybe people don't want that, but nobody who's studied Con law really thinks it's calling balls and strikes. I have 160 Con law students this semester, and I'll bet you not one of them thinks it's calling balls and strikes. Apparently umpires don't think that calling balls and strikes is like calling balls and strikes either. There's an element of subjectivity in that too. Nobody thinks that.

MR. SHESOL: I just want to go back to E.J. -- your question about the traction -- whether there's traction to this idea of a corporatist court and why there hasn't seemed to be that so far, and why I'm not particularly optimistic that this can be promulgated as a progressive talking point in any successful way anytime soon.

I think that -- reflecting on something that Dahlia said -- I think it's really incumbent upon us as progressives to get out there and think about the message that we are conveying, to convey it with clarity and to convey it consistently. And I think that the main reason we can't do that is because we don't know what we think. It's not that we

don't know how to say it. It's that we don't know what we think.

I think if you are going to try to provoke a backlash, as has been done many times successfully, as Michael pointed out, historically, you've got first to establish the pattern. What's the pattern of these decisions? And ultimately, what's the alternative?

And in terms of the pattern so far, I think we've got to be able to answer the question, Citizens United plus Wal-Mart plus AT&T equals what? Equals what? Equals a court that gives too much attention to the Chamber of Commerce briefs? Maybe. I think that the numbers probably indicate, as I referenced before, that that's probably true.

But I think that one of the things that we're missing in that connection of the dots are impressive dots. These are meaningful cases with disastrous results, as Dahlia and others have pointed out. But none of these has really gripped the public. I think as progressives, we have to accept some of the responsibility for that, but I also think that none of these really have been marquee cases in the way that the ACA is going to be a marquee case. Unfortunately, for our purposes, that doesn't fit this little narrative that we're talking about.

And so I think, first of all, as I've said, you've got to establish the pattern. And I don't think that we have impressive dots from a public messaging perspective or that we have connected the dots.

And then secondly, we have to answer the question of what the alternative is. And I found it very interesting, Dahlia, to hear you walk through these series of confirmation hearings and the messaging as it finally emerged. And this is a familiar message for us Democrats -- that it's ultimately about the little guy. But if we're going to call this, then, maybe the little guy doctrine.

What does that mean jurisprudentially, if I may use that word? What does it mean in terms of the Constitutional values we wish to promote? What does it mean in terms of our understanding of the Constitution and how is that different from their understanding of the Constitution? What does it mean in terms of our methodology, our mode of interpretation of the Constitution? What does it mean for the role of judges?

These are questions that we haven't answered effectively because I don't think that the little guy doctrine is anything more than an effective talking point. And it does tap into a general disaffection, not just on the left but actually on the sort of far reaches of the right as well. So it may have some political saliency, but what it doesn't actually have behind it is a real idea that translates this into anything that means much of anything when you're in a courtroom and an argument is being made.

So we've got a lot of work to do, not just in the public space but in spaces like this and wherever everybody goes back to at the end of the day.

MR. WITTES: Should we go to audience questions? I see Sy has his hand up. Again, for those of who who've just come in recently, when the microphone comes your way, please say your name and where you're from -- when the microphone comes your way.

MALE VOICE: Jeff -- and in particular, I'd just like to ask -- direct this statement in question at you all, though others may want to comment on it. I think it's not correct to say that there's no examples of backlash -- and in particular, it's not correct to say that the -- I would call it not just the little guy approach but the don't bend the law to protect the big guy approach, which is actually what the judiciary committee senators have been saying in these cases. I don't think it's correct to say that hasn't been effective.

It was, I think, quite effective in the case of the Ledbetter case. And

because it produced a concrete backlash, legislation actually passed. And even before the 2008 Congress was elected, I think there was seven Republican votes to break the filibuster in the previous Congress, which is quite remarkable.

And I'd just like to suggest, I think, that the reason, the strength of this type of situation -- and it's also true in some of these other cases -- is unlike the case of an ACA and its constitutionality and what does the commerce clause mean, these are situations involving very real people in real situations that people in general can identify with, if one does it the right way.

And the second little point I would just suggest is if it's just the little guy doctrine, we lose. Senator Durbin asked Chief Justice Roberts then in his job interview when he was a judge on the DC circuit, "Give me an example of a case where you haven't ruled for the big guy." And Roberts shot back, "When the law favors the little guy, I rule for the little guy. When the law favors the big guy, I rule for the big guy because that's my oath to the Constitution." Needless to say, Senator Durbin responded to that with silence.

So I think that the lesson from all of that is that if you combine the two, which Senator Leahy and his colleagues have tried to do -- and as Dahlia pointed out -- in the Kagan hearings, did very effectively. It actually works, I think, quite well -- needs a lot of development, but there you are.

MR. SHESOL: I'll just respond quickly to your points there. I think on the second point, I completely agree with you, that I think that the little guy doctrine in itself is a losing proposition. And I would add one reason why I think that's the case.

I think it's one thing in the political space, in the political branches to say they're for the big guys and we're for the little guys or we're for the middle class or whatever it is. It's quite another thing to enter the judicial space and to be a senator on

the judiciary committee and start speaking in the judicial space, and kind of hint or even say that what we're for is putting the thumb on the scales for the little guy. They put the thumb on the scales for the big guy; we put the thumb on the scales for the little guy.

I think that with respect to what some others have said, I don't think the public wants the thumb on the scales. So I don't think that's an effective response, and I think that to the extent that that's what we're saying, it reinforces the sense that the judiciary has totally politicized. And I think it leaves us very vulnerable, and in a way that we probably ought to be vulnerable.

And the last thing I'll just say quickly about the -- you raise an excellent example in Ledbetter, in which there was a backlash, there was a discrete response and effectively a reversal. And I'm not saying that can't happen, and I think that is an important dot that I should've added to my litany here.

But I think that for there to be -- so we can continue to be opportunistic, and when they really overreach like that and there's an identifiable victim and there's a statutory response that we can come up with, then I think we'll do just fine.

But I guess what I'm talking about is viewing this more sort of globally and from a long term perspective, as I think conservatives have done effectively -- that we need a better fundamental response that can be applied in each of these instances, that reflects our understanding of the Constitution and of the role of the judiciary.

MS. LITHWICK: And I think I would just add one, maybe two glosses to that too.

One is I think the same little guy problem is the same empathy problem, right? The reason empathy crashed and burned is because of course we all secretly want our judges to have empathy, but we don't want to say that they have empathy because oh my God, they'd just be crying all the time.

So I think that -- and it goes a little bit to Ben's aspirational point -- the judiciary is really a different branch of government. It's such an aspirational construct that anything that you do that in any way dings the image of the balls and strikes umpire is a loser because we want to believe that our judges are not that.

And so even though we have a laundry list of qualities like empathy -- I'm saying it -- that are really of value in a judge, that can't be the message because that reads as bias and we can't be for bias.

The only other thing I want to say -- and I'm a little less persuaded than Jeff that the Occupy Wall Street, we are the 99 thing won't catch on as a way of talking about the court -- and it's just because even Occupy Charlottesville has five "I hate Citizens United" sign. So I think it's got more traction than we may believe, but I think there's a problem there too, and it's an interesting problem.

And that is that the public understanding of what Citizens United did is almost completely wrong. And I think that it's a very complicated -- it's not Ledbetter. It's not AT&T. It's an incredibly complicated decision to explain and there's a caricature that the court just made corporations people. And so that's a good thing. I'm against that.

But that's actually not what the case stands for as a legal matter. And I think we have a problem when the broad -- that 80 percent of the public that hated Citizens United -- hates a metaphor and not the outcome of that case.

So I just think that -- it's a problem to suspect that the American public are going to glom onto that in their backlash against the court because it doesn't mean what most of us think it means.

MR. DIONNE: Could I just toss something out real quick? It occurred to me in this conversation about why no backlash now -- because I actually agree with you, Ben, that you don't see immediately where the backlash will come from. In the

healthcare cases (inaudible) as the source of it is problematic because of where public opinion is.

But, when you think about how long it took to create a backlash against the conservative activism last time around, it was over 50 years that the conservative Supreme Courts started ruling in the Gilded Age the corporations are people -- decision was, if I remember right, 1886. It took from 1880s to 1937 before you had an effective counter-response. And as Jeff pointed out in his book, even Roosevelt suffered a great deal, and in some ways, lost the -- in a fundamental way, lost the court-packing fight. So even after 50 years -- and that the conservative backlash -- I think it's really important to locate it, beginning with Brown.

And one of the things, if you go through historically in some of the cases mentioned, anything having to do with race and our struggle as a nation with race has produced instant backlash, whether it was on the segregationist end with Brown or on the anti-slavery end with Dred Scott.

But then the conservatives built on an era that began with Brown. And so -- but they already had this powerful -- both on a real and a symbolic level, this powerful case to work with. Now some of us who are obsessed with Citizens United and Bush v. Gore already see ample reason for this backlash, but we also, I think, need to acknowledge that many, many other people do not feel as ignited by those cases as, say, the conservatives were by Brown -- or Roe v. Wade, where I think there's a legit argument about whether that should've stayed in the political system, regardless of where you stand on abortion.

MR. WITTES: I want to throw out another question, sort of related, that goes to Mike Klarman's intensity point.

So one of the things that I think gives rise to some of the prior historical

instances of real actionable backlash -- backlash that actually has an impact in the political arena that you can measure and see -- is the perceived consistency of the court's activism or aggressiveness.

So the New Deal court is, as Jeff pointed out, tossing out act after act after act in marquee cases in very quick succession so that it reaches a real critical mass. The Warren and particularly Burger courts, there's not much in them, whether one agrees with David Strauss or not, that it's largely defensible -- and I do agree, at least as to the Warren court.

There's not much in it that was a conservative of that time -- and I think we can actually be thankful for this -- it was going to see as mitigating the push, right? I mean, it was a very consistent, long-term endeavor that eventually reached a certain critical mass that Nixon ran against.

And one of the oddities of the current court is that it has strains of conservative activism that coexists with strains of liberal activism together, and so that if you have a gathering of conservatives who discussed the Supreme Court today, they sound a lot like the way they did a few years ago. They're not sitting around triumphing about Citizens United. They're talking about certain Eighth Amendment death penalty cases involving the mentally retarded and people under the age of 18. They're talking about the looming prospect of decisions in gay marriage. They're talking about areas that they see as sort of continuous with a long-term trend of liberal judicial activism that they're allergic to.

And so my question is, in a world in which one -- everybody looks at the Supreme Court right now and sees an activist court. But some people look at it and see a conservative activist court, and some look at it and see a liberal activist court. And as Jeff pointed out -- and I pointed out in my introductory remarks -- the poll data suggests

that there are many more people who look at it and see a liberal activist court than see a conservative activist court. Does that sufficiently confuse the picture that you would have to have a much greater density of much more consistently conservative opinions before the picture would clarify enough that you could seriously talk about backlash.

Yeah, please. Get David a microphone.

DAVID: This is further to Ben's point, and it's something Mike averted to too. The hypothesis is that we are no longer in an era where an acute backlash of the 37 variety is possible. And here's the data point. In, I think it was, 1989, the Supreme Court cited a case called Webster against Reproductive Health Services, which seemed to, of course, (inaudible) the overruling of Roe against Wade, just as Slackman wrote a very impassioned dissenting opinion. I have only a few years left and Roe's going to be overruled.

And there was a bit of a backlash, I think, in the senatorial elections. And I think Michael will know all the data, but the senatorial elections in 1990, and I think in the off year gubernatorial elections in New Jersey and Virginia of '91. Abortion was an issue and it was a winning issue for the pro-choice side because it looked like Roe would be overruled.

Now as Mike said -- and I think he's right -- the conservative Justices on the court now, I think, will not write the sentence Roe v. Wade is hereby overruled. They will not write that sentence. And part of the reason they won't write that sentence is because they're learned.

And I wonder if given -- people learn. People see what happened in '37. People see these other mini-episodes of capital punishment and Goodridge and cases like that. It's possible now that the people getting on the Supreme Court are more sophisticated politically because the confirmation process -- the nomination and

confirmation process may tend to filter in people who have a lot of political savvy to a greater degree than it used to. There's more public exposure for the court, there's more media, and that the Justices are just too savvy to get themselves caught in that position.

And you can make a case that one -- E.J. and I were talking about this at the break. One reason liberals haven't gone after the court is they've been very careful to maneuver themselves on choice and a couple of other issues where liberals don't want to go after them in the way FDR could really take them on and Jackson took them on and Lincoln took them on.

On the other hand, conservatives aren't going to take them on because they do lots of things conservatives like. And I wonder if, as Ben is -- I mean, Ben's suggestion is you're going to have to get a critical mass. I wonder if we're now at a point where you just won't get it. They're just too savvy to do that.

MR. WITTES: This is a different angle toward the same -- well, it's at once perhaps more fatalistic and more hopeful than David.

It's no doubt that conservatives have learned to avoid marquee cases when you can instead inflict death by a thousand cuts. You can slowly erode the Voting Rights Act or Title Seven without overturning it.

But I think it's fair to say that the -- this picks up on E.J.'s point about the long run-up to the confrontation during the New Deal, that there was, from the 1890s onward, a drumbeat of the courts are in the hands of the corporate interests.

And part of what the drumbeat prepared was all the sub-constitutional cases for which the marquee cases striking down labor legislation were simply a capstone and an emblem. It was the everyday injunctions against strikes and the everyday decisions that a given regulatory statute was in derogation of the common law and needed to be interpreted narrowly. That was the stuff of the pro-business courts.

And those decisions were vastly more important in the real lives of the little man, right, to use Jeff's -- or the little guy, right, than were the striking down.

I mean, the proof of that pudding is that the labor movement, which was the most organized, right, attentive, right, group attending to this stuff was vastly more exercised by the sort of injunction cases and the cases restricting their ability to organize than they were about the occasional labor law getting struck down.

And by the way, it wasn't so consistent. Even during the New Deal, it wasn't so consistent. They did uphold cases. So where does that take one? It may take one to the following proposition, which is the more fatal, at least the part that takes us away from the courts -- that what made the court's pro-business posture during the first sort of few decades of the last century so salient was that there were organized players, bitterly opposed to the court's posture on economic and class issues.

What's missing here, the kind of gorilla in the room in a certain way, since this morning, is any discussion of what difference it makes that there's no labor movement with the kind of clout labor enjoyed during the Warren court era or the kind of momentum labor enjoyed during the New Deal. They drove politicians to care about the judges' pro-business outlook.

The reason a Judge Parker was denied confirmation to the court wasn't only because of his race decisions, which Michael has focused on, but equally his labor decisions. The Warren court was effectively fairly anti-labor. William Brennan, for all his glory, was a management side labor lawyer who crafted a lot of anti-labor jurisprudence. Labor was the heavy lifter for the pro-little guy legislation for a long time. Until some other -- either labor revives or some other kind of economic actor for Pam's working people appears, jurisprudence will reflect that absence.

MR. DIONNE: Can I follow that with a question to Dahlia -- because she

actually follows this much more closely than any of us, and that is, do you see evidence of the Justices acting in this sort of stealthy way? I mean, are they savvier than they used to be?

MR. WITTES: While you're at it, I'd love you to take up Willie's point too.

MS. LITHWICK: Well, I just agree. You're right about labor so there's that.

And I think -- to David's point, what I was thinking about the stealthiness is the best example I had was right after Citizens United, when everyone was kicking and screaming about corporate personhood, this case comes before the court -- this sort of under the radar court about AT&T claiming a FOIA exemption because they're embarrassed -- the possibility of corporate embarrassment.

And you may recall, not only did the court spank them for trying to purport to have human characteristics, but the Chief Justice wrote the opinion -- and it's by far the funniest, most accessible thing he's ever written, and I think that's the course correction. I mean, that's a subtle example of the court saying, "America, we didn't mean the corporations go to the bathroom and get their hair cut and get embarrassed; we just mean they have speech rights." So that was exactly the corrective that I think you're talking about.

The only other thing I want to just add -- and I realize it's injecting this whole other thing into this, but I think one of the backlashes that we talked about isn't an ideological one. It's a sense that the Justices at this moment are behaving very badly.

The backlash that I am watching play out in every speech that I've given for the last year and a half is how can Justice Thomas go to Koch brothers' events? Why isn't Elena Kagan recusing herself because she was the SG? And I think that what I'm seeing -- the strand of this that is really interesting because it cuts across ideological

lines, and I do think it's a product of a world in which if you have a camera phone, you're going to catch Justices doing things that they probably did in 1937 but nobody found out about.

I think we have a real issue, burgeoning issue with a backlash against the court behaving in overtly partisan political ways and a complete inability to control that. It loops back a little to what I said about controlling the judiciary, but I think that backlash may actually overmaster any political backlash we're talking about.

MR. WITTES: We are, believe it or not, at the end of the last panel -- for a very long but, I hope, enriching day. I would like to thank all of you who hung in there until the end and everybody who participated in all of our panels but in particular, at this moment, those who are participated in this one and my co-moderator E.J., and let's give this panel a round of applause.

Thank you all very much for coming.

MR. DIONNE: And thank you, Ben. A pleasure to work with you.

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