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A CONVERSATION WITH JUSTICE STEPHEN BREYER

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WELCOME:

CAMILLE BUSETTE

Interim Vice President and Director, Governance Studies, Director, Race, Prosperity, and Inclusion Initiative,
Brookings

FEATURED SPEAKER:

RETIRED U.S. SUPREME COURT JUSTICE STEPHEN BREYER

MODERATOR: BRIAN RICHARDSON

Associate Professor of Law, Cornell School of Law

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BUSETTE: Good morning everyone. Good morning. I want to welcome you here to the Brookings Institution. I'm Camille Busette. I'm the Interim Vice President of Governance Studies. And before we get started, as you know, to pull off an event of this type and size, it always takes a lot of people. We have a tremendous team behind us, in our, development, capacity communications, our security and our catering teams. And I just want to recognize them before we get started. So welcome to the launch of our new Katzmann initiatives on improving intra branch relations and government. The Katzmann Initiative is named after Robert Katzmann, a lawyer and political scientist who worked in this very building from 1981 to 1999, the year in which he was appointed to the U.S. Court of Appeals for the Second Circuit. The three main pillars of the Katzmann Initiative are topics to which Bob Katzmann devoted his energies here at Brookings, and in his role as a federal judge promoting effective inter branch relations, monitoring the health of our democracy, and promoting civic education a timely set of contributions for a trying time in American history. We are fortunate to have well-known presidency scholar Katie Dunn Tenpas serve as a director of this new initiative under her leadership the Katzmann Initiative has grown from a mere idea to a thriving effort generating compelling research. The New Courts Congress dashboard, which charts the relationship of these two branches of government over time, was just released and will serve as a lasting resource to students, scholars and citizens across the country seeking to learn about this critical relationship. I encourage you to check it out on our Brookings website. I look forward to its future contributions that will shape and expand our understanding of American government. Of course, today we honor Bob Katzmann intellectual and professional legacy. But beyond that, we are also honoring a husband, a brother, and a friend who touched so many in indelible and lasting ways. As you know today, we are also very honored to have Justice Stephen Breyer with us to celebrate this initiative. Justice Breyer and Judge Katzmann were friends and colleagues, and Bob's brother, Judge Gary Katzmann, who is here today, was one of then Judge Breyer's first law clerks in 1980. Justice Breyer has a long history with Brookings, going back almost 50 years as chief counsel to the Senate Judiciary Committee and later as a circuit judge and as a member of the U.S. Sentencing Commission. He participated in the so-called Williamsburg Seminars, annual conferences launched in 1978, sponsored by Brookings, the federal courts, the Judiciary Committees of the House and Senate, and the Department of Justice to allow off the record exchanges between judges, legislators, and executive branch officials since his 1994 appointment to the Supreme Court. He has appeared on the stage several times, and earlier this year, Brookings hosted the 10th lecture in the Justice Stephen Breyer Lecture Series on International Law. It is with great pleasure that I welcome Justice Breyer back to Brookings. Justice Breyer will tell us a little bit about his friend Bob Katzmann, and he will also be joined by Brian Richardson, who I'd like to welcome, a former law clerk to both Judge Katzmann and Justice Breyer and currently a professor at Cornell Law

School. Brian will ask his former boss, Justice Breyer, incisive questions about his new book, "Reading the Constitution," and thereafter, we'll open the discussion to you with Q&A. Again, welcome and enjoy.

BREYER: No, you don't know. You're not old enough. You're not old enough. This is old home week. I mean, the era I was here before the earliest point you mentioned. Know we had what's new? Well, you painted the place. We met down. Who's we? There was something called the regulatory group. This is Charlie Schulz. Dick Caves was there, George Eads, and it was, we connected with AEI. It was, and Chris DeMuth, and we'd meet down here and Caves would say, why do they, force a grandmother who flies from, Boston to Los Angeles to see her children, to pay more so that the business traveler, from New York to Utica can pay less. That was the beginning of airline de-reg. I had something to do that, we all did. We all did. That was Brookings, AEI, and a lot of others beside. And, with the truth of the airline directive. What was the truth of it. The fares are now half in real terms. They really are. And, it was. And it was Andy Debourny and I look around, you see where is George is now, I don't know. Jim Miller was involved in that. We were all involved in the the whole government, the sensible part of the government, which was started in Brookings, you say. And and. The peeling paint. Peeling paint off the yellow walls down in the basement. That's all right. Because, Andy Debourny and told the truth about that one. United Airlines tried to get out of it. And, you know, a whole lot of statements we didn't think were too accurate. So we flew out and, we sort of caught them out on this, this and this and this, we thought. And Eads said, or Debourny said, well, Stephen, you really knew the industry. You were right. I think de-reg is a good idea. You will bring people into the airplane who can't afford to fly. The fares will plummet and they have, if you check it with you will. The fares have plummeted. We'll fill up the airplanes. Absolutely. People who have never flown will fly. And you, Stephen, will hate it. Yeah, right. Okay. That was. That was the start Brookings and started what I taught. Regulation and administrative law. And Stuart and I brought that in. I was Brookings and, Brookings and a lot of other things, after which you mentioned Strobe was a great friend. And, goodness. So I don't know about to say anything. I'll just wallow in nostalgia and, and, and Gary and my first law clerk and his brother, I couldn't tell them apart. Twins. And and. Bob was great, and I used to think sometimes, at least, intellectually speaking, they think they have twins. I think it's triplets. Well, what I mean, my goodness, we did see, like, Russ Wheeler, I mean, came down here and we were trying to deal with the ethics problems in courts, and and we did Sally and Russ and and, we were always going down to Williamsburg. And I heard Strom Thurmond say, you know, he said when you worked at the Judiciary Committee, we usually work things out. He's speaking to me in his staff, people and probably to Kennedy we usually we can't today. He says they're all upset about abortion. I took that in. You're upset about things we can't compromise on. We don't know what to do. That

was Thurmond. Interesting. Interesting. And we had all kinds of things going on. And you repainted the walls in some spots may look better and and. No, it was great. It was great. And AEI too. I'm sorry they split off on this regulatory thing. I'm sorry they did. Is it so interesting? You know. Well Bob, why do I say twins? I read his book on interpreting statutes. So I wrote one blanket word for word, and, I read, and it wasn't so easy. You know, it's easy to say. What we're going to do when he work with Frank Coffin, he worked with Frank Coffin as chief judge in the First Circuit then. And they were trying to do little say little because they were noncontroversial things. The statute wasn't drafted correctly. So why don't we send some information over to the Judiciary Committee they could redraft them. And what why it was difficult is because I've always thought since I worked in the Senate on the staff, there are different timeframes. Harold Wilson was right when he said a day is a long time in politics. And over in the Senate Judiciary Committee, it seems like a minute is a long time. That's just not the time frame. Judges are all over in the court. They're in a time frame of two or three months looking out to several years, but they're going to do their work in two or three months, so it doesn't work. I remember one day I was sitting there, I got a call. It was from Warren Berger. Why was he calling me? That was the first thing I thought. I mean, I'm not Senator Kennedy. I'm a staff person. And then I worked out why. And it wasn't that they don't like him. I think it was because nobody had the time. After all, what politics is, what politics is. And I use this example all the time. Oh, this is Senator Kennedy gets a call from the Mayor of Worcester and instantaneously from the Secretary of Defense, which really answer first? That easiest question under the sun. I mean, of course, the Mayor of Worcester, their constituents. I see a young woman in my office and she's going through every single paper on my desk. I was annoyed. Who are you? I said, how are you here? Well, I'm a student, and I wanted to see what you did over in the Judiciary Committee. I think you're going through all my papers. So I was a little annoyed. But then just before I sort of expressed my annoyance, I thought, maybe she's a constituent. Right now that you understand how that place works. And that's not the call. Absolutely not. And so, Gary, I and Bob, Bob on this one. Had his work cut out for him there with Russ and with with other people to try to get some kind of, communication going. And I think they achieved something there. And of course, Bob was off on immigration and, see that people had lawyers. That's good. The judge doesn't just sit there and say, hey, where's your lawyer? If there are no lawyers around and if there's no way to get representation, maybe you got to do something about it. And that, I think, is what is the basis of this thing? When you see a problem and it's within the range of things that you can do something about, do you try to do it? And the answer to Bob was always, always yes, absolutely yes. And what did we both think? And Sandra Day O'Connor thought that. And Tony Kennedy and and David Souter and all of us really. How are we going to improve the good old USA? We're going to improve it by teaching the high school students something about civics. And they went up in different ways. And there is a

there is a thing up in the first circuit where they bring the students in, and there is a thing in the second circuit. And I remember hearing him talk about that. So I, of course, looked at his opinions. Of course, I would see what he was doing there. And it was called improvement, Improvement. That's not an outdated idea. That's an idea we actually can work with. And that's an idea he spent his life working at. So we say thank you, Bob. And I think I maybe I could be an honorary triplet. That's it. That's the that's the thing. All right, now we want to talk about this book. Why did you write the book? So I could go on talking about it. Why not. See, we've moved from. Remove from. What do you call it? Norms and approaches to rules. That's one of the rules as I sit on this.

RICHARDSON: Exactly. A good morning, everyone. I'm delighted to be here. My name is Brian Richardson. I'm from Cornell Law School, and I had the honor of clerking for Chief Judge Katzmman. And the man to my left, Justice Breyer. The man needs no introduction. But as you know, Justice Breyer is the Byrne Professor at Harvard Law School, where he has long served on the faculty and, perhaps the least retired justice of the Supreme Court. You're extremely busy these days. Before we dive in, I have two, logistical announcements from, the organizers. The first, please remain seated when we finish today. We will, we will run about 55 minutes, and then we will throw the floor open to questions from the audience. So, think through your questions in advance and in connection with that, reminder, both for myself and for the group, Justice Breyer cannot answer questions about pending cases or controversies at the court. I mean, we can try asking them, but we are hoping apologies, Justice, to ask you as many questions as possible. So in the interest of doing that, please, please keep that admonition in mind. So without further ado, Justice, as you know, we have two goals today. The first is the launch of the Katzmman Initiative, which we've heard a bit about. The Katzmman Initiative has three, pillars, which we've actually just heard about in your remarks. The first is the relationship between courts and Congress. The second, examining that relationship. The second is monitoring the health of the three branches. And the third is the promotion of civic education. And our second goal is to talk about your wonderful new book. And happily, I think those goals converge. So before today's event, we asked, the public for a number of questions. We we have a few dozen, which we boiled down, and the KI board has given a few questions as well. And they all sound in both the Katzmman Initiative goals and your book. So I will talk through these two things. Last logistical announcement. Justice Breyer's book is available in the bookshop here at Brookings. And I discovered on the drive down from Ithaca is available as an audiobook that you have narrated, if you like to listen to it. All right. So one of the three pillars of the Katzmman Initiative is examining the health of our institutions. You remind us in your new book that in order to perform their constitutional functions, courts need public support. You describe a number of important practices that our

court uses, to encourage compromise and moderation. I think some are collegial order of speaking those sorts of things. Others are institutional imperatives. You describe in your book, rulings that are workable over time that are accepted by an informed public. Could we start there? Could you tell us more about what practices make our institutions healthy?

BREYER: The best advice, you would you well know, when we started on the staff in Kennedy's office, one of the things he told his staff. And I say this and I'll say it in the same way I speak to, high school students about because they will not talk to high school students, which I like to do. The first thing is say, well, what should we do about this mess? I have an idea what they're referring to. You. Okay. So. I said, why do you ask me? I say, it's your country. It's your constitution, and you're the ones you're going to have to figure it out, not me. And so I hope you do. And when I speak to us, I'm talking to them. I speak to graduating class. I say, what can I tell you? I can tell you that I hope you find someone to love. I hope that you have a good job. And I hope that you work in public affairs. I mean, you just vote. That's good. And you can be in the library commission, or you can do a lot of different things. But there I draw in some experience because I think John Adams and I think anyone on the court and people who work with this document will think that this document won't work unless you participate in public life. And if they're really interested, I'll tell them. And I don't know if it's true what he said, but Derek Bok, in one of his books on education, wrote that you can look it up and I don't know, is it true? He said Pericles in his famous funeral oration extolling the virtues of Athens said, "what do we say? In Athens about the man who does not participate in public affairs. We do not say he is a man who minds his own business. We say he is a man who has no business here." That's tough, tough. But they're interested. They're interested those students. And so I say that's. Yeah. And I want you to know what Kennedy did tell his staff very soon after they started working for him. He said, stop worrying about credit. He said, if you're successful at something, there'll be plenty of credit. Don't worry. And if you're not, who wants it? But it is a weapon and I'll pass on to you. I'm talking to the class. What he told us. He said. We're having a roadblock here on something. We want to get something or stop something or do something. And there are a few others and working for other senators, and then I want to do it. Okay, here's what you do. You go talk to them. Find someone. That's what Mills said. I don't know that we did that, but I think he did. Find someone intelligent. You respect his opinion, and he doesn't agree with you. Go talk to him. See what he says. Okay. Wait. Don't talk too much. Listen. And if you listen for a long enough, what will you discover? That, that person, that man or that woman that you're talking to actually says something you actually agree with. And as soon as that happens, you say what a good idea you have. Right. Let's see if we can work with that. And lo and behold, you may get some where you may get 30. Take 30%. You please do not hold out for 100%

because you know your followers will say how wonderful, what a principled person you are, how great you are to have really wanted this whole thing. And too bad we went down the drain. But we were principle. No. We want the 30%. You take that 30% for real. And then when we get it, we have something. And how often? I've heard him quite often questioned by press when we did get something. Senator Kennedy, you did such a good job on that. Don't thank me. Thank Orrin Hatch. Thank the Republicans for having come up with an idea that brought us. I saw that for four years. I worked from two on airline directing two on chief counsel. All right. So so I saw that in operation not 100%. I mean, you can't stay in Congress can be 100%, but quite a lot, quite a lot. And I said, the important thing is you get something done, go out and talk to people. Now, what I found interesting in that little thing with my imaginary high school students, which often is not imaginary. Not what I said. But rather they're interested. They're interested. You can tell I think maybe I'm making it up, but it's the look in their eyes, the silence in the room. They want to hear it. And they want to hear it because they want to do something. And now we've given them something to do. And not only have we given them something to do, we've given them something to do that might get them somewhere and get the country somewhere as a result blah, blah, blah, you see where I'm going? Okay, so I'm not totally pessimistic, and you've led me into something that explains why I'm up.

RICHARDSON: Before this event, one of the KI board members noticed, not everyone goes to the State of the Union address, but you do every year. And he asked why?

BREYER: Why? So people know that there's such a thing called the judiciary of the United States. I mean. When they get off their screens. The younger ones, which they do get off their screens. Contrary to popular belief, I've seen it with my own grandchildren. They do get off their screens approximately 14 minutes a day and, and and, they, they should actually, yes, know that they don't know what's being said, or they might, but they're going to see Congress. They're going to see the president of the United States. And I would like them to see the judges, too. We are called the third branch, and we are a branch of the United States. And we are a nation that is built on rule of law. All that's there, and they'll take it in visually. Because sometimes I say to my grandchildren, have you learned how to read or do you just go and play games on the screen? I guess. I'm the only one in this room affected by that problem. But, but. Yeah. Okay. So, of course we should go. And well, that was not uniform in the court because it comes at a time when it's in between our sitting in January, in the sitting in February, and some people didn't want to go and other people thought, well, it's we shouldn't because it's too political and it is political. You know, first one says yeah and the second one says yeah. We know that it is very political. And some of the justices that I just said when I think it was pretty

uniform not going, I said, I'm going. That was pretty brave. If you're there long enough, you get it those occasions or you can say, that's what I'm going to do. That's not a good habit. But but nonetheless, I said I was going. So the person in charge said, well, you can sit up in the balcony. I said, no, no, no. You're new. And so, that's they organized it and I did go. I didn't go once because I had 104 temperature or something but but, I went for a period of time, and gradually they came back. Gradually they came back. And I think that's very good. And, I hope that continues into the future, and I think it will. And so just use that if you want, as a little marker of something that in the Supreme Court time matters. It's a long time. New appointments were made recently. Justice Douglas said five years. David thought three years. It's a long time and you become more used to it. And a few other things about I don't want to go on.

RICHARDSON: Well, you are, I think, an optimist about our future. I'm just taking your lead from a moment ago. Your account of the court's work over the history that you describe in the closing chapters of your book expects that the court will find you. You write, "It will find the necessary general support from the American public as our constitutional history unfolds in the future." And this question came, I think, from four folks in the audience. "How would you respond to uncertainty or fear about the effects of increasing polarization in our democracy? And relatedly, how do you think the court would ensure it can assure that it will continue to find that support in the American public as people get their news from things like social media or less reliable sources."

BREYER: I don't know. We've had it go back to my own experience. I mean, some of you were around at the time of Vietnam. You don't know that. I had to spend the night in Weidner Library with R.G. Cox because the students were going to burn it down. I would say, but I didn't cause Vietnam. I'm not even for it. And that made no difference. So, Abe (inaudible) had the bright idea of getting busses for these students, and we got busses for them. And we sent them down here because the march on the Pentagon is perfect. They liked it. We liked it. They're out of our hair. So there were a lot of bad things that happened if you haven't seen it. I bet everybody in this room has seen it. You turn on YouTube and you get Bobby Kennedy speech in Indianapolis. My God. I mean, the day Martin Luther King was killed. And the governor of Indiana said, don't do it. It's a poor neighborhood. It's a primarily Black neighborhood, and you don't know how they'll react as they hear this news. Bobby said, I'm going. And he sat there on the platform and he quoted Aeschylus, his father, made them a whole, apparently learned some of Aeschylus, and it was about the pain dripping. I can't do it. And and then you think to yourself it was something about trying. Yeah. Holding us together. And, you think 3 or 4 years ago, his brother was killed. Four weeks I think from then he will be killed. Martin Luther

King was killed that very day. A significant number of students were killed at Kent State and elsewhere. What was burned down? There were plans to Jim Vorenberg had to be on the committee to try to stop them from burning down Washington, who all kinds of different people. And when the soldiers would come back. If you want to watch something that moved me because of course, I was rather hostile to the Vietnam War. But, soldiers would come back and these groups of people would go and throw things at them and hiss and boo and and Ken Burns made an awfully good series of the Vietnam War. And one of the things in that that moved me was a woman who was a big demonstrator at the time. She got over up to she was talking to Ken Burns and she burst into tears. And she said, I'm sorry. I'm so sorry. And she was. And what she meant was they weren't at fault those soldiers. They weren't at fault. And that's what you were sorry about. You see, so we've lived through some tough, tough times. That was what Civil War wasn't exactly slavery, Jim Crow. I mean, that's another (inaudible). The is the country goes like this. You know, we all know Winston Churchill, you know, "The US government, US they always does the right thing after trying everything else." Yeah. Okay. So it's a high school student. That's where. He's so right. Bob, it's the high school students you have to explain all that to. And so, you know, you know, something else in in Cambridge, Massachusetts, which, when COVID was there, there were groups of people, ordinary citizens who went around to see that all the old people were fed and that they weren't sick, and that happened probably in San Diego and St. Louis across the country. And my my fifth grade teacher, Mrs. (inaudible) you and she have projects about the government of San Francisco and four, students assigned to each. Okay. And, one grade. Hey, you learn how to work with other people under those circumstances. And, we're supposed to be good at that. Americans are supposed to be good at that. There are all kinds of projects, all kinds. And get together on this. Get together on that. Forget about this one. Okay? Do that one. But we're not bad at that. I like to think and see all those things, I think. Sure. And then you want to go personal. You say, what is it, Supreme Court? What is it like? Why does it take five years? Should I go into that?

RICHARDSON: Please.

BREYER: Okay. Why I think this is just my view. First few years. You're frightened. my God, I thought I could take this job. I thought I could handle it. I told all my friends I could. I wanted to get appointed. And there I am. Oh my God. Can I really do it? I mean, can I really do it decently? Because often a lot depended. And maybe you sit around and think, oh, I can try. And it's only after three or four or five years that you say, okay, I may not do it perfectly. But I can do my best at it. Pay attention. And really, the thing that's hardest to take in. And you never know if you're taking it in completely. That's what a president told me. He said. The

applause goes away faster than you think. Very fast. And he said, then you have the job and you better like it. You better like it. And boy, that's true. I mean, after two years, I'm in some reception and there's a young law student and he says. Justice Breyer, you write such wonderful opinions. I would love to have your autograph on my program. Can I have that? And I say sure of course. Now he turns away, and as he turns away, he talks to his friend next to him, and he says, that makes four. I understand. And so what is there about this job? It's like the doctor. You have to pay attention. God, I see you here. Ruth did. I mean, she really did go into her office. When I'm allowed in her office. She doesn't have to say anything. I know I can walk in anytime. We can talk. It's only when she starts to get up and go to her stand in desk. Which you would, because she's going to get that opinion written. And so I better calm down with my jokes and go down and get my own written. And, yeah, it was good. I enjoyed that a lot. That's great. Because you have to pay attention. And it's, as I say, reason. I compare it to a doctor. And if you read "La Peste," Camus, you'll see in the last paragraph, it's there. The reason that I do is because a doctor never says, oh, this patient has disease X. I've seen it a thousand times, so I won't pay attention. No doctor does that. No one. And no judge really does. It may seem minor. Maybe it was a question of the comma. What is the meaning of that after Internal Revenue? Go da da da da da. That's the word for which is the next word mean a which or that. We get a case like that. I liked it. I don't know if anybody else did, but Ruth may have liked it. You know, that's true. But, you pay attention. And you give what you have, and that's the virtue of the job as you get older. The opportunity to do that. And so that's why I say things. Calm down. You begin to see how things worked out. Douglas thought it begins to repeat, not directly repeat, but somewhat repeat in the subject matter and so forth. After three years. And there are rules that help to bring us together. Informal rules in the conference. Nobody speaks twice till everybody speaks once. I was junior justice for 11 years. That meant I spoke last, so it did benefit me. I always got the world's record. Alito was sworn in. 11 days before, I would have had the world's record for being realized. If I thought of writing him and saying, just wait. 11 days. And then. Then I could be go down in history as the answer to a trivia question. Fabulous. But the the the the the no one speaks twice and it's very serious. And I've never heard a word in that conference, shouting or angry about somebody else, or say mean things about somebody else. You've not even as a joke professional go out. And I also learned listen, listen to what people say. As soon as I get there and I start in the temptation of, oh, I have a better argument than you. Ha ha. Whatever form that takes, that leads the other person to say, I've a better argument than you. That gets us nowhere. And so try, you know, thought we didn't go off and get somewhere. I thought we did. You try. You don't. You're not going to get perfection. You're not necessarily sometimes actually switch people but you might matters a lot. Those words on the paper and how you approach the problem, how what you say is important. What you say isn't how you deal with,

subsidiary things or other things. All that's important. And you want to bring people together and they'll work like mad. They will to get at least five. Nine. Good. That's better. 40% are used to be unanimous. Anyway. I think they probably still are 40%, but the used to be five fours, 5%, 10, 15, sometimes 20. Not always the same people. I counted it one year. There were 18, I think five fours, and of those, 12 were not what we might call the usual suspects. But I thought to myself, I didn't look it up. You can if you want. But I thought to myself, every one of those 12, not the usual suspects the press is going to say in an unusual combination.

RICHARDSON: At this rate.

BREYER: Okay. So. Yeah. Over time. I mean, some things don't work too well. I wrote this book in part to show some that wouldn't work too well. You'll learn. They're not all going to come out the same way I do or whatever, but that's just. It's a big country and that's not surprising and so forth. But yeah. Along together. Yeah. So I'm I'm somewhat optimistic, but I don't know more than you. I mean, it's a problem for everybody, not just one for us.

RICHARDSON: Thank you. So one of the KI goals is examining the relationship between Congress and courts and the executive, the inter branch question. I note in your book, you describe a burning set of questions taken up by the court in recent terms, which is the role of agencies in our constitutional structure. You ask the question. You note that numerous students of the subject criticize agency performance, but you ask, compared to it, to Congress or to congressional staff taking on the task, the judges or judicial staff doing the same? And I wondered if I could take you back to your time in the Brookings basement to the regulatory group and ask, in light of perhaps this moment of increased skepticism about legislatures accountability or the use of agencies. Does this skeptical moment we have in the, is there a skeptical moment? And if there is such a thing? Does it accord with your own experience in government before your time at the judicial branch?

BREYER: Well, there are two separate things involved there. One, I called the big question. The big question. Let's go back to the Liberty League. Herbert Hoover. And there was a traditional Republican view through the Liberty League as one example. That the federal government's too big. Too much regulation. By the time Roosevelt comes along, the country is no longer going to believe that's bad. And power shifts to Washington, but they still under the surface, very traditionally. It's not some new form. I don't think of a more conservative Republican, Ronald Reagan. Fine. Okay. And they can debate more or less of that. And and

that's maybe some are buried on the court, but it's buried. And then there's the kind of thing the court decides and, and that's, well, typical, typical all the time this kind of case comes up under somewhat different forms. There is a statute. The statute gives power to an agency, the agency either through a rulemaking proceeding or some other proceeding or through no proceeding. That's X, which could be one person or the appointed people or somebody in the basement. I found out Paul MacAvoy. Oh, he was in this too. Paul MacAvoy and I went to find out. How does the Federal Power Commission, that's the predecessor of FERC. They change the initials all the time. How do they really set rates? So there used to be a green building over here somewhere, which was it was a bilious green. It was the Federal Power Commission. And we went down and it was a Fred Swidler, it was Swidler, and I can't remember the other one. We ran it during those times and we got permission to go down. And we went down to the GS 18,17, 16, 15 we found in the basement Georgia La Docas. She was a GSA 12, I think, or 14. And, she was the one because everybody else just ratified what she did. And, we said, how did you do it? How do you do it? How do you decide what is a reasonable rate? And she said, well. It's not easy. What do you do? She said, well, we look at other industries and see how they're doing. Well, what other industries? Well, grocery stores, she said. So decide. But the right rate of return for a natural gas pipeline is by looking at grocery stores. You know, she said they help, trucks. Okay. It's made up for other industries, but that's how she did it. Okay, so use your judgment. You know, we found out that was my. I thought my greatest discovery when I was working with Brookings. Was how the natural gas rate and I had on my desk at that time, the Phillips Petroleum case following, down in Oklahoma, you know, where they were. They were people following how they were doing that, and they had stacks of paper. But McEvoy and I had really. Found out it was Georgia La Docas. Okay. And, yeah, you can, you can. We wrote a book about it. I say, our first book, it was the Brookings book, and you can still get it. This number, 2,876,932 on the Amazon list. But, you can get it. But, but but in any case, there is this question for Georgia La Docas for, anyone else who does anything in any agency. Hey, here's the statute. Here's what you did. Does this statute allow you to do that? That comes up in 50 different forms. And the things that they argue about is how much weight you give to the agency's decision. Did we have the authority to do it and how much not? And what we used to say in Louis Jaffe's treatise, it says there are many things. There are many things that we look at. We look at what's now put in capital letters. I wouldn't have put it in capital letters. Is this really a big deal thing he did? Is it going to destroy the country's economy or is it going to improve? Is it economically wide and huge? And it's the kind of thing Congress would have decided itself, for example, in Packard. Are you getting my ad law lecture? This is the thing in Packard, that, what can the NLRB, have jurisdiction over foreman? That's a very important question. At that time foreman are in every company. What about a newsboy? Newsboy? The court says listen to the NLRB. That's not such an

important job. Foreman that's a big deal. You see, that was one of the things. But you look at other things. What's the scope of the agency's mission? Is this a minor, sort of administrative matter? Is this something that they spent a lot of time working on? Is it something that, you know, on and on and on and on. And that's the traditional thing. That's more with the court gets. Now with the answer to the first question. I am a member of the Liberty League. I'm not anymore because I'm a judge, but now I hate regulation. Is that going to help you answer or the opposite? Is that going to help you answer the second question, I doubt it. I doubt it. In my mind, I can't prove anything. But it might. But I doubt it. I think they're going to be. I think the courts are involved in the second question, and they think in that they think there are going to be easy ways to answer that. I've never found an easy way to answer that kind of question. My own business is this is different from this is not necessarily gospel. I mean, this is just my own approach, 40 years that counts for something. And you have to look at the agency itself. You have to look at what a customs officer does. You have to look at whether they've looked into it thoroughly. You have to look out, look out, look out, look out. And then you will get an answer to the basic question. Do they have the authority to do this? And you have to keep in mind what Jerome B. Frank said, because on the question, as it's put in the opinions, it will say. How much weight, how much deference, you pay to the agency. And Arthur Goldberg told me when I was his law clerk. That's a terrible word. Deference doesn't mean anything. You have no idea. And Jerome Frank wrote a great thing saying he didn't do it in respect to agencies, but he did it in in respect to the trial court decision of a matter of fact, he said, I thought I had finally found a case in which I would have said the trial court made a mistake. But knowing that I should defer to the trial court in light of his greater expertise, I will uphold it. I thought I'd found that case. But on closer inspection, I discover like like all the other cases where I uphold the trial court. I agree with the trial court anyway. Is it? Okay, so now you get a picture of the chaos that I think is the law, and we have that what we work with, that's what we work with and lots of different rules.

RICHARDSON: We received a number of audience questions about the subtitle of your book, "Pragmatism as Against Textualism." In your recent book, I know it for the benefit of the audience. You cite Judge Katzmman Madison Lecture for a list of tools that history uses and interpreting statutes, the Congress's work product, to use Judge Katzmman phrase. You also cite work on pragmatism for the point that any good legal interpretation turns on the proper identification of a law's purpose, followed by a decision about what outcome in the case would serve that purpose best. You've called your method pragmatic. Perhaps in light of the chaos you've described and you quote the ancients on your first page, it's better to to show us rather

than to tell us what what your philosophy means. But the audience wants to know if you if you had to encapsulate or define pragmatism. For the audience today, what would you would how would you describe.

BREYER: No, I didn't think up the word pragmatism. Right. My publisher did. They wanted to put it because it was short. You put it short? And, I wanted to say make clear because Posner does this a lot. He talks about private. For me, and I believe for Posner, too. It's not, well, but but, pragmatism is. We don't mean. He doesn't mean. I don't mean, you know, do what's good. You know, American pragmatism is something special. That's Pease and James and William Van Orman Quine. And it's that you you look to a whole system, a system which has in it, institutions, lawyers, explaining to clients, rules of stare decisis so you don't overturn too much too fast. Rules about not exactly rules, maybe approaches, maybe standards. And sometimes they change them in California used to have a perfectly good standard. Don't drive faster than it's safe. And then somebody got to them and said you should have an absolute speed limit 55 or 65 and, don't use a standard, poh well why not use standards, and, all those things are in pragmatism. How does it, how does it actually let me be more specific, which will be more clear? I'm looking at normally saying the Supreme Court, Courts of Appeals. I'm looking at a statue. It has some words in it. Same thing is true with the Constitution, but it's more general. Not usually, not always. And, how do I interpret those words? How did they apply? Not so much. What do they mean? But do they apply here? Yeah. Read them. That's the first thing. You read them if it says vegetable. I know that's not a fish. And I will not say it's a fish, no matter how good it would be if you call it a vegetable, a fish. No. It's not. But very often those words don't give me the answer. And if they did, why is this case in the Supreme Court? Because we take cases. Really almost all of them are because lower court judges have come to different conclusions about the same question of federal law. Well, why did they? They're good judges. If the words are so clear. Two senators. Two is two, and that's it. It's not going to change, but a lot of other words the freedom of speech, etc.. Okay, so I read it and when it doesn't quite give me the answer. I begin to look to things like, what's the purpose of these words in this statute or in the Constitution? What's the purpose? Somebody wrote it. They had something in mind. So let's go and read what the report wrote. It may not be. It may be it was a joke. And or maybe it was people fighting. And I don't get much out of it because they're he's trying to get there. A lot of things that could make that report less than totally useful, but there are a lot of things that make it totally useful. And there are other things you can look at to try to answer that question. Hearing testimony, all kinds of stuff. Purposes and consequences. If the consequences are going to be terrible. Hey. Congress doesn't usually. Try to make consequences terrible. I imagine there's debate on that, but but I think they don't. I think they don't. And and they want something good to happen. Somebody believes something good is going to happen. Let's look at

those consequences and let's look at those values. I mean, what have we got here? A document that is filled with stuff. Some of it of course, and some I've written on it doesn't tell you too much about values. I mean, there's the what's the clause the. But, we wrote one on the, the, tonnage clause. That was that I have almost exclusively the only justice ever written on the tonnage clause. But Stone did, and it was a good opinion, too. But, anyway, others the freedom of speech. Okay. What's there? Democracy. Basic human rights. Equality. Rule of law. Separation of powers. That's there. And, how do we do it? Well, let's look at McCullough, and we see that. John Marshall. Deciding whether Congress could pass a law establishing a bank of the United States. He read the document. You know how many times the word bank appears in the Constitution? Anybody know? No. Yes. Zero is the right answer. Correct? Zero. But he says he stay still can do it because there are other words. There are more general words that might be read to encompass this. And we should. Why? He says, because it's a constitution that we are expounding and it's meant to last for 50, 100 years, 200 years more than that, to deal with problems that we cannot see at all, he says. Or if we can see them, we can see them only dimly. And they wrote those words around the basement or the first floor of the Supreme Court. It is a constitution that we are expounding, and you ought to go back and look at McCullough, because you look at those words alone. You have no idea what you're talking about. You say, well, of course they're not. But read what he has in mind. A workable document, a workable document. As the country has grown from 4 million people to 330 million. Every race, every religion, every point of view, you know, etc. and, yeah. Okay. So look at. Words purposes consequences, values. And your brother put it in a few other things which I will look after. Have don't know, sometimes in history. Sometimes, how thoroughly they went into this, sometimes how close it is to their basic mission. Sometimes, sometimes sometimes, all kinds of things. They'll look at them. Now, that's what I think should be done. And the only way I can show people that, what I thought. And I imagine what Ruth thought, because we're very rarely on the opposite side except in copyright. But the. Yeah. Okay. So, I said, this is this is, I use examples lots and lots of examples. Why? Good reason because examples help teach people a bad reason. Because there are 500 law professors in this country, minimum, who think they know the theories of these things better than me. So I can counter that by saying, I'm not talking about theory. I have had some experience you haven't had, and I'm writing from that basis, and I'm writing on the basis of examples, okay. And that's what I do. But I'm trying to show something. I'm trying to show my belief after 40 years of directions that you might take. It's not the original with me. Montaigne wrote, don't write rules, write approaches, write 1584. Write the standards. Not always, not always. You have a procedural rule. Rules help with procedure. But. Standards help to. General approach has helped to norms. All kinds of things, all kinds of things there. Yeah. Try that. Try that. But the tidal wave. The tidal wave. What's that? Textualism. Originalism. What's that? Well, Nino

writes, you know exactly what it is. He says textualism read the text. Stop! Don't go looking to purposes. Too complicated. Too many different ones. Too many ways of cheating in Congress, maybe, don't look at consequences. Don't look at values. Those are just ways of the judge substituting what he believes is good for the law. And I say no. I mean no. You've got to look at these other things, too. Okay. We debated this together often. Lubbock, Texas. A lot of students enlisted in the football stadium. Why? They probably thought we were going to play football. It was Nino and me. And we talked about this, and they came away thinking they're friends. They like each other. All true. And they think very different things. But we talk also about our basic approaches to these things. And I would say, you know, George Washington didn't know about the internet, freedom of speech and so forth. And he would say, you know, I knew that. He'd say, well, the problem is, is different. He said, it's, I think it's the two campuses. And with the two campers, it's about two campers. First, putting on his running shoes. Second says, why are you putting in your what is the bear in the camp, a the bear in the camp! You can't outrun the bear. He says, yeah, but I can outrun you. And he says, that's all I'm trying to do. And, I would say, and then he would say, but Steven, you know, this system that you've just sort of described briefly is so complicated, you're the only one who could do it. Competent, but not really. But I say, well, yeah, but your approach to these things is going to lead to a constitution no one wants. And that's what I think lies underneath this war here. And, we won't know the answer, really? For years, for years, I'll never know. But that's that's what's going on. So I say you make some promises. And he does explicitly four promises. He says you follow textualism. Easy. You read the words. You look to see what those words would have meant to a reasonable person at the time they were written. No. It's a fair system since everybody will reach the same result. Every judge across the country. Now, the more of these splits. And Congress will love it because they know it will happen, and it will rein in those judges who substitute what they think is good for the law. And I think or say those promises are great. If I just heard you giving those promises for textualism, I'd say I should be a textualist. But there's a problem. You cannot keep one of them. Not one. What about just looking at the words or, you know, etc. I said, okay, try a real case. I mean, let's try one. I like one, which is the easiest to me. The easiest. You can anyone can. Who has a handicapped child asked the school board to give them some special education. If you think the school board is not doing a good enough job, you can bring a lawsuit. If you win that lawsuit, you get your this is the word cost. Okay. Question. She said I want my cost, including the cost \$29,000 of an educational expert. Does that word include educational expert or does it just include legal costs or court costs? Something like that. So I say, okay, let's try it. Let's try it. We will look at the word cost. Okay. I'm going to look really carefully because it's a tough case. I say cost. I mean well I could try repeating it. Cost, cost, cost, cost, cost, cost. I said that doesn't seem to get me very far. And let's look at why they passed this. Let's look at

consequences. We might still disagree, but let's look at these other things. And there are others. That's an easy one. I mean, you know, you can sue people in the government all over the place for torts. Not everybody, because there's some exceptions in the statute. One of the exceptions says you can't go sue a customs in for certain things. You can't go and sue Customs and Excise officer or any other law enforcement officer. Who does that mean? Any other law enforcement officer? Does it include the traffic cop? Does it include the 100,000 ordinary policemen? Hey, if it does, we've gutted this exemption. I mean, we've got a statute not gutted the exemption. We built it up. Well, try repeating the words 50 times. Same problem. And so you better look to see. And I would look far, perhaps farther than most. I discovered these words were written by Barinholtz a procedural expert, later a teacher famous for his treatise, and he was over in the Department of Justice, and he wrote it, and he was trying to copy the English and the English only customs and excise officers. So I said, well, that's where it came from. Nobody objected. Let's say customs and excise policeman, any other officer related to customs and excise now but not everybody agreed on that. Is that but I'm trying to show you the kind of thing. So I'm saying we have no choice. Oh, by the way, you say at least you're reining in. Reining in the judge will substitute. You shouldn't do that. You shouldn't substitute what's good. For what the law requires. No one thinks you should do that. Somebody might say yes, but they're being sarcastic. But. No. All right. I try to keep it at a distance. You can't totally. I mean, I did grow up in San Francisco. I didn't go to a Lowell High School. I did go to Stanford. Every one of us has had the life he's had. And you say you tried to jump out of your skin. You can't. So of course that has some influence, but you try to keep it down. All right. Let's look at. Do I dare say it? Dobbs. Abortion. Now, Justices Kagan, Sotomayor and I wrote a long dissent on that together. And but one of the points, one of the points is this. Oh, textualist judge by imaginary. Oh, textualist judge. Why did you overrule Roe? Why? Why did you overrule Casey v. Palino? Why is it that you overruled them because they did not follow a textualist method? Is that why? I know what he's going to say to that. You say of course not don't be ridiculous. That's because if he says the contrary, he's gonna overrule every case because they're very, very few cases that were decided by the textualism method, certainly before the 21st century. He's not going to say that. He's going to say I overruled them because I thought that they were very, very, very wrong. Wrongly decided. Wrong wrong wrong. So all I want to say here at this moment is, oh, I get it now I see what your job, judge. Oh, textualist judge. And there is no risk that you will substitute. What do you think is good or bad? For the law. When you're deciding how wrong something is. No risk there. But there is a risk when I decide how I decide a case. I said, how does that work? I haven't been able to figure that one out yet. Seems to me like a contradiction. And so if that is a contradiction, which I think it is, they have just as big a problem. And if they have just as big a problem, there they go. The four promises. Bing bing bing bing down. So I say there are

the promises don't work. You can't carry them out. You cannot carry out those promises. So where is the plus? And I see a lot of minuses. And the minuses when we get something very different. From what Congress wanted, or what the founders wanted, or what the basic values are underlying this. And it detracts from some extent. Some extent from a basic object of laws. I did learn from Hart and Sacks at Harvard. Some basic object that law in general. Not always. But in general should work in a way that helps. Those 330 million people live together peacefully and productively. Okay. And if that goes too far or too fast. We're both. People will have less reason to follow a rule of law where the rule of law depends not on judges or lawyers. It depends on people who are neither. And contrary to popular belief, 300 no 299 million of America's 300 million are not judges. Yeah, hard to get people to believe that, but it's true. And they're the ones. You have to follow. Case decisions that they don't like, and they may be right, he said. That's called rule of law. So I see a danger. I see a risk of reaching wrong results. I see a failure to carry out the promises, and that is now you don't have to read the book. You can still buy it. But there we are.

RICHARDSON: So we have time for one more, question, on my end. And then we will open up the floor to audience questions. So get your questions ready. The last question I want to ask you, it was the final pillar of the Katzmann Initiative, which is civic education. You have spoken today and throughout your career written movingly about the judiciary's role in public life. You have written about the openness of courts to the public, the Supreme Court, to the public. In fact, and these thoughts? Katzmann Initiative board member reminded me, similar to, Judge Katzmann, initiative in his circuit entitled Courts and Community. So general question first, how do you think the judiciary as an institution, should have some role in the creation of a civic minded public? And what might that role look like?

BREYER: Sure. I mean, that's what I told my friend who came in to see me, from the Prime Minister, the, Chief Justice of Ghana. And she asked a lot of questions. She wants it more, human rights oriented, system. The big question was, well, why do people do what you say? I mean, it depends upon. But, you know, Andrew Jackson, refused to do what the court said and kicked all the Indians out of northern Georgia after the court and said he couldn't. He just did it. He brought in the troops. And I walked on the Trail of Tears down to Oklahoma, where the descendants lived to this day. And, sure. How do we stop that? I mean a good question. Not to tell her about that case, but I told her about Cooper v. Aaron and, Governor Faubus saying when those nine black children died down there, that white school said, well, maybe they have a court order, but I have the state militia. And telling Eisenhower that he, he was going to let them in. Black kids in the white school. He told the press the opposite. I wasn't I was pretty angry. Send in 101st airborne from Fort

Bragg. The heroes of World War Two Normandy is coming up this week in invasion 80th. Everyone knew who they were, and they take the kids, but they couldn't stay forever, so it doesn't have an immediately happy ending. Eventually they have to leave and Faubus closes all the schools, closes a school, and then Cooper v. Aaron comes to the Supreme Court and the Court says integrate but he closed the schools, but I say it's too late. That's the era of Martin Luther King is the year of Rosa Parks. It's the era of Freedom Riders. The North had awakened to the problem in the south, and they couldn't get away with it, not just because of the court. Because the opinion in the country would overcome. The black efforts of resistance, which only took, I mean, the south efforts of resistance to the black integration, which only took about ten years, if not more. You say? I have to explain all that to her and say, that's a long and difficult effort to explain people to a people and get them on your side to accept things they actually don't agree with. And that's the that's really a thing at the bottom of a rule of law. All right. That's a complicated thought. A complicated thought. And people aren't going to understand the relation of that thought and other complicated thoughts. To the life they're living in this United States of America, unless they're taught that. And so I say to her. Get the judges to explain to the newspaper editorial boards, or at least the lawyers, or have the lawyers go out and you don't have to convince them they make their living out of it and but have them explain in the villages, in the towns, in the people that 299 million who aren't, you know, lawyers or judges. Explain it, explain it, explain it. And I think that's one of the best initiatives that Bob had. That initiative of bringing school kids into the second circuit. Same thing is true in the first circuit. We'll do the same thing there. Bring them in and let them play judge. They see what's happening. And of course, that's important. And I can't think of a better institution to do it, because you preserve a lot of arguments and don't do them. Don't get into them necessarily. If you're being a judge and managing a judicial system. Explain to them. Have them participate. Let them see some cases. Let them see how that judicial system works. And it's like jurors coming in. Jurors come in. They don't want to do it. Sorry. They have to but they don't go away that way. They go away thinking this is a very interesting, not such a bad system. When 12 people chosen at random have to reach agreement before a person's liberty, or much of his property is taken away by the government. So of course, the judges and others can do it too. Nothing wrong with a senator Congressman having a television program directed, right at his high school in his district and showing him what he does every day.

RICHARDSON: Thank you. Let's hear from the audience. I think there are some microphones circulating.

Thank Bill Eskridge.

AUDIENCE QUESTION: Yes. Thank you. I'm Bill Eskridge of Yale. Thank you very much, Justice Breyer, for your fabulous remarks and the pay on to Katzmann. I might add, the costs decision was a Katzmann decision that was reversed by your court with you and dissent. I want to, ask a question from your grandchildren's perspective. So I think you hit the nail with your head that the textualist cannot. And they know they cannot fulfill any of the promises. And in fact, the Katzmann opinion documents in the cost case that they were ignoring statutory language that went against them. In other words, they gerrymander the text in addition to all the other criticisms that you make. But here's the problem. And this is one your grandchildren will understand. They're the future. And that is that when you explain textualism, they're in the closet. Krishnakumar and Norris have documented and they look at consequences all the time. They did in that case, but they deny it. They're in the closet about consequences. They're in the closet about complexity. And they say, look, your grandchildren are only going to listen to a pitch for about 60 seconds. Text, whole text, nothing but text. Six words. You've got our theory, and then you got Breyer. Well, you know, you look at this and you look at that and so on and so forth, and then you have to consider this and for that. You can't do that in 60 seconds. And so to a certain extent, the success of textualism is a success of the closet. They have a very simple sort of mantra. They repeat it over and over again. They deny departing from it. And then they accuse you of sort of complex, defying things so much that judges are going to be misled. Right. And judges are going to be turned loose to impose values, whereas they can do it through like Bostock, the Title VII case. You were on that, textualist war and they all looked at consequences except kind of the decision you joined. But the rest of the textual sort of consequences. Scalia often looked at consequences. Sweet home, the spotted owl case. You were on the majority. Scalia was in dissent, and his first line of the dissent was, this is a this is a socialistic war. The simplest farmer whose land is being expropriated for national zoological use. That's a normative appeal. They did that all the time. But he claimed just to be doing text. So it's a this is kind of like a grandkids post-modern question for the generation that gets their news in 60 second YouTube bites. What is the strategy for opposing textualism? What is the educational process to supplement the speeches to high school groups but the but the but the strategy in this internet era, this YouTube era, etc. etc..

BREYER: It's a good question, well, I'm reminded of this. It's a little far fetched, but I read it in the Globe Spotlight team. Once they found a what do you call a no show job. That this guy had obtained through Senator Kennedy, I think. And, they confronted him and they said you didn't show up at your job once last week. Then he said, I work at night. You forget. They said we followed you at night too. And for four nights you went around giving speeches to like Senator Kennedy. So when did you do your work? And he said, you

forget. I said, what do we forget now? There are many hours in the night. Yeah. There are many ways, in many ways. You teach classes. They sit there and listen. They're going to be out of the law school. They listen. There are Sandra O'Connor and her, civics, civics, civics. Pictures, pictures work with civics. There are lots of teachers. There are lots of lawyers. And there are judges themselves who after time, don't want to sit there and make up things when they don't work. Why? Why do it? If you're doing it. So some group of people who worries about judges continuously applaud you. First, remember they won't. There will be plenty of times when they don't. And you're a terrible traitor. And, what's the pleasure of that? Diminishes rapidly. The pleasure that grows is the pleasure of trying to do your job properly as best you can. And I think when human beings were there a long time, how long was Charlie Wyzanski there, about 50 years. Yeah. They see this isn't working very well. Nino remembers a kind of pioneer in this. So pioneers are always, always somewhat perhaps overstating and saying so. And he was a great writer and we used to at our joint things people would very often say, why do you say mean things about your colleagues and your opinions aimed at, Nino. So I'd say I'm going to answer that question. Though I know perhaps it's not aimed at me. And the reason is because some of us suffer from a disease and the disease is called good writer's disease. And when a good writer finds a felicitous phrase. Can't give it up. The earth may come to an end. And I say we all understand that in his writing. And it doesn't bother you see. So there there'll be many, many. You know, people get paid down in Silicon Valley. My God, we were just in California. My son now is this family is near Silicon Valley. I mean, it's very beautiful. The weather is fabulous. But I saw Lawrence Ferlinghetti, who was one of the beat poets of my generation, asked, do you like San Francisco now? No. Why not? He says, too many techies. What's wrong with that? He said they have too much money. How you see that. And they raise the price of everything. Oh my God. And they have terrible manners. I don't know about that, but but the prices are unbelievable. But those people get those unbelievable prices and and, salaries, I guess. Because they can invent things that will take what you want to do, and they will put it to those grandchildren on those screens in a way. And I thought one thing we could do, which I'd like to do if we could, in this, 250th year, a couple of years from now is, let's get the general counsels of Facebook of of, now it's called X. You see I say X and they automatically.

RICHARDSON: They're listening.

BREYER: Yeah, get them. And you saw this movie social. what's it called, "Social Dilemma." It's everything you say doubled. My God. In building habits, to see the martian tentacles come in and choke the whatever they choke. I don't know, but. Hey, let's get them to form the habits to watch civics. Let's get them to form the

habits to watch. This congressman who's going to tell the high school what he does. I mean, there's a lot you can do, I believe. And so I'm not totally pessimistic. And nobody's pessimistic about his grandchildren. When I speak of the college, I say, hey, I hope your grandparents are here. Why? You want to know why? Just because your grandparents are the only people in this world who know for absolute certainty that you are perfect.

RICHARDSON: We have time for two more. Yep. And if you could let us know your name.

Audience Question: Hi. Oh. Thank you. My name is (inaudible) from the Africa Business Magazine. I'm glad you mentioned Ghana. My question to you. You mentioned your grandkids at. And I know you don't want to comment on current situation. Political issue. So as you look, had a country and you look at the world. What what keeps you awake at night? And I'm not talking about coffee. And the other part of my question to you is you've spent years at the Supreme Court. Could you share one of the most challenging cases that you work on?

BREYER: Well, two opposite things. Okay. The first the first question. What? Look, you have to understand my personal history. This is my father's watch. And by the way, Ketanji in the same situation. He was lawyer for the school board in San Francisco. It says Irving Breyer, a San Francisco Unified School District, 1933 to 1973. And, yeah, that's how I grew up. And he used to say that if you want to be a lawyer for the school board, and I told Ketanji this about her father said something similar. You have to know the answer to a geography question. And. What's that? Where is city hall? Yeah. That's right. So I naturally gravitate towards what are we teaching? And I think it worries me is we won't teach. Don't guess they say in the third grade. George Washington chopped down a cherry tree. Probably that's not true. But teach it. Say something. And, there's a value in this, and, these mythical stories are part of the mythical base that establishes what's in this document and which establishes how 330 million people live together. So teach the good as well as the bad. Teach how this came about. Teach. This is (inaudible) for kids same grade. Okay. Find out ways in the schools to teach them together. To work together and remind them maybe they could even read this as possible. And what worries me is we get so caught up in current issues, which it's legitimate imagine current issues, of course. But there's more, there's more. And I read in some magazine somewhere that some countries are based upon history, which has some good things to it, but not such good things. If you're worried about who won the battle of 1215 and that's still bothering you. All right. Other countries are based upon documents. There we are. And whichever it's based on. That's the thing that has to get through. And

what worries me is maybe it won't. Everybody trying to be too rigid or whatever. Anyway, that's the thing. Probably worries me the most. Teach them. We'll get somewhere. Okay. The other question you said is what's the case? Well, it's hard to say because of course, Dobbs worried me a lot. Of course I thought that. But the case that I thought I found the hardest. You're not going to even have heard of this case. But what I found the hardest case, but in a way, was one of the more valuable was a case called Google v. Oracle. And and that was a oh my God. So it was about copyright protection of certain parts of a, of a program in the Java language. And when, when we started out, I thought Java was some kind of island somewhere, and I had no idea. But we took two sets of law clerks, two years and a lot of work before, before we got to an answer in that case. And the reason I was sort of pleased with it is I don't normally look to what the lawyers who are experts say about a case that I've written, because I know the ones who won think it's great. (Inaudible). But I look this time because all I wanted to see is, did we get roughly the background? Right? And they thought we did. And okay. So to me, I mean, it shows I mean, the court isn't all about abortion, unfortunately. I didn't wasn't happy about that case, but, you know, but it's about a lot of things. It's about a lot of things. And before everybody gets too excited out of Stanford, when I said even Bush v Gore, which I dissented in and you're all upset, I heard Senator Reed say the most remarkable thing about that case is never remarked, that people didn't throw stones in the streets. That they didn't shoot each other. They didn't have bonfires and riots. And I say to the Stanford students, and I know a third of you minimum are thinking, too bad there weren't a few riots. Too bad there weren't a few stones. But I say before you come to that conclusion, go and turn on the television set and look and see what happens in countries to decide their major decisions that way. So these are basics. And what I want fear fear most. What I want is just that I taught in enough depth so that people understand the history of the good and the bad and what I fear. Maybe they won't maybe they will.

RICHARDSON: Oh, excellent. David.

AUDIENCE QUESTION: Are like this. David Louk, also former Katzmann clerk. And like Brian, also former clerk to the justice. Actually, the term of Google v. Oracle. And on the theme of technology, I was wondering if you could talk a little bit about your thoughts about the role of technology in interpreting the Constitution and statutes, and in particular, it strikes me that it's easier today, to look at the history of the ratification of the Bill of rights across the states at the time of the founding, to look at the original, you know, public meaning than it was 50 or 100 years ago. And now a statutory interpretation. We have judges who are interested in using corpus linguistics and large language models to see how patterns of usage occur across large bodies

of text. Again, something we couldn't do 50 or 100 years ago. So I'm wondering what role, if any, do you think. Technology does or should play in how we employ tools of judging over time? Thank you.

BREYER: Well you know, you know that because it was my law clerk. of course I will want to know what people thought this meant at the time. That's a relevant factor, but beware of putting too much weight on that. Among other reasons, which we wrote, in, Dobbs, the three of us, among other reasons for beware of putting too much weight on some things some of the time, is it's important to remember that that half of the United States, perhaps more than half, was not represented in the political process at the time. These things were written and relevant sometimes, sometimes. And, in slaves too women and slaves are not, of course. And. Go back and see how what it meant at the time, you know, do it. I'd be want to do it. I think and we wrote in Bruen. Judges are not historians, and, we you said we're just going to look and see what weapons were protected at the time. And if they were protected at the time, they're protected now. And we include in were they the they includes sort of what's the word analogous weapons. I like this you wouldn't let me probably say all of the things I wanted to say. We looked up in Wikipedia. What were some of the weapons used in the Hundred Years War? So I put in and what is the lineal descendant of, for example, a skill ladder or a halberd. Or Asian fire, which you used to throw over the wall or something? I mean, is that the part of artillery? I mean, you have and you set somebody else's, house on fire, I don't know, I don't know, and nor does anybody else. All right. So so, be careful. And, we did have in the, by the time we got to Bruen, we had some group of historians who had looked up, they said we found 200,000 examples of the use between 1760 and 1790, or something like that, of the words right to bear arms and virtually everyone else, the Second Amendment and virtually every one of those had to do with militia. So, I mean, Nino maybe we should overrule it, but, so we're not experts. Beware of that, too. And remember the words engraved, right? It is a constitution we are expounding for satisfactory resolution of problems we do not know and can only dimly see at best. Okay. That's there. And if you say, hey, that's so vague and difficult, so many things we don't know. And I say to that, well, law is not computer science. Law is not physics. And, I didn't make that up. Go read on. Experience 1584 Montaigne. He says Justinian was an idiot trying to reduce all of the law to a set of rule making codes. He says, doesn't he understand that every word in a code is simply an excuse for lawyers to make an argument? He says, doesn't he understand that life is complicated? Life is vague. Life has all kinds of ups and downs and all kinds. And life will exceed any kind of code that you write in ways that you will not be able even to guess. That's not me. That's him. But that's been true since Justinian anyway. And probably before. I just read in some review that people have been around not for 50 or 100,000 years, but a million years. Well, I don't know what it was like a million years ago. Maybe they had textualism. But

regardless, that's true of life. And this document is written for life. And therefore, I admit to a degree of uncertainty. I used to think of it as sort of a mess up there. And we get a case and we try to make a little bit of clarity, and before you know it, it's a mess again. All right. But but that's our human situation. And judges are part of that. And they have role. And I think textualism is minimal in that regard.

RICHARDSON: On that note, I think we need to wrap up if you all would join me in thanking Justice Breyer.