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Oral History of Distinguished American Judges

HON. STEPHEN BREYER
ASSOCIATE JUSTICE, U.S. SUPREME COURT
An Interview
with
Julia Fong Sheketoff
NYU School of Law, Class of 2010

May 18, 2017

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MS. FONG SHEKETOFF: Thank you for meeting with me today Justice Breyer. As you know, I'm Julia Fong Sheketoff.

JUSTICE STEPHEN BREYER: [laughter] Yes, law clerk.

MS. FONG SHEKETOFF: As your former law clerk, and also a graduate of NYU Law, I'm really happy to take your oral history today on behalf of the Institute of Judicial Administration at NYU School of Law.

JUSTICE BREYER: Well, thank you.

MS. FONG SHEKETOFF: So, to begin, what was your childhood like?

JUSTICE BREYER: [Laughter] My childhood was fun, it was great. I grew up in San Francisco. A wonderful place to grow up at that time, in the 1940s, 1950s. Lots of parks, the weather was nice, we were outside, I was in the Boy Scouts.
We'd go up to Camp Royaneh, near Russian River in the summer, and up to Lake Tahoe where there was another camp and swim, and hike and be out of doors quite a lot. It was interesting. My father was a lawyer for the school board. Really, a school administrator. This is his watch. It says, "Irving Breyer, SFUSD," that's San Francisco Unified School District, "Legal Advisor, 1933-1973." He was a very kind man. He was a very decent man and people liked him. I grew up in the City schools. My mother was more of an intellectual. Of course, your parents think you're going to be great. My brother was very good, we got along well. I went to Lowell High School. I was pretty happy as a

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1 Camp Royaneh is a camp for Cub Scouts and Boy Scouts located in northern California and founded in 1925. [http://camproyaneh.org/about-royaneh/history](http://camproyaneh.org/about-royaneh/history)
2 Irving Breyer (1908-1979).
3 Anne Breyer (1909-1971) was active in San Francisco Democratic politics and the League of Women Voters, and volunteered with the United Nations Association.
4 Charles Breyer (1941-) is an attorney and judge who had a career as a prosecutor and in private practice before his appointment to the U.S. District Court for the Northern District of California in 1997. He assumed senior status in 2011.
child. I had friends, we had a good time. High school was fun. I think my senior year I told my mother, "I'm never going to enjoy anything as much as I'm enjoying being a senior in high school." Slightly loopy, but nonetheless. [laughter] I did enjoy it.

MS. FONG SHEKEFF: How did your time after college at Oxford, shape you and your interests?

JUSTICE BREYER: I think I learned quite a lot at Oxford. I liked Oxford, I liked England at that time. You see, people were a lot less used to traveling than they are today. My father took me when I was about eight years old on the train, the Lark or the Daylight⁵, from San Francisco to Los Angeles. That was like going into a foreign country. I mean, it's the equivalent of that now. No one in my family, I think, had been to

⁵ The Lark and the Daylight were well-appointed Pullman passenger trains running between the San Francisco and Los Angeles areas in the 1900s.
Europe. I went on an exchange to France when I was in my first year of college, after my first year. Afterwards, I was at Oxford and we'd travel and I had friends there. We got a little car and went down to Morocco once,

and we drove into Russia once and spent time—we saw everything. But there is, I think, a kind of English way of looking at academic things, which is useful for lawyers, which is don't waste words, get to the point, figure out what the heart of the matter is and think clearly. So, if there were intellectual lessons, I think they were those. I studied philosophy. It was a wonderful time, too, for philosophers. It was the time of the Ordinary Language School\textsuperscript{6}. It was J.L. Austin, and Strawson, and Ryle,

\textsuperscript{6} The Ordinary Language School was a name later given to a linguistic philosophy and methodology that favored looking to the everyday "ordinary" use of words to clarify or resolve philosophical problems.
00:04:08 I went to their classes and I went to H.L.A. Hart's lectures on law, which later became a book, *The Concept of Law*. The weather wasn't so good. But my thought, and I think the thought of most of the Americans there then was get around, meet people, find out what it's like, and that's what we did. We enjoyed that.

MS. FONG SHEKETOFF: When and why did you decide to pursue law?

00:04:32 JUSTICE BREYER: Oh my father was a lawyer. In those olden days, children didn't question perhaps as much as they do now, and I'm sure they wanted me to be a lawyer. I thought, well I'd like to be a lawyer. I sort of always knew I would be. I followed through on that plan.

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7 J.L. Austin (1911-1960), P.F. Strawson (1919-2006), Gilbert Ryle (1900-1976), and Paul Grice (1913-1988) were British philosophers of language and professors at Oxford University.

8 H.L.A. Hart (1907-1992), a British legal philosopher and professor of jurisprudence at Oxford University. He gave a set of lectures beginning in 1952 that grew into his most famous work, *The Concept of Law* (1961), on his theory of legal positivism.
MS. FONG SHEKETOFF: What was law school like for you and what did you like best and worst?

JUSTICE BREYER: Well, law school was a big change after Oxford. I mean, at Oxford, we'd spend a lot of the time maybe having lunch out at one of the pubs or maybe riding our bicycles somewhere out into the countryside or having tea in the afternoon with friends. Our tutorials, it was one-on-one with the tutor and we'd write an essay desperately at the last night before meeting with him. It was a more relaxed atmosphere. And suddenly, law school was not relaxed. Law school was intense. It was very interesting, but law students are a pretty competitive group and there's a lot to learn. I think the Socratic method in law school is really just a way of making interesting the need to learn a lot of facts about law.

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9 In the Socratic method, named after the Greek philosopher Socrates (470-399 BC), a teacher continually questions the student to help develop critical thinking skills. The Socratic method is frequently used in law schools.
You learn property law and tort law
and criminal law and I enjoyed it,
but it was work. It was work and you
had to pay attention and remember and
review your notes. We got through it
all right. [laughter] Interesting,
but different.

MS. FONG SHEKETOFF: You speak often
about Justice Goldberg,\footnote{Arthur Goldberg (1908-1990) was appointed to the Supreme Court by President John F. Kennedy in 1962. In 1965, he was appointed Ambassador to the United Nations by President Lyndon Johnson. Prior to his judicial service, he was Secretary of Labor in the Kennedy Administration. http://www.nytimes.com/1990/01/20/obituaries/arthur-j-goldberg-dies-at-81-ex-justice-and-envoy-to-un.html.} who you
clerked for after law school. How
did Justice Goldberg shape you or
have an influence on you and what did
you learn from him?

JUSTICE BREYER: I learned a lot from
him. He did have an influence. I
came down here after law school.
That was my first job. At that time,
there were two clerks, only two. And
so, probably, we got to spend more
time with the Justice. Justice
Goldberg was an activist. I mean,
not in any pejorative sense, but he
liked to get things done. He would go into conference sometimes and he'd have already written out a per curiam opinion, and he knew that when they discussed it, he would be able to say, “Well, why don't we do it this way?” He would hand them the opinion and then more often than not, they did. It was a different court. It was Justices Black, Douglas, Goldberg,

White, Brennan, Harlan, Stewart, Clark and the Chief Justice Warren. It's not just that the personnel were different, but they were a court with a mission. They had decided in 1954 that segregation was contrary to the Constitution. It's one thing to say it, it's another thing to bring about

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an end to legal segregation. And of course, in practical terms, we're not finished with that task yet. But then there was a tremendously complex legal framework that supported segregation in the South, legal segregation. The Court was trying to dismantle that within the context of existing constitutional law, and the context of a document that doesn’t change its words. Yet, it had to make the Equal Protection Clause effective in practice. So, they saw themselves, I'm pretty sure, as having that mission in case after case. That led to other things like the Fourteenth Amendment incorporating the Bill of Rights, and various other changes in the law which we can look back in retrospect and say well they were simply making that document meaningful, protecting free speech

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13 The Equal Protection Clause refers to the Fourteenth Amendment to the U.S. Constitution which provides that no state shall deny any person within its jurisdiction equal protection of the laws.
and other things from interference by
State as well as Federal officials.
And it all may make sense now, but at
the time it was quite new and they
were trying to figure out how to do
it.

00:08:56 Well, Goldberg was right in the thick
of things. [laughter] He would take
us to lunch on Saturdays and we'd go
to Duke Zeibert's, a famous old
Washington restaurant, and on

00:09:08 Passover, we'd go out and have a
Seder at his house with all the labor
leaders, whom of course he knew
because he helped put the AFL-CIO\textsuperscript{14}
together. We'd sing old labor songs,
they knew all those songs out of the
AFL-CIO songbook. So, it was a
combination of sort of Passover
ritual and “You can’t blame me” (or
whatever it was), “I’m sticking with

00:09:36 the union.”\textsuperscript{15} [laughter] It was a lot

\textsuperscript{14} The American Federation of Labor and Congress of Industrial
Organizations.

\textsuperscript{15} “Union Maid,” a union song written by Woody Guthrie in 1940,
has a chorus of “you can’t scare me, I’m sticking to the
union.”
of goodwill. But Goldberg being an activist in later life, I've read biographies about him, I think he was happiest as Secretary of Labor. He wasn't unhappy, I mean he enjoyed being a Justice, I'm sure. But sometimes he'd say, "Nobody ever calls me." [laughter] That's true.

00:10:02 The telephone would rarely ring. But people did call him sometimes to offer him a job in the Administration and I think the Administration, the Johnson\textsuperscript{16} Administration--and later, I was told this by Jack Valenti\textsuperscript{17}--they thought he wanted another job. He didn't think he wanted another job. But Ken Galbraith,\textsuperscript{18} having had lunch with him once, went over and told Jack Valenti and the President that Goldberg wanted another job--which he didn't. He'd come into us and he'd

\textsuperscript{16} Lyndon Baines Johnson (1908-1973), 36th President of the United States from 1963-69.  
say, "You know, I can't understand this. They're calling up from the White House and saying 'do I want another job,' I said no." [laughter]

Of course he didn't. Then along came Vietnam\textsuperscript{19} and that's when we were clerking. The most interesting conversations I've had about that, I think, were with Sol Linowitz,\textsuperscript{20} who was a great friend of Lyndon Johnson and used to sit in the Cabinet meetings sometimes. He provided quite a lot of insight into Johnson's mentality. With one story, would you like to hear that? He told me that he was in the Cabinet room one time and Johnson usually would pay no attention. He'd have his chair facing the other way and people would talk about different things. Then someone said on reference to some

\textsuperscript{19} Vietnam War, (1954–75), a protracted war between the communist government of North Vietnam and its southern Viet Cong allies against South Vietnam and its ally, the United States. See: https://www.britannica.com/event/Vietnam-War

Well, I don't know if we can get it done. We should, but I don't know if we can get it done."

Johnson, he said, swiveled around in his chair, pointed his finger at that man and said, "This is the United States of America, and we can do anything." Ha! Well, that does shed light. We can? I mean, maybe that's what he thought. But we sure couldn’t in Vietnam. Of course, at that time that was the big issue of the day and I still think it affected my generation enormously. When Adlai Stevenson died, Johnson called Goldberg and asked him to take his place in the United Nations. Why would Goldberg give up this job to do that? And the answer, if you knew Goldberg, was pretty clear. What Johnson probably told him, which is what Linowitz told me Johnson would have told him, "The most important

problem facing America is Vietnam. I want to solve that problem, and I can solve it at the United Nations and you are the only one who can do it and you'll have access to me."

That's what Johnson would have said. Goldberg would have believed he was the only one who could do it. Moreover, he would have thought he probably could do it. I think Johnson might have added, said Linowitz, "And you know Arthur, the man who solves the problem with Vietnam can do anything." So Goldberg might have thought maybe I'll be President. I don't know what he thought. Then he consulted with Brennan and Chief Warren, and Brennan told me that yes, it did make sense. It did make sense because of the enormity of the Vietnam problem and the need to solve that problem for this country, which of course we didn't for many, many years. So, I can understand why Goldberg would do
that. A mixture of ego, but also when Jack Kennedy\textsuperscript{22} said Arthur Goldberg was the smartest man he ever met and that may be true, and he'd asked Goldberg to do all kinds of things when he was Secretary of Labor. We'd see reports of when he'd go around and inspect Army bases for Jack Kennedy. So, he'd always done what the President had asked him to do, and here he wanted him to solve the Vietnam War. I can understand it. In later years, he said he was sorry he resigned and maybe he was. But I do understand it. We kept up with him in later years. It was six clerks: Peter Edelman,\textsuperscript{23} David Filvaroff\textsuperscript{24} the first year; the second year it was Alan Dershowitz\textsuperscript{25}

\textsuperscript{22} John Fitzgerald “Jack” Kennedy (1917-1963), the 35th President of the United States from 1961-63.
\textsuperscript{25} Alan Dershowitz (1938-), a retired Harvard Law School professor who specializes in civil liberties, criminal law,
and Lee McTurnan; and the third year was Steve Goldstein and me. We’d have dinner, the six of us, with Arthur Goldberg from time to time, and Dorothy. It was really great. We had like a family.

MS. FONG SHEKETOFF: Why did you decide to pursue academia?

JUSTICE BREYER: I guess I'd had an academic bent. I liked teaching. I liked explaining things to people. I liked teaching in class. I liked students. I liked having to explain to them something so they'd understand it and then they'd ask a question or repeat something and I'd try to find in their answers something that showed they did understand it. Sometimes that was

and the Arab-Israeli conflict.


Stephen Goldstein (-2009), was a practicing lawyer in Philadelphia and a professor of law at both the University of Pennsylvania and Hebrew University of Jerusalem. http://en.law.huji.ac.il/people/steve-goldstein.

But the system of asking questions and so forth does help the students remember. I enjoyed that enormously.

A class is always a challenge—it's always a challenge. Derek Bok\(^29\) told me, anybody's first year is hard in teaching, because if you say you don't really know all the time, they begin to think you've said that a little too often, why'd they hire this guy? [laughter] And if you say you know everything, they know you don't. [laughter] So, it's not so—Derek said, which is true of a lot of things, he told me, "Don't worry quite so much. No class is either as good as you hope or as bad as you fear." That's true. Things are never quite as good as you would like them to be and you believe maybe they are, but they aren't. And they're never as terrible when it

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goes badly as you fear they would be.

MS. FONG SHEKETOFF: As a professor, you wrote about deregulation and copyright law. What sparked your interest in those topics?

00:15:57 JUSTICE BREYER: Well, after I had worked for Arthur Goldberg, I spent two years in the Justice Department working in the Antitrust Division for Don Turner.\(^{30}\) He was head of the Antitrust Division. He taught me at Harvard. He taught antitrust and economic regulation. Very intelligent man. Very interesting man, and practical, and very clear. Indeed, he was responsible for bringing economics into the antitrust world and really emphasizing the need for economic rationality in antitrust decisions.

00:16:35 He was the one who first wrote the merger guidelines. I know that because he wrote them on the golf course down in, I think, North

Carolina somewhere and I went after him and took notes. [laughter] He would dictate and we had the first antitrust merger guidelines, which were a little less complicated than the present ones. We had to, at that time, run them through Ramsey Clark\textsuperscript{31} who was by then Attorney General, and possibly the President, I don't know. But at that time, I think that the Department would have thought that in major matters, whether it's antitrust or criminal law or everything, you might have to get White House approval because the President, after all, was responsible for the Department of Justice, which indeed worked for him. The notion of total insulation was not the notion that people had then. I think there is some happy medium. I'm not sure exactly what it is. But we had the merger guidelines and he would try to explain things and I would sort of

\textsuperscript{31} Ramsey Clark (1927-), Attorney General in the Johnson Administration from 1966-69.
sit there and write, what--resale price maintenance. I wrote a dissent here in a case involving--they wanted a rule of reason to apply to resale price maintenance. I didn't. I wanted them to be absolutely illegal, price fixing should be illegal per se. Now how did I know about that?

Because I learned it from Don Turner and had to write Senate testimony for him and had read some books by Basil Yamey\textsuperscript{32} who is a great English economist in this area and head of their Monopolies Commission. Well, I'd worked for him, so I was interested in antitrust. When I got to Harvard, I wanted to teach antitrust, they had somebody who was great, Phil Areeda,\textsuperscript{33} one of the greatest teachers they had. So, I taught antitrust and then eventually I began to teach administrative law.

\textsuperscript{32} Basil S. Yamey (1919–), a South African-born economist, professor at the London School of Economics, and member of the U.K. Monopolies and Mergers Commission from 1966–78.

I first started out teaching evidence, of which I knew nothing. I feel sorry for the students who had to take that class. [laughter] But then I moved on to administrative law and the idea was, since economics fit so well into antitrust, which it did, Frankfurter explained that, the judges can't just fish around for what's a bad practice or something. That's, if anybody's job, the Federal Trade Commission, not the judiciary's. They need a framework, they need a set of standards, and antitrust law was informed by economics, not dictated to by economics, but informed by economics which helped build a reasonable set of administrative standards. So, administrative law, which is always an unpopular course, and I think it perhaps remained unpopular even after

34 Felix Frankfurter (1882-1965), Associate Justice of the Supreme Court from 1939-62.
many years of teaching it [laughter]

but nonetheless, I thought it needed standards. Now, not standards for,

00:19:28 necessarily, application, but a way of teaching it. Some people thought you could teach all of administrative law by looking to one agency and then you'd show the details of that agency and how it’s administered. Others thought, no, teach it as a procedural course. And then Dick Stewart\(^\text{36}\) and I thought we would try to build a course around the idea of economic regulation. So, I would tell the students, when you finish this course, you will know how to set a rate. I hope you will know. You will know what the economics are and how you

00:20:01 give out something that's in scarce supply like a television station license. You will know how to set

\(^{36}\)Richard B. Stewart (1940-), a professor of administrative and environmental law at NYU School of Law and, previously, Harvard Law School.

standards using the NHTSA\textsuperscript{37}, the Highway Administration. How do they reach these standards? How do they do it? You will know a lot of things that are really economic regulation that could comprise a course in economic regulation. Let's have one course, let's teach the student something about economic regulation and at the same time you will learn how administrative law applies. Now, the people who liked that mostly were people who'd had some experience in the government or a little experience outside the law school. But it isn't the tax code and so I think it was a perfectly good way to teach it and I became more and more interested in economic regulation and ended up writing books about it. I wrote a book about economic regulation called \textit{Economics and Its Reform}.\textsuperscript{38} A Los Angeles Times reviewer got a hold of

\textsuperscript{37} National Highway Transportation Safety Administration, part of the U.S. Department of Transportation under the Executive Branch of government.

But there it was, a review in the Los Angeles Times. Review: "In Alice in Wonderland, Alice emerges from the pool of tears with the dormouse and the dormouse begins to read from Hume’s History of England. 'Why are you reading that,' said Alice. 'Well because,' said the dormouse, 'we're wet and this is the driest thing I know.'" “That,” he said, “was before Breyer wrote this book.”

Well I can't say that economic regulation is just a bundle of laughs, [laughter] but nonetheless it's a very interesting subject and I hope my writing since then has become less dry. 

MS. FONG SHEKETOFF: You speak often about your experience working for Senator Ted Kennedy39 on the Senate Judiciary Committee. Why was that experience important to you?

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JUSTICE BREYER: Oh it was great. I loved working for Senator Kennedy.

00:22:00 Everyone did who worked for him. I started out in--I worked in Watergate. I got down there because there was a section of it dealing with antitrust and Jim Vorenberg and Archie Cox wanted someone who knew something about antitrust to look into something called the Dita Beard Memo, which a few arcane trivia followers will remember what it was. I spent the summer of that year looking into that and whether there was scandal attached or not and some prosecutions grew out of it. But Archie, I think, thought I'd done a good job and he

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42 A memo written by Dita Beard, a lobbyist for International Telephone and Telegraph Corp., suggesting the company donate $400,000 toward the 1972 Republican National Convention in San Diego in exchange for the Justice Department settling an antitrust case against the company.
was one of the people that taught me a lot about honesty and probity and...
a great man. [laughter] Here’s a great thing, when they fired him, I read

00:22:47 the words--he gave a talk and he said he was simply trying to do his job. But he started out and he said, "We were not trying to get the President," indeed they weren’t. He said, "I sometimes think I've got too big for my britches," that's New England, "and I was worried about that. This is what we found and I hope the staff continues." That speech after that Saturday night massacre made a big difference. He was a very honest man, an admirable man. But I suspect he recommended me to Senator Kennedy and Senator Kennedy had just taken over a sub-committee called Administrative Practices and Procedure and he wanted somebody to run it. So, I went to his house and we had dinner and he
wanted me to run it. Well, I couldn’t because I was teaching at Harvard, but I said I'll do this if you'd like. I'm going to have a sabbatical. Well, I'd be happy to run a set of hearings. That was a stab in the dark. He liked that idea and we ended up having a set of hearings on airline deregulation. Well, I really thought that was great. It showed you the power of a set of congressional hearings. We had like three people on our staff, two maybe besides me. And we had an office the size of a broom closet, but we had the most powerful investigative instrument there was: the telephone, because you could phone people and ask them to do things for the Senate. We had eight days of hearings. They were absolutely on the level. We had economists. We had people testifying on how you set a route rate, and Kennedy became an
expert in that. He saw it was going somewhere. See what he would do is, the staff competed for his time. He would give time to any project that was going somewhere. He began to think that ours was. So, he learned

00:24:48 --can you believe it, he learned how to set an airline rate and he learned how to--they did routes, and of course it didn't make any sense, and it kept prices way up.

00:24:59 Eventually, we more or less proved that and showed that the airline prices were much too high. That led to deregulation. We had to put together a coalition of people within the Senate and within the Administration which started out as part of the Ford\textsuperscript{43} Administration and President Carter\textsuperscript{44} picked it up and pretty soon he appointed Fred Kahn\textsuperscript{45}

\textsuperscript{43}Gerald R. Ford, Jr., 38\textsuperscript{th} President of the United States from 1974-1977. Ford was Vice President and acceded to the Presidency upon the resignation of President Richard Nixon.

\textsuperscript{44}James E. “Jimmy” Carter Jr., 39\textsuperscript{th} President of the United States from 1977-81.

\textsuperscript{45}Alfred E. Kahn (1917-2010), Cornell University professor of economics who chaired the Civil Aeronautics Board from 1977-78. \url{http://www.nytimes.com/2010/12/29/business/29kahn.html}. 
who was the great master of economic regulation, as head of the Civil Aeronautics Board and he began administratively to deregulate and eventually a bill was passed in the Senate\(^4\) and prices did fall. We went out one day to United Airlines—all the airlines were against deregulation, they didn't want the price competition. We had people from Texas where they weren't regulated and they came in and said look the price is at half. We take the people who can't afford to fly and we put them in our airplanes.

Why not? That was our theme, you see. If the airlines can provide this service at prices people can afford, why not do it? And the answer was regulation was stopping them. Now this man at United told me, he said, “I've come to the conclusion you're right, that we should have price competition, and

we'll have it, it'll come about.

00:26:19 We'll have route competition. We'll have price competition. We'll fill up the airplanes. And you, Stephen, will hate it." [laughter] Now there isn't one person in America who likes it, because--all they have to do, though, is look and see what the price in real terms was, in real terms, in 1973-74 and compare those prices today and they will see on average, because there are good comparisons of the average prices, they've fallen nearly 50%. But other things have all gone up. All right, now I'm being defensive there. But I loved running the hearings. And then --when he became head of the Committee, he asked me if I wanted to be Chief Counsel. I said of course. I came down in '79 and '80 and it was really one of the most interesting--I would get up in the morning and just hardly wait to get into work. [laughter] My
family moved down here. There were 17 members of the committee and every morning we'd have breakfast, Ken Feinberg and I from the Kennedy staff would have breakfast with Emory Sneeden who was Senator Thurmond’s chief person, and he'd been in the Army, he was a retired general and we got on very well. We planned the day. The senators liked that. When we investigated the 200 Carter nominees to be judges, jointly investigated, a Republican investigator who worked for Senator Thurmond, Duke Short.

47 Kenneth Feinberg (1945-), an attorney specializing in mediation who has served as a special master for several high-profile settlements and victim compensation funds. He was Senator Kennedy’s chief of staff from 1978-80 and special counsel to the Judiciary Committee from 1975-80. [http://www.law.columbia.edu/faculty/kenneth-feinberg](http://www.law.columbia.edu/faculty/kenneth-feinberg).


49 James Strom Thurmond (1902-2003), a U.S. Senator from South Carolina for 48 years and proponent of segregation.

Burt Wides, ours. We started with Carmine Bellino who had worked for Bobby Kennedy. And they jointly signed a report, jointly. We confirmed almost everyone. We didn't have any Supreme Court nominees while I was there. But there were lots of district court. That just shows it was a different Senate. They had liked the cooperation. They liked it.

Kennedy, what we learned, I had to put on a cup for my law clerks now, a few lessons I learned from Kennedy. One of them: the best is the enemy of the good. He didn't make that up, but boy he lived by it. And I've tried to follow that. If you could get an inch, it's much better to get that inch then to complain.

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51 Burt Wides, a lawyer specializing in intelligence and national security policy, was a Judiciary Committee staff member.

52 Carmine S. Bellino (1906-1990), a certified public accountant, FBI special agent, and later Congressional investigator.

53 Robert F. Kennedy (1925-1968), Senator from New York from 1965 until his assassination in 1968. He was Attorney General from 1961-64 in the administrations of Presidents John F. Kennedy (his brother) and Lyndon Johnson.
about not getting a mile. You can become popular by complaining, but it's better to get the inch. And what about the credit? Second rule was credit is a weapon and he told us that. He tried to live by it, he didn't always, but he tried to, and people did. Credit, he said, look, if the thing succeeds, there'll be plenty of credit for everybody. Don't worry about it. And, if it fails, who wants the credit? So, the way you compromise, you don't compromise by going into--this is him--you don't compromise by going to somebody who disagrees with you and say, "I'll do this and then you do that." No. The way you compromise is you listen to what they're saying, and having listened to what they're saying, you listen until you think, 'Oh. Maybe we could work with that'. And then you say to the person, "what a good idea YOU have. What a good idea, let's try to work with that."
Then you try to work with their idea and combine it and figure out something you can all live with, and then, if you get this thing, and then, after it's enacted into law, and then if the press comes along, you push that person out in front and you say he was so constructive, so constructive. My goodness, Kennedy did that and you saw how he did it. At the same time, he had two things—well, he just made it fun. But underlying, I heard him talk to his staff one time, and there was about hundreds by that point. He had a reunion or something up in Hyannis, and he said what his father had told him: what you do if you're interested in politics or in government or probably in many areas of life, you get people together, different talents, different abilities, but

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54 Hyannis is a village on the Cape Cod peninsula in Massachusetts known for the private compound where the prominent American political family, the Kennedys, lived and gathered.
they work with you, as well as for you, and your object is to help.

Help what? Well, help him if you're working for him. Help others. Help accomplish something that's good for other people. And he didn't have absolute definite ideas about what that was. So, you can lower airline prices? Good, he's for you because it's going to help that person who's never flown. Indeed, one of the hearings, that was a big bus segregation issue in Boston and we were having a hearing in Boston and a woman rose up in the meeting and said, "Senator Kennedy, why are you having hearings on airline deregulation? I've never been able to fly." And he said, "That's why I'm having the hearings." So, when I think back on that, it was a wonderful time. It was a great group of people. We still keep up so often and he just made it fun. You're cooperating in an effort. You're
cooperating in an effort to do something for somebody and very often you'll fail, but it's worth it because sometimes you'll succeed.

00:31:43 MS. FONG SHEKETOFF: What life experiences prepared you for your work as a Supreme Court Justice?

JUSTICE BREYER: As a justice, nothing can prepare you. Nothing. I mean, to be appointed a federal judge, lightning has to strike. To be appointed to this court, not only does it strike, but it has to strike twice in the same place. Everyone on the Court knows that and everyone on the Court knows--I wasn’t appointed the first time I was considered. I thought well, okay, I wasn't. They had a good appointment, [laughter] I have to say Justice Ginsburg was a good appointment. I knew that in my heart. I said okay, it's good for me to have been considered. It's good for me to be considered. There's

55 Hon. Ruth Bader Ginsburg, Associate Justice of the U.S. Supreme Court appointed by President Bill Clinton in 1993.
where I've done my best. And the
wheel spins around. Through good
luck, I was appointed the next year.
Well, you're in a job and I'd say one
00:32:36 of the most important criteria is
that you've had—that's why judges in
this country are appointed at middle
age or more, in their 50s perhaps,
and they shouldn't, in my opinion, be
00:32:48 appointed much earlier. I mean, it
depends on the individual of course.
But still, you want a person to have
had enough experience so that when,
as an appellate judge, he is doing
his job, which job, as you well know,
is sitting in a room or on the
airplane or in your house, reading.
You're reading briefs and you're
writing. You turn around to that
word processor. You
00:33:13 have a draft from your clerk and then
you sit there, and if you're a former
academic you can't help but sort of
start from it and it unwinds and you
write your draft and you give it back
to the clerk and she thinks, oh hers was better. [laughter] But nonetheless, you say there we are. And so, the two or three drafts and you're writing and pretty soon it's ten drafts--

00:33:33 eventually you get a draft you're satisfied with and you circulate it. But the important thing is that those words on paper will affect people's lives. You have to have the

00:33:43 imagination to understand how those words will affect those lives. That means you understand something about the lives of other people. That's why it's a good idea on the Court to have people of different experiences because they each bring something to the same legal question; that they may have different experiences that help them imagine and think

00:34:09 somewhat differently how the words on that paper are going to affect people in this country.

MS. FONG SHEKETOFF: What was the
confirmation experience like for you?

JUSTICE BREYER: The joke I always use in order to avoid answering that question is I say: I was not the person who does the nominating, I was nominated. I didn't do the confirming, I was confirmed. And it's sort of like asking a recipe for chicken à la king from the point of view of the chicken. That's just a way of avoiding the question. It was stressful. Even then, it's gotten worse, more stressful. I mean, I'm on one side of the table, 17 United States senators are on the other side, and people are saying this will be easy, he'll easily be confirmed. How do I know? I know people are watching it on television. And I do know that the senators are asking the questions that they believe their constituents want asked. If they do not reflect the views of their constituents, they won't be senators very long. They're
pretty good at knowing what those are, so they ask what questions they want and then I respond. I think I was there for two-and-a-half days testifying, but who's counting. [laughter] But I felt it was stressful, though I was confirmed. And I'd like to think, and I do sometimes think --I knew that if people don't like you, you won't be confirmed. If enough of them don't that strongly. Well, what do I think about that? Well luckily, they turned off the television after a while because I was boring. [laughter] But nonetheless, I think it's a democratic window into a process where a person is going to be appointed to a job where the public will not have the power to affect him, and he shouldn't--they shouldn't. The point of having an independent group of judges is they decide independently and they are not swayed by public opinion. That
doesn’t mean they pay no attention to how people are affected, that's a different matter. But just that the public likes this and doesn’t like that, independent of that, and if you're not prepared to be you should get some other job. But this is the way of the democratic window into that, appointed by political people. And it's all right, if there had not been that, would we have ever desegregated the country? I mean, there are a lot of things to think about there. But anyway, I did get through the process. The best advice I got was from Michael Berman who was one of the people who shepherded this through and he said, "You have a tendency to talk too much."

[laughter] "Don't." [laughter] He said, "First, think about your answer. Listen to the question."

witness. "Listen to the question. Pause. Think. And then answer the question. Now the purpose of this is not to show how clever you are. The purpose of it is to get confirmed. So, when you answer the question, answer it fully, satisfy the senator he has an answer whether he likes it or not, and he'll move to the next question. And when he moves to the next question, you will do the same and eventually he will reach his last question. And eventually, all the senators will reach their last questions and then they will vote and you will be confirmed." That was good advice. I tried to follow that. [laughter] A friend of mine listening to the radio in Boston where it was being broadcast, one of the people she knew was listening said, “isn’t that a friend of yours,” and she said yes. “Is there something wrong with him?” She said, “Is he sick?” [laughter] “No, no,” she said, “he's
all right.”

MS. FONG SHEKETOFF: How has the Court changed since you’ve joined it?

JUSTICE BREYER: Well, since I've joined it, the personnel have changed. What Justice White, Byron White, said years ago is “with every new appointment, it is a new court.” The interaction is different. The dynamic among the justices is different. Indeed, it is. Indeed, it is. So, you move on.

I was good friends with Sandra O'Connor. I was very sorry when she left. We all get on well. I was good friends with David Souter, I still see him occasionally. And with Nino Scalia, we were friends and it was fun, he made it fun even though we disagreed about quite a lot of things. So, people change. Some

57 Hon. Sandra Day O'Connor (1930-), Associate Justice of the U.S. Supreme Court from 1981-2006, appointed by President Ronald Reagan.
58 Hon. David Souter (1939-), Associate Justice of the U.S. Supreme Court from 1990-2009, appointed by President George H.W. Bush.
59 Hon. Antonin Scalia (1936-2016), an Associate Justice of the U.S. Supreme Court from 1986 until his death in 2016, appointed by President Ronald Reagan.
leave, some disappear and you have new people, and it's fine. It's fine.

The discussion in the conference is still—nobody says anything insulting or mean, no voice is raised in anger. It's professional. We go around the table and no one speaks twice until everyone's spoken once. A very good rule. And then there's some back and forth. That back and forth works well. When you're not saying I have a better argument than you, but rather you're listening to what the other person is saying and trying to make a contribution there.

So, I think the conferences work well and there's probably a little more discussion with Chief Justice Roberts than there was with Chief Justice Rehnquist, who thought no one's ever going to change his mind, but they did sometimes. So, it's the

61 William H. Rehnquist (1924-2005) was appointed to the U.S. Supreme Court in 1971 by President Richard Nixon. He served as Chief Justice from 1986 until his death.
same institution, slightly different personnel.

MS. FONG SHEKETOFF: What do you feel are the most important qualities in a judge?

JUSTICE BREYER: Well probably what I've said. I think you have to be open-minded, that's the most--fair, and pay some attention to what the impact of your decision is going to be and take that into account, where it comes in. It comes into account in many ways in the law. Open-mindedness is not a question of coming into a case with a blank slate. An open mind is not a blank slate. When I read the blue brief, the petitioner's brief, and I look at the question, I already think I know the answer. But after I read the red brief, I think maybe I didn't know the answer. And I read the gray brief, that's the government's brief, they're always gray. I think "yeah, I really didn't know the answer at
Open-mindedness is not having a blank slate, it's being willing to change your opinion when faced with facts and arguments that suggest it should be the contrary. And that happens all the time. So, I would say listen. And often, a judge will repeat to someone the argument he made or to the other side, putting it in slightly better form. And interestingly enough, even if you make that to the other person and hear the answer and you decide against the lawyer that made that argument, that lawyer who made the argument is still happier than otherwise because he knows he was understood. It doesn't mean he'll win, but he's understood.

MS. FONG SHEKETOFF: What's a judge's job in applying the Constitution to cases that come before him?

JUSTICE BREYER: Well it's the same
job you have. A man or woman, I mean, we do, that's a change which we now have three women on the Court, that's good. Why is it good? I don't know. [laughter] But there it is, it's a good thing. But same job, same job. Those words in the Constitution, like the words in a statute, don't always explain themselves. So, a judge looks at the words, whether it's a statute or the Constitution, and I tend to think they all have the same tools. There are six basic tools which I've said many times, I think those are important, they read the text. If it says fish, that isn’t a carrot. And if it says speech, that isn’t privacy, that's a different part of the Constitution. You're limited by the text, but very often the text doesn’t answer the question. You look at the history. You look at tradition. Suppose it's habeas
There's a long tradition.
You look at the purpose or the values that underlie that and how they've been applied. You look at precedent.
You look at consequences. But not every consequence in the world but the consequences related to the particular provision, particular values at issue there like speech consequences if you're talking about free speech. Privacy perhaps if you're talking about an unreasonable search and seizure. Everybody uses those. You have the text, the history, the tradition, the precedent, the purposes or values, and the consequences. When you're talking about the Constitution—and different judges emphasize different ones of those and maybe some pay more attention and put a greater emphasis on text and others put more on consequences. But nobody leaves any

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62 Lat. (You have the body.) The name given to a variety of writs, having for their object to bring a party before a court or judge. BLACK'S LAW DICTIONARY (2nd ed.).
those out completely. When we're talking about the Constitution, the words are more general, typically. The Tonnage Clause63 is not more general, [laughter], but “two senators” means two senators. But there are a lot of words... "The freedom of speech...". Justice Black used to say, "But the First Amendment is definite, it says 'Congress shall pass no law abridging the freedom of speech.'" Those aren't the words, "no law". They're clear. The words that are difficult are "the freedom of speech". Just what does it consist of? And it doesn’t tell us directly in the Constitution. “Liberty” in the Fourteenth Amendment. And so, we have very often, to work out how the values underlying those words apply today. I tend to think the values don't change, but the circumstances

63 U.S. Const. art. I, § 10, cl. 3. The Tonnage Clause prohibits states from imposing tax on any tonnage.
do. You know, Scalia and I used to
discuss this, and publicly. We went
to Lubbock, Texas, I rather

enjoyed that. There was a big

audience of students and I think

they came away having greater

respect for the Court regardless of

which side in this they took because

we had a good time debating. I would

say things like, “you like to look
to history? We all look to history.”

Of course you have to look to

history. You look to history to
decide what

the Second Amendment means, the

right to bear arms. And he looked to

history and I looked to history and

we came out to opposite conclusions.

And John Stevens⁶⁴ agreed with me and

four others agreed with him. So,

there we are. But we all looked to

history. The question is how much

and where do you find it. I tend to

think the history, for the most part,

⁶⁴ Hon. John Paul Stevens (1920- ), Associate Justice of the
U.S. Supreme Court from 1975-2010, appointed by President
Gerald Ford.
is a history of people who are trying to write a document that's going to last a long time and they aren't themselves certain of how it's going to apply in particular situations.

He may think that well, I go too far in some of that. When we talk, I’d say, “I'm going to make this very good point”. I'd say, "The Commerce Clause\textsuperscript{65} applies today, the Commerce Clause applied then. George Washington didn't know about the Internet and George Washington didn't know about automobiles." And Nino\textsuperscript{66} would say, "Oh you know, I knew that."

[laughter] He would say, "Well, I'm not saying it answers every question. I'm not saying the Commerce Clause doesn’t apply. I'm simply saying it's like the campers--." I rather like this joke, everyone knows it, but it's a good joke in this

\textsuperscript{65} U.S. Const. art. I, §8, cl.3 grants Congress the power to regulate commerce.

\textsuperscript{66} “Nino” was a nickname of Justice Scalia.
"--One camper sees the other putting on running shoes, 'where are you going?' he says,

'well there's a bear coming to the camp.'

He says, 'well you can't outrun a bear.'

'Well, yes,' says the other one, 'but I can outrun you.'"

And that's what Nino is thinking in respect to a lot of the cases where I've decided things. But I'm afraid that if you really follow his approach too rigorously, you will get a Constitution that no one would want. It's too rigorous. It's too out of date. I mean, we don't have flogging anymore, you know? And they did at the time they wrote that 'cruel and unusual punishment.'

Things change. Values don't change, but circumstances do. He would think that my approach will lead too often
to judges substituting what they think is good for what the law demands. I said, “But I don't think I do that.”

And he says, "Maybe you don't think so, maybe others would, I don't know."

I say, "Anyway, it's a kind of risk, isn’t it?" Who will prove to be right? I don't know.

That's for others to say at some point in the future.

MS. FONG SHEKETOFF: What judge or justice living today or in the past, has had the greatest effect on your jurisprudence?

JUSTICE BREYER: Let's see, in reading through the different opinions from the past... there are so many that have such different things to be said for them. I mean, Jackson, for example, wrote like a dream and thought very clearly. But

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67 Robert H. Jackson (1892-1954), Associate Justice of the U.S. Supreme Court from 1941-1954, appointed by President Franklin Roosevelt.
probably Brandeis\textsuperscript{68} is the
one that I feel was closest to what I
would like to be because he liked
detail. He'd go into the facts. He'd
think the facts mattered and he'd
want to set out what was really going
to happen, and he would give lots of
weight to what Congress did. Don't be
too ready to overturn what the
people's representatives have decided
to do, that's their primary job. But
there comes a point when they've gone
too far. The Constitution sets up
not a system of telling people what
to do, it doesn't tell people what to
do. It creates a framework or an
outline or a set of boundaries within
which the people's representatives,
the democratic system, will decide
what to do. So, it's up to the
people to decide through their
elected representatives. But still,
they cannot exceed the boundaries.

\textsuperscript{68} Louis Brandeis (1856-1941), Associate Justice of the U.S.
Supreme Court from 1916-39, appointed by President Woodrow Wilson.
Those boundaries try to be protective of basic human rights, as well as impose quite a few other conditions. That's the job of the judge. If you go back and look at the Constitution, I think most of us would say it does a few basic things. It's a constitution. A constitution is “constituting” or creating a set of institutions. Those are primarily democratic institutions and that's how we decide most things: what kind of cities, states, nation we want. People decide through their votes. That's what it's supposed to be. That's one of the things, [creates] democratic institutions. Also, it separates and divides powers. Federal- State, Executive- Legislative- Judicial. Three branches, so that no set of individuals has too much power. It protects liberty in that way, which is important. It secures certain basic rights to individuals. The
Bill of Rights\textsuperscript{69} and others elsewhere in the Constitution. It assures a degree of equality, equal respect for people, in the Fourteenth Amendment.

And it insists upon a rule of law, which is the most important -- I don't know if it's the most important, but it's certainly very important, -- going back to the Magna Carta, King John,\textsuperscript{70} Rule of Law. What is that? Protection against the arbitrary. What is the arbitrary? The unreasonable, the chaotic [laughter], the despotic, the autocratic. The Rule of Law in and of itself is designed to stop that. So, I sometimes used to say when we were talking to Russians, when they first threw out communism, and talked to some Eastern European judges and so forth, I'd say, "Some of the most important law in the United States

\textsuperscript{69} The Bill of Rights collectively refers to the first ten amendments to the U.S. Constitution enacted 1791 and address Americans' individual liberties and state rights in relation to the federal government.

\textsuperscript{70} Magna Carta, a grant of liberties agreed to by King John of England in 1215.
Think of the Administrative Procedure Act. That which is unreasonable, arbitrary, capricious, abuse of discretion, is not law.

That which is not published, is not law.\textsuperscript{71}

Tremendous protections, but those protections of law in the Constitution run through the document and much of it simply explicates that in greater detail.

\textbf{MS. FONG SHEKETOFF:} What's the most difficult case you've decided on the Supreme Court and why?

\textbf{JUSTICE BREYER:} I usually don't remember because if they're difficult I block them out as soon as they've been decided. One rather difficult case, which I think we split 5-4 on... if [people saw it, they'd] see what we were doing, they'd understand that we're not divided on political lines and 50% of our cases are unanimous,

just about. The 5-4 is only about 20%, and it isn’t always the same five and same four [justices]. But one of the more difficult ones was, I think it was Arkansas, that imposed a two-term limit or a three-term limit on being a member of Congress.\textsuperscript{72} You couldn’t run for more than three terms I think, or a certain number of terms. Well, was that consistent with the Constitution? Huh. The Constitution says a representative in Congress has to be 25 years old, a citizen of the United States, and a resident of the state from which he’s elected. It doesn’t say those are the only three requirements, so can they add one? Hmm. Well, Jefferson\textsuperscript{73}, I think, and Joseph Story\textsuperscript{74} thought that they could. I think Hamilton\textsuperscript{75} and

\textsuperscript{73} Thomas Jefferson (1743-1826), Founding Father, principal author of the Declaration of Independence (1776), and the third President of the United States (1801-1809).
\textsuperscript{74} Joseph Story (1779-1845), Associate Justice of the Supreme Court from 1811-45.
\textsuperscript{75} Alexander Hamilton (1755 or 1757-1804), Founding Father and first Secretary of the Treasury.
Madison thought they couldn't.

They said "but of course they can add some, can't they say [add] 'a representative] can't be a lunatic'"

No.

"Well, what about saying there are property qualifications? You think they can do that?"

There was one state that had it at the time, Virginia had a property qualification. But only one, the others I think did not.

A precedent? Well, there was some precedent one way and some the other way. My goodness, for every argument you had that they could, you had an argument that they couldn't.

Ultimately, I think four people, the dissenters, thought let's look to the Tenth Amendment which says, "Power reserved to the states, unless it's delegated." Hmm. All right, it doesn't say you can't do it. Power reserved to the states. So, they can
But five of us thought, no, it's a federal Congress, it's Congress that has control of the qualifications. They [Congress] should be the ones to decide if there are any extra ones and the Constitution means those three and that's it. There we are. And what would have been interesting was seeing the nine judges sort of wrestle with this because it was so evenly balanced and so difficult to decide. The oral argument was very good, very good. I was in the majority.

MS. FONG SHEKETOFF: You wrote a lengthy dissent in *Glossip v. Gross* about the constitutionality of the death penalty recently. How have your views on the constitutionality of the death penalty--developed over your time on the Court?

JUSTICE BREYER: Well the dissent was

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77 *Glossip v. Gross, 135 S. Ct. 2726 (2015).*
long. It was 43 pages, but who's counting? [laughter] I wanted to show something and what I wanted to show, I think, I would not have been able to do for quite a while after I started. What I was trying to show basically is that it is randomly administered. There is a very good argument. I didn't say it was unconstitutional. I said we should consider it. But if you read the opinion, I'm thinking there's a good chance it's unconstitutional because it's random. And why is it random? I tried to show that it's inherent in the system, that there are two things that are at loggerheads that we're never going to be able to resolve. The need for fair process and for great certainty you're not executing the wrong person conflicts with this need to get a speedy, immediate decision. The result is people stay in solitary confinement, for example,
for years. On average, I think it’s 18 years or more. Then you look and see, well who gets the death penalty? There are a handful of people only and it's only in a handful of counties. I said, look at that. That's the world we're in and is that a system of law? Is that a system of law? Does that comply with the basic requirement that law be fair and non-arbitrary? That’s the question I raised and I don't definitely answer it, but I say we should certainly hear it argued, and I think we should.

MS. FONG SHEKETOFF: As you know, there's a lot of debate about whether foreign laws and foreign court decisions should have any effect on American court decisions. What's your view on that?

JUSTICE BREYER: I've written a book about it fairly recently78 and I try to use a

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lot of examples. I was on a panel with a congressman and some
academics, there are panels like this every so often. I can't remember
what group we were talking to, but we were talking about different judicial
and congressional things. And the congressman, after a while began –a
kind of criticism, rather forceful about people who looked to foreign
law. So, I said “I guess that's aimed at me”.
“Yes”, he said, it was. [laughter]
So, I said, well let me explain. I mean, the world is more
and more closely knit, more and more countries have become democracies,
more and more have written constitutions like ours and independent judiciaries like ours,
and we have more and more of the same problems. So, if a person who is a judge in another country has a
document like mine and a problem like mine, and he's tried to interpret
words like we have to apply to resolve that problem, and he writes it down, why don't I read what he says? It doesn't bind us, but I might learn something. I don't have to agree, but I might learn. And I thought that was a very good point. But he said, well fine, read it, just don't refer to it in your opinion. [laughter] So, then I should have just kept quiet, but I went on and said, well there are a lot of new-founded democracies, at that time there were in Eastern Europe particularly, and their judiciaries are less well-established. And if we refer sometimes to their opinions, they refer to our opinions quite often. We're a well-established court. They can take that and go to their legislatures and others and say you have to pay us this month or you ought to leave us alone politically and let us do our job. I said, it can help establish democracy. He
said, fine, fine, by all means, but write them a letter. [laughter] Just don't refer to [in your opinions]--so I realized I was getting nowhere with my arguments. Nowhere. I thought, really, why are these people thinking this, because there are a lot of people who think that this is a good political issue because people don't want references to foreign countries. And the reason is, and it's not such a bad reason, they pull out the document, the Constitution, and they say this is an American Constitution. The most significant relevant thing was said by Madison, he said, "This document here is a charter of power granted by liberty; while in Europe they might have a charter of liberty granted by power." Now what he meant by that is in Europe, at that time certainly, the source of power is the center. It's the king. The king could grant liberty to the people. But in the
United States, it's the people.

That's the basic condition, liberty.

01:00:53 And if they don't grant the power to
the government, it doesn't have it.
That's a difference. Now they know
who judges in the United States are.

01:01:02 In many states, they elect them and I
don't think that's a good idea, but
nonetheless, they do. They also know
that they elect the people who
appoint judges in the federal system.
There's some control. Who are those
foreign judges? We have no say over
them. None. Very little. Maybe
occasionally through a treaty, that's
so distant. Why should we do what

01:01:26 they say? That's the instinct that's
in back of that [thinking] --that
helps explain why there is this
political reaction. To me, it helps
me understand it. So, I want to talk
to those people, and I want to say,
look, I want to show you something.
I want to show you what our world in
the Supreme Court is like. I want to
tell you about security cases where security conflicts with preserving individual rights and security's a matter for the government. I want to tell you about Guantanamo\(^{79}\). It's a matter for the President. It's a matter for Congress. But, individual rights are a matter for us, the judges, and what happens when they conflict. Today's world is a world where terrorism is international. And it can help to know what other democracies have done. We don't have to copy them, but we may learn something. It may help when you see those conflicts to know the nature of the terrorist threat, which may again require us to know something about what happens abroad. When we have a copyright

\(^{79}\) Guantanamo refers to the detention camp at a U.S. Naval Base located on Guantánamo Bay, Cuba where political prisoners were detained after the September 11, 2001 terrorist attacks. The administration of President George W. Bush claimed the detainees as “enemy combatants” held off U.S. soil were not entitled to constitutional legal protections. The detentions were the subject of several Supreme Court rulings. See: Hamdi v. Rumsfeld 542 US 507 (2004); Rumsfeld v. Padilla 542 US 426 (2004); and Rasul v. Bush 542 US 466(2004).
case,\textsuperscript{80} as we had: a student at Cornell from Thailand, who found his textbooks, half price, same textbook, sold in Bangkok in English. So he says to his parents, “send me a few”, and they sent more than a few. He began to sell them. It was pretty profitable for him and the publisher got annoyed and brought a lawsuit under the copyright law and we ultimately had to hear that lawsuit. The answer whether he could do it or not lay in some words that were so technical, hard to understand. We had briefs in that case about a pile that high, from judges not just lawyers, from lawyers and governments, in Europe and Asia, Holland, England, Japan. I mean all over the place. I couldn’t figure out why there were so many briefs. Why? I mean, it’s an interesting case, but... There, down towards the bottom, a brief tells me

\textsuperscript{80} \textit{Kirtsaeng v. John Wiley & Sons, Inc.}, 568 U.S. 519 (2013).
the reason that this is of importance. Copyright today is not simply a matter of movies or books, or music even, it is everywhere. Automobiles, software, cars made in Japan, sold in San Francisco. Buyer resells them without permission? Hmm? Used cars?

01:04:01 [laughter] I mean, go to a store, any store you want, you'll see labels: “copyrighted.” Well, this brief says, your answer in this case is going to affect $3.2 trillion worth of commerce. $3.2 trillion, that's a lot of money. Why? Because it's all over. And to answer that properly, the question you have to know, what other countries are doing in similar areas because they affect the answer here. Antitrust. Securities. Commerce is international, let alone environment. I mean, not everybody has heard of the Blue Fin
Whale Treaty, but we're a member of it and they have a bureaucracy that makes rules. How do those rules impact us? Not everybody knows that marriage and families, a matter that, by the way, judges in the federal system know next to nothing about, and it's really the state court judges and the family court judges, the toughest job in the system. I mean, my friends who are family court judges say, one of them told me, he says to a couple that's fighting over the children, “I hope you can decide yourselves because if you don't I'll decide and I'll make a worse decision than you would have done.” Abducted children, why are we deciding that? After all, there are some groups who very strongly have fierce laws against that. But then there are others--women groups were in front of us saying it's because women are abused, that’s why the

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child's been abducted in many cases.

And why are we deciding it? It's the subject of a treaty. And why are things like this more and more matters for treaties? Because marriages are more and more international. You think we're going to change that? Of course we're not. So, we have to begin to know about what we're talking about. Everybody agrees with treaties. What foreign judges say matters because they interpret the same treaty. Nino Scalia agreed to that, unanimous in the Court on that proposition.

That's what this is about, [the] environment. Not just treaties, but treaties involving environment, marriage, other things...finance, human rights, national security and conflicts with fundamental rights... organizations all over the place that are dealing with matters that affect more than one nation. I say, you want us NOT to pay attention to that?
I mean, if we don't, the world will go its own way without us and we'll have to live with the result. Of course we have to know about that to do our job. That isn’t an argument. I want to show them the facts and then they'll see. Not in every case, but the number of cases I'd say when I came to the Court, maybe two or three a year, I would say now it's maybe 15-20%. You have to know something beyond your own shores and that reflects, not some ideal of internationalism, or the contrary some ideal of regionalism, it's factual. It affects the nature; the nature of the world is what is driving this. And we should do it.

MS. FONG SHEKETOFF: You're fluent in French. How has your experience with the French language and culture affected your views on American law, if at all?

JUSTICE BREYER: It's not just the French. When I get, often, questions
from undergraduates, what should I study to become a lawyer or a judge as an undergraduate? I say whatever you want. I mean, you don't have to study something related to law or economics or government, though you can if you want. But I personally recommend the humanities. Learn a foreign language. “Why?” I'd say well, the best reason for me is because you only have one life, and you'll know your own life, and you'll know the lives of your nearest and dearest. And you'll know your family and friends, a few others. But there are a lot of people in the world and one way you can get to know the lives of others, is by knowing a foreign language. That will introduce you to a culture, to a way of living, to ways of thinking that are not your own. You will then be able to understand the lives of other people. Same with literature. Same with great literature. It brings you into
It brings you into their feelings. Chesterton\(^2\) has that in one of his books. He says, you look out over London--this was years ago --and you see all those houses and they all look sort of suburban houses or small houses or tenements and you think ‘Oh my God it's all the same’. But it isn’t. Every one of those houses, he says, has a human being in it, and every one of those people is a living, breathing person. And every one of those people has his or her own emotions and feelings and life, and he tries to understand it. And I say, well, you have one chance in those four years, one chance, so why not read a few books? Why not read a few novels? Why not learn a foreign language? So, French has been wonderful for me. It has opened my eyes to a lot of things. It is a very different culture. It

\(^2\) G.K. Chesterton (1874-1936), an English writer.
is, and you try to learn it. What we think of as very, very important: examples and metaphors... eh. What they think of as important is the principle, the general principle. Both are important, but we tend to think the general principle, we can't always, no, not always, the example! And they tend to think a principle, not--so, so what. But those are just different ways of thinking about the same problem, and might lead to the same result. What they do emphasize, and it's well worth that, they call it la forme et le fond. You have to have, when you're writing something, both the substance and the form, both are important. Maybe we have a tendency too much to think it's the substance that matters, well it does matter, but so does the form in which you put it because that's a way of helping you think clearly and helping other people understand. So, I like that in the French language,
01:10:46 French culture.

MS. FONG SHEKETOFF: What is your view of the relationship between law and the economy?

JUSTICE BREYER: Well, it's not one, of the law and the economy. There are many different relationships depending upon what field you're in. I saw antitrust really become, I think, much improved when Don Turner was running that division and would introduce economic thinking into the law of antitrust. The law of antitrust is designed to regulate business and it's hardly surprising that a law that sees its objective—maintaining and increasing or improving competition—is a law that benefits from its practitioners knowing economics. Same is true of economic regulation, hardly surprising. And then, Dick Posner83 thinks, and I think he has a point,

83 Richard Posner (1939-) was appointed to the U.S. Court of Appeals for the Seventh Circuit in 1981 by President Ronald Reagan. He retired in 2017.
that a lot of law can be well-explained by--tort law--looking to certain economic principles. And Guido Calabresi\(^8\) has written books on this. I think they're helpful. They're not the only thing, but they are one thing. Then when you try and go around and apply it to every legal thing, I don't think that's too helpful. I mean, it might be sometimes, but sometimes not. I don't think law is going to help that often with family--I mean, economics is going to help that often with family law, though it can help you decide what's appropriate support. [laughter] But probably not in general. So, it depends. But the knowledge that has been growing over the course of my working lifetime, increased knowledge of economics I think has been helpful on balance, very helpful.

\(^8\) Guido Calabresi (1932–) was appointed to the U.S. Court of Appeals for the Second Circuit in 1994 by President Bill Clinton. He took senior status in 2009.
MS. FONG SHEKETOFF: What opinion of yours are you most proud of and why?

JUSTICE BREYER: That's hard to say because it really will be other people at some point will decide whether I've written something good or not. If I try to think of an opinion, I like Noel Canning.\textsuperscript{85} I like that opinion because Noel Canning was a question of the scope of the President's power to make a recess appointment— that is to appoint someone to a job that needs congressional or senatorial confirmation but they don't have it, so they put him in during a recess of the Senate. What was that power like and what are its limits? No one really had decided that and our court had to work it out. In the opinion in that case, you had to go back and try to figure out how you would work it out as well as work it out. So, we created a structure which looks

\textsuperscript{85} National Labor Relations Board v. Noel Canning, 134 S. Ct. 2550 (2014).
to, again, the history, but also the underlying motives and tried to work out a way of the two branches, each exercising their power without too much stepping on the toes of the other. It took some time and I think the Court disagreed on it, but I wrote a majority opinion there and I think it reflected the work and thought and effort, so I was rather proud of that. As a dissent, I'm probably--rather, at the time was, I probably could be still, but I wrote a pretty strong dissent in Parents Involved,\(^{86}\) which was the question of whether or not the Constitution allowed race-based affirmative action in high schools. The majority--four of them anyway of the five--thought no. The Constitution is color-blind. The fifth was sort of uncertain. And I wrote a dissent saying it does up to a point, it does because there's a difference between discrimination on

the basis of race designed to bring people into American society who previously had not been, and that [discrimination] designed to exclude them, and Congress had more leeway and the states had more leeway, and the legislators had more leeway in respect to the inclusive use of race than the exclusive use of race. I explained in quite a few pages and there we are.

MS. FONG SHEKETOFF: What do you find most helpful in legal briefs, and how would you advise an attorney who's trying to write better briefs?

JUSTICE BREYER: Clarity and brevity. [laughter] You know, making ten bad arguments is not going to help. Choose your best arguments. I find that helpful. And express them clearly and succinctly because if it's just repeating, I'm going to get bored and I will find that out pretty quickly and skim. And then, choose your weakest point, not your
strongest. The other side's best point, not their worst, to rebut.

Because your case is no stronger than its weakest link, and the other side will figure out the weakest link. Those are obvious things,

lawyers know that and they do it, and the briefs here are pretty good. So, I don't have to tell them that. But it's true, that is when I find repetition, I start skimming.

MS. FONG SHEKETOFF: Every year there seems to be pretty widespread agreement among all the law clerks in the Supreme Court that your law clerks are among the luckiest in the building because you're such a kind person and very engaged with your clerks, and you're really funny. [laughter]

MS. FONG SHEKETOFF: Do you have any thoughts you'd like to share about how you supervise your law clerks?

JUSTICE BREYER: [laughter] They probably like it because I don't.
[laughter] That is to say, I enjoy my law clerks. I'm glad that they enjoy working for me. But it's nice for me. That's why I like teaching. I like that they're younger, they have energy. It's nice to talk to them and I like the interplay when we discuss cases together. So, I've always been responsive more easily to what I hear and talk about, than what I read. Both are relevant obviously, but I like to talk through the cases with them, and I like the conversation. I just enjoy it.

MS.FONG SHEKETOFF: How would you like to be remembered?

JUSTICE BREYER: [laughter] How would I like to be? I was just talking about Thurgood Marshall 87 to a group and he said he would like it carved on his tombstone, he did the best with what he had, [laughter] and that

87 Thurgood Marshall (1908-1993) became the first African-American Supreme Court justice when he was appointed in 1967 by President Lyndon Johnson. Prior to his judicial service, Marshall was U.S. Solicitor General and argued several cases before the Supreme Court as executive director of the NAACP Legal Defense and Educational Fund.
is pretty good. I mean, I won't do what he was able to do. Sandra O'Connor said to him when he was feeling low, "Thurgood," she said, "you know, I don't know why you're feeling low, you're the only member of this court, who if he'd never been on the Supreme Court would be a genuine American hero." He did the best with what he had. Well, I think that's the most you can aspire to. I like Nancy Reagan's\(^{88}\) point on that, you play the hand you're dealt. You're dealt one. [laughter] And you do the best with what you have. If people say yes, he did, he tried, he did his best and was a decent person, good. And there we are.

MS. FONG SHEKETOFF: What's your favorite novel or movie?

JUSTICE BREYER: Movies, what do I

\(^{88}\) Nancy Reagan (1921-2016), actress and wife of President Ronald Reagan. In her 1989 autobiography *My Turn*, she wrote that her mother used to say, “Play the hand that’s dealt you.” [Link](https://www.nytimes.com/2016/03/07/us/nancy-reagan-a-stylish-and-influential-first-lady-dies-at-94.html)
think are great movies? Third Man\textsuperscript{89} is a great movie, it's just what comes to mind out of the best. I love the

01:18:14 Third Man. Great movie--Vienna, Orson Welles, Joseph Cotten. Really good movie, interesting. I like a French movie, is very, very good, a great movie called Les Enfants du Paradis, the Children of the Gods.\textsuperscript{90} I used to think it was a cult movie. No, it isn’t. I saw it on the airplane not too long ago, an airplane. It's a three-hour long

01:18:35 movie. It has a great French movie star, Jean-Louis Barrault, Arletty, made during and just after World War II and suddenly you see this tremendously entertaining, tremendously entertaining group of actors and players and they’re representing France really, I think. Arletty is really Marianne. It's

\textsuperscript{89} The Third Man, a 1949 British film noir set in Vienna, directed by Carol Reed and starring Joseph Cotten, Valli, Orson Welles, and Trevor Howard.

\textsuperscript{90} Les Enfants du Paradis, a 1945 French film directed by Marcel Carné and starring Arletty and Jean-Louis Barrault.
filled with different

01:19:00 characters. I read the great Shakespeare professor at Yale…

MS. FONG SHEKETOFF: Harold Bloom?91

JUSTICE BREYER: Yes, Harold Bloom, right. I read his book and he said

01:19:13 the three great characters in Shakespeare, Hamlet (I understand that), Falstaff (yes), and Iago. I thought why Iago, my goodness. But the more you study Iago, he's a mystery. He's really evil. Then see this movie, because they have a character like Iago. They do exist, a person who is trying to simply prove to himself that he's superior and

01:19:41 cares not a whit for any other human being. The only person he wants to convince of his superiority, which he knows, is him. That's what Iago does. And at the end, Iago is sitting there and they say why did you do it? Why did he kill this

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aristocrat or why did they kill him in the movie? Why? Why? Why did he kill Othello, this great man? He won't answer. He's proved to himself something, you see. You say, yeah, there could be characters like Iago. There could be. So, I think that's what Harold Bloom sees. But in any case, this movie is a great movie so I recommend that. And there's so many others, Singin’ in the Rain is the greatest musical. You know there are great lists and I sometimes look at those lists. I love the divorce comedies of the 1940s, 1950s. Stanley Cavell wrote a great book about it. You want to understand the role of women, and who doesn’t--

[laughter]. See those movies. It's the same as Shakespeare, same as Shakespeare, Beatrice and Benedick.94

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92 Singin’ in the Rain, a 1952 musical romantic comedy film directed by Gene Kelly and Stanley Donen.
93 Stanley Cavell (1926-), a Harvard philosophy professor whose 1981 book Pursuits of Happiness discusses seven comedy films of the 1930s and '40s and their focus on divorce and remarriage.
94 Beatrice and Benedick, the two main characters of William Shakespeare’s comedy Much Ado About Nothing, written ca. 1598.
You see Cary Grant and Katharine Hepburn\(^{95}\) and it's great. And the book I would recommend to any American, as well as others, when they're in college they should read it, is Henry Adams, the *Education of Henry Adams*.\(^{96}\) You see he was born into a world where his grandfather was President, great-grandfather was President. They thought they'd be an aristocracy, but the country changed dramatically and sometimes he despaired, sometimes he despaired, after the Civil War in 1890s Washington. I mean, at that time, there wasn't just campaign finance money. They used to have real bribes and they were the Nast


\(^{96}\) Henry Adams (1838-1918), a historian and political journalist. His grandfather (John Quincy Adams) and great-grandfather (John Adams) were both presidents, while his father (Charles Francis Adams Jr.) served as U.S. Ambassador to the United Kingdom. His memoir, *The Education of Henry Adams*, was published posthumously and received the Pulitzer Prize in 1919.
where you had the sugar trust and the oil trust and this trust and that trust and they're back there running the Senate. I mean, it was a serious matter and he said “Oh my God, democracy won't work”, and then he says “well, what's the choice?” It's the same as Churchill said, but earlier.

[laughter] And still, the question is relevant and he becomes [resolves]-- we're going to do our best with this democracy. But it's a great book and you want to understand America? Born in 1838, died in about the 1920s. And he puts it all down there. I would read that.

MS. FONG SHEKETOFF: And finally, what other interests outside of law do you have?

JUSTICE BREYER: Oh, I like movies as you can see. We like traveling. I

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97 Thomas Nast (1840-1902) was an early American political cartoonist.

98 Winston Churchill (1874-1965), British Prime Minister from 1940-45 and 1951-55, said in a 1947 speech, “It has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.”
don't know, we like bicycle riding.
I know my days may be finished with that. And Joanna\(^99\) and I, I like cooking and she likes me cooking.

[laughter] And it's fine. We're coming up on our 50th wedding anniversary. We're going to take all the children and grandchildren and go to the Galapagos so they can see the blue footed boobies, and I think that will be fun. [laughter]

MS. FONG SHEKETOFF: That sounds wonderful. Well, thank you very much Justice Breyer for your time and for participating in this oral history project. We're very grateful.

JUSTICE BREYER: Thank you. I've enjoyed it. Thank you very much.

[END RECORDING]

\(^{99}\) Joanna Breyer, a retired pediatric psychologist who worked at the Dana-Farber Cancer Institute and Children’s Hospital, Boston. She and Justice Breyer married in 1967.