



INSTITUTE *of* JUDICIAL  
ADMINISTRATION  
NYU SCHOOL OF LAW

NEW YORK UNIVERSITY SCHOOL OF LAW –  
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)  
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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[START RECORDING]

00:00:16 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.

00:00:34 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?

00:00:54 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.

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We'd go up to Camp Royaneh<sup>1</sup>, near Russian River in the summer, and up to Lake Tahoe where there was another camp and swim, and hike and be  
00:01:08 out of doors quite a lot. It was interesting. My father<sup>2</sup> 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  
00:01:45 schools. My mother<sup>3</sup> was more of an intellectual. Of course, your parents think you're going to be great. My brother<sup>4</sup> was very good, we got along well. I went to Lowell High School. I was pretty happy as a

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<sup>1</sup> 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>

<sup>2</sup> Irving Breyer (1908-1979).

<sup>3</sup> Anne Breyer (1909-1971) was active in San Francisco Democratic politics and the League of Women Voters, and volunteered with the United Nations Association.

<sup>4</sup> 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.

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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.

00:02:15

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

00:02:22

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 *Daylight*<sup>5</sup>, 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

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<sup>5</sup> The *Lark* and the *Daylight* were well-appointed Pullman passenger trains running between the San Francisco and Los Angeles areas in the 1900s.

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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,

00:03:21

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

00:03:39

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<sup>6</sup>. It was J.L. Austin, and Strawson, and Ryle,

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<sup>6</sup> 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.

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and Grice.<sup>7</sup> I went to

00:04:08 their classes and I went to H.L.A.  
Hart's lectures on law, which later  
became a book, *The Concept of Law*.<sup>8</sup>  
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  
00:04:32 you decide to pursue law?

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  
00:04:44 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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<sup>7</sup> 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.

<sup>8</sup> 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.

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MS. FONG SHEKETOFF: What was law school like for you and what did you like best and worst?

00:05:04 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

00:05:34 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

00:05:49 method<sup>9</sup> 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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<sup>9</sup> 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.

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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.

00:06:23

MS. FONG SHEKETOFF: You speak often about Justice Goldberg,<sup>10</sup> 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.

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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

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<sup>10</sup> 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>.

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00:06:56        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,

00:07:19        White, Brennan, Harlan, Stewart, Clark and the Chief Justice Warren.<sup>11</sup> 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.<sup>12</sup> It's one thing to say it, it's another thing to bring about

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<sup>11</sup> Hugo Black (1886-1971), appointed to the Supreme Court in 1937 by President Franklin Roosevelt; William O. Douglas (1898-1980), appointed in 1939 by Roosevelt; Byron White (1917-2002), appointed in 1962 by President John F. Kennedy; William J. Brennan Jr. (1906-1997), appointed in 1956 by President Dwight Eisenhower; John Marshall Harlan II (1899-1971), appointed in 1955 by Eisenhower; Potter Stewart (1915-1985), appointed in 1958 by Eisenhower; Tom C. Clark (1899-1977), appointed in 1949 by President Harry Truman; Earl Warren (1891-1974), appointed Chief Justice in 1953 by Eisenhower. The Warren Court (1953-1969) is known for progressive rulings on issues of race, gender, and civil liberties.

<sup>12</sup> [\*Brown v. Board of Education of Topeka\*, 347 U.S. 483 \(1954\).](#)

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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<sup>13</sup> 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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<sup>13</sup> 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.

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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<sup>14</sup>  
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.*"<sup>15</sup> [laughter] It was a lot

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<sup>14</sup> The American Federation of Labor and Congress of Industrial Organizations.

<sup>15</sup> "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."

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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<sup>16</sup> Administration--and later, I

00:10:12 was told this by Jack Valenti<sup>17</sup>--they thought he wanted another job. He didn't think he wanted another job. But Ken Galbraith,<sup>18</sup> 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

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<sup>16</sup> Lyndon Baines Johnson (1908-1973), 36th President of the United States from 1963-69.

<sup>17</sup> Jack Valenti (1921-2007), advisor to President Johnson and, later, president of the Motion Picture Association of America. <http://www.nytimes.com/2007/04/27/movies/27valenti.html>.

<sup>18</sup> John Kenneth Galbraith (1908-2006), a professor of economics at Harvard University and advisor to Presidents Kennedy and Johnson. <http://www.nytimes.com/2006/04/30/obituaries/30galbraith.html>.

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say, "You know, I can't understand  
00:10:31 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<sup>19</sup> and that's when we were  
clerking. The most interesting  
conversations I've had about that, I  
think, were with Sol Linowitz,<sup>20</sup> who  
was a great friend of Lyndon Johnson  
and used to sit in the Cabinet  
00:10:52 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  
00:11:08 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

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<sup>19</sup> 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>  
<sup>20</sup> Sol Linowitz (1913-2005), a lawyer, diplomat, businessman, and advisor to President Johnson.  
<http://www.nytimes.com/2005/03/19/obituaries/sol-m-linowitz-dies-at-91-businessman-and-diplomat.html>.

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project, "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<sup>21</sup> 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

00:11:34

00:12:03

00:12:14

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<sup>21</sup> Adlai Stevenson II (1900-1965), a lawyer, twice Democratic candidate for President, politician, and diplomat who was ambassador to the United Nations from 1961 until his death. <http://www.nytimes.com/learning/general/onthisday/bday/0205.html>.

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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

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that. A mixture of ego, but also  
when Jack Kennedy<sup>22</sup> 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  
00:13:43 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,<sup>23</sup>  
00:14:08 David Filvaroff<sup>24</sup> the first year; the  
second year it was Alan Dershowitz<sup>25</sup>

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<sup>22</sup> John Fitzgerald "Jack" Kennedy (1917-1963), the 35th President of the United States from 1961-63.

<sup>23</sup> Peter B. Edelman (1938-), a Georgetown University law professor who specializes in constitutional and poverty law. <https://www.law.georgetown.edu/faculty/edelman-peter-b.cfm>.

<sup>24</sup> David B. Filvaroff (1931-2014), State University of New York at Buffalo law professor. [https://www.buffalo.edu/ubnow/working/obituaries.host.html/content/shared/university/news/ub-reporter-articles/briefs/2014/obit\\_filvaroff.detail.html](https://www.buffalo.edu/ubnow/working/obituaries.host.html/content/shared/university/news/ub-reporter-articles/briefs/2014/obit_filvaroff.detail.html).

<sup>25</sup> Alan Dershowitz (1938-), a retired Harvard Law School professor who specializes in civil liberties, criminal law,

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and Lee McTurnan;<sup>26</sup> and the third year  
was Steve Goldstein<sup>27</sup> and me. We'd  
have

00:14:18 dinner, the six of us, with Arthur  
Goldberg from time to time, and  
Dorothy.<sup>28</sup> 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.

00:14:39 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

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and the Arab-Israeli conflict.

<http://hls.harvard.edu/faculty/directory/10210/Dershowitz>.

<sup>26</sup> Lee B. McTurnan (1937-), an attorney and mediator.

<http://www.mcturnan-mediation.com/Biography.html>.

<sup>27</sup> 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>.

<sup>28</sup> Dorothy Kurgans Goldberg (1908-1988), was a community activist, artist, diplomat, and wife of Arthur Goldberg.

<http://www.nytimes.com/1988/02/14/obituaries/dorothy-kurgans-goldberg-79-artist-writer-and-rights-figure.html>.

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harder than other times. [laughter]

But the system of asking questions  
and so forth does help the students

00:15:02 remember. I enjoyed that enormously.

A class is always a challenge--it's  
always a challenge. Derek Bok<sup>29</sup> told  
me, anybody's first year is hard in  
teaching, because if

00:15:17 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

00:15:40 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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<sup>29</sup> Derek C. Bok (1930-), President of Harvard University from 1971-91 and Dean of Harvard Law School from 1968-71.  
<https://www.harvard.edu/about-harvard/harvard-glance/history-presidency/derek-bok>.

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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.<sup>30</sup> He was head of the

00:16:08 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

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<sup>30</sup> Donald F. Turner (1921-1994), a Harvard Law School professor who headed the Department of Justice's Antitrust Division as Assistant Attorney General from 1965-68. <http://www.nytimes.com/1994/07/22/obituaries/donald-turner-lawyer-for-us-and-writer-73.html>.

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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<sup>31</sup> 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

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<sup>31</sup> Ramsey Clark (1927-), Attorney General in the Johnson Administration from 1966-69.

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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?

00:17:51

Because I learned it from Don Turner and had to write Senate testimony for him and had read some books by Basil Yamey<sup>32</sup> who is a great English

00:18:03

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,<sup>33</sup> one of the greatest teachers they had. So, I taught antitrust and then *eventually* I began to teach administrative law.

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<sup>32</sup> 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.

<sup>33</sup> Phillip E. Areeda (1930-1995), a professor of antitrust law at Harvard Law School.

<http://www.nytimes.com/1995/12/27/us/phillip-areeda-considered-top-authority-on-antitrust-law-dies-at-65.html>.

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I first started out teaching

00:18:22 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<sup>34</sup> explained that, the  
judges can't just fish around for  
what's a bad practice or something.<sup>35</sup>  
That's, if

00:18:51 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

00:19:03 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

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<sup>34</sup> Felix Frankfurter (1882-1965), Associate Justice of the Supreme Court from 1939-62.

<sup>35</sup> [Standard Oil Co. of California v. United States, 337 U.S. 293 \(1949\).](#)

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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<sup>36</sup> and I  
thought we would try to build a  
course around the idea of economic  
00:19:48 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

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<sup>36</sup> Richard B. Stewart (1940-), a professor of administrative and environmental law at NYU School of Law and, previously, Harvard Law School.  
[http://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=pr  
ofile.overview&personid=20316](http://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=pr<br/>ofile.overview&personid=20316).

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standards using the NHTSA<sup>37</sup>, 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 *Economics and Its Reform*.<sup>38</sup> A Los Angeles Times reviewer got a hold of

00:20:26

00:20:49

00:21:00

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<sup>37</sup> National Highway Transportation Safety Administration, part of the U.S. Department of Transportation under the Executive Branch of government.

<sup>38</sup> STEPHEN G. BREYER, *REGULATION AND ITS REFORM* (1984).

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it. Don't ask me how. [laughter]

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

00:21:28

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

00:21:52

Senator Ted Kennedy<sup>39</sup> on the Senate Judiciary Committee. Why was that experience important to you?

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<sup>39</sup> Edward M. "Ted" Kennedy (1932-2009), U.S. Senator from Massachusetts from 1962 until his death in 2009, was chair of the Senate Judiciary Committee from 1979 to 1981.  
<http://www.nytimes.com/2009/08/27/us/politics/27kennedy.html>.

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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<sup>40</sup> and  
Archie Cox<sup>41</sup> wanted someone who knew  
something about antitrust to look  
into something called the Dita Beard  
Memo,<sup>42</sup> which a few arcane trivia  
followers

00:22:21 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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<sup>40</sup> James Vorenberg (1928-2000), a Harvard Law School professor and dean, served as an Associate Special Prosecutor in the Watergate Special Prosecutor's Office in 1973.

<http://www.nytimes.com/2000/04/13/us/james-vorenberg-watergate-prosecutor-s-right-hand-man-dies-at-72.html>.

<sup>41</sup> Archibald Cox Jr. (1912-2004), a professor of labor law at Harvard Law School, served as Special Prosecutor to investigate the Watergate scandal for several months in 1973 until his firing at the order of President Richard Nixon.

<http://www.nytimes.com/2004/05/30/nyregion/archibald-cox-92-is-dead-helped-prosecute-watergate.html>.

<sup>42</sup> 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.

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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

00:22:58 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

00:23:25 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

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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  
00:23:44 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  
00:23:59 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  
00:24:22 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

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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<sup>43</sup> Administration and President Carter<sup>44</sup> picked it up and pretty soon he appointed Fred Kahn<sup>45</sup>

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<sup>43</sup> Gerald R. Ford, Jr., 38<sup>th</sup> President of the United States from 1974-1977. Ford was Vice President and acceded to the Presidency upon the resignation of President Richard Nixon.

<sup>44</sup> James E. "Jimmy" Carter Jr., 39<sup>th</sup> President of the United States from 1977-81.

<sup>45</sup> Alfred E. Kahn (1917-2010), Cornell University professor of economics who chaired the Civil Aeronautics Board from 1977-78. <http://www.nytimes.com/2010/12/29/business/29kahn.html>.



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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

00:26:44 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

00:26:56 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

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00:27:16 family moved down here. There were 17 members of the committee and every morning we'd have breakfast, Ken Feinberg<sup>47</sup> and I from the Kennedy staff would have breakfast with Emory Sneed<sup>48</sup> who was Senator Thurmond's<sup>49</sup> 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

00:27:37 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,<sup>50</sup>

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<sup>47</sup> 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>.

<sup>48</sup> Emory M. Sneed (1927-1987), a lawyer and retired Army brigadier general who worked on the Republican staff of the Judiciary Committee from 1975-78 and 1979-81. President Ronald Reagan appointed him to the U.S. Court of Appeals for the Fourth Circuit in 1984.

[https://www.washingtonpost.com/archive/local/1987/09/26/obituaries/f4680124-bbbd-4bd8-a762-10e78ff4021c/?utm\\_term=.ec6fdc3a108d](https://www.washingtonpost.com/archive/local/1987/09/26/obituaries/f4680124-bbbd-4bd8-a762-10e78ff4021c/?utm_term=.ec6fdc3a108d).

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

<sup>50</sup> Robert "Duke" Short (1934-), Senator Thurmond's longtime chief of staff.

<http://www.goupstate.com/article/NC/20010307/News/605178671/SJ>

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Burt Wides,<sup>51</sup> ours. We started with Carmine Bellino<sup>52</sup> who had worked for Bobby Kennedy.<sup>53</sup> 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

00:28:15

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

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

<sup>53</sup> 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.

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00:28:43           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  
00:28:55           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  
00:29:18           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."

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00:29:41        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

00:29:53        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  
00:30:16        reunion or something up in Hyannis<sup>54</sup>,  
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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<sup>54</sup> 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.

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they work with you, as well as for  
you, and your object is to help.  
Help what? Well, help him if you're  
00:30:42 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  
00:30:56 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  
00:31:19 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

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cooperating in an effort to do  
something for somebody and very often  
you'll fail, but it's worth it

00:31:43 because sometimes you'll succeed.

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

00:31:49 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<sup>55</sup> 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

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<sup>55</sup> Hon. Ruth Bader Ginsburg, Associate Justice of the U.S. Supreme Court appointed by President Bill Clinton in 1993.

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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 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 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 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

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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

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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

00:34:29 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

00:34:44 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.

00:35:11 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

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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

00:35:37 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

00:35:50 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

00:36:16 shouldn't. The point of having an  
independent group of judges is they  
decide independently and they are not  
swayed by public opinion. That

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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

00:36:49

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<sup>56</sup> 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

00:37:15

about your answer. Listen to the question." Excellent advice for any

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<sup>56</sup> Michael S. Berman, a lawyer and lobbyist active in Democratic politics who aided both Justice Breyer and Justice Ginsburg during their confirmation processes.  
<http://dubersteingroup.com/principals/michael-s-berman/>.

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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

00:37:48

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

00:37:58

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

00:38:17

him?" She said, "Is he sick?"

[laughter] "No, no," she said, "he's

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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

00:38:37 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

00:38:56 O'Connor.<sup>57</sup> I was very sorry when she  
left. We all get on well. I was  
good friends with David Souter,<sup>58</sup> I  
still see him occasionally. And with  
Nino Scalia,<sup>59</sup> 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

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<sup>57</sup> Hon. Sandra Day O'Connor (1930-), Associate Justice of the U.S. Supreme Court from 1981-2006, appointed by President Ronald Reagan.

<sup>58</sup> Hon. David Souter (1939-), Associate Justice of the U.S. Supreme Court from 1990-2009, appointed by President George H.W. Bush.

<sup>59</sup> 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.

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leave, some disappear and you have  
new people, and it's fine. It's fine.

The

00:39:20 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

00:39:49 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

00:40:00 discussion with Chief Justice  
Roberts<sup>60</sup> than there was with Chief  
Justice Rehnquist,<sup>61</sup> who thought no  
one's ever going to change his mind,  
but they did sometimes. So, it's the

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<sup>60</sup> Hon. John G. Roberts Jr. (1955-), Chief Justice of the U.S. appointed in 2005 by President George W. Bush.

<sup>61</sup> 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.

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same institution, slightly different  
personnel.

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

00:40:18

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

00:40:44

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

00:40:58

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

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all". 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

00:41:22 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

00:41:49 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  
00:41:58 job in applying the Constitution to cases that come before him?

JUSTICE BREYER: Well it's the same

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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

00:42:26 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

00:43:04 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

00:43:16 look at the history. You look at tradition. Suppose it's *habeas*

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*corpus*<sup>62</sup>. 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

00:43:43

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

00:44:09

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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<sup>62</sup> 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.).

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of

00:44:24 those out completely. When we're talking about the Constitution, the words are more general, typically. The Tonnage Clause<sup>63</sup> 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

00:44:51 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

00:45:22 today. I tend to think the values don't change, but the circumstances

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<sup>63</sup> [U.S. CONST. art. I, § 10, cl. 3.](#) The Tonnage Clause prohibits states from imposing tax on any tonnage.

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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 Stevens<sup>64</sup> 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,

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<sup>64</sup> Hon. John Paul Stevens (1920-), Associate Justice of the U.S. Supreme Court from 1975-2010, appointed by President Gerald Ford.

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00:46:19 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.

00:46:28 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<sup>65</sup> 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<sup>66</sup> would say, "Oh you know, I knew that."

00:46:54 [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

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<sup>65</sup> U.S. Const. art. I, §8, cl.3 grants Congress the power to regulate commerce.

<sup>66</sup> "Nino" was a nickname of Justice Scalia.

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circumstance, he'd say,

"--One camper sees the other putting  
on running shoes, 'where are you  
going?' he says,

00:47:18 '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.'

00:47:28 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

00:47:50 change. Values don't change, but  
circumstances do. He would think  
that my approach will lead too often

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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

00:48:20 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?

00:48:30

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,<sup>67</sup> for example, wrote like a dream and thought very clearly. But

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<sup>67</sup> Robert H. Jackson (1892-1954), Associate Justice of the U.S. Supreme Court from 1941-1954, appointed by President Franklin Roosevelt.

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probably Brandeis<sup>68</sup> is the

00:48:53           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  
00:49:25           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  
00:49:37           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.

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<sup>68</sup> Louis Brandeis (1856-1941), Associate Justice of the U.S. Supreme Court from 1916-39, appointed by President Woodrow Wilson.

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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.

00:50:31 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,

00:50:50 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

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Bill of Rights<sup>69</sup> and others elsewhere  
in the Constitution. It assures a  
degree of equality, equal respect for  
people, in the Fourteenth Amendment.

00:51:19 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,<sup>70</sup> Rule of Law. What is that?  
Protection against the arbitrary.

What is the arbitrary? The  
unreasonable, the chaotic [laughter],

00:51:46 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

00:52:00 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

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<sup>69</sup> 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.

<sup>70</sup> Magna Carta, a grant of liberties agreed to by King John of England in 1215.

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isn't even in the Constitution."

Think of the Administrative Procedure Act.<sup>71</sup> I said, "That which is unreasonable, arbitrary, capricious, abuse of discretion, is not law.

That which

00:52:20 is not published, is not law."

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

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

00:52:43 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,

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<sup>71</sup> [Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 \(1946\) \(current version at 5 U.S.C. §§ 551-559\).](#)

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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  
00:53:27 three-term limit on being a member of  
Congress.<sup>72</sup> 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  
00:53:49 state from which he's elected. It  
doesn't say those are the only three  
requirements, so can they add one?  
Hmm. Well, Jefferson<sup>73</sup>, I think, and  
Joseph Story<sup>74</sup> thought that  
00:54:02 they could. I think Hamilton<sup>75</sup> and

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<sup>72</sup> [\*U.S. Term Limits, Inc. v. Thornton\*, 514 U.S. 779 \(1995\).](#)

<sup>73</sup> Thomas Jefferson (1743-1826), Founding Father, principal author of the Declaration of Independence (1776), and the third President of the United States (1801-1809).

<sup>74</sup> Joseph Story (1779-1845), Associate Justice of the Supreme Court from 1811-45.

<sup>75</sup> Alexander Hamilton (1755 or 1757-1804), Founding Father and first Secretary of the Treasury.

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Madison<sup>76</sup> 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?"

00:54:27 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.

00:54:48 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

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<sup>76</sup> James Madison (1751-1836), Founding Father and fourth President of the United States from 1809-17.

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do it.

But five of us thought, no, it's a  
federal Congress, it's

00:55:03

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

00:55:28

good, very good. I was in the  
majority.

MS. FONG SHEKETOFF: You wrote a  
lengthy dissent in *Glossip v. Gross*<sup>77</sup>  
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?

00:55:47

JUSTICE BREYER: Well the dissent was

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<sup>77</sup> [\*Glossip v. Gross\*, 135 S. Ct. 2726 \(2015\).](#)

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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,

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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

00:57:01 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,  
00:57:26 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 recently<sup>78</sup> and I try  
to use a

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<sup>78</sup> STEPHEN G. BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* (2015).

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00:57:44 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  
00:58:00 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  
00:58:29 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

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00:58:50 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  
00:59:00 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  
00:59:21 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

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00:59:44        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

00:59:56        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

01:00:22        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

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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

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tell you about

01:01:49 security cases where security  
conflicts with preserving individual  
rights and security's a matter for  
the government. I want to tell you  
about Guantanamo<sup>79</sup>. It's a matter for  
01:01:58 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  
01:02:23 threat, which may again require us to  
know something about what happens  
abroad. When we have a copyright

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<sup>79</sup> 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\(2004\)](#).

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case,<sup>80</sup> 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

01:02:53 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

01:03:05 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

01:03:32 interesting case, but... There, down towards the bottom, a brief tells me

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<sup>80</sup> [\*Kirtsaeng v. John Wiley & Sons, Inc.\*, 568 U.S. 519 \(2013\).](#)

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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

01:04:15 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

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01:04:42      Whale Treaty,<sup>81</sup> 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

01:05:08      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

01:05:17      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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<sup>81</sup> [International Convention for the Regulation of Whaling \(Dec. 2, 1946\), T.I.A.S. No. 1849.](#)

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01:05:40 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

01:05:59 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.

01:06:13 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?

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01:06:44 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

01:07:05 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

01:07:21 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

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01:07:43 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

01:08:13 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

01:08:24 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

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01:08:47 the mind of another person. It  
brings you into their feelings.  
Chesterton<sup>82</sup> 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  
01:09:09 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  
01:09:20 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

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<sup>82</sup> G.K. Chesterton (1874-1936), an English writer.

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is, and you try to learn it. What we

01:09:49 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

01:10:08 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

01:10:20 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,

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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.

01:11:09 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

01:11:21 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 Posner<sup>83</sup> thinks, and I think he has a point,

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<sup>83</sup> 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.

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that a lot of law can be well-  
explained by--tort law--looking  
01:11:47 to certain economic principles. And  
Guido Calabresi<sup>84</sup> 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  
01:11:09 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  
01:12:18 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.

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<sup>84</sup> 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.

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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

01:12:38

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*.<sup>85</sup> 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

01:13:02

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

01:13:15

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

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<sup>85</sup> [\*National Labor Relations Board v. Noel Canning\*, 134 S. Ct. 2550 \(2014\).](#)

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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*,<sup>86</sup> 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

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<sup>86</sup> [\*Parents Involved in Community Schools v. Seattle School District No. 1\*, 551 U.S. 701 \(2007\).](#)

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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.

01:14:45 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.

01:15:09 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

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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,

01:15:48 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

01:16:11 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

01:16:20 thoughts you'd like to share about

how you supervise your law clerks?

JUSTICE BREYER: [laughter] They

probably like it because I don't.

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[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

01:16:43 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?

01:17:04 JUSTICE BREYER: [laughter] How would I like to be? I was just talking about Thurgood Marshall<sup>87</sup> to a group and he said he would like it carved on his tombstone, he did the best

01:17:20 with what he had, [laughter] and that

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<sup>87</sup> 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.

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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

01:17:46

that's the most you can aspire to. I like Nancy Reagan's<sup>88</sup> 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

01:18:06

favorite novel or movie?

JUSTICE BREYER: Movies, what do I

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<sup>88</sup> 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." <https://www.nytimes.com/2016/03/07/us/nancy-reagan-a-stylish-and-influential-first-lady-dies-at-94.html>.

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think are great movies? *Third Man*<sup>89</sup>

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.<sup>90</sup>  
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

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<sup>89</sup> *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.

<sup>90</sup> *Les Enfants du Paradis*, a 1945 French film directed by Marcel Carné and starring Arletty and Jean-Louis Barrault.

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filled with different

01:19:00

characters. I read the great

Shakespeare professor at Yale...

MS. FONG SHEKETOFF: Harold Bloom?<sup>91</sup>

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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<sup>91</sup> Harold Bloom (1930-), professor of humanities and English at Yale University. His 1998 book, *Shakespeare: The Invention of the Human*, surveys Shakespeare's work.

<http://english.yale.edu/people/tenured-and-tenure-track-faculty-professors/harold-bloom>.

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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  
01:20:07 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  
01:20:18 case, this movie is a great movie so  
I recommend that. And there's so  
many others, *Singin' in the Rain*<sup>92</sup> 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<sup>93</sup> wrote a great book  
about it. You want to understand the  
role of women, and who doesn't--  
01:20:40 [laughter]. See those movies. It's  
the same as Shakespeare, same as  
Shakespeare, Beatrice and Benedick.<sup>94</sup>

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<sup>92</sup> *Singin' in the Rain*, a 1952 musical romantic comedy film directed by Gene Kelly and Stanley Donen.

<sup>93</sup> 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.

<sup>94</sup> Beatrice and Benedick, the two main characters of William Shakespeare's comedy *Much Ado About Nothing*, written ca. 1598.

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You see Cary Grant and Katharine Hepburn<sup>95</sup> 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*.<sup>96</sup> You see he was born into a world

01:21:08 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

01:21:19 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

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<sup>95</sup> Actors Cary Grant (1904-1986) and Katharine Hepburn (1907-2003) starred in four romantic comedy films together. <http://www.nytimes.com/1986/11/30/obituaries/cary-grant-dies-in-iowa-at-82-hollywood-epitome-of-style.html>; <http://www.nytimes.com/2003/06/29/obituaries/katharine-hepburn-spirited-actress-dies-at-96.html>.

<sup>96</sup> 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.

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cartoons<sup>97</sup> 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

01:21:44 said "Oh my God, democracy won't work", and then he says "well, what's the choice?" It's the same as Churchill<sup>98</sup> 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

01:22:09 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

01:22:17 you can see. We like traveling. I

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<sup>97</sup> Thomas Nast (1840-1902) was an early American political cartoonist.

<sup>98</sup> 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."

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don't know, we like bicycle riding.

I know my days may be finished with

that. And Joanna<sup>99</sup> 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

01:22:40

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.

01:22:53

JUSTICE BREYER: Thank you. I've

enjoyed it. Thank you very much.

[END RECORDING]

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<sup>99</sup> 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.