

Sunnylands Seminars, June 5, 2005

## OUR CONSTITUTION: A CONVERSATION

In the summer of 1787, delegates to the Constitutional Convention gathered in Philadelphia to create a document that would establish the government of the United States. On September 17, that landmark document, our Constitution, was signed. In commemoration of that day, students from several Philadelphia high schools were recently invited to the Supreme Court building in Washington, DC to meet with Justices Sandra Day O'Connor and Stephen Breyer.

The views of the students and the responses of the justices provided a unique glimpse into the workings of America's highest court and the document that shaped our history and guides our future.

### **QUESTION 1: Teaching the Constitution**

**Justice O'Connor** It's nice to have you safely here and assembled. And are you all ready to start with some questions about our Constitution and our system? Who's going to start off?

**Questioner** How do you believe the Constitution should be taught in schools, especially with all the new resources that we have and the fact that a lot of young people simply view the Constitution as something that was created two hundred-something years ago and is old and maybe out of date?

**Justice O'Connor** I hope that the Constitution is something that every school in America will try to teach to young people. You don't inherit it through the gene pool. Every generation has to learn about this, learn about the history. Why was it written, why do we have one? What does it provide? What are the benefits of having such a constitution? Has it worked and how do we as citizens help make it work? And I want to show you something today. This is show-and-tell time.

Each of you is holding a little booklet with our Constitution, aren't you? In the little booklet I have, the basic Constitution is 20 little pages and then there are some additional pages for a few amendments we have had to the Constitution and that's it. Have you noticed in the news that there was a proposed new constitution for the European Union? Here it is. It's 450 pages long, approximately. How many of the voters do you think in France or the Netherlands could read that and understand it or

would bother? And they voted “no,” didn’t they?

Well, this little Constitution certainly has the benefit of being short enough and simple enough that all of us as citizens can read it and understand it, and what a blessing that is.

**QUESTION 2: Why have a Constitution?**

**Questioner**

I was wondering why you think we have a constitution?

**Justice O’Connor**

Oh, well, to establish the fundamental ground rules for a government. Otherwise we’d have anarchy. What would we have if we didn’t have some basic principles of governance in this country, a system of government?

**Justice Breyer**

Think of then: 13 million people. What are there today, 300 million?

**Justice O’Connor**

Almost 300.

**Justice Breyer**

And we’re in a country with every race, every religion, every point of view, every possible national origin. They’re not just from California and New Mexico, Maine, Massachusetts. Who knows where they come from; they come from all over and they live together.

Think of then: They all came from England, 90 percent—those who could vote, the others were slaves. Think of then. They were still arguing, weren’t they? The Virginians and the ones from Massachusetts, well, they got into arguments. You get into arguments in your class, but you settle them.

You got here didn’t you? Well, you think people don’t argue on the basis of abortion? How do you think people feel about that? How do you think they feel about prayer in schools? How do you think they felt about the last election or the one before? Go look on television; see how they do it in some places. They pick up paving stones and hit them over the head or worse, and we don’t do that. We don’t do it.

**Justice O’Connor**

Do you want to fight it out on the streets or do you want to take it to court? And it’s about that simple in a way.

**QUESTION 3: Helping to Solve Problems****Question**

How does the Constitution help Americans solve their problems?

**Justice Breyer**

I've been reading some of the history of this, and one of these foreign observers I've been reading is De Tocqueville, and he noticed it 160 years ago, that Americans from the time they're 6 years old are forced to learn how to work with each other in groups and they have to learn that to get my way, I better be sure that you are getting your way. Or if we can't do it, we'll work out a compromise. Or if we can't do it, it will be a mess, but eventually we're going to work together.

Now that, taught in school, is what lets this document work. Because at the heart of this document I would say is not free speech. It's there... It's not even equal protection, that's there, or federalism or separation of powers. Those are very, very important but they're not what this is about.

What this is really about at the bottom of it is how to create a country, now of 300 million people, where people can solve their problems democratically. And all this document is, and all our work with it is, is figuring out how in large groups, states, communities, associations, others, people put to work the same principles that you put to work every time you work with six of your friends and figure out these five other people are as about as irritating as I've ever met.

But nonetheless, I'm going to get this group together and we are going to accomplish what we're suppose to do. You figure that out, you figure this out.

**QUESTION 4: The Power of Precedent****Questioner**

What factors do you think need to be in place, if any, other than just different constitutional logic, in order to overturn a precedent?

**Justice O'Connor**

What would motivate us to overturn a precedent of our Court?

**Questioner** In addition to...does there have to be something in addition to you just thinking that it might be wrong, or is that enough?

**Justice O'Connor** Well, I think you have to be able to persuade at least five members of this nine-member Court that an earlier judgment and opinion decided by this Court is now clearly wrong. That is possible to do. We can be persuaded at times that something we decided earlier has become, over time, no longer defensible. And the most clear big example was in *Brown vs. Board of Education* when the Supreme Court decided to overrule the old *Plessy vs. Ferguson* principle that you could have separate public facilities for people based on race provided they were roughly the same. You know, the same school, one for people of the black race, one for people of the white race. That's what *Plessy* said was all right.

The members of this Court unanimously concluded that just was not valid and it overturned it.

So what standard is required? It's just a standard of persuading at least five members of the Court that the earlier precedent is clearly wrong and shouldn't remain the law of the nation.

**Justice Breyer** That last phrase is very important. Every one of us understands that if you change the law too often, even when it was wrong before, people cannot live their lives. They can't plan how to live; they can't plan their societies. So no one thinks just because a case is wrong that you are going to overturn it. They have to both think it was wrong and think it's harmful and causing a lot of trouble.

Now, if you said never overturn a case, we'd still live in a society that had racial segregation. That would be terrible. So, of course, sometimes you have to overturn a case. But five people have to agree it was wrong then and it's wrong now and it's causing a lot of harm to the point where even though people have to plan their lives, we better get rid of it. That happens very rarely.

**QUESTION 5: Moral Values / Decision-Making****Questioner**

I have a question, a two-part question, for both judges. How closely do your own moral values, um, how closely are they aligned to your interpretation of the Constitution, and would you vote for a decision that is constitutional but not in line with your own moral values?

**Justice Breyer**

Oh, yes, the second one of course. It depends on what the value is you're talking about, but every day—I mean, if it is a decision that is going to lead to the deaths of thousands of people, like the Nazis' judges in Germany, the answer there is I would quit rather than be one of—I hope—rather than be one of the Nazis' judges.

But there are all kinds of decisions all the time that maybe this drug is forbidden or that drug is forbidden, or we're not going to forbid this or we are going to forbid that, or this search is forbidden in a high school, and I think that to myself I don't really like that that much. If I were there voting for it as a voter or an elector, I'd vote the other way. But my job is to say: Is it against the Constitution? And so I've often said I think it is not against the Constitution, even though I would never vote for it.

**Justice O'Connor**

Or if it's a statutory interpretation question, interpreting some law passed by Congress, we might think that's a terrible law and that had we been in Congress voting, we would never have voted for it, but it was passed and there it is. And it was clear enough that we think that we ought to enforce it even though we think it's odd. And why?

Every officeholder, including every federal judge, takes an oath of office when we assume the role of judge, and we swear to uphold the Constitution and laws of the United States, so help me God.

And it doesn't matter what I personally think or would do at all. It matters what the Constitution provides and the laws of the United States. And we do our best to interpret those faithfully and it doesn't matter that my personal views might be different.

**QUESTION 6:  
Questioner****Separation of Powers**

My question deals with separation of powers. Do you think that if today we made a new Constitution, or the founders wrote the Constitution today, considering how much power the president and the executive branch has gained, do you think they would place more limitations or define better what is separating the powers?

**Justice Breyer**

No, I don't. The separation of powers between the three, the president, the Congress and the judiciary, is not a total separation. The term that really describes it best is checks and balances, in my mind, and a checks and balances that itself is not too well defined. All you know is there is tension. So when we hear members of Congress say they don't like us, I figure that goes with the job. And indeed they don't like the president sometimes and sometimes the president doesn't like them and nobody likes anybody too much, all right? But I think that's what it was supposed to be.

**Justice O'Connor**

And the genius and innovation of this Constitution of ours was that it established three separate branches, each with some power over the other two. It was rather an innovation in the world at the time it was written and it really has withstood the test of time.

**Justice Breyer**

Now, is there an ideal balance? No. It's been different at different stages of the country's history.

There have been different shifts as to which of the branches is predominant, or how predominant, and whatever, and that reflects circumstances in politics.

**Justice O'Connor**

And it's hard to get legislation out of both houses, the House and the Senate, and then to get the president to approve it. And then if it's alleged to be unconstitutional, it might get reviewed in the courts.

The result is that they set up a process that's pretty tough.

**Justice Breyer**

But the fundamental idea is nobody gets too powerful. That's why we set up the system where we divide the power into pockets. That's an inefficient system, but it is a system that protects against one small group of people gaining all the power.

**QUESTION 7:  
Questioner****Relevance Today**

I think that when the framers were writing the Constitution that the situation in the United States and the relationship between the federal government and state government was a lot different than it is now. Do you ever find that in your rulings there are specific aspects of the Constitution that frustrate you to have to apply to modern-day cases?

**Justice O'Connor**

I don't think so. I think that's one of the reasons why the Constitution that we have is, in fact, so special. It has lasted longer than any other Constitution in the world today. I think it was very well crafted to serve us then and to serve us now, and if there are any crucial problems that emerge, they can certainly be addressed by a proposed constitutional amendment.

**Justice Breyer**

The biggest flaw they would have said at the time that would certainly be true, was the problem that they didn't deal with slavery.

**Justice O'Connor**

But that was true...

**Justice Breyer**

Initially...but we only had to fight a civil war because of that, all right?

And then the Constitution was amended.

**QUESTION 8:  
Questioner****Federalism**

Do you believe that federal policies such as No Child Left Behind or minimum drinking age and things like that that effectively force states into making laws, do you believe that is an abuse of federal power, where the jurisdiction was originally states' rights but by withholding funding for say highways or something, the states are forced to make a decision?

**Justice O'Connor**

It's a good question. It deals basically with federalism. What are the respective powers of the states and the national government. And when the Constitution was written, of course, it was a system whereby the states retained most of their sovereign powers and the concept of the people who wrote the Constitution was to create a national government with limited powers.

**Justice Breyer** Now go back to the Constitution. Look at Article I. It says: “Congress shall have the power,” it gives directly to Congress, “to regulate commerce among the states and with foreign nations.”

Then look at the 10th Amendment. Look at that. It says: “The powers not delegated to the United States,” that means to the federal government, “by the Constitution nor prohibited by it,” which there are only a few, “are reserved to the states respectively or to the people.” And that means that if you don’t find the power delegated in the Constitution, it’s there in the states.

Now why did they do that? When they wrote it, it was a government that wasn’t even in Washington. It was in Philadelphia, wasn’t it? Everywhere else was far away. Well, if it’s far away it would be absurd having people in Philadelphia or wherever the Capital was telling them what to do.

Justice O’Connor grew up on a ranch in Arizona and people from Washington used to come and tell them how to run their cows. They didn’t know a thing about it.

**Justice O’Connor** And we didn’t like it either when they would come and tell us how to do that.

**Justice Breyer** They didn’t.

So the people who wrote this Constitution understood that local affairs have to be run locally, and only those things that are given to Congress for national purposes can be done by Congress. And the big question today, which you can resolve, is how are we going to divide those things which really do belong in the states from those things which we have to have decided in Washington by the federal government?

Nobody has the answer to that question, nobody. But what I think the disagreement is really about is that I probably think that most of the question I just said is the big question should be decided in Congress itself.

**Justice O’Connor** See, I don’t.

**Justice Breyer** Yeah, that’s right. That’s right.

**Justice O'Connor** I grew up thinking that the best government is the government closest to us, our local government and if need be the state level government, but certainly not Washington, DC. I don't regard that as the best. I regard that as something that Congress was given specific authority to do, but beyond that, let's leave it closest to the people. So that's where we have some disagreements.

**QUESTION 9: Individual Liberty vs. Security**

**Questioner**

In light of President Bush's war on terror, do you believe that in terms of individual rights, when is it, if ever, justified to sacrifice individual rights for safety purposes?

**Justice Breyer**

Justice O'Connor wrote, I thought, a very good opinion, I agreed with the opinion, on the question on Guantanamo. And that was a matter that does involve rights of individuals and problems of security.

All right, now that's a different part of the Constitution. We've talked about the basic democratic structure. We've talked a little bit about the division of powers between states and federal government. It creates a rule of law, that's why we are here. And now you're talking about some of the individual sections that set boundaries to protecting human rights.

**Justice O'Connor**

For instance, evidence...somebody is charged with a criminal offense, a federal criminal offense. Maybe something related to some alleged terrorist activity. And some of the evidence against the individual was obtained pursuant to a wire tap that was obtained pursuant to some law passed by Congress recently that made it easier to get authority for a wire tap. And so the criminal defendant might say that law went too far. It doesn't meet the requirements of the Fourth Amendment to our Constitution, so we think the court should have excluded that evidence.

**Justice Breyer**

All right, so let's look at the section. What amendment were you talking about? Fourth.

**Justice O'Connor**

Fourth.

**Justice Breyer** Let's try the Fourth, which is made applicable to the states by the 14th, you're quite right.

Lets look at the Fourth. It says: "The right of the people to be secure in their persons, housing, papers and effects shall not be violated." That's the right, right? Shall not be violated. That it's a right against what? What does it say there?

**Justice O'Connor** Unreasonable searches and seizures.

**Justice Breyer** Unreasonable searches and seizures. So the question is, in all the cases that you're talking about, what's unreasonable?

Do you think its unreasonable to search a persons house without a warrant? Yes, you do. Well, suppose I tell you that the police just saw a man grab a women from the street, kidnap her with a knife and run into the room of the house next door. You want the police to go and get a warrant? No, because now I've showed you right then and there that whether something is or is not reasonable depends on the particular circumstance. Now the problem of terrorism, and you should read the Guantanamo opinion, I liked it, I joined it and that means I liked it...but you see, it's carefully written.

Why? Because what counts as reasonable in time of peace is not quite so reasonable or unreasonable always if there are terrorists about to blow up a city, or if you're at war. And so one of the most difficult things for the court system has been to decide in a time of war or emergency, is this reasonable or is not reasonable?

Now, in World War II, the country arrested all the Japanese citizens who lived in California where I grew up. And I can remember my mother showing me the place, Tanforan Race Track, where they were held and then sent to the Midwest.

**Justice O'Connor** Now these were citizens of the United States...

**Justice Breyer** They were citizens. They weren't...they were citizens.

**Justice O'Connor** ...of Japanese ancestry.

**Justice Breyer** Correct. Now why did they do that? Well, they said that they did it because they were worried about an invasion, and there was some concern, but those people who were arrested did

nothing wrong at all. There was no reason for concern about them. And the FBI at the time, the FBI told the president of the United States, there isn't one of them who is a danger. But still they moved them to the Middle West and they were held against their will, and I would call that war hysteria. The country made a mistake.

**Justice O'Connor** Although the case came all the way to the U.S. Supreme Court. And what do you suppose the court did?

**Justice Breyer** Said it was okay.

**Justice O'Connor** It said it was all right.

**Justice Breyer** There were some dissenting voices, but it said it was all right. So we know about that case and we sit here thinking we don't want that to happen to us. We don't want to make a mistake that years later everybody would say that was an unnecessary and wrongful infringement of people's liberty, but we also know that the terrorist danger is not something made up. That it's actually real.

**QUESTION 10: Most Influential Cases**

**Questioner** Which case do you think has most influenced the direction of the country during your term?

**Justice O'Connor** We've had any number of cases here involving that very challenging difficult issue of the extent to which states may regulate abortion. And those have been very difficult for the Court and very difficult for the country. And we have had a number of cases and probably that has had some effect since we've been here.

We had a case involving the presidential election before last, the Bush-Gore cases that came here. And they were significant in a way because the election result was ended, the process was ended with the Court's decision. Although subsequent three recounts of every vote there show that the result would not have changed regardless of the holding of the courts.

**Justice Breyer** Since I have been here, I would say the case, if I have to pick one that's had the most influence on the law—and it's not that it has influence, it's that I think it stopped what would have

been a major change—I think is the affirmative action case, because I think the country generally has adjusted to a degree of affirmative action. It can't go too far, but if we had said you can't have any at all, I think it that would have had an enormous effect and I don't think it would have been a positive effect. I think it would have been harmful. But, so I would pick that one...

**Justice O'Connor** If you go back a few more years before I got here, the Court handed down some one-person-one-vote decisions...

**Justice Breyer** Oh, yes.

**Justice O'Connor** ...which basically changed the way in which district boundaries are drawn for purposes of congressional elections or even within states for electing legislators.

**Justice Breyer** If you want to go back to the 20th century, that period, I'd say probably *Brown vs. Board*.

**Justice O'Connor** *Brown*.

**Justice Breyer** *Brown vs. Board* made all the difference to the country.

**QUESTION 11: Court Decision-Making**

**Questioner** I want to look into the future and ask you if you think that the way in which the Supreme Court works will ever be changed and if so, in what way?

**Justice Breyer** The essence of being a judge in this Court or any court in the United States is first, anyone can come in and present their claim and you will decide the claim on the merits of the claim, not the merits of the person. It can be the poorest person or the richest person. It can be the most powerful or the least powerful. What's of importance to the judge is the merits of the claim and not who that person is, and that's at the heart of coming in.

Then when the judge has the case, he or she reads the argument or listens to them without prejudice and thinks about it. There has to be time to think it through and get an answer.

And then, the third thing, is to write that answer down with

reasons, and the reasons, when it's a good opinion, must be the true reasons. The real reason why you as a judge have come to this conclusion under the law, and not somebody else's reasons or it sounds good or it was the easiest thing to say. It has to be the true reason. And that I hope will not change.

**Justice O'Connor** That's a good process. I don't see it changing. I think that serves well to resolve the issues and I think it serves the nation well when we give detailed explanations of our reasons for what we do. In that sense, the Supreme Court is the most open of the branches because, in every instance, we give our reasons. And that isn't necessarily the case for a decision by Congress or the executive.

**Conclusion:**

**Justice O'Connor** Now I see our time's up and I have to say it's gone very fast and I would also like to say that you've been good participants. You've asked good questions and you've engaged very much in the discussion we had today.

So it's been a pleasure to have students from Pennsylvania to be with us today for this discussion.

**Justice Breyer** Excellent. Very good.