

TRANSCRIPT

"CHANGING CONSTITUTIONAL LAW IN THE POST-SCALIA ERA - LESSONS FROM THE PAST FOR THE FUTURE"

A conversation with David Cole, Jeffrey Toobin, and Wendy Weiser

Introduction: Stephen Hubbell

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ANNOUNCER:

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STEPHEN HUBBELL:

Good afternoon, my name is Steve Hubbell of the Open Society Fellowship program. On behalf of the Open Society Foundations and our friends at the Brennan Center, we are delighted to welcome you to this discussion of *Engines of Liberty: The Power of Citizen Activists to Make Constitutional Law*.

When David Cole approached us in the waning days of 2011 with an idea for a fellowship project on the subject of what he was provisionally calling civic constitutionalism, the timing did not strike us as particularly auspicious. Citizens United had been decided the previous year. A raft of other cases relevant to campaign finance were making their way up through the appellate system, certain to run into the same 5-4 majority that gave us Citizens United. Meanwhile, after-- after a series of encouraging victories-- advocates for marriage equality had suffered-- several stinging defeats, chiefly in the form of ballot referendums that were enshrining-- traditional marriage. And for a while it seemed as if the promise of marriage equality was more remote than ever.

At the same time, in another sphere, the U.S. government was escalating its use of

drone warfare in places like Yemen-- Pakistan, Somalia, and elsewhere. That previous year an American citizen had actually been assassinated-- using a drone in Yemen. Meanwhile, the bulk collection of telephone metadata was accelerating.

What has happened, what has transpired in the intervening years, has been-- nothing short of breathtaking, culminating in a landmark decision on marriage equality in 2015-- new constraints on executive action in the so-called War on Terror-- and renewed hope even in the area of-- of campaign finance reform, as Wendy Weiser and I were discussing just before-- just before this event.

It is testament to David Cole's-- perspicacity, his vision-- that he saw the-- the early evidence that some of these breakthroughs were possible well before the rest of us did. And that the-- that the-- the crucial ingredient of citizen action could make-- could make the difference that-- that we sought. We are deeply proud here at the Open Society Foundations to have played a small role in the birth and maturation of this book.

It is a role that will grow with each subsequent retelling, believe me, David, because-- we're very proud of this book. And I know I speak for many in this room when I say that during these past event-filled years-- I would turn regularly and eagerly to the pages of the *New Yorker*, where-- in search of insight from their-- from their-- staff writer, Jeffrey Toobin, who is our moderator today.

Jeffrey is the bestselling author of *The Nine, Too Close to Call, A Vast Conspiracy*, and *The Run of His Life*. He has written and commented on many of the most controversial cases of our time, including-- including those involving Michael Jackson, O.J. Simpson, Bill Clinton. His *New Yorker* obituary of Justice Scalia, called *Looking Back*, was one of the best commentaries written on that topic, at least by my lights. He is a staff writer at the *New Yorker* and the senior legal analyst at CNN, and we're delighted to have him here today. Thank you very much, and over to you Jeff.

JEFFREY TOOBIN:

(UNINTEL) When are you gonna introduce Wendy? Do you want me to introduce--

STEPHEN HUBBELL:

I was gonna-- introduce you, but I'm happy to--

JEFFREY TOOBIN:

Oh, okay. Why don't you introduce Wendy too? So we're, like, I can just start right in? Because I don't have the full Wendy resume at my fingertips here, and we have, you know, it could go on a long time.

STEPHEN HUBBELL:

It could go on a very long time. Wendy, I don't have very the-- I couldn't carry all those papers down with the full Wendy resume. So-- I know that w-- Wendy works on campaign finance at the Brennan Center. There's a lot more to say about you, if you'll--

WENDY WEISER:

The director of the democracy--

JEFFREY TOOBIN:

Director of democracy--

WENDY WEISER:

--Brennan Center for Justice-- including-- campaign finance reform, voting, redistricting, (UNINTEL) courts, and I am delighted to be here.

STEPHEN HUBBELL:

Thank you very much.

(BREAK IN AUDIO)

DAVID COLE:

That's what he hired him for, for these insightful question.

STEPHEN HUBBELL:

No, seriously-- you know, it's-- we're here to listen to you, not to me.

DAVID COLE:

So-- so-- put your-- put your mic on, that's the first thing I'll say. Push-- push it, and when it's a red light, there you go--

JEFFREY TOOBIN:

God, it's so high tech.

DAVID COLE:

So-- so-- well, thank you for that question. And-- and thank you to-- OSF-- which-- really did get me rolling on this-- book-- when I was an OSF fellow, and not just by supporting me in writing it, but also by the-- the many conversations that I had with-- people here and in Washington-- who have devoted their careers to-- trying to change society for the better through support of civil society.

So-- thank you to them, thank you to Wendy and the Brennan Center, who are cosponsors-- here-- I think-- the Brennan Center is a brilliant example of the kind of civil society-- work that I'm talking about can make such a difference, much of it outside of the-- of the courts. And then thank you so-- to all the people who came. There are some seats in the front. We won't call on you and you can leave early, even if you sit in the front.

But I have-- I have-- here some f-- I have former students-- former colleagues at the Center for Constitutional Rights and here at OSF-- former clients-- law school friends-- so, you know, the only people that are not here are my-- you know, my wife and-- and kids. But-- otherwise I-- pretty much everyone I know is here, so thank you.

So the book is really about the democratic roots of constitutional change. It's-- it's an argument that-- you know, when we talk about the constitution and constitutional law, we talk incessantly about the court and about the five justices who-- hold the power to change-- the Constitution-- through their interpretations. And sometimes we talk about the arguments made before the court, and the lawyers who appeared before the court, and the cases.

But my sense was that that's a really an incomplete picture of how constitutional law develops and evolves in this country. And of course, it has developed and evolved dramatically from the time that we-- that some dead old white men-- signed off on it-- on our behalf, and-- and-- and today. And so I looked at the three most-- what I think are the three most-- (MIC NOISE) successful constitutional reform campaigns of the-- of my-- certainly of my-- professional lifetime, and-- and I think-- of pretty much everybody here. How did marriage equality go from unthinkable-- to inevitable?

It was unthinkable in 1972, actually-- when a gay couple petitioned the Supreme Court and said, "We have a right to marry on the same terms as heterosexual couples," and the Supreme Court dismissed it with a single sentence in 1972, saying it doesn't even present a serious federal question, we're not even gonna-- take up the case.

To 2015 when we were waiting for the court to decide, and it was inevitable that they

were going to recognize-- marriage equality. How did that happen? The court-- in 1972 was more liberal than the court in 2015. The arguments were the same. The-- the court didn't change constitutional law, it recognized that constitutional had changed. So how did that happen? How did it change?

And then the second one is how-- did the individual right to bear arms-- go from something that was for 100 years rejected as a constitutional doctrine? Chief Justice Warren Burger-- said it was-- he said-- in 1991, he said-- that, "The notion that the Second Amendment protects an individual right to bear arms is the greatest fraud perpetrated on the American people by a special interest organization in my lifetime."

And within 20 years, the Supreme Court had declared that it was not only not a fraud, but it was a constitutional right. And that special interest group, the most-- in my view, the single most effective civil liberties organization in the United States, the N.R.A.-- is responsible-- I argue for that-- for that shift. And even today, after the court decided-- the-- the Second Amendment protects the individual right to bear arms, it's that group rather than the court that is the real protector of our liberties.

And then the third-- the third story is, what caused President Bush-- by the time he ended his term in office to-- curtail so many of his counterterrorism measures? He, by the time he left, he had released over 500 people from Guantanamo. He had suspended the C.I.A.'s in-- torture interrogation program. He had emptied out the C.I.A.'s secret-- prison s-- he had suspended extraordinary rendition, when we take people in country A and deliver them to Morocco or Egypt or-- Syria so they can torture them for us.

He had put the NSA's warrantless wiretapping program, which he created unilaterally under judicial supervision. What-- what-- how did that happen, given that in-- in-- in prior-- periods of crisis and wartime, presidents had gotten to do whatever they deemed necessary in dealing with-- the enemy? And again-- my-- my argument is that it's really civil society. It's us.

So, you know, I call it-- I call it the *Engines of Liberty: The Power of Citizen Activists-- to-- to Make Constitutional Law*. If someone hadn't already stolen this title, I would've called it-- *The Power of Citizens United to Make Constitutional Law*, because it's really about groups, it's about organizations, it's about the power of the civil society sector to really effectuate change.

JEFFREY TOOBIN:

So-- there is a conceit underlying legal education, which is that courts decide what the Constitution is, and that, you know, we-- we-- you refer to it at the beginning of your remarks, that-- that-- that-- that the Supreme Court or-- and other courts recognize what the Constitution means.

And you are asserting in-- in-- in the book that-- it's not just the courts. But does this mean that constitutional law is just politics and that elections are-- are gonna determine just what the Constitution means, and that there is essentially no core

there?

DAVID COLE:

Right, so great question. So I always thought the conceit underlying legal education was the law professors. But-- but-- but-- but-- but my-- so-- so-- I mean, that is-- as you-- you identify-- see, he opens with a really easy question, and then he-- and then he follows up with a really hard question--

JEFFREY TOOBIN:

See? We're movin' (UNINTEL) that's what we're doin'--

DAVID COLE:

--which is this, you know, if it's-- if it's all politics, if that's the message of this book then, you know, why do we have a Constitution? And-- and I-- you know, I'm-- I'm a believer-- I-- I-- I quote-- Learned Hand-- in the book-- who said, and this is sort of along the lines of Jeff's question, he said, "Liberty lies in the hearts of men and women. When it dies there, no court, no constitution, no law can save it. While it lies there, it needs no constitution, no court, no law to save it."

In other words, it is all about us. And-- you know, like many great quotes, this-- this is an overstatement. It-- it-- I think we do need courts, we do need a constitution-- and-- and it is important to have-- a bulwark against sort of the-- the vicissitudes of ordinary politics.

And the Constitution plays a very important role in-- in doing that. So-- so how do I reconcile that? So m-- m-- my r my sense is that when you-- when you read these-- accounts, what you see is that these changes don't happen overnight. It's not like-- a bill gets enacted. There is a extended d-- dilber-- deliberative process that occurs in-- multiple forums-- in state courts, in state legislatures, and even in-- foreign countries when it comes to human rights-- and-- executive power in the War on-- on-- on Terror.

In the academy-- the N.R.A. was very good about funding-- research that supported-- ultimately supported it's-- view. And all of that-- (MIC NOISE) g-- then over time, if it is successful in transforming what we as a culture see as our fundamental values, then I think, and only then, is the court likely to recognize-- that constitutional law has changed.

So it doesn't change because, you know, a buncha people go march on the-- on the court and the next day-- or they take a poll and the next day they change it. It-- it-- it-- it requires this kind of-- what you would call-- what I would call constitutional politics, incremental change. And that's how-- that's how it should be.

JEFFREY TOOBIN:

Now, your book is mostly descriptive. And, you know, you have the great liberal project of marriage equality, and the great conservative project of an individual-- Second Amendment right. And then-- which is most-- the-- the mostly liberal-- you know, constraint on-- on-- f-- military or intelligence activities-- in the third part. Is this good or bad? Is it good that we have this check or-- or is good that citizens can do this? Is it bad? Or is just a fact that we have to deal with in the world?

DAVID COLE:

So I think it's-- I think it's-- it's good. You know, it is-- it is mostly a descriptive book, but-- in terms of-- I'm not arguing the merits of marriage equality or the individual right to bear arms, or-- human rights in the War on Terror. I'm really looking at-- trying to understand how change happens. What are the tactics that-- that people deployed? And-- and so-- so-- so that's-- that is-- that is my focus.

But there is a normative sense in-- in this sense. So it-- it is, in a way, a response to the kind of originalism position, that the-- that-- the Justice Scalia-- rest his soul, position that-- we should-- just be bound by what they agreed to, and if we don't like it, we should change it through the constitutional amendment process, which happens to be impossible.

My sense is that we are bound by the Constitution because it reflects who we are in our deepest-- commitments today, not because those-- white men with property-- who were allowed to vote and didn't even represent the majority at the time agreed to it, and not because what-- whatever their views are.

So constitutional law, I think in order for it to work as-- as-- a normatively legitimate institution in a democracy has to reflect the development of society. And that-- that development is-- is, I argued-- has these deeply democratic roots. And that's a good thing, because we wouldn't want to live in a society, I don't think, a democratic society where people have their cell phones on.

But no, we wouldn't wanna live in a democratic society where five justices just got to impose their views on us. Right? That's crazy. And whenever, you know, someone doesn't like a Supreme Court decision, like Justice Scalia didn't like the marriage equality decision, he portrays it as "five justices just imposing their will on the people."

Well, that is problematic. But I don't think that's actually what happens. I think what happens is we organically develop through-- through democratic deliberation and debate in a variety of-- of different-- forums, and only once that-- w-- when that development has kind of-- crystalized-- is it possible to take an argument that was rejected as frivolous-- 40 years-- ago, or a fraud 20 years ago-- and-- and it's recognized as a right.

JEFFREY TOOBIN:

So Wendy, you-- you're the head of the Democratic Project at the Brennan Center. You are dealing in a very practical way with the legacy of Citizens United, with the legacy of Shelby County. When you think about litigating in this area, obviously you are thinking about how to write an e-- excellent brief, how to call the right witnesses in court. Are you also thinking about the broader agenda that Dave lays out in the book?

WENDY WEISER:

Absolutely. And I do wanna-- for those of you who haven't read it, I commend this book. I-- I-- I think it's an incredible contribution to the thinking about how constitutional change happens. I-- I agree that too frequently we have been so narrowly focused on the courts and the arguments made before the courts that people aren't seeing the broader context of what's really happening, and how-- and-- and how we are evolving our law.

And so-- and-- and certainly those of us who are in the business of-- law reform, and in the civil society sector-- you know, need to use all of these tools in order to actually help persuade ultimately the five justices at the end of the day, whether it be political organizing, whether it be broad communications campaign scholarship-- and-- and-- and all of the different ways that (UNINTEL) described here.

For example, in the Citizens United context-- one of the central projects that we had to contend with in the money and politics field was-- the-- scholar-- there wasn't a unified scholarship rejecting the Supreme Court's ap-- approach to money and politics, and-- which was gonna be a big challenge, even if there's broad, popular opposition to the court's jurisprudence to the Citizens United decision.

If there isn't really-- any-- any-- academic consensus around alternatives, then we're not gonna be able to see-- a change in the courts. This is-- a real parallel to the Second Amendment story that you told. That has been something that, for example, the Brennan Center has worked over a number of years to try to foster, pulling together symposia to get people to start writing and thinking about what are alternatives to the court's approach in Citizens United? So the-- that's sort of one example of the sort of many ways in which we sort of try to take all these pieces and put them together in our strategy to change-- change civil-- change the law.

DAVID COLE:

I mean, in many way-- in many ways the Citizens United challenge is-- is a greater challenge than-- than gay-- than gay marriage or gun rights, because-- one of the things that I show in the book is that the way-- the principle way I think that the gay group-- rights groups and the gun rights groups advance the ball when federal law

was against them was by going to the states and g-- and filing lawsuits in state court, making state-based arguments-- amending laws in-- in court of incremental ways to prepare the ground under state law-- to ultimately recognize-- their right, whether it's an individual right to bear arms or marriage equality.

And that they could start in the states that were most sympathetic. They could develop those. You could then go to the next most sympathetic, build momentum, and then you can-- you know, finally jump the tracks. But when-- when a constitutional right has been recognized by the court against you, right, whether it be Citizens United if you're into campaign finance reform, or Roe versus Wade if you're-- pro-life, it-- it limits significantly what you can do.

WENDY WEISER:

It-- it does. And-- and in fact, there's been a lot more that we could do than you would otherwise think. But-- a real major difference I think between the three stories you tell and the situation that we're in in money and politics is these were all battles to try to recognize or expand a previously recognized right.

In Citizens United, the-- the script has been flipped, where the court has recognized the right to unlimited spending in elections, essentially. And so we are-- we-- we need to-- and has recognized no-- only a very narrow legitimate interest on the other side, hasn't characterized that in rights terms.

And so it's-- it's sort of starting in a different place there. There are some major advantages though, relative to where the-- other movements were-- at this point before the courts, for example, there is widespread-- on-- widespread disapproval of the court's jurisprudence in Citizens United and in the entire money and politics realm, to an extent not-- that-- that wasn't present in any of these other cases. I mean, it's really dramatic. And so I think that there are both advantages and disadvantages.

JEFFREY TOOBIN:

One reason why I think your book is so topical is that there are two big news events that I think are relevant to the-- to the ideas. One is the nomination of Merrick Garland to the Supreme Court, and the other is the presidential campaign, where in part because of the Garland nomination-- the court is more-- of-- of a topic for the candidates than it usually is.

One of the things you now see with-- let's talk about the Garland nomination first, is that you have particularly some Republican senators saying, you know, "Because of-- a vote that he cast-- about the Second Amendment," and it's a pretty obs-- it's like, whether he voted to re-hear a case on a bank. It's hardly, you know, an opinion that he wrote.

But putting aside the issue of, you know, what he actually did in that case, you have

senators saying, "Well, you know, I am not gonna vote for this candidate because of a specific vote on a specific issue." Isn't that okay, by your standards, because these senators, as-- are part of the constitutional conversation? They are-- expressing their view of the Second Amendment, and they are voting-- or not voting accordingly.

DAVID COLE:

So I do think that-- the-- one of the ways in which the-- constitutional change in the political-- realm, and in-- in society at large gets translated into constitutional written by the court is through the nominations process. So you know-- if, for example, the N.R.A. was opposed to the filing of the case that eventually recognized the right to bear arms, because they felt, much as the gay rights groups did with respect to the first case filed on-- in federal court urging the recognition of marriage equality after Proposition Eight, that it was too early.

It was too early to go to the court, and they were nervous. They didn't think they necessarily had five votes. And they probably didn't. They had reason to believe that Justice O'Connor would not recognize their-- the right. And so they fought hard to get that case killed. And it-- what they-- they failed. It was-- it was filed. You can't-- you know, one of the lessons is you can't actually, as much as we would like to control-- national litigations strategies, and the gay rights groups did a pretty good job-- the gun-- and the N.R.A. does a tremendous job. But nonetheless, you can't control it--

JEFFREY TOOBIN:

But-- but I mean, it is interesting that both cases, both-- the Proposition Eight case, which was-- the lawyers were David Boies and-- and Ted Olson, who were not part of the-- the-- the gay rights--

DAVID COLE:

Cabal.

JEFFREY TOOBIN:

--cabal, litigation cabal, and-- the Heller case in the-- in-- coming outta D.C. was not part of the N.R.A. litigation cabal. Both of them went forward anyway. And--

DAVID COLE:

Right, but-- but then what the N.R.A. did was, you know, once it-- once it was going

forward, it went full steam ahead. You know, and it-- and it played-- a critical role in the election of George W. Bush-- both times. It was-- I think in 2000 it was-- it was single-- his single biggest civil society supporter was the-- the N.R.A.

And then when it-- when it came time for George Bush to replace Justice O'Connor and-- and Chief Justice Rehnquist, they picked two justices who were very friendly to gun rights, and they ended up winning the c-- and-- and the case wasn't decided until justice-- Justices Roberts and Alito were sitting on the court, and they won 5-4.

So-- so they-- you know, so that's the situation in which it does make-- it does make a difference. And you know, I think one of the reasons that we have a system in which-- the president nominates and the Senate-- confirms is because there's a recognition that these people have power, and to their views are relevant. And I-- you know, I don't know. What-- is it-- is it appropriate or not for a particular senator to take a single issue and say, "I'm not gonna vote for this person if he's not pro-gun rights," or, "I'm not gonna vote for this person if he's not-- pro-choice."

You know, I-- I-- I-- I don't think I would want-- that to be the-- the norm, and I don't think litmus tests are particularly appropriate. But it's-- it's a political pr-- it's a validly political process. There is nothing in the Constitution that says, "Senators much look at the justice as a whole," et cetera, et cetera.

JEFFREY TOOBIN:

Well, I mean, litmus test, that-- that brings me to the next question. Because litmus test, there used to be a really strong stigma in presidential-- among presidential candidates-- to say that, "While I-- I would not-- I don't have a litmus test about Roe V. Wade, but any justice I nominate would almost certainly uphold Roe V. Wade or oppose Roe V. Wade"-- as the case may be.

In the 2016 campaign, it is not-- I mean, they've spent a lot-- (LAUGH) it-- it hasn't been focused on a lot. But one thing I've certainly noticed is that both Bernie Sanders and Hillary Clinton have said, "I will only appoint justices who will vote to uphold Roe V. Wade and overturn citizens United." Now, what does that do to the process? And so-- so-- if-- if-- with their interviewing potential candidates, is it appropriate to-- to ask them, you know, "Judge So-and-So, will you vote to overturn Roe V. Wade?" I mean, have litmus tests moved to the realm of the acceptable? And should they be acceptable?

DAVID COLE:

Yeah, well, I-- I-- I-- I think they-- they've ob-- they've obviously moved to the realm of the acceptable if-- if major presidential candidates are-- are-- are--

JEFFREY TOOBIN:

Donald Trump has not expressed a view on this just yet. He's not so much about the Supreme Court yet--

DAVID COLE:

You have to be-- you have to be-- not-- you have to be in favor of the constitutionality of the Donald. And that-- that-- that's the litmus test. But-- no, I mean, I-- it-- it-- that-- that disturbs me. I-- I do think, you know-- but-- I-- I think it's-- but it points to this very tension, which is--

JEFFREY TOOBIN:

Yes, I mean--

DAVID COLE:

--which-- but-- but what-- what-- in a way, when you reduce-- an appointment to a single issue, that seems-- wrong-headed in-- in that the court decides a whole range of issues, and you know, it's-- we don't wanna be deciding on a single for that reason. We don't wanna be deciding on a single issue.

But I-- but the-- but the-- the inescapably political nature of the process-- is inescapable. You know, and-- and-- and I don't-- and I don't think we can-- you know, I-- I-- we can argue about why it would be better to look at qualifications, look at-- world view-- more broadly.

Look at-- life experience-- all of that is relevant. You can ask the question. But it's still also entirely appropriate for judges and not only appropriate, but de rigueur for the j- - for the nominee not to answer those questions, right? So at the same time as we recognize that these-- it's politically acceptable to ask the question, it's also politically acceptable for nominees not to answer the question.

JEFFREY TOOBIN:

Wendy?

WENDY WEISER:

And-- and I think necessary. I mean, I think that that's sort of the critical distinction here, that the judiciary, you know, needs to remain independent. The political branches are the political check on the process and can apply whatever-- whatever

assessment they want for a candidate, and for-- choosing who they wanna have on the bench.

This isn't act the only time in history where the selection of judges has focused on a narrow set of issues. We think of the New Deal as another time where it was focused on just a single set of decisions. Judges are appointed for life in the federal system, and so the ultimate impact of focusing on one issue when judges are deciding many, many issues over a long period of time-- is hopefully not that corrosive. But I do think that-- that happens when there's a crisis, or when a particular issue is coming to a head, and hopefully that sorta dissipates over time. There aren't so many issues that get that kind of treatment--

DAVID COLE:

I would just-- I would just add one thing on that--

(JEFFREY TOOBIN: UNINTEL)

DAVID COLE:

--which is that I wrote-- I-- I wrote a piece-- for *The Post* about-- how the-- the-- appointment of Merrick Garland may matter less than, you know, we think. Sort of saying, well, liberals are all excited, we're finally gonna get a 5-4-- liberal. Conservatives are all worried. Oh, there's finally gonna be-- a liberal majority.

But actually when you look at, you know, when you look at how constitutional law changes-- it doesn't tend to change just because of-- of-- of an appointment of a new justice. It-- it changes, again, through this much lengthier, incremental democratic process. So in a way, it's-- you know, the litmus test questions are-- are kind of mistaken, because that's not how constitutional changes. It doesn't happen because you put a new justice in. It happens because of-- a range of work.

Merrick Garland may well be opposed to Citizens United. He may well get confirmed. They may well get that case up again. And I think there's a good chance that it will not be overturned, even though you now have five justices who-- who-- (UNINTEL) would have--

JEFFREY TOOBIN:

Yeah, I-- I read that op-ed piece. I thought that-- you were-- you were-- you were at your most law professor-ish in that. It was like, "Well, in the long run, it'll all sort itself out." If I'm the Planned Parenthood lawyer up there, and I am challenging the-- the new restrictions in Texas and Louisiana, the appointment of Merrick Garland to replace-- Antonin Scalia means a hell of a lot to me, don't you think?

DAVID COLE:

No, absolutely. In the short-term, on specific cases, of course it does. But in the long-term, look, we've had 40 years of a conservative majority court. *Miranda* was not overturned, *Roe versus Wade* was not overturned, affirmative action still exists. These are things that the conservatives really fought.

They got-- the-- yes, gun rights were recognized, but in-- but not in a very fulsome way. So-- and-- and-- and yes, there have been changes. I'm not saying that it doesn't matter. But the changes, again, are much more incremental over time, and-- and democratically-- driven as much as-- imposed from the top down by whoever these justices are.

JEFFREY TOOBIN:

I mean, and just to hear you talk about resp-- the-- the-- the n-- nomination process, aren't you a little bit sort of wimping out on your hypothesis here? I mean-- you know, you-- here you have-- here you have, you know, you're saying it's the people's responsibility to interpret the constitution. It's the people, you know, who-- and-- and the people's representatives have a role in this. But when it comes to actually appointing the justices who will bring these-- you know, make these rights real, they say, "Oh, we can't have any politics." We can't-- we can't ask them--

DAVID COLE:

No, I-- I didn't say that, I didn't--

JEFFREY TOOBIN:

--how they'll stand-- how they'll vote on these issues. Why not?

DAVID COLE:

--you can-- you can ask them--

JEFFREY TOOBIN:

You can ask them, and then you say, "Well, it's fine if they say no."

DAVID COLE:

Right, right.

JEFFREY TOOBIN:

Well, but I mean, what's that? I mean--

DAVID COLE:

Because the-- that reflects this tension that we-- that-- that at the w-- on the one hand, we do understand, we need a Constitution and we need an institution that stands above ordinary politics to do the things that the democracy doesn't do well, which are many. So we need that.

And we need to protect their independence, and there's a real-- I think a real value to the def-- the-- the role of a judge, the obligation of a judge, the-- the institutional design of a judge-- that plays a very valuable role. And is-- and-- and requires that they be above politics. And I think we all recognize that. You know, we-- you know-- you don't ask a judge point blank, you know, what they're, you know, what they're gonna decide on something. They-- they'll tell you when they write their decision.

And-- and there's a whole, you know, the judges have to be more careful about what they say in public. And everybody understands that right? So that's necessary. At the same time, this thing that they're interpreting, in order for it to have normative-- heft and in order for it to be a legitimate constraint on what we wanna do-- as a majority at any particular time-- has to be more than what it was when it was-- originally-- signed off on.

And for it to have legitimacy, it's gotta reflect this democratic-- democratic deliberation. But-- but as I say, I w-- I think the story I'm t-- I'm-- I'm telling in the-- in this book is about constitutional politics, which is different from ordinary politics. And it's different in some of the ways that make me blanch at the litmus testing.

WENDY WEISER:

I-- I wanted to respond to two points, one on the-- judicial nomination process. It-- it might be that this time is different, and maybe unique historically because of this very long-term stability on the court. We've had this so little turnover on the court, and a fair-- and-- and the justices have been able to actually pursue an agenda over time in a way that earlier courts had maybe more frequent turnover, so that the-- the significance of the one-- justice might be more-- than-- than we've seen previously.

And in response to whether or not it's politics that's influencing the judge's decision, y-- you're telling the story of three sort of major shifts in judicial decision-making. But it might not be the Constitution that's changing, and-- and-- it might be our understanding of how those constitutional values apply to our current context. It might be our understanding of the facts that change, which is another-- way of sort of interpreting the same changes, in which case that's-- much more consistent with an originalist perspective, and with-- sort of an evolving understanding of facts and

science and who's-- and-- and how these values will apply in our present day and age. And there's some great quotes that you pull from Justice Kennedy making exactly that-- those points, that-- that this-- these-- constitutional rise from a better informed understanding about how constitutional imperatives define liberty, and remain urgent, and new insights and societal understandings can reveal how unjustified inequality-- in our most-- fundamental institution. So a lot of this is seeing new things, understanding facts in a new light can change our interpretation of our constitutional values without changing our Constitution. And one thing that would be interesting to sort of mine more is how do the justices see what they're doing? Do they think that they're changing constitutional law? Are they discovering it? So how do you approach that?

DAVID COLE:

Well, I'm sure they don't. And in fact, I would say, we did a panel here-- a cup-- when I was writing the book where I-- where had-- Evan Wolfson, who is-- one of the leaders of the-- of the marriage equality-- movement, and who I feature in the book, and Dave Keene, who was a former-- president of the N.R.A.-- and--

JEFFREY TOOBIN:

And your-- your book, I'm-- I'm just staring at the blurbs here, has a certainly politically diverse group of endorsers. You have David Keene endorsing one of your books is-- is kind of a delicious thing--

DAVID COLE:

It's-- yeah. The-- the head of the N.R.A. said this is the single best book about the N.R.A. that's ever been written. You know, that's pretty good, right--

JEFFREY TOOBIN:

But Dave, you don't wanna read the other stuff that he's written, but this book is fine, yeah.

DAVID COLE:

I hope that doesn't scare you off from-- from-- from reading it. But-- but both of them sort of resisted my suggestion that they-- they were trying to change the Constitution. They-- and particularly within the N.R.A., where there's-- you know, the-- it's largely a conservative organization, largely group of people who say, "We're

not changing constitutional law, we're just rest-- we're just correcting a mistake, we're restore"-- you know.

And you could say facts on the ground change, but they don't ch-- like, that's the passive voice, right? How did they change, right? How-- and how did the N.R.A. get-- correct this mistake? And when you look at how they did it, it was through-- an intensely political-- effort at every-- you know, in every outlet that they could make-- headway.

They-- I think the strength of the N.R.A. and I think, you know, we can all learn from the N.R.A., is that they understand the democratic-- the in-- the-- the sort of necessity for political struggle to the realization-- and protection of constitutional rights, that they're not just up there, they're not just in a piece of paper, they're not just enforced by the guardians of liberty, the court. They-- they require us to be-- to be engaged through these kinds of organizations in-- in-- in a whole range of-- of-- of strategies in order to make the thing happen.

JEFFREY TOOBIN:

One prism to-- to look at your book through, and-- and one-- one-- another chapter you might have written, I think, was about originalism itself, which was, you know-- essentially introduced into political-- in-- in to sort of legal political doctrine during the Reagan administration by Robert Bork from the bench, by Edwin Meese giving a series of speeches.

And has been enormously successful, I think, in-- as-- a way of talking about the Constitution, if not ever commanding a full majority of the court-- at least in all cases. How do you account for originalism's rise at the same time you see these movements f-- clearly changing the Constitution also succeeding at the same time?

DAVID COLE:

Yeah, well I think a couple things. One, I don't think originalists-- I think-- the-- the influence of original-- of originalism, in terms of actual decisions, is-- is not that great. In terms focus the sort of academic debate and dialogue, you know, it's-- it's taken seriously in a way that it wasn't when I was in law school, certainly. And Robert Bork was my con law professor, and even so--

JEFFREY TOOBIN:

Boy did-- boy did he fail with you.

DAVID COLE:

But and-- and I also-- I also think it's sort of-- it's-- it's-- it's sort of inevitable that originalism will sort of die out, because you know, it's one thing to be an originalist like Scalia and to maintain your position of originalism when-- when you never have a major-- virtually never have a majority of the court that agrees that that's the appropriate way.

And you write dissent after dissent after dissent. But you're always looking back. And the great justices, I think, who have, you know, who have been in dissent-- and articulated a strong vision that has ultimately been-- become sort of-- a leading-- part of our constitutional framework, like Justice Brandeis or Justice Holmes, were prescient about looking forward. And originalists are looking back. They're looking back.

So I think-- I think it's kind of inevitably going to die off. I think Scalia was a very, very-- powerful advocate, v-- and-- and sort of out-sized powerful advocate in-- in terms of this-- concept. And even so, he could only really get Justice Thomas to go along with him in any kind of consistent way. So I-- I just don't-- I-- I don't think it's-- and-- and-- and the question of, you know, how did it-- how did it-- how did it gain its pr-- its prominence, I-- I think a lot of it is Justice Scalia. But-- another part of it is a civil society story. It's-- you know, and it's told a little bit in Jane Mayer's book, and-- and it's told in a book called *The Rise of the*-- I can't remember--

JEFFREY TOOBIN:

Oh, Steve Teles's book--

DAVID COLE:

Steve Teles's book, yeah--

JEFFREY TOOBIN:

--Teles's book about-- it's basically about the federal society and the intellectual-- you know--

DAVID COLE:

Yeah, so there was-- so there were-- there was-- a group of people who, committed citizens, who-- who-- saw originalism as a useful mechanism to push back against some of the rights-- that they didn't like that had been recognized using more living constitutionalism kinds of mechanisms. So they-- they-- and they got behind it in-- in the same kind of way that the N.R.A.-- and the gay rights groups got behind their

ideas--

JEFFREY TOOBIN:

But-- but I would just-- in terms of public arguments, one thing I was struck by during both Justice Sotomayor and Justice Kagan's confirmation hearings is that the-- the-- questioning from the Republican senators was all based on the idea of, "Well, if you don't-- if your views are not tethered to the views of the-- framers, you're just makin' up constitutional law."

And that's-- I mean, that is sort of what-- what Justice Scalia argued and what Justice Thomas argued. But, you know, that's a big-- that-- that is-- when you have convinced, you know, the-- the core of the Republican Party that this is the best way to interpret the Constitution, that's still pretty darn significant, I think--

DAVID COLE:

Yeah, yeah, yeah, no, it is. But I'm-- but again, I don't think, again, with the exception of Scalia and Thomas, I don't think there's anybody on the Supreme Court that really takes it strictly. And even they don't. I mean, even Scalia is-- was not as strict about it as-- as Thomas was. So-- so yeah, they made a lotta progress.

But I-- I just don't think-- for the reason that I-- you know, there are many reasons to be skeptical about originalism, including, you know, how do we know what the framers thought about GPS devices and things like that? But-- but even if we did know, who cares? Right?

If we-- as a community have a different set of fundamental principles and they have developed over time in an organic way, the fact that they-- they differ, so the fact that we now think segregation is wrong or we now think women should have-- equal protection, or we now think that-- gay people have-- equal dignity to straight people, you know, those-- those are-- those are more powerful to me and more-- and-- and ought to be part of our constitutional framework.

But they only-- they can only be part of our constitutional framework if you reject originalism, given how hard it is to amend the Constitution. I mean, Scalia's answer would be, "Well, if a court wasn't doing this, then we would just amend the Constitution more." You know, the last amendment to the Constitution was the 27th Amendment. And it was passed in the '80s. And it was not terribly controversial, it was that members of Congress, if they vote themselves a pay raise, should not be able to get the pay raise. It goes to the next, you know, member of Congress. Which was--

JEFFREY TOOBIN:

That was-- wasn't it pending for, like, 100 years or something--

DAVID COLE:

Two hundred years. It was introduced in, like, 1790 and didn't pass till 1980. So that's not a way to, you know, keep the Constitution living. So-- my argument is that what k-- you know, and it is sort of what-- j-- Judge Learned Hand said, what keeps the Constitution living is us. And-- and-- but I particularly think, you know, it's not us in some amorphous movement sense.

But it's us in-- the-- in the-- specific manifestation of-- of organizations focused on constitutional liberties and values, people who come together because of a shared vision, and then work with the resources and commitment over the long time it takes to-- to convince, which is really what they're doing. They're convincing-- the people that this is a value we ought to-- we ought to (UNINTEL).

WENDY WEISER:

And I-- it might be just a linguistic problem here, messaging, like, the-- calling it constitutional change. Because the-- the values stay the same, and so the-- so that at some point you can-- you're tethered to the Constitution, to the broad values of equality, due process, and then you're just-- changing your understanding of how they mean and how they apply to present context.

So that your-- there needs to be-- I-- I think there's a lot of power in the idea of originalism when it gets sort of-- applied and-- and so narrowly. And so-- targeted towards specific questions-- it goes to the absurd. But I think if we run away from the idea that there's some sort of central values that we've had since the founding which was never fully realized, but that were continuing to evolve our understanding with and struggle with, then we still are tethered to something concrete that's not just makin' it up.

JEFFREY TOOBIN:

Wendy, you said earlier in our conversation that you think Dave is right, that the-- let's talk about Citizens United, that it is not just a matter of litigating correctly. It's about-- the larger effort. How's that goin'?

WENDY WEISER:

I think it's goin' great. I think that we are, like-- on the precipice of some really major change. I think we have a lot going for it, and in part because of a lotta the groundwork laid over many years-- by-- by many, many people-- including-- people at-- at the Brennan Center, and at other groups, by-- the Open Society Foundations as well.

But I-- I think that-- you know, fundamentally-- it's-- persuading people-- as you said,

it's-- persuading all relevant segments of society and the profession and judiciary that this is inconsistent with our understanding of the Constitution and our constitutional values. And that I think-- as-- I think there's-- this is the first federal election and-- and presidential election in decades where money and politics has taken on such a central-- role in the election, where there's really such broad public consensus that-- Citizens United as-- as just-- a placeholder for the entire money in politics-- jurisprudence has been wrongly decided, and it needs to be changed.

And where all these candidates are stepping up behind it. We're seeing activism across-- the country. We're seeing states pass ballot initiatives calling for-- resolutions to overturn Citizens United, people trying to pass-- c-- other money in politics reforms. And there's really been a real increasing consensus-- among the-- elite thinkers, among academics and law professors-- among other-- major influencers, that something's deeply wrong, and that something needs to change. And one of the other, I think, things that-- precipitates court changes is-- an understanding that the decisions that they've made are unworkable or have led to-- maybe unintended consequences.

And if there's ever an election that showed the sort of unworkability of the court's current jurisprudence and-- and all these consequences that they-- said were not likely to happen, and the growth of super PACs, the incredible shrinking of-- the-- number of people who are-- responsible for financing elections, it's-- it's this election.

So I think that we are poised at a precipice where it does seem inevitable that something's gonna change. And now, you know, that-- now there's-- you know, some strategic considerations. But I-- I think we're-- we've built a lot of the groundwork for that--

JEFFREY TOOBIN:

Well-- well, you both alluded to the fact that one difference between the Citizens United issue and, say, the Second Amendment, and-- and marriage equality is that instead of looking for sort of the perfect case to, you know, pull the thread that-- that-- that, you know, holds-- holds some bad law together, you are in a situation where the court has already deregulated a lot of what's goin' on. And you-- there's no such thing as a court case that can restore regulations. So how do you do what you do?

WENDY WEISER:

Well, I think that I-- I mean, there are a number of-- there are still standing-- campaign finance regulations and there are some that are continuing to make their way through the courts. And there's actually-- a case right now that-- that implicates-- campaign finance jurisprudence that-- that's right before the court involving-- a bribery-- or a corruption conviction of-- Governor-- McDonnell.

And so the-- where-- so there are other opportunities, cases where the court might have an opportunity to start changing course and signaling that it's-- receptive to a broader-- set of interests, and-- maybe pull back from some from some of the sort of sweeping assertions it's made.

I think that ultimately-- there's-- there's gonna have to be-- there's gonna be a cata-- a more cataclysmic-- event. And the question is, what are the sort of-- earlier steps beforehand that sort of chip away? And I think one good example is-- the-- backlash against Roe v. Wade, where the court had-- where the court had recognized-- a strong right, and where the-- choice-- opponents have-- sort of very slowly chipped away at that right through-- smaller-- regulations to-- to the point where we're now-- experiencing cases which are essentially completely eliminating access to abortions. That's one option.

There are other options where the court-- other times where the c-- the-- the time when the court-- changed course after-- after-- the New Deal-- after the Lochner era was-- was-- sort of another course correction where there was a right that was recognized on the other side that had been overturned. That was done in a single opinion. So there-- there are different paths that could-- that the court could go in.

DAVID COLE:

You know, I'm--

JEFFREY TOOBIN:

Okay, but actually Wendy raises-- I think a very good point there, which is that yet another chapter that could've been written in this book is Roe v. Wade, is-- and-- and-- and the backlash to Roe v. Wade. Like, where-- where do you think that struggle is, and what-- and-- and--

DAVID COLE:

Ongoing.

JEFFREY TOOBIN:

--how does that fit with your theory that Merrick Garland makes no difference--

DAVID COLE:

It-- it totally-- it-- it totally-- I didn't say no difference.

JEFFREY TOOBIN:

Oh, all right-- yeah, yeah--

DAVID COLE:

Less-- less of a difference. Less of a difference. It totally fits within my, you know, within my story. I mean, in some ways much of my story-- is about the-- the importance of state forums to the development of federal constitutional law. So that's what the-- how marriage equality was developed. That's how gun right-- the notion of an individual right to bear arms was developed.

By the time the case the-- the federal constitutional Second Amendment question was before the Supreme Court, the N.R.A. had already succeeded in getting about 45 states to recognize an individual right to bear arms. So if there's already-- in their state law. So if there's already, you know, that recognized through almost all the country-- the country, it's a lot easier for the court to recognize a federal right.

And it's-- and it's harder when there's been a constitutional right recognized and you're trying to chip away at it. But what have the pro-choice-- pro-life people done? They have gone to the states. And-- and the nice thing about the states is you can choose your states, right? So the-- the gay rights groups-- went to Vermont-- and-- and Massachusetts and-- and Connecticut, New England.

Where the gun rights people-- inevitably start in Florida. So much so that it's called the gunshine state. And I-- and I feature-- a woman in the book-- Marion Hammer, first female president of the N.R.A.-- who never went to law school. She's 4'11", she's in her 70s, she carries around a pretty significant pistol in her-- in her purse. But her power is that she is the most influential-- lobbyist in-- in Florida. So they start there. And then they take it and go, go, go.

And-- and-- and the-- and the pro-- pro-life people have done the same thing. Figuring out-- laws that you can-- cr-- create, that won't-- that-- that will-- that sort of push at the edges of Roe versus Wade create, you know, an opening of a broader set of understandings, for example of the states' legitimate interest in regulating them.

And that's the same thing that ultimately I think is gonna happen with respect to Citizens United. There will be-- a broadening of the-- and Wendy alluded to this, to-- to the-- a recognition of a broader set of legitimate interests that justify the state in-- in restricting. It won't be to say corporations don't have rights.

It won't be to say the regulation of money in campaigns is not a First Amendment issue. It will always be a First Amendment issue. But if there is a recognition of a broader set of compelling interests-- on the other side of aisle, you can-- you can-- you can get to a significant amount of regulation. But that will happen, I think, largely through the states. And-- and it already-- they're already doing it. They're already doing that--

WENDY WEISER:

And I think that there will also be states and more and more states who-- who will want to actually-- act even in the face of the Supreme Court's decision. I think the dissatisfaction is so strong that there will-- there will even be defiance too, which is something that's-- and one focus the--

JEFFREY TOOBIN:

But that tends not to work as well. But--

WENDY WEISER:

No. But one-- one of-- but I think that-- it's-- I-- I don't think it's gonna stop--

JEFFREY TOOBIN:

You don't wanna get the Supreme Court's backup.

WENDY WEISER:

Yes, so this is not-- yeah, I-- I don't think that this pushback against Citizens United is gonna stop. I think that there's-- there's a lot of tension-- there. And one of the-- the-- I don't know, observations after reading your book that I was thinking is that this backlash might actually make whatever reform-- whatever new-- balance comes to the Supreme Court, hopefully-- if-- if I'm correct, that-- that we're poised for a change.

The Supreme Court's gonna recognize that a lot of the grounding on which it-- it's-- recent. I mean, it's all fairly recent. I mean, even if the seeds were in an early 1974 case, they didn't really come to fruition in-- in-- except in the last-- six, seven years. Decisions were rested on sort of factual misunderstandings and sort of-- not appropriate balancing of interest.

I-- I think the-- the new order will rest on much firmer ground, because we've actually experienced the precipice already. And so it'll actually be harder to chip away-- in the future, I think, because people see what-- what-- or you could start seeing what-- it looks like-- without this regulatory scheme in place.

JEFFREY TOOBIN:

Why don't we invite our audience to ask some questions and-- I-- you-- you have to speak into the-- even though we could all hear you, you need to speak into the

microphone so our friends in Washington can listen along. (MIC NOISE) Why don't you-- this gentleman on the aisle over there-- oh, I'm sorry, Steve, what did you--

STEPHEN HUBBELL:

Just quickly-- the time has come for me to distribute those three glasses of water, so I'm going to-- I'm gonna come up on the stage. Don't think that I'm in-- you know, enraged-- enraged member of the Federalist Society--

(OVERTALK)

JEFFREY TOOBIN:

--we took care of it--

STEPHEN HUBBELL:

Its happening anyway.

JEFFREY TOOBIN:

We took care-- (UNINTEL). Yes, sir?

QUESTION:

I apologize for my voice, but I'll speak slowly and I'll-- enunciate clearly. There's-- what's that called, there's a social class dimension that you haven't discussed. You go to the-- cl-- it's the upper-- the-- this discussion, there are three issues that you raised, it's a discussion among the upper middle class.

The backlash is coming from the lower 2/5ths of the labor force. Where in the-- the technology and the social networking and all this stuff-- outsourcing of the industry-- we don't-- no longer need the lower 2/5ths of the labor force. And they're slowly being pushed out of the body politic-- voter disenfranchisement and other things.

JEFFREY TOOBIN:

Okay, just move-- just ask a question, please, yeah--

QUESTION:

You don't-- you-- you don't discuss that. And the three issues that you discussed-- it's

a discussion among the upper middle class. And-- and the people, the lower working class that feels alienated-- you know-- all the-- referendums that have-- have been--

JEFFREY TOOBIN:

Okay, I-- I think we got the question--

QUESTION:

--have-- have-- gone against your issues--

DAVID COLE:

So I-- I don't think-- I-- I mean, I would-- I would push back. I-- I don't-- I certainly don't think gun rights--

JEFFREY TOOBIN:

What?

DAVID COLE:

My-- I turned it off by mistake. I certainly don't think gun rights is-- an issue of the upper middle class. It is-- it is-- the-- the strength of the N.R.A. lies in its members, its members are not-- you know-- the elite-- particularly. But they've been able to mobilize that group of people behind a particular idea in-- in-- in a very effective way.

So I don't think it's-- I-- I-- my-- my point is about the necessity for-- democratic collective action to advance and protect constitutional rights. Yeah, it-- it-- in our society-- to be sure-- those who are powerful and wealthy and elite-- have lots of advantages. But-- but democracy does create the possibility for collective action by-- by a broader-- con-- constituency. And-- and-- and-- and it's the same-- you know, it's the same-- same mechanism.

So I'm not-- I'm not r-- I'm-- I'm not refuting or-- or-- or-- or taking on that question. I'm saying that whether your-- whatever you're fighting for, it's gotta be-- through this kind of a collective action that works through civil society.

JEFFREY TOOBIN:

I-- I'm for democratic collection action in favor of stuff I agree with. In the back, all the way, the gentleman there.

QUESTION #2:

Do you think they are grooming Denny Chin to be a Supreme Court justice and could you ever see a day where possibly Barack Obama would go onto the Supreme Court after the presidency?

DAVID COLE:

Well, I don't know anything-- I don't know about Denny Chin, and I-- and Barack Obama, he's already said he doesn't want to--

JEFFREY TOOBIN:

Speaking for-- I-- I-- I-- I-- talk about a good name drop, I've asked Barack Obama that question. I interviewed him in 2014, and I actually asked him during the 2008 campaign when I thought it might be more realistic if Hillary had won to appoint him. He said he's not interested, and-- I really do believe that he's not interested.

And-- as for Denny Chin, I think Denny Chin is already in his early 60s. And-- Merrick Garland notwithstanding-- I don't think any Democratic president other than in these very unusual circumstances of the Scalia vacancy is gonna nominate anyone in their 60s-- in-- in-- in the near future. Who's got another question? (UNINTEL) sure there, yeah. Wait, wait, wait for the microphone.

QUESTION #3:

Hi. I read an article in Truthout on-- on-- Citizens United and McCutcheon, and looked-- at-- the particular verbiage-- and also how it all relates back to m-- Marbury versus Madison. And-- and-- Jefferson very, very forcefully brought up his view that Marbury versus Madison was not at all what was intended, and the court created for itself the really troubling possibility that five unelected people, acting as a faction, could turn the Constitution into anything wanted. And the idea that justices never do anything disingenuously I think is-- is a fantasy. And--

JEFFREY TOOBIN:

So-- so what's your question?

QUESTION #3:

I'm sorry.

JEFFREY TOOBIN:

I'm sorry.

QUESTION #3:

So-- getting back to the fact that we have now gotten to a point where a major candidate is saying, "This seems to be an oligarchy," and what is our road back to getting a democracy seat in the current position that-- the court has redefined the system we are in? So I'd like to ask Wendy what-- concrete actions she sees as the most promising to-- to overturn McCutcheon and Citizens United, and bring back a truly representative one man, one vote or one woman, one vote system. Thanks.

WENDY WEISER:

Well, thank you. I think that we have-- a huge number of challenges to our democracy, many of which are directly attributable to five votes on the Supreme Court. And the mess that we're in now with respect to money and politics is directly attributable to a series of about six or seven five to four decisions-- that really transformed the nature of politics.

I-- I think we-- we-- we are entering our first-- presidential election in 50 years without the protections of the Voting Rights Act. And one of the things that can be done and that is being done is-- mobilizing against this. I mean, there's a lot of popular opposition, and there's-- to these decisions and the electoral process is another place where expressing this kind of dissatisfaction with the-- direction of the country can be felt.

And it's now-- you know, so in addition-- so we need to mobilize against it. We need to-- clearly articulate-- what's wrong and what the harms are of these actions, and then put pressure on our political leaders to do something about it and change that course. And the-- the court is one place where presidents have the power to-- reshape the law.

The-- the bully pulpit and regulations are another place. There-- even without the court changing course, there's a lot that we can do to take back our democracy. And you know, there are a lot of policies that are even permissible under the current understanding of the Constitution that could really-- improve-- and-- improve the-- what the court has undone, whether it be public financing of elections, whether it be restoring the Voting Rights Act. There are a number of bills pending on both of these in Congress. These are actions that we can take right now to take back our democracy, even if the court doesn't change course--

JEFFREY TOOBIN:

Dave, the-- the-- the gentleman raises-- sort of a profound question about the nature of the court-- the place of the court in-- in American life. It is the most counter-majoritarian, counter democratic institution. They-- they are unanswerable to-- they have no accountability. They serve for life. Yet, you assert that they are subject to democratic pressures anyway. In--

DAVID COLE:

Right, right. And I-- and I-- and that's-- that's-- that's the sense in which I think this is a good story, right? Because it would be, as I said, it would be problematic if they weren't. If they were truly-- independent, if they truly had the power to impose, to subvert democracy, as you say, I mean, so Thomas Jefferson said he saw that-- that the court had the power to subvert democracy, five justices.

We've now had 240 years. That court has not subverted democracy. You know, it's-- it's undermined the ability of-- of some-- some efforts to limit-- money in-- in-- in-- in campaigns, and-- and-- and it's-- it's-- it's struck down part of the Voting Rights Act because it was-- out of-- out of sync with where we had come. But it-- but we're still a democracy. We're still electing a president. The president will still--

JEFFREY TOOBIN:

God, listen to you. Listen, Dave is like--

DAVID COLE:

No, we are. And-- and-- and-- and--

JEFFREY TOOBIN:

-- "Hey, what's the problem? Everything's great."

DAVID COLE:

--no, no, no, and-- and-- and--

WENDY WEISER:

But we can course correct it is also the message here--

(OVERTALK)

DAVID COLE:

Of course we can, but--

JEFFREY TOOBIN:

What's happened to you? My god--

DAVID COLE:

--but the way-- the way-- the way that we correct is through-- through the democratic process. And the-- and again, the point of this book is that when you look at how constitutional law develops, it is not imposed top down from above by five people who happen to wear robes and all agree. It is built from the bottom up by us, by the people, engaged with the system--

JEFFREY TOOBIN:

Judge-- I-- one-- one second, the gentleman in the back, and then I'll get you. I promise, I don't mean to be (UNINTEL).

QUESTION #4:

Okay, I-- I do civil rights laws-- lawyer here in New York. And from the trenches, you know, the Supreme Court takes what, 70 or 80 cases a year. But I'm faced with U.S. District Courts and the Second Circuit, who routinely like to throw out-- s-- civil liberties cases on, "You're not right," or, "Your-- or it's moot," or both. Or both. I've had a case where it was both moot and not right, or standing or judicial immunity. All these types of things.

So I guess my question would be, with the Supreme Court taking so few cases, it seems to me the people's right to petition government and the judiciary's role in-- in keeping government accountable is being diminished by the federal courts, in my view, being too conservative and too quick to throw out and not address all sorts of cases. So I was wondering if you'd have-- could express a view on my view, that the federal courts should be more involved in taking more cases, and-- and dealing with this sort of civil (UNINTEL)--

DAVID COLE:

Yeah, well, I-- I th-- yeah, I-- I think there is-- I think there's an access to justice problem-- of-- which has many elements, one of which is a set of decisions that have made it very difficult for people to-- bring legitimate grievances to court. And they include the-- the-- the law-- laws on arbitration, they include the laws on qualified immunity-- and sovereign immunity. They include laws on standing-- and the like.

How's that gonna change? By people organizing around the principle of access to justice. And, you know, to-- to some extent they have. It hasn't been as sort of sexy a topic really as-- some of these others have been. But-- but if it's gonna change, that's w-- that's why it will change.

JEFFREY TOOBIN:

And this gentleman here--

WENDY WEISER:

And-- and that too is the product of organizing--

JEFFREY TOOBIN:

--oh, I'm sorry.

WENDY WEISER:

--on the other side. I mean, that-- that-- the reason why you're faced with that doctrine and that firewall when you get into court is because of-- strong organizing, probably a little bit more elite organizing-- on the other-- on the side of-- that disagrees with you.

JEFFREY TOOBIN:

Just gentleman here, let-- let-- just wait for the microphone.

QUESTION #5:

Dave-- is this on?

JEFFREY TOOBIN:

It's on, yeah.

QUESTION #5:

Hello?

JEFFREY TOOBIN:

Yeah.

QUESTION #5:

Dave, you say state forums, state forums is your proposal to the citizens and d-- in our democratic society to have their v-- voice heard. Now, here's the question: How are these state forums going to go up against ALEC, the American Legislative Council (SIC) that's funded by the Kochs?

DAVID COLE:

Yeah, so--

QUESTION #5:

I mean, the Kochs have their lobbyists writing the laws.

DAVID COLE:

That's right. And they're-- they're engaged in state for-- they're engaged in law development at the state level, that we have to do the same thing. If we care about-- about these sorts of issues, I-- I think ALEC is a great example. I mean, ALEC worked with the N.R.A. to-- develop model laws, pass them first in the states that were most-- sympathetic, and then-- expand them to the point where they can jump the tracks to the federal for-- forum.

It's-- it's not-- this is not-- a recipe for progressive reform. It's-- it's a rec-- it's-- it's an argument about how law changes. And that you-- you-- when the law is against you in one forum, you need to find alternative forums. If the law is against you on federal constitutional law, you either have to go to the legislature, the federal legislature, the executive branch, regulatory action.

If you can't go there, then you go to the states. And the-- I think one of the nice

things about the states is that there are, you know, there's gonna be some states who are gonna be on your side. And you-- so you-- you have a place to start. And then you can build momentum, and that's-- that's--

JEFFREY TOOBIN:

Okay, c-- let me just add-- I mean, I-- follow up on your question, and you can continue. I mean, I think one of the-- the-- the idea behind this question perhaps is how much of your idea behind this book is dependent on something like a fair fight? You know what I mean? Something like, you know, I-- where both sides get to-- to put their ideas forward. And this gentleman is saying, well, it's not a fair fight, so--

DAVID COLE:

I guess I don't understand why it's not a fair fight. ALEC exists, it's a conservative organization, it is devoted to-- to-- reforms-- in a conservative direction at the state level. Lambda Legal-- GLAAD-- Freedom to Marry, were liberal organizations devoted to developing liberal-- constitutional conceptions at the state level.

It's-- it's an open field. We can all engage in it. And, you know, just-- and-- and where we see-- if you're liberal and you see-- conservatives engaging in this action s-- as the N.R.A. did-- you-- one thing you don't do is sort of sit back or focus on Washington. You have to go and fight where the f-- where the fight is.

And so one of the reasons the N.R.A. was so successful was that the gun control organizations-- Brady-- and the like, were focused in Washington. They didn't-- they-- they left the field un-- basically they-- they didn't fight at the state level. Now, Bloomberg is trying to change that with his organization, and I think that's a good-- development.

But-- but my-- the-- the point is, it is-- a very-- it's-- it's an opportunity. The states are an opportunity for those who are seeking to-- to-- to move for change. And it's been that way forever. And if you look at Prohibition, if you look at-- women's suffrage, these things were first advanced at the state level by people picking their states wisely, m-- and then going state to state and building momentum together.

QUESTION #5:

Yeah, but they weren't a Koch Brothers-financed ALEC--

(OVERTALK)

DAVID COLE:

But we live in a capitalist system--

QUESTION #5:

Lobbyists writing the law. Their lobbyists tell--

DAVID COLE:

--we-- we live in a capitalist system. But we-- but we have to fight it-- in the ways that we can. And-- and that's, you know, that's just the nature of-- of the thing.

QUESTION #5:

All right, last--

(OVERTALK)

QUESTION #5:

--how-- under what constitutional right did the Supreme Court give Bush rather than Gore the presidency? Did the Constitution-- I don't think--

DAVID COLE:

It was-- it was a one-time only equal protection right. But let's-- let's--

(OVERTALK)

JEFFREY TOOBIN:

The woman-- two rows behind you there. I have a book on that, if you're interested, but we can get into that another time, you know.

QUESTION #6:

So-- so I'm-- I-- I-- I'm really addressing this to Wendy-- and to what the Brennan Center is doing. How much litigation could be based on factually showing that there can't be a firewall between a super PAC and the candidate? Sometimes I think I'm the only person who watched to the end of *Mitt*. But you see, at the end, caught on film--

JEFFREY TOOBIN:

The end of what, I'm sorry?

QUESTION #6:

Mitt, the-- the documentary, Mitt--

JEFFREY TOOBIN:

Oh, when-- are you talking about when he irons his sleeve, that one--

QUESTION #6:

At the end-- right. You know, where Karl Rove calls up and tells Mitt Romney not to concede the election. So how much, you know, is this part of-- a strategy in the Brennan Center?

WENDY WEISER:

I-- I think that it-- it's-- incredibly important and valuable to undermine the-- the-- the entire edifice of campaign finance jurisprudence rests on a series of factual assumptions, many of which, including that one, I think are-- incorrect. And they-- they can be disproved. And actually it's one of the things that we are trying to do is actually foster more scholarship and investigative journalism actually targeting those factual assumptions that we think there's already substantial evidence aren't true. Including the fact that independent spending is not really independent.

They also have an assumption that independent spending-- can not be corrupting and will not undermine people's faith in f-- the access and influence that donors get will not undermine people's faith in the fairness of their democracy. All these are sort of factual assumptions.

So I think that that is a critical part of a litigation strategy, building that factual record demonstrating that these-- that these assumptions-- that the decisions rest on aren't true. That said, I think that the effort is greatly benefitted by the-- the-- at the same time, a broad, popular mobilization and-- and public opinion that these decisions are wrong. And they're-- and they don't reflect our values.

So while-- you need both together, I think, when you're heading into the court, that understanding that something's wrong here, this doesn't accurately reflect these values that the court is expounding in our constitutional laws, our fundamental values. I-- I think put together, with that factual research, I think makes a very powerful showing.

JEFFREY TOOBIN:

Final question? Who has a final question? Yes, this woman here.

QUESTION #7:

Hi, I'm curious if you could speak to the-- if you saw any differences in the national security context. I'm thinking really about sort of the difference in constituencies, and who activates sort of your citizen-led-- momentum in-- in the kind of cases that involve foreign policy or some of the specific loopholes to-- to rights that we find in a national security setting--

DAVID COLE:

Yeah, great-- great question. So you know, and-- and the n-- the-- the third story is really different in--

JEFFREY TOOBIN:

Oh, r-- repeat the-- yeah.

DAVID COLE:

Oh, so the question is, you know, how is national security different and-- and what are the constituencies for citizen action in that context. And-- and-- and it's a great question. They are very different. And-- and-- and in some ways, it's-- it was the most challenging area of all for-- a couple of reasons.

One is you don't have the option of state forums, right, when you're talking about the president's power to wage war. It is a federal question. Massachusetts can't really say much about it. So you-- you-- you-- you lose that. Two is that most of the victims were not citizens. Most of the victims of the-- of the-- of the abuses that were undertaken were foreign nationals. And so you didn't have a self-interested-- body of constituency-- of citizen constituents, particularly-- to-- to-- activate.

So how did they-- you know, how-- how did groups-- engage? Well, one of the things they did was they recognized that, you know, there are no American citizens at Guantanamo, but there are citizens of 42 different nations at Guantanamo. And they are citizens somewhere. And in those places that they are citizens, there will be concern. And so I-- feature Clive Stafford Smith, who's a lawyer with-- Reprieve, which-- is in-- located in London, not here.

Which-- represented 85 people at Guantanamo. They filed habeas petitions on behalf of all their clients, but they didn't get a single person out through a habeas petition. But what Clive also did was he took, for every case, he went to the country from which the person was. He brought-- pulled their family together, held the press conference, raised public awareness about how their people were being abused by us. That put pressure on their government-- which then, oftentimes, put pressure on our government.

And there's-- a particularly powerful story, I think, of the way that public opinion around the British detainees for-- caused Tony Blair to reverse his position, which was originally, "I'm 100% behind George Bush, Guantanamo's a great place, I have no concern about the British detainees there," to, "I demand that they be returned."

And-- and when he switched, Bush released the British detainees. And as soon as the British detainees were released, this was before the Supreme Court even heard its first argument on the Guantanamo case-- that-- they told their stories about what happened there and about the torture that they had-- suffered. And when the cases were-- the first case was heard-- on-- Guantanamo case in the Supreme Court-- two of the justices asked about torture, even though the cases were not about torture. Why? Because those stories coming out of Britain-- had made their way across the pond, and b-- in-- informed the-- the concern of the court. And Paul Clement r-- arguing for the government said, "Don't worry, the United States doesn't torture." And that night CBS--

JEFFREY TOOBIN:

That night. That night--

DAVID COLE:

--yeah, CBS *60 Minutes* published the Abu Ghraib photos, which were remarkably similar to the accounts that the Guantanamo detainees had given in advance of these pictures of how they were-- how-- how they were treated. And so-- so-- there, one of the principle-- avenues for engagement was foreign citizens, rather than, you know, state-- states-- and-- and U.S. citizens.

And you know, you might say, "Well, that's problematic, our-- our Constitution should be driven by our views, not by their views." But you know, I-- I think we're the-- we should be the last-- the last to object to-- others calling into question our human rights record. After all, our State Department issues a report on every other nation's human rights records-- in order to try to change their behavior.

And one of the things that I think is hopeful, one of the things that makes the War on Terror different from World War II is that there is a human rights-- rhetoric. There's a human rights-- institutional-- network that can-- that can speak to these issues and organize-- transnationally to bring pressure to bear on a country that is-- as ours was, violating the rights of others.

JEFFREY TOOBIN:

Two points. One, Dave, Professor Cole, will be signing his book outside. So please buy multiple copies. And second, join me in thanking Dave and Wendy for coming.
(APPLAUSE)

* * *END OF TRANSCRIPT* * *