

TRANSCRIPT

"CIVIL SOCIETY AND HUMAN RIGHTS IN THE UNITED STATES"

A Conversation With David Cole

Moderator: Kenneth H. Zimmerman

ANNOUNCER:

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KENNETH H. ZIMMERMAN:

I'm Ken Zimmerman. I'm the director of U.S. programs and-- glad to be able to serve as our moderator-- here today. So-- I'm gonna turn it over to David momentarily. I don't think he needs elaborate introduction even though I did just wanna say two quick things about the topic that-- as far as Justice Fellowship-- is devoted to and-- and frankly-- the topic of his brown bag as well. I think the set of issues around-- how rights and constitutionalism get advanced-- through various movements is actually something incredibly important for OSF as a whole and certainly in the course of my own work and what U.S. programs is thinking about equally significant.

I mean, at the end of the day, our goal is both to advance human rights in many significant respects-- and thinking about what actually matters-- is at the root of what David's doing, focused on the U.S., but I think it's got international dimensions as well.

You know, in my own work, both inside government as a civil rights lawyer in my initial days but also working in a political-- environment, whether it was to abolish the death penalty or to-- enact legislation to curb predatory lending practices, this is the issue that keeps coming up over and over again.

And I think the questions of how one thinks about the purpose of rights and actually how one both creates or-- enforces those rights but also ensures that it's not simply--

what appears on paper but is translated into real people's lives is at the-- essence of what David is studying and I can't think of anybody better-- to be doing that. J I suspect most of you know David is a Georgetown law professor-- the legal editor for *The Nation*? What--

DAVID COLE:

Legal affairs correspondent.

KENNETH H. ZIMMERMAN:

Legal affairs correspondent?

DAVID COLE:

Yeah.

KENNETH H. ZIMMERMAN:

For *The Nation*-- I've known David-- for a long time and-- I have no idea if it's appropriate to say but also it's nice that his wife has just been-- nominated for the DC Court of Appeals-- a wonderful legal scholar and activist in her own right as well. So with that, David--

(OVERTALK)

DAVID COLE:

Thanks, Ken. So-- I'm immensely grateful to the Open Society Foundations for-- supporting this-- this project which is-- still very much un-- underway-- because I keep getting distracted by-- the news-- all of which is relevant to the project in-- in one way or another.

So this comes-- and part of this comes out of my experience teaching law for-- 20 some years and-- feeling a little frustrated with-- scope of the debate within law, the legal academy about constitutional law. And-- the-- the-- and so this is really an attempt to sort of-- give a fuller account of how constitutionalism actually works in-- in a constitutional-- democracy.

The standard accounts that you get in law school-- are that constitutional law is something that judges do. So therefore when you teach constitutional law, you teach opinions that judges have written. You debate largely-- about how judges should interpret the Constitution.

What are the appropriate sources? What are the appropriate methods and the like for-- interpreting-- the Constitution. Should we have originalism-- or should we have some concept of-- reasonable elaboration and a living Constitution? That standard account claims constitutional law is distinct from politics, must be distinct from politics.

The point of constitutionalism is to be counter-majoritarian, super majoritarian, in order to defend the rights of minorities and people who are unable to-- get their-- interests protected through the ordinary political process. At least that's one central purpose of constitutions.

And-- and therefore courts are critical because-- they are-- not responsive to the political majority. The standard response to this standard account in the law, in the legal academy-- comes from-- sort of legal realism and critical legal studies-- and critical race studies and various-- left incarnations of the same, I think, ultimate criticism which is that constitutional law is not distinct from politics ultimately-- just politics.

The Constitution is open-ended and indeterminate-- and we should be-- skeptical about the role that judges play-- given that it's open-ended and indeterminate. So some-- like my colleague-- Mike Seidman, have asked, "Why should we be bound by a constitution at all? What purpose does a constitution serve in terms of answering the kinds of hard questions that face us as a society today? Why should we be bound by anything that-- people agreed to 200 years ago?"

Others argue that we should take the Constitution away from the courts and we should empower the people in some way to-- override constitutional decisions-- out in the light. I-- I-- I think all of these accounts are-- partial-- to some degree, misleading and-- don't really give a full account of what-- what goes on.

Yes, judges interpret the Constitution. That's their-- role. But they are deeply affected by forces in-- in society. They more often follow and consolidate changes that have-- developed in society, then lead in terms of-- pushing change. So-- *Brown versus Board of Education* overturns *Plessy versus Ferguson*-- but only after society has-- developed in a number of-- respects that makes that possible.

Lawrence versus Texas, the Supreme Court overturns *Hardwick versus Bowers* and says, "Sodomy statutes are unconstitutional," but only after there had been significant-- substantial development in the-- legal culture and landscape of the states and in the popular culture around-- homosexuality and-- and-- and-- and privacy. Barry Friedman at-- at NYU has-- has-- written-- influential book that shows that courts very rarely get very far ahead of public opinion.

So yes, judges interpret the Constitution but their interpretations are very much reflected-- affected by-- the-- the legal and-- and-- and-- and political culture. Constitutional law is not-- is in some sense distinct from politics. I like to think of it more as a-- as another level of politics rather than as something that is distinct from politics.

To change the Constitution, you need to-- and the case studies I develop illustrate

this, you need to-- engage in-- politics. But it's-- it's not the politics of momentary majorities; it's the politics of changing fundamental understandings over a sustained-- a sustained period of time.

And I think constitutional law is not ultimately reducible to politics-- can't be left to the people, is not entirely indeterminate as-- as-- some of the critics on the left-- maintain. I think it is critically important to maintain-- a distinction between constitutionalism and-- and-- and-- and politics precisely because I-- I think that constitutional-- constitutional law does provide an opportunity for people who are losers in the political process to assert their claims, have their claims heard and respected and in-- in-- in time-- are honored in-- in-- in a number of instances.

I don't think you can sort of take the Constitution away from the courts-- in part because I think the Constitution is not just a restriction on government, it's a restriction on us. It's a restriction on the people. It's designed to protect and-- us from our own instincts.

So we protect free speech because we know that we'll be inclined to suppress those that we find offensive. We-- pr-- we require equal protection because we know that the easiest way to-- to-- deal with hard tradeoffs is to single out some particular group and-- and-- and have them-- bear the costs.

We protect due process and the rights of criminal defendants because we know that when people are charged with doing wrong, the society is gonna be-- impatient with-- getting what they call, "justice," and-- and with-- technicalities getting in the way of-- of-- of justice.

So-- so what I-- what-- what I wanna do in this project is to really move beyond those debates and to s-- and to argue that they and the legal academy and the way we talk about constitutional law have-- largely ignored-- the-- the important role that civil society organizations play in-- in a robust constitutional framework in making the Constitution-- meaningful. And-- and-- and-- and so the claim is basically that in-- in a vibrant constitutional democracy, behind every right and behind every judicial-- recognition of a right-- is a-- is some set of people who have come together-- in-- in associations-- organized by their commitment to those-- to that right or those rights and then have engaged-- in a range of-- strategic action to-- to get the right realize.

You know, the-- the classic example, of course, is the NAACP, the defense fund and-- and-- and racial equality and the end of segregation, in particular, the women's groups-- and the rec-- court's recognition of gender discrimination. Labor unions played a critical role in the initial development of rights of free speech-- as did and continue-- to do the-- the-- the organized-- press.

Criminal defense attorneys-- and their associations have played an important role in the criminal defendant's rights and maybe the vulnerability of criminal defendant's rights is, in part, because we don't have the same kind of vibrant civil society-- there that we have with respect to certain other-- oth-- other areas.

And-- and-- and so the-- the claim is, you know, we talk in-- in constitutional law about living constitutionalism-- but that's a metaphor. That's a notion that the

Constitution is like a plant. It evolves over time. But it's thought of evolving through-- judicial interpretation.

I think that the-- the truly lived Constitution is the organizations that define themselves by constitutional commitments and then engage in the kind of constitutional politics to-- achieve-- achieve those ends. And-- and I think tho-- that-- the presence of those institutions in a democracy is critical to the rights-- having meaning off of the page. Lots of countries have constitutions with rights on the page but to the extent that those rights are meaningful-- it-- it's-- it's rare that they're meaningful without a c-- a robust-- civil society. The separation of powers-- formal checks and balances are critical to constitutionalism but they're not sufficient to constitutionalism.

So that's the sort of general-- claim in-- in the project on-- on three case studies to look at how this operates. They're all situations where individuals committed to a certain set of rights or a certain constitutional vision, have faced challenging-- circumstances, have organized and worked systematically and strategically to achieve constitutional change.

The three-- case studies are civil liberties and human rights groups responding to-- the Bush war on terror and-- now the Obama war on terror after 9/11-- one. Two-- gay rights groups and-- struggle for marriage equality and three-- gun rights groups and the individual right to bear arms.

So these are-- situations in which-- individuals-- really sought to change the status quo. The status quo on civil liberties in wartime is that they are ignored. And the-- the-- the effort of civil liberties groups and-- and human rights groups in the wake of 9/11 was to-- and to change-- paradigm and to actually-- insist upon their en-- enforcement.

And-- and with respect to gay rights and gun rights-- the-- the-- the challenge they faced was that the court-- the courts didn't recognize their-- their right. Marriage equality was-- the notion of same sex marriage was not-- in-- not even taken seriously-- until-- the-- the Baehr case in-- in-- in Hawaii.

And the individual right to bear arms was rejected by the Supreme Court-- in the 1930s and was declared by Warren-- Warren Berger in the 1970s to be the greatest fraud ever perpetrated on the American people. Yet I think today, looking back, all of these groups have-- have achieved some significant success.

Civil liberties and human rights, I think, despite the odds and in contravention of-- history, were able-- to-- force/persuade-- the Bush administration to moderate many of its most extreme-- measures, not to succeed in terms of achieving their vision entirely but-- yeah, but in-- but in-- in ways that I think would have been surpris-- would have been surprising that people predicted them at the-- on the day-- on 9/12 (UNINTEL)

Same sex marriage is not yet constitutionally protected but-- tremendous-- progress has been made in the last-- really decade-- since-- since the-- Massachusetts Goodrich case in 2003 and I think will be a constitutionally protected right in our

lifetime. And of course, the individual right to bear arms has been recognized by the Supreme Court in 2008, extended to the states in 2010-- and is a tremendously powerful political force irrespective of its usual enforcement as illustrated by the failure in the wake of Newtown-- to even-- enact-- universal-- or not even universal-- expanded background checks for-- for guns.

So the point-- and the point obviously with the-- with-- by having the-- the NRA and the gun groups in the mix, the point is not that civil society always goes in the direction that progressives-- might like but rather the point is that this is where the action is in terms of-- how-- change occurs.

And so-- you know, I-- I-- I c-- I can tr-- I can say a little bit about each of the-- examples that I've-- looked into. What I'm doing with respect to each of them is-- you know, a lot of reading-- and a lot of-- interviews with people engaged in the-- struggle. So-- on the civil liberties and human rights side, I've talked to a lotta people, both in the groups that have sought to achieve change and in the-- Bush and Obama administration who were, you know, in positions of authority to see their-- reaction to the kinds of-- initiatives that these groups engaged in.

The-- on same sex marriage, I've talked to a lotta the people who'd been involved in both-- litigation of some of the-- key cases around the country but also-- and equally importantly in the referenda-- that-- virtually (LAUGH) always follow upon the-- the litigation.

And on the gun rights-- situation, I have yet to talk to the gun rights-- groups but I-- but I've done a lot of r-- reading-- about them and I have some-- I have some good inroads to talk to. So that's-- that's sort of the-- the big-- biggest parts still to be-- to be done. So just a couple of-- I'll-- I'll just make a couple of general points about this. One is that-- that while courts are-- are a central feature of the story, being-- in constitutionalism, in each of these stories, they're not the-- only-- part of the story by any means.

In ea-- in-- in-- in each-- in each setting, there's-- there's-- there's con-- constitutional forces in play that are far beyond the formal decisions of-- of courts. So for example-- on the war on terror, Bush-- was ultimately compelled to pull back on torture, on the black sites-- on rendition-- on Guantanamo-- on the claim of-- of un-- unvarnished-- unchecked-- executive power.

And-- and in-- on each-- and again not as far as many of us would have liked him to pull back but further than he would have liked to pull back, certainly further than Dick Cheney, who really called the shots, wanted to pull back. And so-- and-- and so you have to sort of explain-- you have to really account for how that happened. And I think-- you can't s-- you-- you can't attribute it to the action of the courts or of Congress, of the formal checks on the President nor can you attribute it to the political, you know-- political forces generally, majoritarian political forces-- after all, we re-elected the man in 2004 after he had-- all of this stuff had-- or most of this stuff had been-- had been disclosed.

And yet in the second term in particular-- there was some significant retreats. And I-

- try to show how this worked. And one of the th-- one of the key things I think that--
- that civil society organizations did was to look outside of (MUSIC)-- sorry. Look--
(OFF-MIC CONVERSATION)

DAVID COLE:

To look-- s-- so-- so you know, you're-- where-- where were they gonna go? Where were these groups gonna go, right? And that's-- well, any group that's facing-- a status quo that they're not happy with has to ask that question, "Where do we go?" So-- with the civil liberties and human rights groups, they couldn't really go to the executive branch and it wasn't likely to be very responsive. Congress was, you know, throwing power at the President-- whenever it-- it possibly could.

And the courts historically are quite-- reticent to act in significant ways. And here, I think the courts did act in s-- in significant ways but in limited significant ways. So w-- and ways that didn't actually, for example, require a single person to be released from Guantanamo and yet 500-- or more than 500 people were released by President Bush from Guantanamo. So how did that happen? Why did that happen? And I think-- one of the strate-- strategies that-- worked was to-- reach out to foreign bodies-- and to-- engage foreign governments to bring pressure to bear diplomatically on the-- Bush administration.

Because after all, the victims of most of our initiatives were foreigners. And when the victims are foreigners, Americans generally don't care. But those foreigners are citizens of some other country. And so if you-- reach out to that country, you can get a lot of traction.

So Maher Arar, who I represented, a Canadian who was sent to Syria to be tortured by the-- by the immigration service-- you know, ar-- not exactly a household name here in the United States but in Canada-- a major hero. He was named *Time's* Person of the-- of-- of the Year.

Clive Stafford Smith, that reprieve represented some-- 50-- Guantanamo detainees virtually all of whom he was successful in getting-- released-- not by virtue of any court order but instead by going to the countries where those people-- those detainees were from, hook-- hooking up with their family members, holding press conferences and then bringing pressure to bear on their countries to then turn around and bring pressure to bear on-- on the United States.

I-- I-- I see my time is limited so let me just-- let me talk BR-- briefly about the-- the gay rights and-- and the gun rights groups and then some of the similarities there. They're-- the concern was the federal Constitution doesn't protect the right that we think-- it-- it should protect-- in terms of existing law.

So-- where do you go then? You can't go with foreign-- foreign governments aren't gonna have much interest in whether our country recognizes same sex marriage or our country has gun rights-- even less. And so what-- what both movements did was

go to the states and have a very concerted effort of developing their claims, their normative claims in-- states that they thought might be-- might be sympathetic, sometimes through litigation, sometimes through-- legislation.

But-- with-- with the idea of sort of developing momentum towards a kind of normative understanding of the importance of this-- this right before going to the federal government to s-- to sort of get it, you know, get the stamp of the imprimatur of the Supreme Court.

And both the gun-- the-- the gun groups and the gay rights groups were opposed to the filing of the case that-- the cases that took the initial cases that went to the Supreme Court. So there's-- the NRA tried to kill the Heller case which was the decision in 2008 that recognized the individual right to bear arms. Why? Because they didn't think they were ready to go to the Supreme Court. Somebody brought it against their will. The gay rights groups have been fighting for, you know, f-- since the '90s, stopped people from bringing lawsuits that they thought were brought in the wrong states or that made federal constitutional claims because they didn't feel that they were ready.

And-- and so they were-- u-- unanimously opposed to the f-- the Perry case-- for this-- for this very reason. So-- I-- I-- I guess I'll stop there-- and-- and-- and take-- I've-- lots more I can say about the particular strategies that each-- employs.

Oh, but let-- let me-- let me-- before I stop there, let me just say the three conclusions that I-- that I-- broad conclusions that I-- wanna draw ultimately from the-- these kinds of-- case studies and they are c-- they're-- they-- they are implications for constitutional-- theory, for constitutional law and for constitutional practice. So for constitutional theory, the-- the implication of all of this is that if we're going to understand how constitutions work-- we, in the legal academy, those who spend our time studying constitutions, need to be more attentive to the-- to the work done outside courts, the w-- the-- the strategies that are employed that create the conditions for a constitutional shift to-- to take-- place than we-- than we-- than we currently-- do.

For-- for constitutional law and constitutional doctrine, I think the implications are that if I'm right that-- a vibrant civil society is critical to maintain a living Constitution, then we oughta-- then we oughta be particularly-- adamant about protecting those rights that make civil society act-- activity possible. So it's an argument for an-- further argument for-- protecting-- the freedom of speech and freedom of association, in particular. It's not just it lets people speak out. It's not the-- just that it gives us-- information. It's not just it allows the press but it creates the possibility for civil society to act.

And even non-constitutional-- you know, implications might come from this. So for example, ta-- the-- the 5013-C tax incentives for charitable donations, that's-- that's critical to a vibrant democracy because it allows for a kind of neutral-- substantiation of a vibrant-- civil society.

And then third-- the third implication for constitutional practice-- is-- is really about

the importance of citizens engaging in this kind of work if they-- wanna live in a vibrant constitutional-- order. That you can't sit back and watch and-- leave it to, you know, the courts or leave it to lawyers.

But you have to-- you-- you-- you have to get engaged. And then if you do get engaged, I think the-- each of these stories tell-- suggest that you can-- you can actually have a significant-- impact on the way that constitutional-- on the ways that constitutional law develops and operates and so-- so--

KENNETH H. ZIMMERMAN:

Great. We're gonna make sure we left enough time-- for questions and discussion and there's plenty there. I am gonna take, you know-- the-- the-- the chair as moderator and actually ask a question that allows you to elaborate a little bit-- but also offers-- you know, hopefully a few flies in the ointment that are of interest.

Generally I'd love to ask you to talk more about your conception of constitutionalism and what you mean by-- by, "civil society," for a couple of reasons. I mean, there's a question-- as you talk about each of these movements, I'm struck by how often not only were you not talking about court cases but frankly you weren't talking about constitutional change in many instances so that-- much of what you discussed in terms of the movements you're tracking are uses of whether it is regulatory authority or statutory authority to advance some of it.

And so the question of what is unique in terms of the constitutional dimensions versus the other ways in which groups are seeking to advance-- social policy objective that short of constitutionalism but nonetheless realizes their aims, sort of raises the question as-- what is unique about the constitutional dimension here and therefore how do your conclusions-- are they unique to the constitutionalism or are they simply part of what we should be thinking about in terms of social policy?

And then second, in terms of civil society, you made a comment early on that-- you know, a potential observation in terms of the rights of criminal defendants, for example, that it may be a weakening of the civil society component that has led to the diminishment of some of the constitutional rights that-- that you've noted. And I'm curious about pressing on that.

I mean, as you and I talked about in advance, one of the things that's striking about the three examples you use is how different the civil society-- groups are that are active there. I mean, the NRA, some would argue, is certainly a sophisticated legal actor but the idea that they've got how many millions of members?

DAVID COLE:

Four-- four million.

KENNETH H. ZIMMERMAN:

Four millions members, a \$300 million war chest makes them effective in terms of advancing their constitutional or legal vision because of their ability to engage in a political orientation that is probably different than at least the civil rights and liberties groups post-9/11.

And therefore as one thinks about-- civil society dimensions, does that have implications about what we're thinking about civil society groups are, how we define them. Certainly the private sector has become far more sophisticated about knowing how to advance their own agenda in the context of the courts. So anyway, I'd love to hear-- there's a lot there but both in terms of the civil society and the constitutionalism, you know, to go a little bit more in depth.

DAVID COLE:

Yeah. Well-- I mean, I-- I-- it is-- is-- I think it-- it is not easy to draw a-- sharp line between constitutionalism and politics in this kinda-- or-- but I think there are features of-- that-- (HORN HONKS) that are different about the-- the claims that are made-- from sort of ordinary social policies is just the best thing that we should do at the moment-- because majority of people think it is.

And-- and so, you know, one is-- is-- is-- is a kind of a rights-- rights consciousness. I mean, I think that one of the-- one of the-- the things that the gun groups have been very successful at is instilling in people a very powerful sense like this is-- it's not just a gun I have; it is a right to have the gun that I have.

And you're not just taking away my gun; you're taking away my right. And-- that is a right which is infused with-- conceptions about-- about independence, about self-reliance, about-- checks on tyranny-- that I think gives it a kind of intensity-- in the political-- arena that-- and are a policy argument, you know?

Talk-- is-- is-- is distinct from a policy argument and I think is predicated on some notion that this is-- there's something fundamental about this. You know, similarly with-- with the-- with-- marriage equality-- I mean, the-- the-- the-- the claim is a claim.

It's-- it's-- in some sense, it's just another-- assertion of-- it's another instance of groups asserting accor-- equality of the-- their equality to the rest of us-- as African-Americans did, as women did, as-- aliens have too-- less-- successful (UNINTEL)

And so in-- in that sense, it's-- you know, but it-- but it's a claim about-- it's not just it would be a good thing for society to have-- to recognize same sex marriages or we should do it because now polls show that it has over 50% support.

It's-- it's-- it's a claim about-- it's a claim about-- who we are as-- as a society-- that is articulated in sort of fundamental values which can be-- and is articulated in courts as having a constitutional force that can override-- political decisions of the majority.

But in-- in that example, because the-- most of it has been done at the state level and because many states, California being most obvious, have-- it's relatively easier to respond politically to a constitutional decision there, the distinction between politics and the cons-- and constitutionalism is very, you know, very mixed.

And the-- and the s-- and so the str-- the strategy of constitutional thinking by the people who are in the movement has to be very cognizant of the kind of political language. And I think in some way-- ways-- in a way in-- in the U.K., the fact that when bring in human rights claim-- in the-- before the courts and ultimately to the law lords, the law lord-- well, I think now it's called the, "Supreme Court."

But the Supreme Court doesn't have the power to declare an act of Parliament invalid because it's inconsistent with the ECS charter. They have the power to declare that it's-- that the-- that the law is inconsistent or, "incompatible's," the term-- incompatible with-- with-- with the-- the ECHR. And then it's-- but the law's still there and then it's Parliament's dec-- choice to respond.

And-- and what-- and-- and many people in the U.K. think that's a good thing because it means that there's a kind of political engagement with the right that has to follow upon judicial decision. And I see-- you know, that-- that, you see very much (LAUGH) in the-- in the-- in the-- in the gay marriage context and I think you also see it in the way-- in the gun context in the way that the right-- the-- the-- the-- the conception of the right that-- has gone beyo-- far beyond what the courts-- have been willing to recognize.

So nothing about universal background checks would even conceivably be struck down as unconstitutional were it enacted and-- and let it go to the court given what the court has said in-- in Heller. But nonetheless, that rights consciousness and I think in the context of-- the-- the civil rights and-- civil liberties and human rights groups, there, the consciousness was really a constitutional consciousness about rule of law values.

And-- and-- it was the appeal-- I think the-- the-- one of the critical strategic victories there was the fra-- the successful framing of the issue as not security versus liberty but rule of law versus lawlessness. And to some extent, Bush, you know, walked into that because of the kinds of claims that he was making.

But I think also, there was a real-- concerted effort on the part of-- of the-- of those making these claims to-- to-- to create that frame. And then that frame is, I think, what brought in many sort of validators who see these as-- as-- as aligned with the rule of law like the ABA or like the members of Parliament from the U.K. or-- the European Parliament-- and ultimately the Supreme Court because if the question before the Supreme Court is, "Are you gonna be on the side of lawlessness or the rule of law?" and it's an easy-- you know, the answer should-- is easy. Whereas if the question was, "Are you on the side of liberty versus security?" not the same answer, right? So-- that's a longwinded answer. Uns--

KENNETH H. ZIMMERMAN:

Well, it was a long-- it was a longwinded question so that's entirely--
(OVERTALK)

DAVID COLE:

Yeah. And-- and civil society groups, I don't-- you know, I don't know. I mean, I-- I am troubled by the way in which civil society-- you know, the Chamber of Commerce is civil society. You know, civil society doesn't always represent the weak or the vulnerable.

There's all kinds of-- you know, it's non-governmental institutions-- so I don't-- you know, I don't have a claim-- I don't wanna claim, "These are the true civil society groups. These are false civil-- civil society groups." I just wanna claim that this is the-- the-- the institutions play an in-- incredibly important role.

And-- you know, and this is one-- one-- one-- one last point I'm just-- and in-- in terms of the way the institutions play incre-- incredibly important role. After 9/11, right, all the forces in society were directed towards security, the executive branch, Congress, the courts, the people, polls, et cetera.

All were pressed on security, right? But not the ACLU and not the Center for Constitutional Rights, not Human Rights Watch. They were some-- the only-- sort of forces of resistance-- but what I find interesting is that they get rewarded for that resistance, right?

You-- they're-- they're counter the-- the majority so you could think, well, because they're counter majority, they're gonna get-- they're gonna get demonized and they're gonna get marginalized. But in fact, the ACLU's budget tripled in, you know, in the course and not-- not only because of OSF, right? Because of (LAUGHTER) a lot of people who saw--

KENNETH H. ZIMMERMAN:

But partially because the--
(OVERTALK)

DAVID COLE:

Yes par-- oh, absolutely. Partially because (LAUGHTER OVER WORDS) always thrive on adversity.

KENNETH H. ZIMMERMAN:

Yeah. Exactly. Exactly. And that-- and that's-- but that's-- that's-- that seems to me to be a kind of built in-- important built in institutional check that these group-- you know, the nation--

MALE VOICE:

My tenure at the ACLU, we boomed during the Nixon years. And when Carter was elected--

KENNETH H. ZIMMERMAN:

Yeah. Exactly.

MALE VOICE:

We went down-- dramatically.

KENNETH H. ZIMMERMAN:

Right. And-- and in some sense, that's-- you know, in the-- in the same sense that, you know, the separation of powers in government is, you know, self-interest versus self-interest. The self-interest of these institutions is to resist in these periods of times because they're defined by these commitments and then people who have those commitments see that those commitments are more important than the leader they get.

So let's-- let's open it up. I just-- I just wanna make two quick points as you're thinkin' about your conclusions that really go to this. And the first of a civil society, I mean, certainly what we're grappling with in U.S. programs and I think is a function, is-- what the definition of NGOs are-- I mean, certainly as we see the blending of C4 to C3 groups, as we a more effective use by private interests of the NGO mantle, you know, a conclusion that suggests NGOs are increasingly important in constitutionalism I think has to grapple with a reality with what we mean by NGOs are actually a way more complicated dynamic than previously ex-- and your insights as to whether there's always to call out legitimate ones or really j-- what that means for the broader conclusion you have would be really valuable.

And then the-- the second point I wanted to make w-- or-- that I think fits into this, you know, when I raised the issue about how do you define constitu-- it wasn't actually to-- to counter poise it with politics, it was other ways in which rights can be advanced.

And so I mean, especially when we look at state constitutional amendments that are largely majoritarian-- it seems that actually what's relevant is how central or how easy it is to (LAUGH) amend the legal apparatus in which, you know-- as we saw-- in the gun context, you know, legislation at the federal level can be far more difficult to change than state constitutional amendments.

And if that's the case, what does that mean about constitutionalism as the place in which longstanding values get recognized? Again I don't have an easy answer but that was really what was the-- the genesis. So with that-- I would love to open it up. (UNINTEL) nobody better to start.

MALE VOICE:

First a comment on-- your reference to NGOs and-- and civil society. Now there-- there is a point of view-- Mahmood Mamdani embodies this-- that NGOs are, in fact, the enemy of civil society. He claims that in Africa-- NGOs-- have-- destroyed the-- the development of-- of the civil society. But--

KENNETH H. ZIMMERMAN:

Outsider NGOs or insider NGOs?

MALE VOICE:

No, insider NGOs but often with outside support. And-- but-- that-- that wasn't the-- the question-- I wanted to-- get out. I-- I would really differentiate the-- the gun rights issue from the other issues you discussed in-- in the following way.

When-- one is dealing with something like the-- the gay rights-- effort to-- promote-- marriage equality-- it is-- at the outset certainly-- a minority effort and-- a minority effort to the degree that it uses the courts-- it is a part engaged-- in a political strategy-- to use-- the-- the judicial process as a means of gaining further legitimacy and-- helping it-- to-- acquire-- a higher level of support, not necessarily majority support, but a more significant-- level of support.

I think that's also true when you discuss the-- the civil liberties effort-- with respect to the-- the war on terror. And I think that a lot of the way in which civil society has used constitutionalism is to put issues on the-- the public agenda.

They may not ultimately-- achieve their goals through the litigation process-- per se. Ultimately it may require the political process more directly-- to-- achieve their goals. But it's part of this process of legitimizing-- the cause with which they are concerned in the first instance.

When you're dealing with the-- the gun rights effort, you're dealing with-- a movement-- that has-- great strength-- in the political process-- before it goes-- to

the courts. But it almost always-- prevails-- in-- the political process. There were a few states-- where it may not-- prevail. But in most states and at the-- the national level-- it tends to prevail-- politically.

And so the-- the traditional p-- process-- doesn't really-- serve-- the-- the same purpose. It merely becomes a kind of ratification of-- what is already the case-- in-- the political process. And to me, the significant thing about constitutionalism and-- civil society is the opportunity that constitutionalism provides to-- civil society representing minority causes-- to get a greater degree of-- public support and political support for its causes and thereby-- to be able to-- to shift the-- the politics-- in the-- the country.

KENNETH H. ZIMMERMAN:

Yeah. I-- I-- I agree with that. I mean, I think-- absolutely, the-- one of the values of constitutionalism and of court-centered constitutionalism is that, you know, anybody can go in and bring their claim and the judge has to hear that claim, has to decide the issue and has to give reasons. That's not true of the political process, right? So if-- if the Baehrs had gone to the Hawaii legislature and said, "We wanna get married. We think we have the right to get married," the legislature would just ignore them and would be perfectly legitimate in ignore-- ignoring them.

There's no political ground swell for this. There's no-- we don't have to give you any reasons. We just-- you know, it's not-- whereas you-- it's-- so-- so-- so-- so you can always go into courts and you can always make your claim. And then I think for-- for same sex marriage-- being able to go into court-- it also turns out that on the merits there, the arguments are very strong in their favor and what is strongly against them is more tradition and prejudice and-- things that are harder to justify when you have to give reasons. So the courts are a good forum.

But it also-- by-- by doing that, they ultimately normalize marriage. People see-- you know, you win a couple of these cases and people see the people get married and then it becomes, you know, "Oh, you know, they're-- they're married," and you know, the-- the sky hasn't fallen and-- and-- and get-- it has exactly that kind of legitimacy.

But ultimately, right, and if they're gonna succeed in the-- that recognition of this right, it does have to have-- it does ultimately have to gain some pretty strong political-- popular support. And that-- there-- they've achieve-- they've al-- already-- achieved that in-- in significant measure.

And then by, you know, according to Nate Silver, by 2024, even Mississippi, there'll be a majority of people who favor same sex marriage. And-- you know, I-- from the gun rights-- the gun rights perspective, I mean, any time you're bringing a constitutional claim, right, you are-- asserting a claim against a political-- a politically-- a political victory that you are on the other side of, right? That they were not able to succeed in the District of Columbia-- in challenging, you know, politically the handgun ban.

They were not able in the city of Chicago to-- you know, and-- and-- and I think if you talk to them, they'll identify all sorts of places in which they're not able to succeed politically and they then have gone to state courts. Many have gotten many-- many state con-- constitutions have sort of a kind of Second Amendment analog.

In some places they've gotten state constitutions to adopt-- (UNINTEL PHRASE) analog. So you know, we see them as-- as a very powerful political force. And I think on the national level, they certainly are. But-- but from the standpoint of their vision of what their rights should be, they know, you know, they're-- they're--

MALE VOICE:

I think there's something special about-- representing-- a cause which starts out as-- only being-- supported by a relatively meager-- narrative and gradually-- prevailing in the public-- debate or in-- in public action through a variety of strategies.

And one of the key strategies in the United States-- in particular-- is-- the strategy of constitutionalism, the strategy of-- bringing the-- the matter-- to court in that way. That's happening-- in-- in other countries today but it wasn't-- something that happened historically in other countries. I think it is-- mainly-- in imitation-- of the United States-- that that is-- it is happening in a number of other places.

MALE VOICE:

I mean, it is very interesting as we think about the three different examples, I mean, in the-- the marriage equality context, you-- I mean, the demographic shifts that are going on and frankly the financial resources that those who are supportive of those shifts have maybe another distinguishing factor between that community and the civil rights, civil liberties community in terms of how-- what resources are able to be amassed and supported there.

(OVERTALK)

MALE VOICE:

--civil liberties--

MALE VOICE:

Absolutely.

MALE VOICE:

--world is not lacking in resources. The--

(OVERTALK)

MALE VOICE:

If you combine them all together.

DAVID COLE:

Combine them all together but compared to the-- I-- I would--

(OVERTALK)

MALE VOICE:

--compared to the marriage equality in terms of the political resources-- I'm not trying to diminish the-- what it's about.

DAVID COLE:

Well, it could-- this does raise one of the things that I-- I'm struggling with in the-- in this and it is very relevant to this institution which is the role of money in all of this, you know? When you look at the marriage equality referenda, you know, a lot of it is about how much money could each side spend.

So in many-- yeah, they won in Maine in 2012 after losing in 2009 and remarkable turnaround. But they also outspent our-- the marriage equality side outspent the-- other side five to one-- five to one. And-- and-- and it just-- it-- it requires a tremendous amount of-- expenditure of (LAUGH)-- of capital to-- so-- so you know, the-- the-- the--

MALE VOICE:

No. But you know, the gay rights issue-- came into the courts-- in the-- starting in the 1960s. And at that moment-- there was no money-- available-- for those issues. Anybody--

KENNETH H. ZIMMERMAN:

And no success.

MALE VOICE:

Hmm?

KENNETH H. ZIMMERMAN:

And no success either.

MALE VOICE:

Well, but the courts nevertheless-- played-- something of a role-- in that area in helping to-- to-- legitimize the issue. For one thing, they even created-- spokespersons. You live in Washington DC. There was a fellow named Frank Tammany-- in Washington DC-- who-- began-- dealing with gay rights issues in the courts-- in the-- the 1960s.

And as a consequence of that, he became-- the best known spokesperson for gay rights-- in Washington but I think in-- in the United States. So just in identifying a spokesperson-- litigation without-- any resulting court victory-- began to have-- an impact. There are a lotta things you-- you do through litigation other than win victories. You get discovery. You identify spokespersons. You can-- unify-- a cause. It-- it isn't just what formally happens-- through the-- the result of the-- the litigation.

DAVID COLE:

No, absolutely. And that's a big part of the story of this-- of all-- of each of these claims is the litigation is, you know-- you don't-- it-- I mean, I don't think any-- I think the-- the-- the affects of all the-- of the-- four Supreme Court decisions after 9/11 that went against Bush were much broader in their kind of-- informal-- affects than the formal orders which, after all, didn't require very much at all.

So, yeah. No, I-- I-- I absolutely agree with that. But I-- but I guess my point is, you know-- like g-- if you go to my last point, you know, you can make a difference if you get engaged. If you're a citizen, you, you know, start an association, join an association. That's how constitutionalism works. That's a great story, right? You can change the Constitution if you have enough money to change the Constitution. That's not such a good story. (LAUGHTER) And I think that there's-- you know, there--

MALE VOICE:

There's some of that.

DAVID COLE:

It-- it-- it's a little bitta both going on. And you know, in some sense, you know, the money follows good ideas to some extent but not always, you know? I mean, the-- the-- the-- there's a lotta money in the-- behind the gun thing and that's not necessarily a good idea.

So I-- I'm just not, you know-- wh-- when you talk-- I mean, I was talking to a d-- one-- at one point, I was gonna do-- capital punishment and-- the right to life as well. But then I decided that life was too short. All right. Maybe those'll be the next book. (LAUGHTER) But I-- I actually am really interested in the-- in the, you know, abolition of capital punishment and (UNINTEL)

But I was talking to somebody who said, you know-- I was saying, you know, this-- it's-- it's sort of remarkable to me that you-- that in-- that the-- the capital punishment, they seem to have-- there seems to be a lotta progress in the capital punishment resistance in the last ten, 15 years, the-- just by the numbers-- and by the Supreme Court being more, you know-- attentive to claims of-- of-- of-- attorney m-- you know, misrepresentation like the-- the same bad lawyering that was ignored for years, not the Court's beginning to pay attention to it and provide (UNINTEL PHRASE)

And I was thinking, you know, "What do you-- how do you explain that?" And this person says, "Well, you know, we got a group of people, funders, together and the decided they were convinced to put a significant, you know, (UNINTEL PHRASE) of money, amounta money in for"-- you-- I don't know if you guys are a parta that. Maybe you are.

But you know, that was her (LAUGH)-- her explanation for, you know? And that-- that's not as good of a story. (LAUGHTER) So-- well, I mean, this is one in which we could talk but you know, it would be some and I think-- folks would identify the innocence project.

KENNETH H. ZIMMERMAN:

Oh, yeah.

DAVID COLE:

And the ability to reframe that issue.

KENNETH H. ZIMMERMAN:

Absolutely.

DAVID COLE:

Is about innocence-- in a way that like rule of law starts actually captivating both courts and the public in a fashion that was done, I think, in a fairly sophisticated way.

KENNETH H. ZIMMERMAN:

Let's open it up. Other-- Tim?

DAVID COLE:

Well-- on this theme then of-- influence, of money versus civil society, that sort of raises the question of Citizens United and-- does the Chamber of Commerce constitute a civil society organization? And if one of your main takeaways is the importance of safeguarding freedom of expression, freedom of association or to protect constitutional ri-- rights, what about when powers that-- such as-- businesses-- start to co-opt free-- free expression-- by be-- being able to pay for it.

DAVID COLE:

No, right. And-- and I get-- and one-- one defense of-- I think-- a good defense of the regime that Citizens United invalidated was that it was an attempt to try to-- to segregate from the political market place and the market place of ideas, the power of ideas from the-- from the power of money raised by, you know, selling microchips or something like that, right, by saying corporations can engage but corpora-- and-- and unions can engage but they have to engage by setting up a separate fund and the separate fund, people are free to donate to but it's not a treasury of the-- of the corporation.

So that-- you know, that-- that was-- you know, I think the-- the-- the best defense of that program was that it was precisely an attempt to try to keep the taint of money out of this political-- arena-- you know? But-- the-- the claim, the constitutional claim, that-- that prevailed against it-- ultimately s-- is-- I think a kind of-- a constitutionalism.

And may-- maybe this goes to Ken's, you know, original point. If you have to start-- you have to think of-- NRA. You have to think about what ki-- how you're gonna define civil society, how are you gonna-- you can't just let it become a front group for private economic power, right? And-- there may be-- there-- you know, there are dangerous ways of trying to limit private economic power but there are also ways that I think are-- that make a lot of sense. And I think the-- the-- the law struck down, it's-- this is (UNINTEL PHRASE) one that makes more sense.

DAVID COLE:

It-- I mean-- the-- in your analysis or-- well, you've been making an argument against the Citizen United-- outcome of the constitutional.

DAVID COLE:

Well, I'm not-- I-- I-- I-- I don't-- I don't know that I was gonna take up Citizens United, that whole campaign finan-- I mean, you know, but-- so I--

KENNETH H. ZIMMERMAN:

Life is short? (LAUGHTER)

DAVID COLE:

Yeah. I-- I-- I don't think-- I'm not sure that I have to-- but I probably have to advert to those concerns at least in-- in-- in addressing--

(OVERTALK)

KENNETH H. ZIMMERMAN:

Well, the interesting-- I mean, it-- when you mentioned 501C-3s as potentially being an embodiment, you know, the sets of issues, for example, around the disclosure of donors to C4s which is a very (UNINTEL) raises sort of an interesting complexity for your argument, right?

On one hand, that furthers the transparency of who's behind it. At the other time, as a freedom of association, the ability to donate without necessarily being disclosed cuts the other way and you know, I think there's a way in which I-- I can imagine not wanting to take on all the Citizens United.

But I could see as you get into your conclusions, you know, you-- your thinking as to how that plays out, to (UNINTEL PHRASE) And the group in Citizens United itself was-- was a perfectly legitimate-- it wasn't a front group. It was just-- it was just a group that didn't like Hillary Clinton. But it-- but it was a non-profit. It was a (UNINTEL PHRASE)

It-- the implications-- you know, have been very broad in terms of what-- what corporations can do. But you know, it was a non-profit corporation. Let's give a chance-- folks in DC or London wanna-- join us? We can only see one and 1/2 people in London. (LAUGHTER) So-- please--

DAVID COLE:

A few-- a few others around the table.

KENNETH H. ZIMMERMAN:

I know there are others there. I assume the other 1/2 of a person actually exists. (LAUGHTER) But-- if you'd like to jump in, we'll give you a chance since otherwise it may be difficult.

MALE VOICE:

That's probably not that directly related to the-- to the talk but it would be interesting at some point to consider the differences between this approach and the work and other countries. What is it that makes this particular approach in the U.S. so successful and unique?

And what should other countries learn from this? And what is different and maybe works differently in other countries? I'm just thinking that if there was a similar research in France and India and Kenya, that would be something fantastic, comparing and contrasting.

DAVID COLE:

Yeah. I had originally-- thought about doing a comparative look at the U.S.-- taking one issue and doing the U.S. and two other countries-- to sort of-- try to do a comparative analysis. I-- I ultimately concluded that my-- expertise is-- is more-- is here or at least my-- my-- I have some ability to claim expertise with respect to United States, very little outside the United States in comparative work.

I've done some comparative work with the-- the U.K.-- and the main thing I-- I learned-- it was fascinating but it was also incredibly difficult to-- to understand enough about a society and its legal system and its political system to be able to make meaningful-- meaningful comparisons.

And I think you ult-- you-- and so I think it's-- I-- I absolutely think it's important that it be done. I couldn't do it in this-- project. And I think, you know-- if I wanna engage the American public, the American public for better and for worse-- mostly for worse, is very-- very-- parochial and they're gonna be more interested in-- in-- in an account that sort of tells three American stories than an account that tells an American story, a British story, Israeli story, an Indian story or something like that. So-- but, yeah. I think it's-- I-- I-- it's absolutely something that would be worth pursuing by those who have--

MALE VOICE:

And (UNINTEL PHRASE) civil society litigation say, (UNINTEL) Indonesia, someone told me months ago-- please can you not give examples from the U.S., South Africa, U.K. or Canada? Can you give us examples from other places," so that's what motivates my question.

DAVID COLE:

Right, absolutely. The-- the-- the dominance of the English language, for one thing. Lisa?

LISA:

Yeah. I just was curious-- this may only apply to the-- to the national security side but how much does the sort of-- underground, you know, non-accessible secrecy and-- reluctance of courts to engage on-- certain issues, how does that change the dynamic of what you're looking at? Or does that just reinforce what your conclusions are tending to be?

DAVID COLE:

Yeah. Well--

LISA:

Because it does sort of change the-- the dynamic, right?

DAVID COLE:

Yeah. Hugely. I mean, I-- I-- you know, I think-- I think-- without transparency, it's hard to engage on the issue, right? And-- and-- and-- and that's-- that's the-- that's a barrier, a significant-- that's not the only barrier but it's a significant barrier that-- that we have run up against time and time again.

And you know, you-- you-- one can-- and-- and should and-- and I think we do appeal to the rule of law values that see-- transparency as critical and secrecy as-- as detrimental. And then one can and I think as we have done-- exploit those instances in which there is a break in the ch-- in the secrecy like the-- every link that we've seen thus far, right?

I mean-- the-- the-- with the exception maybe of Wiki leaks, I think, has-- has-- led to some, you know, a s-- a significant debate which has, in many instances-- forced-- a

more-- a more balanced approach to be-- to be reached. And we're seeing that now with the NSA.

So-- y-- yeah, I mean, I think transparency is sort of the life blood of-- of-- of a working democracy. And-- and we, yeah, have to keep pushing on that. And it's-- and-- and it's gonna be-- in-- increasingly-- and it's increasingly a challenge.

But-- on the one hand, it's increasingly a challenge. On the other hand, you know, it-- it's increasingly a challenge because the government will-- will always-- believe that the s-- the success of its programs requires secrecy. And there's a legitimate and in many instances, there probably are real costs to transparency. But it's also the case that the-- the very kind of stuff that has-- you know, that-- that has us scared like the NSAs, of the digitizing of everything and the sharing with third parties of everything that we do also increases the likelihood of-- leaks.

Because there's-- you know, there are-- there are-- there's data. There's-- there's some tr-- trace-- that can-- can be brought to bear to show that something happened. The-- the-- on the other side, there's a trace that makes it easier for the government to find the leakers-- and so, you know, we're seeing-- Obama has more leak prosecutions than an-- than all the other Presidents combined. I don't think that's 'cause Obama, you know, hates leakers more than Richard Nixon did. (LAUGHTER) I think it's--

(OVERTALK)

DAVID COLE:

I think-- yeah, I think it's because it's easier to find them, you know, with email and-- and the like. But it also-- you know, it makes-- it makes it possible for people like Edward Snowden and Joe Darby who-- who-- to-- to disclose-- important stuff that we should know about. So--

MALE VOICE:

To-- to what degree, David, will you delve into the losers in these three-- in these three case studies and their experience of failed civil society constitutionalism? And-- a related question is how do you guard against the danger of tautology which is only those civil society interventions will succeed in the judicial realm that have all the resources they need to succeed in the judicial realm? Do you know what I mean?

DAVID COLE:

Yeah. Yeah. Yeah. Well, the losers-- I mean, in some sense, I feel like I should be-- you know, I-- I-- I-- I-- you know, so-- I-- I-- if I tell the story of the gay rights groups, I-- I also have to tell the story of the National Organization for Marriage.

And if I tell the story of the gun rights groups, I also have to talk-- tell the story of the gun control groups. In civil liberties and human rights, who's on the other side? The government, yeah. I mean, there are some groups on the other side but I don't think they're the major players. I think it's the government and so-- decision.

You know-- you know, and I-- and I don't think any-- in any of these areas are-- I mean, I-- I am-- emphasizing the extent to which change was achieved. But in each instance, I think, people would say, "Well, you know, we haven't won yet," or, "Even when we do win, we still have, you know, looked at abortion. We still have to fight for"-- you know-- the fight never ends. The-- the battle-- never ends. So there's winners and losers in-- you know, all of these stories, I think, and partial wins and partial losses. In terms of tautology-- I'm not sure what-- I mean, I guess I'm not sure what you mean with--

MALE VOICE:

Well-- I know your goal is not to emerge from this exercise with a primer on how you can take your social movement and through the intervention of civil society achieve-- you know, sweeping judicial gains.

DAVID COLE:

Yeah. Yeah. no, it's not a, "how to," book.

MALE VOICE:

And yet you would like-- at the end of the day to have some portability of these lessons?

DAVID COLE:

Yeah. Yeah.

MALE VOICE:

The-- you-- you focused on three case studies but you might want them to apply to the two others that you suggested as well as--

DAVID COLE:

Yeah. Yeah. Yeah.

MALE VOICE:

--opposed to additional ones. So I-- I guess the tautology that I'm describing is-- a question like money is something more than statistical noise. It-- it-- one could frame a pretty persuasive fellowship project even arguing that the decisive factor isn't civil society-- constitutionalism at all. It is precisely money versus money. Again it might not-- apply across all context but it would-- it might be a pretty good predictive-- it might have pretty good predictive-- accuracy.

So I guess-- I mean, to some degree, you will try to identify those attributes of the success stories. And I'm just-- I don't really think you're going to come out of this with a tautology but I-- there w-- there was a moment or two when I'm thinking-- again so all of those success stories are the ones that all the agree-- all the ingredients for success.

DAVID COLE:

Well, I mean, I-- listen, yeah.

MALE VOICE:

The failures are the ones that lack-- did-- one or another of those--

DAVID COLE:

Well, I mean, I-- I-- I guess-- I guess what I-- what I'm tryin' to do is sort of show the way that the change-- show the way the change happened and-- and-- and to some extent draw some, you know-- generalizations about thing-- strategies that-- that-- that groups have employed.

You know, go with-- if-- if-- if you're blocked at this level, you know, where-- what other level do go to? Using-- cases c-- you know, bringing cases even where you are certain you're gonna l-- you know, the Guantanamo case, why did CCR bring the Guantanamo case?

They were gonna lose. The press-- was against them. The courts were against them. The-- everything was against 'em, you know? But by bringing that case, by-- by-- they were able to bring attention to the issue in a way which ultimately they-- they won. That's right. And-- and-- and-- so-- so using litigation not just as-- as-- as-- as a way of getting a formal victory but as a way of-- focusing attention on a subject in a way that-- it's hard to focus attention just be writing op eds or by, you know, introducing a bill in Congress or by having a hearing that nobody attends, you know? It's-- lit-- litigation is useful. So-- so I'm looking-- you know, so it's-- it's-- you know, going to states, going to foreign-- foreign government, looking for-- you know-- validate or-- you know, val-- atypical validators if you look at the-- the role of the generals in-- in--

in the-- in-- in supporting the McCain Amendment and you know-- so you know, the-- I am-- I am-- I am-- I'm interested in the way-- I'm-- I'm really interested in the-- sort of the nitty gritty of how constitutionalism works. I'm not-- I don't think one could draw out of this a kind of template and w-- and we could apply it to any particular issue. But I do think you'll-- you'll-- that there will be some themes.

MALE VOICE:

No. I-- I would suggest one limitation on the effectiveness of-- constitutionalism and it's a fairly important-- limitation. I think civil society-- prevail-- through constitutionalism. When-- it involves-- matters of public policy-- which are executed in a-- highly visible-- manner.

But when it involves public policy, that involves-- low visibility decisions-- by-- low level-- officials-- in my-- experience-- constitutionalism-- ultimately-- fails. Take the-- the criminal defense-- area. When you-- you make-- significant headway in an area of criminal defense or you know, go back to Mapp versus Ohio-- and-- you can't have illegally seized evidence introduced in state court, criminal proceedings.

What you have fairly soon thereafter is-- a police attempt to get around-- Mapp. So these days we have the-- the controversy-- over stop and frisk. Stop and frisk, as legislation-- was introduced as a reaction to-- to Mapp. That is as a means for the police to-- engage in-- certain practices and to be able to-- to seize-- a certain amount of evidence in ways that they were no longer permitted to-- to do by the-- the constitutional decision.

And so-- or take-- school desegregation-- in-- in actual practice-- in the United States. They're often low visibility decisions that are made-- that preserve-- de facto-- segregation. I'll you one-- personal story. My son went all through public schools here in New York City long time ago.

He attended a middle school which was-- 1/3 white, 1/3 Hispanic, 1/3 black. And-- next door was a secondary school which was 100% black. And so when it came time for students to graduate from the middle school, the school would call in the-- the white parents and say, "Your child is going to go to-- to so-and-so school. It's a rough school," you know? And the parent would say, "What are my options?" And-- the school advisors would say, "Well, if your child-- asks to study Russian or Chinese, then they can go to a different school which is-- predominantly white. And once they go there-- they don't actually have to study Russian or Chinese." And so the school bureaucrats preserved the segregation of the schools-- very easily-- with those low visibility decisions. So when you get bureaucracies like-- school systems, the police--

MALE VOICE:

Criminal-- criminal courts.

MALE VOICE:

Other-- kinds of bureaucracies, they're carrying out things which involve-- constitutional rights. They can always prevail. On--

MALE VOICE:

Although one--

MALE VOICE:

--on marriage equality, you're dealing with something highly visible. That is they can't turn you down for the-- the license-- to get married. So once the court decision is there, you actually get to exercise the right. But there are a huge number of areas where once you get the court decision, you don't in practice-- get to exercise the right. That-- is left to a lot of low level-- bureaucrats and they determine the extent to which-- you exercise the right. And a civil society has huge difficulty-- overcoming-- matters like that.

DAVID COLE:

Well, that's a great point and in-- in some ways, you know, you think about the cour-- the courts and First Amendment rights which are pretty much, you know, you either can burn a flag and not get prosecuted or not, right?

MALE VOICE:

That's right.

(OVERTALK)

DAVID COLE:

Versus-- session, you win, you win versus structural reform which we thought we could do through the courts and has been pretty much a failure for-- for-- those reasons. In some sense-- I mean, in some sense, constitutional litigation is a way to-- to-- make low visibility action into a high visibility issue, right? The-- the stop and frisk case that-- CCR were just-- had this trial on, right? That-- that is m-- turning what these ordinary, low visibility, on the street, you know, harassment into a high visibility-- constitutional issue.

MALE VOICE:

And the-- the immediate react to Mapp.

DAVID COLE:

So there is--

MALE VOICE:

The police didn't know quite what to do. Then they invented the dropsy cases. You remember the dropsy cases?

DAVID COLE:

Sure.

MALE VOICE:

Do you know what those were?

MALE VOICE:

Yeah.

DAVID COLE:

Remind me.

MALE VOICE:

The-- the--

DAVID COLE:

The-- oh, yeah. Oh, yeah. Yeah, yeah, yeah, yeah, yeah.

MALE VOICE:

--police officer testifies that, "As I approached the defendant"--

DAVID COLE:

That he dropped it.

MALE VOICE:

I saw him-- becoming apprehensive and he reached into his pocket and dropped something to the ground.

DAVID COLE:

And this is what I think--

MALE VOICE:

And on examination, it was a glassine envelope-- with drugs.

DAVID COLE:

And that gives you probable cause.

MALE VOICE:

There wasn't an illegal search. And y-- no, and then--

DAVID COLE:

No, it's true. The implementa--

MALE VOICE:

But-- but--

DAVID COLE:

Where-- where rights-- where rights require complica-- complex administrative implementation, it's much more difficult to get a meaningful victory.

KENNETH H. ZIMMERMAN:

So I think we're actually a little overtime. I would-- it may be a different book but the-- the-- the setta questions about the implementation of rights, I mean certainly a fair amount of what we're grappling with in U.S. programs is how do you change systems in a fashion that actually realized that? And-- you know, it's not usually framed this way but the ways in which the creation of rights distorts system, sometimes it's low level bureaucrats who are responding to it.

Sometimes when their resource dimensions, as in the school desegregation and sometimes there're political dimensions that flow from that, all of which have huge consequences in the ability to have that right implemented. And-- it's obviously-- a crucial issue in almost each of these areas that may be worth at least-- thinkin' about.

DAVID COLE:

Yeah. I got it. Yeah.

KENNETH H. ZIMMERMAN:

At any rate, I just wanna ask all of you to join me in thanking David-- for what is really interesting now and will be even more interesting as (UNINTEL) he-- takes the next stage in his investigations. Thanks, David.

DAVID COLE:

Well, thank-- thank you all for-- for coming. And-- and I'm happy to (APPLAUSE)-- you wanna-- I'm here all day so--

* * *END OF TRANSCRIPT* * *