

UVA LAW | Breyer Clerks Panel

MICAH SCHWARTZMAN: Welcome, everyone and thank you for joining us today for this panel on Justice Breyer's legacy after four decades on the bench. My name is Micah Schwartzman, I'm the director of the Carter Center for law and democracy at the University of Virginia School of Law.

The Carter Center is a nonpartisan legal Institute whose mission is to promote the understanding and appreciation of principles and practices necessary for a well-functioning pluralistic democracy, including civil discourse, civic engagement and citizenship, ethics and integrity in public office, and respect for the rule of law.

Today to discuss Justice Breyer's retirement and his many years of service within the federal judiciary, we have a panel of four former clerks who teach at the University of Virginia School of Law. Let me briefly introduce them before turning things over to Dean Risa Goluboff who will be our moderator for today.

First we're fortunate to have with us Judge Vince Chhabria who is a lecturer at the law school. So Chhabria is a federal district court judge in the Northern District of California based in San Francisco. Before joining the bench in 2014, he was chief of appellate litigation in the San Francisco attorneys office, a deputy on the government litigation team, a member of the city attorney's affirmative litigation task force. Judge Chhabria clerked for Justice Breyer at the Supreme Court in the 2001 term.

Next, I'm happy to introduce Risa Goluboff who is Dean of our law school and then Arnold H. Leon, Professor of Law and Professor of History. She's the author of two prize-winning books, *The Lost Promise of Civil Rights* and *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s*.

Dean Goluboff is a fellow of the American Academy of Arts and Sciences, a member of the American Law Institute, a distinguished lecturer for the Organization of American Historians, and I should mention host of the UVA Law School podcast, *Common Law*. She also clerked for Justice Breyer in the 2001 term.

Dean Goluboff is joined by Rachel Harmon who is the Harrison Robertson Professor of Law, the class of 1957 research professor of law, and director of UVA Center for Criminal Justice. She's a member of the American Law Institute and author of an important new case book, *The Law of the Police*. Before entering the Academy Professor Harman served for eight years as a federal prosecutor in the US Department of Justice's Civil Rights Division. She clerked for Justice Breyer in the 1997 term.

Our final panelist is Dan Ortiz, who is the Michael J and Jane R. Horvitz distinguished professor of law and director of UVA Supreme Court Litigation Clinic. Professor Ortiz has published widely on election law, civil procedure, constitutional law, and legal theory.

As director of our Supreme Court clinic, he's argued numerous cases before the Supreme Court and with an enviable win loss record. Professor Ortiz clerked for then Judge Breyer on the US Court of Appeals for the first circuit and then for Justice Lewis Powell at the Supreme Court of the United States. Let me now turn things over to Dean Goluboff who will be moderating our panel today.

RISA

GOLUBOFF:

I'm really glad that you all are here and I appreciate all of our panelists being willing to do this at such short notice. I'm really happy that this event came together, I have always felt incredibly lucky to have clerked for Justice Breyer and to know him, and so lucky to have so many UVA faculty who share that experience, including my co clerk Vince Chhabria who is as Micah said a judge in San Francisco. And I'm excited today to explore his legacy as a judge, as a boss, as a person with my colleagues.

So we were excited to do this in part. The news cycle moves quickly and it moves from retirement, to nomination, to the future of the court but we are an institution of higher learning. We can pause and take a bit more time on the legacy part. And I know that our students spend a lot of time in law school reading the opinions of the court. And it's not every day that a justice steps down and we have an opportunity to really explore the oeuvre that he wrote and place him in a larger judicial and personal context, so I'm excited to do that today.

I thought we would start off this morning with just general reflections from each of our panelists about the Justice then I'll ask the panelists a few more specific questions and then open it up to Q&A. So please use the Q&A function on the Zoom screen to post your questions for the last portion of the event. So for reflections, we'll start with you Rachel.

**RACHEL
HARMON:**

Thank you, Dean Goluboff. Well, I assume today that we're mostly going to be talking about Justice Breyer as a jurist though all of us have a personal relationship with him and I think I wanted to start by saying something on the personal side because that maybe won't be in the papers as much as some of his more important opinions.

I think that since my clerkship, Justice Breyer has served as my clearest role model for how to live a full and meaningful life. Of course we'll talk about his cases and he devoted an enormous amount of energy, he worked extremely hard, but even before he devoted his intellect to the bench, he made contributions as an academic, an administrative law scholar, as a teacher, that remain relevant today and many of you may have touched on them in law school.

And before his time at Harvard and during his time at Harvard, he repeatedly returned to public service, including at DOJ and at the Senate Judiciary Committee. And it just felt to me like as I was starting my career to look upon this man who had taken every opportunity to use an incredible intellectual capacity for serious reflection and public purposes.

I clerked in his third year at the Supreme Court and what struck me may be most about that year and in my relationship with him since on the personal side, especially in those first few months when I was working nights and weekends, was that he was working incredibly hard but he was living remarkably well, too.

He always stayed good humored and optimistic, he was really and is a joy to be around. He was incredibly devoted to his wife, to his children, now to his grandchildren. He had valued friendships that have lasted for decades. He was excited by new plays, and movies, and books, and museum exhibits, and ideas. And he constantly wanted to learn something new so while I was clerking he was listening to audiotapes all the time trying to learn Spanish.

I found his intellect, and energy, and passion singular, he lives a life and a half in the same 24 hours that the rest of us try to do one. But his enthusiasm for life and the fullness of his life, even if I can't live up to his example, has been an inspiration for me. And I guess I think it's worth reflecting on that human aspect of his legacy as well as these cases.

**RISA
GOLUBOFF:**

Wonderful. Thank you, Rachel. Dan.

DAN ORTIZ:

I'd like to camp on everything that Rachel said. The thing that's most remarkable about him is how many different things he could do and how many different things he was completely successful at. Unlike most of us who toil in one little corner of the legal field, Stephen Breyer worked everywhere with great success.

He was in government legislature, he worked for the Senate, he worked for DOJ at various times, and the Sentencing Commission, he was a judge, and then a justice, he's been everywhere. And one of the things that most animated him as Rachel indicated is his all consuming interest and enthusiasm for learning new things, having new experiences, and bringing other people along with them.

Many of the ways that I've grown both professionally and personally have been due to experiences, challenges, that Justice Breyer laid out for me personally and for people more generally working in the field. I think one of his most intellectually animating concerns is very important for him that's continuous between his work as a judge and a justice and also his work as a writer and a teacher, is his central concern with government, both in how it works as Rachel mentioned, his deep work in administrative law.

And he was real administrative law nerd but that was because he saw how much it mattered, why it mattered, and how it made a difference to everyone's lives. He is also very interested in Democracy Writ Large, has written books and you can see that in a lot of his election law opinions.

Unfortunately, he found himself in dissent in most of them but I think that those dissents will have a lot of durability and there will be people after he leaves the court like Justice Kagan who will be taking the baton and running even further with it.

RISA Great. Thank you, Dan. Vince.

GOLUBOFF:

VINCE Yeah. Picking up on the public servant theme and the concern for government, where does it come from? I think
CHHABRIA: part of it comes from his family background. So I think it's worth mentioning Justice Breyer grew up here in San Francisco-- by the way, thank you for having me. It's nice to be back at UVA sort of and hopefully I'll be back for real next year to teach another class.

But anyway, Justice Breyer, he grew up here in San Francisco, his father was a member of the San Francisco Board of Supervisors, his-- excuse me, his grandfather. His father was general counsel for the San Francisco Unified School District, worked there for many, many years. And in fact, the board room at the school district is called the Irving G. Breyer Boardroom.

His mother was active in League of Women Voters, his aunt Shirley was a Union activist, and his brother of course was a prosecutor and is now a federal judge. And so I think from a young age, he came from a public facing family and was thinking about these issues. And I think it's really animated his jurisprudence.

I think that's largely where his concern comes from for making sure that the law works for ordinary people and making sure that the law works for the public officials who are trying in good faith to solve society's problems. Briefly, you all talked about the influence that Justice Breyer has had on you. Obviously I'm a district judge and so I feel his influence every day in the work that I do.

One thing, of course, is being practical about the law, using common sense, and making sure that the law is actually working for people and helping them solve their problems instead of getting in the way. Another is transparency. You hear a lot about his goofy hypotheticals from the bench but what you hear less about is that he really made an effort to write his opinions clearly and make them understandable, not just for the sophisticated lawyer who knew the ins and outs of the case, but somebody who might be new to the case in trying to familiarize themselves with it.

And then finally, I won't talk at length about this right now I'm sure we'll have a chance to discuss it more later, but his commitment to diversity, his long standing commitment to diversity, not just in his jurisprudence but in his hiring practices. And like I said, I'll leave it there for now and hopefully we can chat more about that a little bit later.

RISA
GOLUBOFF: Great. I fully expect us to come back to that later. And so I hope we will. I will say, welcome to everyone, Vince especially to you coming from the outside and especially wearing your UVA t-shirt, that gives us all a lot of pleasure here.

VINCE
CHHABRIA: You gave me this t-shirt.

RISA
GOLUBOFF: Even the more so. For those of you who weren't listening really closely to Micah Schwartzman's introductions, Vince and I were co clerks, we were not only co clerks we shared an office together, we spent many, many, many more hours with each other that year than with our spouses or anyone else.

VINCE
CHHABRIA: And we were sitting there together during 9/11.

RISA
GOLUBOFF: We were sitting there together during 9/11, we were. And that was a terrible day and we were there. I was going to say something else about that Vince that was more uplifting.

VINCE
CHHABRIA: Sorry about that.

RISA
GOLUBOFF: That's OK. Anyway, oh, there's a photo of our term that seems to be like an Getty photos and gets pulled out all the time, a black and white photo of the Justice talking to some clerks and Vince is in the foreground and I'm in the background, and a third of our co clerks mirror Horowitz's back there too. Mike Leiter, the only one not in the photo, but we remember you always Mike.

VINCE
CHHABRIA: And Risa was the only time you were in the background and I was in the foreground.

RISA
GOLUBOFF: I don't think that's true. So I would just add, I think one of the things that's remarkable about the Justice is we all have a very similar vision of him and that's because he is who he is and so that's not a surprise. But I would just add, I think he's full of paradoxes and contradictions. So as Vince was saying about the hypotheticals he's incredibly pragmatic, and fact oriented, and practical, but he's also incredibly academic and theoretical and kind of the absent minded professor with the hypotheticals.

He's incredibly erudite and learned, he taught himself how to read French, he taught himself French by reading Proust, and at the same time he's incredibly human and he rode his bike to the court for many years. I think Rachel was not, those are Rachel's years, I think. Is that right, Rachel?

RACHEL
HARMON: The Marshals hated it. Boy, they really didn't like that at all. I actually was going to echo something else you said which is you said, he is who he is. People have many, many times said, well, what is Justice Breyer really like? And I say, oh no, no, no, when you see him on television, that is who he is. That's what he's always like. I think that's actually more so about him than almost anyone I've ever known. He is always himself, totally thorough at.

RISA
GOLUBOFF: I could not agree more, absolutely. Yeah, absolutely. I agree, OK. We could share more on that later. OK, so let's be a little more academic, take a view of the judging for a little bit, and then we'll come back to the personal anecdotes at the end.

So 27 years on the bench and I would say another kind of paradox, he was a frequent dissenter during all of that time and yet he is an irrepressible optimist and continues to be so. That's a lot of cases, that's a lot of time, I'm curious what each of you sees as kind of the Justice's most important, or signature, or interesting opinions, or maybe a favorite, or a lesser known opinion from your term, any kind of opinion that you want to share with everybody. So Vince, why don't we start with you?

RACHEL
HARMON: Sure. Well, we've been hearing a lot about the dissents but as a district judge who sentences people regularly, I thought I would talk about one of his majority opinions, and that is his opinion in the United States versus Booker involving the sentencing guidelines.

And just to go back, I'll try to do this briefly but there was a time when federal judges had virtually limitless discretion to sentence people. There might be a statutory maximum, there might be a mandatory minimum sentence but that was it. This was before my time but you had discretion to sentence people within that.

And so the sentence you got really often depended on the judge you got and it could vary wildly. And people ultimately realized in the 1980s I think that was not a good idea, not a good thing. And so the Sentencing Commission was created by Congress and Justice Breyer then Judge Breyer was appointed to the Sentencing Commission.

And what the Commission did is created guidelines for federal judges that were binding on federal judges and requiring them to find certain facts and if they found those facts, the defendant needed to be sentenced within a particular range prescribed by the guidelines.

And what that did is it eliminated sentencing disparity. It had some of its own problems though so fast forward to when Justice Breyer was on the Supreme Court. There was a constitutional challenge to the sentencing guidelines and the challenge was basically, we can't have judges finding facts that result in an increase in the defendant's sentence. The jury has to find those facts, it's a Sixth Amendment violation of the judge find those facts.

And so a different majority of the court in the United States versus Booker struck down the mandatory aspect of the guidelines, said that the defendant's sentence can't be increased based on the factual findings of a judge so long as the increased sentence is mandatory. Well, this was Justice Breyer's baby, right? So he pulls together a different majority of the court and the question is, well, is there anything left of these guidelines.

And Justice Breyer's majority opinion said, OK, well, the provision of the guidelines that requires judges to increase a sentence based on factual findings not made by the jury is unconstitutional but the way to sever that provision and make it most consistent or at least inconsistent with Congress's intent is to say that the remainder of the guidelines are advisory and judges are required to consider the guidelines as a starting point when they are deciding how to sentence a criminal defendant.

They can deviate from that, they're not required to increase somebody's sentence based on a particular factual finding contemplated by the guideline, but they are advisory. And so he sort of was involved in the creation of the guidelines and then wrote the opinion and saved the guidelines from extinction really and has left us I think with the best of all possible worlds.

Because the judges have discretion to consider particular facts, to go up or down, but they're not bound by it yet at the same time, because we have to consider the guidelines our sentences are to certain degree data driven and take into account what other people are getting sentenced to by other judges around the country. So I think that's been a very important, both as time on the Commission and his Booker opinion have been a very important contribution.

RISA
GOLUBOFF: Am I right Vince that the majority and the dissent or the concurrences in Booker and those cases I remember from our term, Apprendi, there was al-Mihdhar story, all these cases, right, starting back Rachel when you were there, that was a different 5, 4 grouping than the normal one. Rachel, do you want to talk about that or I can go back to Vince? OK, go ahead Vince.

VINCE
CHHABRIA: I'm happy to say something briefly about it which is, yes, they were different majorities and Justice Ginsburg was in the majority in both cases. And the opinion striking down the mandatory aspect of the guidelines and Justice Breyer's opinion preserving the remainder of the guidelines as advisory.

And I wasn't there but I can picture we all Justice Breyer, right? And you can imagine that he thought of 30 different ways to present this to Justice Ginsburg to explain to her why it was important to sever the mandatory provision in that way. And I have no inside knowledge about what happened but I can assure you that he worked really hard talking to Justice Ginsburg about that.

RACHEL
HARMON: I was actually a prosecutor when Booker came down though I'd been there when Armando Torres, one of the precursors to Booker was decided. But as a prosecutor, Booker threatened to append the entire federal prosecution system. I mean, the criminal justice system was going to be in total disarray and Justice Breyer's opinion maybe certainly did not preserve the status quo.

I think Vince is right about that, but it definitely allowed the system to continue with some principles and place and maybe you can have criticisms about the way federal sentencing happens. Surely many people do, but I think he left something intact that was both meaningful and true to the principles that it was intended to preserve.

RISA
GOLUBOFF: Do either of you or Dan have a view of is that actually the right place to be, right? So we went from a world where there was so much discretion and it was so inflected with both discrimination and arbitrariness to a much more rigid world of the sentencing guidelines. I mean, am I being Pollyanna to say maybe the sentencing guidelines as advisory is actually a good medium place between too much discretion and too little or thoughts?

VINCE Well, I will say that I think if you talk to the vast majority of federal judges, they would say that this is the best system. Because with the first system, total discretion, boundless discretion, I think a lot of judges probably felt a little bit lost or should have felt a little bit lost if they didn't. And I think that with the mandatory guideline system, judges correctly felt shackled and unable to go down or up as the facts may have called for it.

And like I said, this system, it is grounded in something, it's grounded in a system of rules that are advisory rules but they put us at a starting point but it's just a starting point and we're allowed to consider particular factors and go up or down based on a particular defendant's situation. So I think and I think the majority of judges think it's the best of both worlds.

RISA How about prosecutors, Rachel?

GOLUBOFF:

RACHEL Well, I think prosecutors definitely prefer a guideline system to a non guideline system in part because it gives them some predictability and outcomes, which helps with negotiations. I think sometimes the criticisms of the sentencing commission's work and particularly the guidelines as a structure were not about the process or sometimes have been about a process but were about the anchoring effect it had a very high level so that the sentences were simply too harsh.

And I think one of the lessons Justice Breyer among others learned from the effort to develop the guidelines was that process wasn't everything, that when we filled in the numbers it ended up having a big impact on human lives. And so it's hard to talk about is this the best system without unpacking those numbers.

But I do think that Vince's points about that the allowing judges meaningful discretion have been very important in actually uncovering some of the problems with the numbers themselves because it allows judges to point out some of the problems with the system.

RISA Great.

GOLUBOFF:

DAN ORTIZ: I have no idea whether it's the best system or not but I think it reveals something very interesting about Breyer that we haven't talked about yet, which is that it shows his concern for the court as an institution and the way he often tried to triangulate between the court and other players. People think of him as an academic, that he wasn't political, but he was Chief Counsel of Senate Judiciary Committee under Senator Kennedy for a while.

And correct me if I'm wrong Vince and Rachel but I seem to remember that the original political constituency for the mandatory sentencing guidelines were a lot of people in Congress and elsewhere, basically outside the judiciary, who looked at the kind of discrepancies and sentences and were horrified by it.

And one of the things you can see Breyer doing is trying to bridge that divide, reaching out in the compromise he made, getting Ginsburg I guess, on board to end up with a system that the judiciary could work with reasonably well at least but also would make the outside constituencies feel not badly done by.

RISA Yeah. I think, well, the institutionalist and the kind of consensus building, I think we'll definitely come back to you in a minute as well and I think you're right to point it out here. So Dan, how about you? What case or cases would you highlight from his time on the bench?

DAN ORTIZ: Well, I would highlight his election law cases but there's one in particular, which is a very big case but it's not one where his opinion in the case has ever really been thought to be very important but I think it really reveals a lot about him. And in a sense it could have been a Booker but it wasn't, and that case is *Bush v Gore*.

And people remember the election between Bush and Gore and it came back to the Supreme Court second time and the Supreme Court famously halted the counting of the ballots in Florida and basically said everyone had to go home. There was a per curiam opinion representing the views of five justice which everyone thinks was written mostly by Justice Kennedy.

And Breyer wrote a dissent and the first part of his dissent was joined by only one justice which was odd because usually the Justices all joined in the case, joined each other's dissents, the liberals want to put up a United front as the conservatives did.

But Justice Breyer only got one other justice in the first part of his dissent and he got three others on the second. And what he did I think was he tried to make an attempt to get-- if I'm reading it right who knows because the files won't be available for some time, but it looked like what he did is he took a position which I can't believe he thought really defensible himself but which he tried to use to create some distance between Justices Kennedy and O'Connor and the other three conservatives.

And that was to say that, yeah, there might well have been a violation, probably the original draft of the opinion said that there was a violation of liability, this violated the Equal Protection Clause but-- and then the second part of the opinion, which all the liberals joined he said, but the remedy here is completely wrong. You should continue to count the ballots, you shouldn't just stop counting.

And I think it was an attempt to try to offer something to the people on the other side, to try to pry a few of them enough, to get a majority over to his side, which he generally thought was what the Constitution required and what would be good for the country.

And the fact that it was a dissent indicates that it failed, maybe Justice Kennedy snookered him at some point. He thought that there might have been some chance of getting Justice Kennedy over and it just never happened. I wouldn't be surprised as Vince describes it, there weren't a lot of discussions between Justice Kennedy and Justice Breyer during the pendency of this case.

But I think his attempt to do that, to actually swallow something he probably didn't believe on liability, to end up somewhere that he thought would be right on remedy, shows a lot about him. And again, it shows him institutionally trying to reach out to other players to put together a coalition that to his mind would do the right thing legally.

RACHEL HARMON: I think that was partly possible because he was humble, that is to say he believed he might well be wrong. And so he was more willing to reach compromise as a result of that.

DAN ORTIZ: I think that's right.

RISA GOLUBOFF: I was going to say I think that's right too and when he was here a few years ago, and before COVID, and spoke to our students. And one of the students asked him about collegiality and consensus building and how do you have conversations across difference? And his answer is, you look in the mirror and you start with yourself.

And he said, of course I think I'm right, everyone thinks they're right but you have to listen and you have to be open to the fact that you might not be right because we all think we're right and maybe we're not all right. And he said, and you can't pretend, people know if you're pretending. If you're not really listening and you're not really considering what they say, you're never going to get anywhere.

But he also said, and I think this goes to how often he dissented even in *Bush v Gore*, it's not that he had no principles, it's not that he didn't have a sense of-- he was looking for common ground, he was open to common ground, he wanted common ground but he also very much had a sense of when that wasn't possible and when your principles prevent you from getting there that I think is really important.

VINCE CHHABRIA: Yeah. And I was going to say, Dan I think that case is an example of him trying to find common ground in a way that would work for our democracy, right? And that was consistent with his vision of the relationship between the court and our democracy.

But there were a lot of times where he says you're alluding to, where he would not be a compromiser, not be a quote unquote "pragmatist" in that sense of the word because the court was doing something that he believed was an anathema to our democracy and inconsistent with the need for the law to get out of the way of public officials who are trying to do their job in good faith.

RISA GOLUBOFF: Rachel, what cases do you want to talk about?

RACHEL HARMON: Well, the one thing I was going to say, you said he really genuinely believed in listening and there was also a flip side of that, which he genuinely believed that others would listen to so he treated everyone as if they would be receptive to persuasive arguments and dialogue.

And I remember my term, Justice Thomas would tease him about that, oh, you're so naive to think I'm actually going to change my mind in this dialogue that you want to have. But Justice Breyer never lost that optimism about anyone.

RISA GOLUBOFF: We recall times, Rachel, very similar, where somebody would come up with an idea about a case and Justice Breyer say, oh, that's good, that's really good, I'm going to go talk to Nino. And he was going down the Hall to share this great idea with Justice Scalia thinking it's going to convince him, right?

RACHEL HARMON: And thinking about his legacy, I think much of the conversation in the public eye is going to be on the significant opinions in divided cases and for obvious reasons. But I think as a clerk and subsequently as a lawyer, that some of the things that mattered to me or some of the things that influenced me were different.

So I'm going to speak on behalf of one of his probably most obscure decisions. I didn't clerk in a blockbuster term, there were some cases but I was still trying to figure out what I want to do. I knew I wanted to do public interest law and his public facing career and his commitment as Vince suggested to making the law work for individuals mattered to me.

And some of my most compelling moments during the term or watching him work through the big and small criminal law and criminal procedure cases, sometimes he never wrote opinions and won in them. But one of the ones that actually shaped my thinking about him and also I think about my career choices was a case called *Gray versus Maryland*.

And in Gray, there's a man named Bell who confessed to participating in a deadly beating and he implicated Gray who was his co-defendant. And they were tried jointly and a judge permitted a redacted version of Bell's confession to be introduced at trial with Gray's name substituted for the word, deleted. So every time Bell talked about Gray in the confession, that the agent would read the word deleted in the testimony.

And that in the mind of the lower courts satisfied what was known as the Bruton rule which prohibited the use of a confession by one defendant as evidence against a co-defendant in the same trial because doing so effectively allowed the confessing defendant to serve as a prosecution witness against the co-defendant without allowing him to be cross-examined as required by the Sixth Amendment.

Now the Bruton case decided that and then in a subsequent case, the Supreme Court had allowed a redacted confession, which really prevented you from knowing that the co-defendant even existed, it wasn't revealing.

And the lower courts used that subsequent case to engage in a practice of admitting confessions that at best fulfilled the letter of the Bruton rule but were far from protecting Sixth Amendment rights because they allowed these redactions that didn't fool anyone, in which everyone knew that one defendant was pointing the finger at the other defendant. And we just had to substitute the word deleted for his name.

And the reason why courts were doing this is because well, it was partly to allow joint trials which were judicially efficient and the admission of the confessions which the prosecutors wanted to continue, OK?

And Justice Breyer's opinion didn't raise any ire or generate any dissents, it's a unanimous opinion for the term, it's lawyerly, it's brief, and it's clean, and yet he manages to capture the real consequences of what happens at trial and the way that legal rules can be used to basically hide what's really going on and deny people their rights within the letter of the law.

So he recognized, he was explicit, the jurors wouldn't have the slightest doubt about what was being deleted and therefore this couldn't be used to bypass the Sixth Amendment principle. And he effectively in doing so ended what was a self-dealing lower court practice that allowed judges and prosecutors I think to have meaningfully evade the prior decisions.

So why did this matter to me? Well, in law school I had studied only big cases and Gray basically helped me firm up my interest in the small law, in the ways that criminal cases, the kinds that Vince decides every day and matter to individual lives, and the rule of law, including in the Supreme Court, of shaping those trials and those decisions. And it was just a couple of weeks after that the court decided that case that I accepted a position as a prosecutor at DOJ in the Civil Rights Division and have been interested in small law in some way ever since.

RISA
GOLUBOFF:

That was wonderful. I did not that story. Yeah, I've known you all these years but I didn't know that that was influential for you and I think that does so capture something right. He understood how it worked and he understood the human consequences and that that's a great story. So I'll add one.

I'll add one which is his dissent in *Parents Involved versus Seattle School*. So that's the case where there were local school districts in both Seattle and Louisville who were using some race based decision making in order to maintain integrated school districts.

So school districts were resegregating and these were school districts that were trying to retain integrated schools and the majority of the court found constitutional violations in those efforts and said that was discrimination on the basis of race in violation of the Equal Protection Clause.

And Justice Breyer wrote an unusually long and an unusually kind of rhetorical but still very evidence based and precedent based but much more rhetorical than most of his opinions would be and very impassioned. And he really saw this as a defense of Brown in many ways that what was really up for grabs here was how to think about what equality is in the United States and how do you get there.

And his view, his clear frustration with the majority, Justice Roberts writing for majority says the way to stop discriminating on the basis of race is to stop discriminating on the basis of race. And I think Breyer really articulates there that that's not how he thinks about equality and sometimes you might have to think about race in order to get to the kind of equality that is a prerequisite for a democracy and is a prerequisite for the kind of pluralist society that he thinks we should aspire to.

And I do think that the case lays out in a very crisp way two fundamentally different visions about equality in the United States. And I think for Justice Breyer part of what was so important to him about this case is his own views about diversity, which I think we'll come back to again, has been suggested before, and his own views about pluralism and equality.

He grows up on the Warren court, he calls for Justice Goldberg on the Warren court, he works for Ted Kennedy. I think he believes deeply in the kind of New Deal Warren court settlement of the mid to late 20th century that you have a large regulatory government that regulates the economy that is involved but you also have quite jealous regard for minority rights for the court.

And I think he saw that at stake here, I think also has been said earlier, his father worked for a school board and I think he has real faith in education, and in most government officials most of the time. And he thinks you have to give communities the tools that they need in order to govern and that this was really taking from communities a significant part of their toolbox in order to create the pluralist society that the United States aspires to be.

So that's one I would mention that is obviously related to my own work and that I think was really close to his heart. Unless people want to talk more about specific cases, I'm happy to talk more about jurisprudence or his role at the court more broadly. And I want to remind people, if you have questions, you can put them into the Q&A and I can ask some of our panelists.

VINCE
CHHABRIA: Can I ask one question of you Risa regarding Seattle School's case? I started thinking about that case again recently with the George Floyd protests. And Justice Breyer's point was, trying to eliminate racial isolation is different from trying to segregate people on the basis of race and we have to let-- this is a real problem, right?

We have 330 million people in this country from all different races and we're trying to figure out a way for them to be able to interact and racial isolation is an obstacle to that and these school officials are trying to solve that and we have to get out of their way and let them do it.

With the George Floyd stuff I was thinking, how can we expect a police officer to relate properly with different members of the community if they grow up in a racially isolated neighborhood and in a racially isolated school where they never interact with people growing up of different races? I mean, is there any chance that recent developments on the issue of race and our relative awakening on some of the problems with respect to race that we have in this country will revive the point of view that he was expressing 13 years ago not dissent?

RISA
GOLUBOFF: Well, I mean, I think the question is survive among who. So I think there are a lot of people who would agree with him and I think you're right that a lot of the themes that have come out of the protests from the spring and summer of 2020 and beyond are very much in keeping with the themes of his dissent, right?

It's basically a question about anti-discrimination versus anti subordination, right? And the word equity, which I think has become far more prominent lately is really a way of choosing one of those two, right? Of choosing the anti subordination way of thinking about what equality is and that's-- in earlier affirmative action cases there have been debates among the Justices and the majority and the dissents about, well, do we know the difference between a welcome mat and a no trespassing sign, right?

I forget who said that, I want to say Brennan but I don't if anyone remembers who that was. But the question of whether all distinctions on the basis of race are equally situated vis-a-vis the Constitution or vis-a-vis you what you think society should be doing on a moral level or whether there are because there is inequality in the world you have to think differently about what you allow government to do in order to respond to that inequality.

And I think you're right Vince, I think the Justice thinks about how do people get along? How do they learn to get along? That you have to people and you have to have actual integration, right? I think he's an old school liberal in that way, right? In order for you to have expectations that people are going to treat each other like human beings.

And I think you see that in a lot of his religion cases too and the *Voucher Case* from our term. If you want to talk about that, he's very aware of what's divisive and what's not divisive and how do you encourage true pluralism and tolerance across different groups of people.

VINCE
CHHABRIA: Yeah, I mean, just briefly to mention the *Voucher Case* since you brought it up, I think that was another example of him not being willing to compromise, right? And again, sort of focused on the fact that we have so many different people throughout this country of so many different religions and how are we going to make sure that they get along and that our country isn't torn apart by the religious strife that you saw in Europe throughout this century, 17th, 18th century, whatnot?

And he sort of drew the line at government funding of religious education. And his primary concern was that if government gets in the business of funding religious education, you're going to start having people fight over that money and you're going to start having some groups feeling that they're being disfavored vis a vis other groups and it will create problems.

Now I happen to disagree with him on that case and I would probably tell him that those voucher programs were upheld and we haven't seen the kind of strife that he was worried about but I think he would respond, well, sort of camel's nose under the tent and we need to take the big picture of you here and the more that government becomes entangled with religion and religious funding and religious education, the greater risk we are at.

RISA Dan, you can just add.

GOLUBOFF:

DAN ORTIZ: Yeah. I wonder whether his openness to complexity and sensitivity to interest on all sides may have come with a cost though, is certainly something I cheer on and I think he captures that better than anyone else on the court.

But when you compare him to someone like Justice Scalia, you wonder whether in a sense that has gotten in the way of some of his legacy and has made him in some ways less effective than he might have otherwise been. You read a Scalia opinion and my God, your heart starts pumping whether you agree with it or not.

And there's a kind of excitement there and there's often a kind of sharpness to it. This is the rule, this is the position you take, whereas you read a Breyer opinion often you come away with the feeling that's he really understands what's going on but my God, it is so complicated that it's going to be hard to carry do much with that, have much of the legacy with that kind of approach.

I just wonder if many of his virtues if you will also come with a kind of cost to his reputation. He's never going to, I think, make people seem as exciting people, or someone like Justice Scalia, who in some ways had a much more simple view not only of law but of the world.

RACHEL That's right.

HARMON:

RISA Go ahead, Rachel.

GOLUBOFF:

RACHEL I think that's really right. I think many of his strengths are also can be viewed as weaknesses. And both his
HARMON: humility and his attention to detail, and reason, and that he tended away from the kind of sweeping rules that would have given him maybe a more lasting impact as a voice.

RISA So that's a good segue to a question about his jurisprudence, his role on the court, his thoughts about judicial
GOLUBOFF: role. Dan and Rachel have started to weigh in, Vince why don't we go to you and then we can come back around?

VINCE Yeah. I mean, I think that he was-- in terms of judicial role, I mean, you saw from his speech at the White House
CHHABRIA: how deeply concerned he is about the relationship between the court and our democracy as a whole and society as a whole. I'm not sure how if people talk about this enough but he was really somebody who thought that the court should stay in its own lane, right?

I remember there was a study from the '90s and 2000s where he voted to strike down a congressional act enactment less frequently than any of the other Justices on the court. And so he cared a lot about the court's legitimacy and part of preserving the court's legitimacy was staying in its own lane.

And part of it was being pragmatic and making sure that the law was working for people and not sort of putting obstacles in their way. And so I think that's one thing to emphasize about his view of the role of the court.

RACHEL I work in an area in criminal procedure where sometimes he has been criticized by liberals for not being liberal or
HARMON: consistent enough because he sometimes voted in criminal procedure cases for the government and divided opinions that expanded access to criminal evidence.

But I actually think that his criminal procedure decisions illustrates some of his strengths, something you mentioned Risa earlier, which is his faith in the power of reason government and good intentions of government officials for the law to be able to do justice.

That possibility informed those decisions and something Vince just mentioned, which is humility about the role of the judge and the role of the court, which is deeply connected to his belief in the power of Democratic institutions and the idea that the rule of law is important.

So he wasn't someone who was willing to uphold constitutional commitments in the face of lower court decisions that officiated them but with this commitment to humility, to Democratic institutions, to reason, to precedent, I think that to me, one of his biggest legacies is his optimism about the power of Justice and the power of government in a society that maybe we haven't lived up to his. I hope we can justify it, I hope we can live up to it.

RISA Yeah. Dan.

GOLUBOFF:

DAN ORTIZ: I think one of his greatest contributions has been as a kind of counterweight on the court to the majority who I think embody a kind of exclusive textualism. So many people talk about Justice Breyer's being very pragmatic with the kind of caveats that Vince has suggested, but he really did look at details with instance how rules would really work on the ground was often sort of pulling various perhaps sometimes in rules together.

But above all, what he was really concerned with I think especially in cases of statutory interpretation but also some constitutional interpretation was purposivism. And he I think was horrified genuinely that the court or many on the court had lost sight of it almost completely and just by following the words of the text.

Now I think certainly agrees that the words of the text will get you some of the way there, maybe sometimes all the way there. But I think it seemed completely perverse to him that you would never try to think in interpreting saying what a statute meant, what Congress or the actor was trying to do, what was the purpose of the legislation.

And of course that opened him up to criticism from people like Justice Scalia, who would say, well, the purpose is your purpose, it's not the purpose of the Congress. How can you ever sort of know that? And it's like a dog chasing its own tail. Some of those debates are interminable.

But I think it really is a perspective that's important to have and I think that even the people who expressly disagreed with him actually applied their exclusive textualism as you will, of sometimes in a way which recognized the power of his arguments. But he was a kind of lonely voice out there for a while and things like just no statutory interpretation on the level of theory as opposed to what the results were on the ground.

VINCE
CHHABRIA: Boy, that reminded me Dan of a conversation I had with Justice Breyer just a few weeks ago actually when he was in town and we were talking about how to decide cases and in reference to the majority of this sort of Scalia majority he said, they view the law as chemistry and I really disagree with that.

And he invoked this image of somebody in a chemistry lab, sort of isolated sealed off chemistry lab where people are experimenting with different words and moving different words around and see what hits. And I think that he used that word because he felt that we cannot view ourselves as sitting in an isolated lab, we have to think about the consequences of how we put these words together for the people who are affected by our decisions.

RISA
GOLUBOFF: Yeah, I would add to all of that. I think the word pragmatic has come up a couple of times and that's a word often used for him. And I think of it as operating on three different registers, so there's the pragmatism of kind of consensus building and Dan what you said earlier about, yes, he's an academic but he's also a savvy guy, right? And so there's a pragmatism there.

There's the pragmatism in individual cases, I think is what Rachel was talking about, the seeing how the system works, right? Pragmatically saying like, how is this operating and how do we make it operate better for these people in this case, in this institution, in this system?

And then I think there's the pragmatism of this kind of consequentialism for the system of governance as a whole, right? He's interested in the consequences in particular cases and then the consequences in the system and in what role the judges are playing vis a vis the political branches.

And so I don't know if you all think of the pragmatism as linked to the consequentialist and I certainly do. But then I would go back to some things that Rachel said, which is I always think, well, when you call a pragmatism and it sounds so kind of low brow or it sounds like it denigrates other values that he also holds.

And so I feel like pragmatic only gets you so far and then you've got to talk about the optimism, Rachel, right? And you've got to talk about the humanism which you also talked about where like everybody knew they meant Gray when they said delete, right? And this guy is not getting the trial that he is entitled to and I and I think when you put together the pragmatism with the optimism, and the humanism, then you get a sense of the whole picture of the world through Breyer's eyes.

And Linda Greenhouse wrote a piece, I don't know if you all wrote about him. And she said sort of he was the wrong man for this time, he was a man from another time and I don't if I agree with that. But I do think his aspirations for our world are really attractive ones, right? Like I want to aspire to be the world as you said, Rachel, that he thinks we can be and that we should be able to be. OK. Anything more on the role in the court or the jurisprudence? I'm going to move on to the personal.

VINCE
CHHABRIA: I'll just say very briefly, his colleagues really liked him all across the spectrum. And when we were there reset from Justice Thomas to Justice Stevens and everywhere in between, they were very fond of him, respected him deeply.

RACHEL
HARMON: How could they not?

VINCE
CHHABRIA: Yeah. But also knew that he was an honest broker, right? I mean, and that's part of why they were fond of him, is he was such an honest broker. And so they did want to hear what they had to say. I mean, Justice Thomas might not ultimately agree with him but they wanted to hear what he had to say and he felt that his presence did matter for the cases, right?

RISA
GOLUBOFF: Sorry, what did you say, Rachel?

RACHEL
HARMON: I said with affection. And that if either one of the Justices disagreed with him, when they weren't persuaded by his deep insights or his reasons over rhetoric or whatever, they did it with affection. I think Vince is just right.

VINCE But I think sometimes he did persuade them. I mean, obviously we share inside information but there were times
CHHABRIA: where his approach resulted in a change in the outcome of cases.

RISA So with affection, speaking about affection, I think the affection that we have for him comes through as well. And
GOLUBOFF: so I'm curious about any personal anecdotes that you would like to share with the Justice. Dan, I will start with you.

DAN ORTIZ: So this isn't something I witnessed myself but it's a story that Justice Breyer tells about himself which I think wonderfully illustrates Risa, something you said in your slate piece which you pointed to out how he juggles intellectual humility and confidence at the same time.

So we were sitting in the clerks then Judge Breyer were sitting having lunch in chambers one day. And one of my co clerks asked him said, well, what was it like making the move from Washington back to academia? And so he said, let me tell you-- this is wonderful, let me tell you about it. My first day of work, I stepped into the Harvard Law School and I looked around this magnificent building.

And I said, Steve, you have really made it, this is everything you've really wanted to do. And then classes got out, people started moving around, and all of a sudden I saw coming down the staircase Dean Erwin Griswold himself, who at that point had been Dean of Harvard Law School by 23 or something years, very famous figure and just American law.

And as he's coming down the steps, I sort of looking at him and admiring him and then he caught my eye and he seemed to be looking at me and he seemed to be approaching me as he came down the stairs. And I thought to myself, my first day at work the Dean of Harvard Law School is going to come down and greet me.

And he walked right over to me and he said, young man, I have a desk that needs to be moved. Do you think you and some friends could come upstairs and move it for him. And so it shows he's obviously very confident, he was very proud of himself, but he tells a story on himself to make fun of himself and to ridicule some of those perhaps pretensions that he had. And I think that captures something very important about him.

RISA That's a wonderful story. I will say it also captures such a difference in time of how the Dean is perceived. I don't
GOLUBOFF: think anyone will be so excited to have me walk toward them down the hall, hard to imagine. But that is a wonderful story. Rachel.

RACHEL Dan, that story also echoes, we used to remember when he was here a couple of years ago, we had dinner with
HARMON: him and he was making fun of his questions at oral argument. He was telling the most ridiculous questions he had ever gotten trapped into asking by himself in oral argument in such a sweet and hysterical way, we were cracking up as he's saying. And then suddenly, I'm talking about an oyster, and I really enjoyed it enormously, his sense of humor about himself.

So I don't know if this is an anecdote exactly but when I was clerking, I was a little distracted, maybe I was less focused than my peers, it was the year of Monica Lewinsky's blue dress and Hillary Clinton's attorney client privilege assertion but my father had advanced lung cancer.

And I was sometimes maybe not as attentive as some of my peers, I think that would be fair. And Justice Breyer could not have been more understanding. And when my father was able to travel towards the end of the clerkship, he hosted my father in chambers for more than his usual tea.

And the warmth, and the generosity, and the attention, and the willingness to say nice things about me to my dad who was a middle school teacher who put himself through law school at night in his 40s and me going to law school was one of the happiest things that had happened to him in his life and that day at the Supreme Court, it turned out to be one of the proudest days of his life and he died just a few months later. So they weren't that many more and I just remain forever grateful for what he did.

RISA It's a beautiful thing. Yeah, Vince.

GOLUBOFF:

VINCE Yeah. A couple absentminded professor stories and hopefully Risa I'm not stealing yours but one story that has sort of been repeated over the years is from our eras. There's one time when Justice Breyer wandered into the clerk's office and started talking about a case.

CHHABRIA:

And I just read this amicus brief and I think they have a real point and I think we need to look into this. And I'm also thinking about that, and can you research that, and then the judicial assistant looked up and said, Justice, none of your clerks are here right now. They're all outside having lunch and he says, oh, OK, OK, and he goes out and joins us for lunch and talks to us about the case.

And it's true that he had this kind of absent minded professor quality about him and I remember Chuck Breyer, his younger brother, before I went to clerk for Justice Breyer. Chuck said, my brother is going to seem like he's not paying any attention to you and he wants to end the conversation but I assure you, he is paying attention to you and he doesn't want to end the conversation.

And an example of that is Risa, the Mike Leiter career advice story, right? Our co clerk Mike Leiter who went on to become the director of the National Counterterrorism Center, the term ended and Mike wanted some sort of advice from Justice Breyer about what the next step should be.

So he got on the phone with Justice Breyer and the conversation was like Chuck's description of conversations with Justice Breyer. He seemed distracted, he kind of seemed like he was thinking about something else, wanted to get off the phone, and the conversation wasn't that helpful. And so Mike hangs up and he thinks, well, OK I'm not clerking for him anymore, maybe he is no longer interested in what I'm going to do.

And then the next day Justice Breyer calls back and says, Mike, I'm really sorry I was distracted yesterday when we were talking. Can we please have the conversation over again? And that is him in a nutshell although he sometimes is distracted. He really, really cares about the people in his life and he's paying more attention than you think he is.

RISA Yeah, 100%. Rachel, you were laughing about that.

GOLUBOFF:

RACHEL He used to walk out of the room talking and then walk back into the room in the middle of the same conversation, you'd be like I missed something. Or when I interviewed with him, when he called me to offer me the job, he started in the middle of a sentence that was from the interview, it was as if we were continuing the conversation. So I felt this constant sense of, we were doing an extended conversation over time, he might miss something, you might miss something but it would all be OK.

HARMON:

RISA

GOLUBOFF:

That is wonderful. When he was here, I don't if either of you noticed this, Rachel and Dan, when he was here a few years ago and I introduced him and then I was sitting in a chair slightly back from the podium on the stage, and he was in a conversation with me and he kept turning back to refer to something I'd said in the introduction, like he was trying to talk to me and he wasn't talking into the microphone and he wasn't-- but he was because we were in a conversation exactly as you say and he was trying to continue the conversation.

So I wanted to pick up on two things, now I'm forgetting one of them. So one, Rachel, you mentioned that he did have so many people for tea and that the interaction that you had with your dad was different but I would also add even the standard tea which is what I got was amazing, right? And he was so generous with his time. He had this beautiful tea set and he would invite you in and he met you where you were and he met everyone where they were.

And I tweeted out this photo of him reading a book to my son and niece when they were about 4 or 5. And he was reading the book because my son had climbed under his coffee table and he was trying to lure him back out. And I think many clerks have stories not as heartwarming and heartbreaking as yours but of the Justice really embracing the families and being so generous in that way that I think we all really appreciate.

And then the other thing I was going to add was, one of the things that the Justice does at his reunions is he goes through term by term and he reminds everyone and tells everyone about a particular thing that happened during that term. And he names the clerks, and he exclaims over a particular case or incident, and he does this.

Literally, he goes term by term and he makes everyone feel a part of the story and everyone feel a part of his world as a Justice and the life of the chambers. And it brings you together with the other clerks so I have relationships, friendships with people who I know only because they were other Breyer clerks that I met at the reunions and heard these stories about them.

But it goes back to Vince what you were saying right, he's always paying attention and he wants you to that and he wants you to know that you're an important part of his life. And I think that's just crucially important. I'm going to say one last thing, and then people can offer last comments for our last couple of minutes.

So my last comment would be, Rachel, you said this before about how could they not like him, how could they not have affection for him? The news media keeps replaying the clip of he and President Clinton walking into the Rose Garden when he was announced to be the nominee and the smile on his face is just so genuine.

I mean, it is just genuine, he's full of joy he's not trying to hide it, he doesn't think it's inappropriate, he doesn't think it lacks dignity, he just is full of joy. And he had the same smile at the White House last week when he gave his retirement speech.

And after 27 years on the bench, I don't think it ever rubbed off, right, that he was in this place and that he was getting to do this role as a public servant, as you said Rachel, and to work for people. And that joy, it's infectious and it's something that I will always keep close about him. Who wants to go next? Last remarks.

DAN ORTIZ: I think several people have mentioned his optimism but the thing that's really great about it Risa as you've suggested is it was contagious and infectious. He was not a back slapper, he is not someone who would roar with laughter really loudly, or would tell the funniest jokes, but at the same time he was someone who could communicate his enthusiasm for basically everything he was doing for life in general and the hope that things could get better. And I think just as a kind of human quality, I think that's very undervalued.

RACHEL HARMON: Yeah, I think that's a great place to end. I mean, his legacy in the law is considerable but his legacy as a human being is equally so and I think we all shared in it.

VINCE CHHABRIA: One other part of his legacy that I think people don't talk about enough is diversity, which I mentioned at the beginning. Back to when Dan was clerking for him on the Court of Appeals, he always really cared about hiring a diverse group of people to work with him, women, racial minorities.

Every year there were his diverse group in his chambers and he cared about that deeply and long before it became popular to focus on diversity in hiring. And so obviously it was great for us, right, and for me personally, I never would have clerked on the court if he didn't care about diversity.

But I think more importantly, he believed it was important for him to have different experiences and different viewpoints coming through chambers and because he was focused on it so long ago, we now have all these people who have come of age who are at sort of the highest echelons of the legal profession who clerked for him.

We have the Dean of UVA Law School, we have JD Martinez who's the Dean of the Stanford Law School, we have Neal Katyal who was the former Solicitor General, we have Ketanji Brown Jackson, perhaps you've heard of her. And that's a legacy that he will leave. He has sent a diverse group of people to participate in our democracy and to operate at the highest levels of our legal profession and that will outlast his time on the bench for sure.

RISA GOLUBOFF: So I think that's a great place to end. I will say we did get a comment in the Q&A about the importance of different kinds of experience to judging and I think he has launched, I think that's true not only to judging but to lawyering and to leadership and I think he has launched the careers of so many who are an incredibly diverse bunch.

And I think it also leads and I think the commentator who shared this probably intended for it to do so to questions about the nomination and who's going to come next and what kind of people do you put on the bench and how do you think about that question. So let me just say thank you to each of you this was just a wonderful conversation and I appreciate you all being here. And thank you to our audience, and thank you to Justice Breyer for leaving such a beautiful legacy. So have a good day, everyone.