

# Richard S. Salant Lecture *on* Freedom of the Press

*with*

**Margaret H. Marshall**

2014



HARVARD Kennedy School

**SHORENSTEIN CENTER**

on Media, Politics and Public Policy



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# History

In 2007, the estate of Dr. Frank Stanton, former president of CBS, provided funding for an annual lecture in honor of his longtime friend and colleague, Mr. Richard S. Salant, a lawyer, broadcast media executive, ardent defender of the First Amendment and passionate leader of broadcast ethics and news standards.



**Frank Stanton** was a central figure in the development of television broadcasting. He became president of CBS in January 1946, a position he held for 27 years. A staunch advocate of First Amendment rights, Stanton worked to ensure that broadcast journalism received protection equal to that received by the print press. In testimony before a U.S. Congressional committee when he was ordered to hand over material from an investigative report called “The Selling of the Pentagon,” Stanton said that the order amounted to an infringement of free speech under the First Amendment. He was also instrumental in assembling the first televised presidential debate in 1960. In 1935,

Stanton received a doctorate from Ohio State University and was hired by CBS. He became head of CBS’s research department in 1938, vice president and general manager in 1945, and in 1946, at the age of 38, was made president of the company. Dr. Stanton was an early proponent of the creation of a Press and Politics Center at the Kennedy School. He served on the advisory committee for the proposed Center in the early 1980s and was on the Shorenstein Center’s advisory board from 1987 until his death in 2006.



**Richard S. Salant** served as president of CBS News from 1961 to 1964 and from 1966 to 1979. Under his leadership, CBS was the first network to expand its nightly news coverage to a half-hour on weekdays; start a full-time election unit; create additional regional news bureaus outside New York and Washington; and launch *60 Minutes*, CBS Morning News and Sunday Morning programs. He was credited with raising professional standards and expanding news programming at CBS. Salant was known as both a defender of the news media’s First Amendment rights and a critic of what he considered the media’s excesses and failings. Salant graduated from Harvard

College in 1935 and from Harvard Law School in 1938. He worked in government and as a lawyer. Mr. Salant represented CBS in hearings before the FCC and Congressional committees and in a suit with RCA-NBC over which network would develop color television. Although CBS lost, Salant impressed the network’s president, Frank Stanton, who later appointed him vice president of CBS News in 1952.





**Margaret H. Marshall** is senior counsel at Choate, Hall & Stewart, LLP and senior research fellow and lecturer on law at Harvard Law School. She served as Chief Justice of the Supreme Judicial Court of Massachusetts from 1999 until her retirement in December 2010.

Chief Justice Marshall was the first woman to ever hold the position in the history of the Court. She wrote more than 300 opinions, including the 2003 decision *Goodridge v. Department of Public Health*, which declared that the Massachusetts Constitution prohibits

the Commonwealth from denying same-sex couples access to civil marriage, thus paving the way for Massachusetts to become the first state to legalize gay marriage. A recipient of numerous awards and honorary degrees for her public service and private practice, she was the first recipient of Harvard's Professional Women's Achievement Award.

Chief Justice Marshall was born in South Africa, where she led the National Union of South African Students, dedicated to ending apartheid. She is a graduate of Witwatersrand University, Harvard University and Yale Law School.





# Richard S. Salant Lecture

## November 13, 2014

**Mr. Jones:** Good evening. And Happy Thanksgiving, early. We're very glad to have you here. I'm Alex Jones. I'm director of the Shorenstein Center on Media, Politics and Public Policy, and it's a great pleasure to welcome you all to this very interesting and happy occasion. This is a night when we honor the First Amendment and look at the challenges free speech and free press face in these tumultuous times. In just a moment, you will hear from Margaret Marshall, but before I speak about Chief Justice Marshall, I want first to spend a moment on the two men who make tonight's lecture possible and whose contributions to a free press were quite enormous.

This is the seventh annual Richard Salant Lecture on Freedom of The Press. Richard Salant was considered in his time the greatest-ever head of a network news division for his tenure at CBS during the time when CBS was truly the television news leader. This is in the 1960s and '70s. When Richard Salant became President of CBS News, the keystone nightly news program was 15 minutes long. There was no "60 Minutes," no full time unit assigned to covering elections, no "CBS Morning News." He changed all that and made CBS the leader in raising television news to something respected journalistically in a way that it had never been before. He stood for high quality news and a willingness to fight for that high quality.

But I think it's important that I mention another great CBS icon. I speak of Frank Stanton. He was a great fan of the Shorenstein Center and of the Kennedy School, and it was a bequest from his will that created the Salant Lecture. Frank Stanton was not a news man in the literal sense. He never covered a story, to the best of my knowledge, but as President of the CBS network, he was a champion of news and of press freedom. For one thing, he was Dick Salant's ally and champion. He made it possible for Dick Salant to win the reputation of being the world's greatest news division chief and made it possible for CBS to become respected as the nation's Tiffany network for news, and it was Frank Stanton who said he wanted this lecture to be honoring his colleague, Richard Salant, and not himself. And now on to the Salant Lecture.

In February, ten years ago, the Massachusetts Supreme Judicial Court told the state's legislature that it must grant full marriage rights to gay couples by mid May. The Chief Justice of that court was Margaret Hilary Marshall, and she had convinced three of her fellow six Supreme Court justices to vote for this epochal change. She cast the deciding vote and

wrote the opinion, and the United States, indeed the world, has not been the same since.

She was the first woman to be the court's Chief Justice in its 300 year history, which was an epochal achievement itself. I got an email yesterday from Justice Marshall saying that she had one request of me, no long introduction. She suggested Twitter length. I told her that was not possible, but if I were to Tweet an introduction for her, it would be as follows: Only a few people have had a genuinely historic impact on their world. Margie Marshall is one.

It is my honor to introduce the 2014 Richard Salant Lecturer on Press Freedom, Chief Justice Margaret Marshall. (Applause)

**Chief Justice Marshall:** Thank you very much, Alex, for that really wonderful introduction. It now means that I have to cut my speech in half because I was going to spend half of my speech telling you that you'd spoken for too long, but I can't do that anymore. (Laughter)

**Chief Justice Marshall:** It is so good to be here this evening at the Kennedy School with so many friends. I'm particularly privileged to be giving this lecture because Frank Stanton, not Richard Salant, but Frank was somebody that I knew very well. We served on a board together for many years, and I had spectacular conversations with Frank over the years. It's wonderful to be here and very typical of Frank that he would never take the credit for this [lecture], but endow it on behalf of somebody else.

Preamble part one. I am 70 years old, and for almost half my life I lived with Anthony Lewis, who was for 50 years a journalist at *The New York Times*. For 30 years and more, he and I had an ongoing conversation about freedom of the press and freedom of speech. Tony expected, he demanded, much from the press and from the law. A print journalist all of his life, Tony had strong feelings, very strong, about the press, about the First Amendment, about law, justice and liberty. Tony spent a great deal of time with judges and lawyers. It was a close call, but in the end, I think, he admired journalists even more than he admired lawyers and judges, but he did marry a judge. (Laughter)

**Chief Justice Marshall:** Tony looked at the First Amendment as a journalist. I look at the First Amendment as a judge. But perhaps more significantly, I look at the First Amendment as the child of a racist, totalitarian system, apartheid South Africa. I have strong views about freedom of the press and freedom of speech, and tonight, freedom of speech, not the press, is the focus of my remarks, and I know that Frank Stanton wouldn't mind.

Preamble part two. Twenty years after the release of Nelson Mandela from prison, it is sometimes hard to remember the fear, the mendacity, the cruelty, the terror of apartheid. A black man riding his bicycle along the edge of an open road, lashed with a bullwhip by the white passenger of a

passing car. Men suspected of anti apartheid political activity roasted alive as the security police watch. Two children left to freeze to death in a car when their father is stopped and arrested as he drove them home at night. And those who raised their voices or more to challenge the system or to report on it were arrested, imprisoned, tortured, banished – and journalists were not exempt. I am the child of that society.

South Africa's apartheid government, like other tyrannies, saw a free press and free speech as its enemies, and so they are. Our founders understood this and placed freedom of the press and free speech as the first personal rights of our countrymen. To speak one's mind freely, to publish one's ideas to the world, to debate and analyze and parody, these have driven the progress of individual liberty in the United States. We should honor, Alex; we should celebrate all that the First Amendment has wrought. The guarantees of the First Amendment are not self executing, and we *should* celebrate it, but we must also be watchful.

Tonight I suggest to you that the First Amendment adopted by the people as a shield to protect the dissemination of diverse viewpoints has become a sword, striking at values and institutions that define who we are as a nation. Would that I could tell you that the United States Supreme Court is responding forcefully to prevent such developments. To the contrary, the majority of the Justices is championing these changes. I focus on three this evening.

First, money and the rule of law. *Citizens United v. Federal Election Commission*, the court's overly expansive opinion on corporate speech, has had consequences, in my view, antithetical to the very notion of participative democracy. The old adage "money talks" has become our cardinal principle of governance. Members of this audience understand full well the corrosive effect of *Citizens United* on campaigns for legislative and executive offices. Less well understood and certainly far less reported in the media is the disastrous effect of that case on the judicial branch.

Exhibit one, an earlier case, *Republican Party of Minnesota v. White*, decided in 2002. Every state has written codes of judicial ethics to which its judges must adhere. At issue in *White* was a provision of the Minnesota Code of Judicial Ethics that prohibited candidates for judicial office from "announcing" their views on disputed

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legal or political issues. The Minnesota judicial ethics rules, like all others, were designed to preserve both the appearance and the reality of judicial neutrality. The principle: that judges must decide each case based only

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on the evidence and not on extraneous factors, such as allegiance to party platform or wealthy contributors, is central to the rule of law. Basic stuff, really, except that judicial candidate White, with backing from a powerful conservative think tank, claimed that the Minnesota “announce” rule violated his right of free speech, specifically his right to “announce” his positions on issues such as abortion and the death penalty, even though such issues were likely to come before him as a judge.

Five of the Justices of the Supreme Court sided with White. Justice Scalia, writing for the majority, brushed aside concerns about the effect of special issue campaigning on the quality of justice. Granted, he conceded “a party on a case who argues against a position previously announced by the judge is likely to lose.” Those are Justice Scalia’s words, “likely to lose.” But so long as *all* litigants taking that stand in the judge’s court are also likely to lose, he reasoned, the judge is applying the law evenhandedly, and there’s no cause to complain. As long as the judge announces, “I am opposed to punitive damages,” and as long as she holds to that position in every single case and never provides punitive damages, there’s no reason to complain.

Is this, Justice Scalia, what we as a society mean by the rule of law? I think not. *White* was just the beginning. Several federal courts have relied on *White*’s First Amendment analysis to strike down other judicial ethics rules, for example, ones that prohibit judicial candidates from promising in advance to decide certain cases a certain way. “I will never allow punitive damages in any case,” promises the judge, and she does not, no matter the facts of a particular case or the law. And this term, the Supreme Court will consider whether the judicial candidates have a First Amendment right to solicit campaign contributions directly from lawyers [and litigants] who appear before them. I leave it to you to anticipate the outcome of that case.

Hardcore activists determined to go state by state to dismantle all ethical restrictions on what judicial candidates may say, even while on the bench, fund most of the First Amendment litigation pitting the rule of law against judicial campaign speech. Their goal has nothing to do with enhancing the marketplace of ideas or enriching public discourse.

Their goal is to buy the loyalty of judges who will then rule in favor of the group's special interests. By pounding judges or judicial candidates seen as adverse to their interests with negative advertising, much of it of the gutter variety, these groups eschew all subtlety about their aim. It is to buy the loyalty of judges who will rule in their favor. And the strategy is working, for there is growing evidence that these "free from all ethical restraint campaigns" do in fact affect the outcome of cases. And the worst part of this? I quote, "The crisis of confidence in the impartiality of the judiciary is real and growing. Left unaddressed, the perception that justice is for sale will undermine the rule of law that courts are supposed to uphold." These are the words of Justice Sandra Day O'Connor, who has been sounding the alarm across this country.

In South Africa, I watched as the rule of law was perverted to maintain the power of the powerful. As a young law student at Yale, I found here a society striving for justice, a society where law was a force for democracy. It opened school doors for black children. It helped secure the right to vote for every citizen. It gave women control over their bodies. The perversion of the rule of law is to maintain the power of the powerful. I am concerned about such beginnings here, Left unaddressed, the prediction of Justice O'Connor's may be our reality.

Second, hate speech. We now live in a world of hate speech. A tsunami of racist, misogynistic, homophobic, degrading, violent and horrifying words and imagery is prevalent throughout the media, especially on talk radio, on TV news and on the Internet. Cyber hate has ignited a race to the bottom, driven by profit, sustained by a public primed for ever more heightened sensation. The shifting majority of the Supreme Court under Chief Justice Roberts seems content with this development. Professor Robert Collins of the University of Washington School of Law has studied the First Amendment decisions of the Roberts court and has documented what he terms, "a new First Amendment: absolutism." With few exceptions, the new absolutism views First Amendment protection to be the default position of all expression, and in his words, "establishes a virtually impossible bar for the govern-

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ment to overcome in regulating speech.” Thus the Court reads the First Amendment to protect the sale of violent video games to minors, and to

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offer special protections to protestors who disrupt private military funerals with declamations that the deceased deserved to die. The Court has afforded First Amendment protection for the sale and distribution of videos depicting small animals being crushed to death under a woman’s high heels and for an individual’s false claim that he received a military honor. That’s what the First Amendment is for, Justice Kennedy has said, to bother people. Indeed.

Historically, the United States Constitution has served as a structural template for many of the world’s emerging democracies, yet no other country,

including those with very protective charters of rights, has as expansive a view of speech as our current Supreme Court does. If this century and the previous ones have taught us anything, it is that words can indeed kill, and that words of hate, spread virally through chat rooms and videos and websites, can kill on a massive scale. Words of hate can also break the spirit. We have come to understand so well that hostile speech in the workplace can deeply wound the person who is the target of that speech in a multiplicity of ways. Why then do we resist the notion that those same words shouted on television or posted on the Internet can also cause real, deep and lasting harm?

When those who have been hurt and disenfranchised by hateful words ask us to take their political and social and emotional issues seriously, it is, in my view, the height of arrogance to fall back on First Amendment platitudes. South Africa taught me how expressions of hate can desensitize a nation and degrade a people. We know that Americans flocked in droves to lynchings, picnicking and clapping at the feet of the hanging tree, sending postcards of the lifeless corpse to the folks back home. Imagine if the channels of mass communication had moved as quickly and broadly then as they do today. What evidence do we have in the 21st century that bad speech will eventually be driven out by good? What evidence do we have that our coarsening civic discourse has made us a stronger nation?

Supreme Court Justice Stephen Breyer has identified five core principles that the drafters of the Federal Constitution sought to secure: democracy, human rights, equality, separation of powers and the rule of

law. Where does freedom of speech fit into this holistic view? Who better to grapple with this question than journalists? The question of acceptable limits on speech in the 21st century democracies profoundly engaged my husband, Tony, in the last year of his breathtaking, intellectual journey. In his last book, *Freedom for the Thought That We Hate*, he quoted approvingly Jeremy Waldron’s observation that “the costs of hate speech are not spread evenly across the community that is supposed to tolerate them” and that “we have a duty to speak to those who are depicted in a hateful light, before we conclude that tolerating this sort of speech builds character” – and I would add, before we conclude that tolerating this sort of speech strengthens our democracy.

Tony was never one to bow to received orthodoxies, not even to those he himself held dear. In light of all we know about hate speech, its affects and its dissemination in our time, should the boundaries between permissible and restricted expression be recalibrated, and if so, how? Tony had the courage, the moral fiber, to grapple with these questions. To the extent that other journalists and legal theorists shy away from this question, we cede the conversation to First Amendment vigilantes, and that is a dangerous path.

And finally I turn to privacy. Many new constitutions explicitly recognize and protect that right to personal privacy. The federal Constitution lacks a specific privacy clause. Nonetheless, our Supreme Court has held that other constitutional rights, such as freedom from unreasonable search and seizure presupposes a private, individual sphere, a refuge of self that cannot arbitrarily be invaded by government.

Yet that same court has allowed the government to spy on Americans on an unprecedented scale. Edward Snowden and Bradley Manning have left no doubt about the extent of domestic surveillance. This is not old school, cloak and dagger spying. Today’s reconnaissance is vast, impersonal, random and, save for the work of renegades like Snowden and Manning, opaque and beyond the reach of accountability. Much of it has been made possible by laws enacted in the wake of the terrorist attack of 9/11. Professor Balkin

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of Yale Law School has studied the deep architecture of government cyber spying. He knows that the same technological infrastructure that brings

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us endless new ways of communicating across physical barriers is the very technology – servers and networks and domain name registers and electronic payment systems – that the government uses to spy on and regulate the dissemination of ideas. The result is a system of pervasive, collusive surveillance, lacking all transparency and accountability.

I know from my own searing experience what happens to a community, to an individual, living in a world where no communication can be assumed to be private. Not one's diary. Not one's conversations with friends. Not an innocent question asked of a teacher. Not a sermon delivered from the pulpit. Whether the overseer is a man with binoculars at the crowded funeral for a popular political reformer or a software program counting keystrokes as you Facebook the mundane events of your day, the effect on the target of surveillance is soul crushing. We are social animals. We grow through expressing ourselves to others. We live for those moments of connection. To be continually self-censoring, continually separating one's thoughts from one's words, worried to talk, to speak the truth, is to invite real danger. That is the death of the spirit – and for the community, that can be the death of hope.

The massive, barely perceptible assault by the government on the

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right to privacy is perhaps the greatest threat to freedom of the press and free speech our country has ever known. 9/11 caused a recalibration of the tradeoffs between privacy and security in this country, and the balance we struck is not, I conclude, compatible with a free people living in an open society.

I am an immigrant to this country. A citizen who found in the United States the promise that had attracted millions of others, a promise of nearly

unimaginable security and freedom, including the right of every person to read, to publish and speak freely, even against the government, without fear of recrimination.

I have focused tonight on the First Amendment under siege because you, our scholars, our students, our journalists are standard bearers for the



First Amendment. You understand the stakes of drowning out participatory democracy in a sea of money, or in shouts of hate, and of destruction of private selves. You are perfectly poised to lead in thoughtful debate, and your leadership has never been more urgently needed. Every generation of Americans is tasked with keeping the fundamental principles of our democracy alive and flourishing for the generations to come. For the work the Shorenstein Center has done, for your work and for the work you will do, I thank you. Thank you. (Applause)

**Mr. Jones:** Thank you, again. Chief Justice Marshall has agreed to respond to some questions for a few minutes. Let me ask a first question, if I may.

**Chief Justice Marshall:** Sure.

**Mr. Jones:** Let's look at the issue of privacy in particular, because I think that that is tied up with national security in a way that is complicated, I think we would all acknowledge. Where do you see that appropriate balance, between a privacy right and an unquestioned threat?

**Chief Justice Marshall:** First let me say where I don't see it. I don't see it with the many, many, many Americans that I've heard in person saying, "I don't mind if they spy on me or if they see what I read because I'm doing nothing wrong." It's a very bad way to look at it [the question] because we haven't felt what it feels like. The great, wonderful thing about being an American and brought up here is this is what you know. So don't start there. It's got nothing to do with whether you're obeying the law or not, it really doesn't.

I think I would start with transparency. I think we have to know what is happening. We are a democracy, and we have to agree that that's how we want our lives to be [i.e. under constant government surveillance]. And if we agreed [about that], I believe in democracy and I'm prepared to listen to other voices who say we need to err more on the side of security arrangements than not.

I don't like courts which are closed [for example, the FISA courts]. I don't even like courts that don't allow their proceedings to be televised, but that's a different issue. I certainly don't like closed courts. I

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**The massive, barely perceptible assault by the government on the right to privacy is perhaps the greatest threat to freedom of the press and free speech our country has ever known. 9/11 caused a recalibration of the tradeoffs between privacy and security in this country, and the balance we struck is not, I conclude, compatible with a free people living in an open society.**

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know too much about them. And I don't like courts where there's no adversary[challenging the government]. There are lots of ways [to maintain security]. You can go to Judge Saris or Judge Barron, and there will be ways in which things could be subpoenaed and so on.

There are ways that you can handle this, but I think that we have erred

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too far the other side, and I always come down to this: I want to know what the government is doing. I don't want to have somebody like a Snowden telling me what my government is doing. That makes me feel very uncomfortable. I don't trust his motives one bit, and I don't want that. So precisely where the

line is, I can't tell you, but it's not where it is at the moment.

**From the Floor:** First of all, I loved your comments. There was one part that I was confused about, and it had to do with hate speech, and I'm wondering if you could elaborate on what constitutes hate speech and who gets to determine the definition. I'm thinking about situations, for example, where a pro life group or ultraconservative group may view certain statements as hateful because of their value system. Or I'm thinking about Vietnam where returning Vets might have been called terrible things – it was an expression of a view of the war. So how do we define hate speech, and if we should envision a world in which the people that you least trust are in a position to define it, how does that reconcile with what you said about it?

**Chief Justice Marshall:** That's a many part question. The first thing I would say is, I don't think we need to take an absolutist position, that just because it's speech, nobody can say anything about it. Second, who defines it [hate speech]? I don't think courts are really good at doing that. I do think legislators and executive branches sometimes are better at that. So, for example, if the legislature, in my view, says that we want to have a rule that regulates the videos that are violent and shouldn't be shown to minors, I don't understand why the First Amendment has to trump that. I understand, I read the elegant opinions [on hate speech]. I just don't agree with them. I don't think there's anything in our history that says we have to agree with that [the jurisprudence of the present Supreme Court].

I don't think that you necessarily have to uphold every occasion in which somebody says something peculiarly hateful directed to a particular person. So if I have a son or daughter, who's been in the military, who's not gay and who served our country proudly and is being buried at a funeral – an incredibly painful thing in a war that isn't so popular – and these returning veterans are not always respected, maybe the ones who are coming home from the ongoing war, not the Vietnam War, we've learned

about that. We're learning now. So we go through our airports saying, "Thank you. Thank you for your service to our country," and then we have a private funeral where the government says that you can come and shout at me so I can hear you saying, "Your son deserved to die"? I don't think the First Amendment is about that. If you want to regulate the ability to oppose abortion, not at a particular person particularly, but people who are going to an abortion clinic, then I think the courts and the legislature can go backwards and forwards as to whether it's 20 feet or 30 feet or 40 feet or 50 feet. It's kind of helpful if you've actually been there. How far do you think the distance is from me to you, for example? Right? All I know is that you have to be given a mic, right? I think we can work with this.

It's the principle that anything goes—when what's going is not good for our country, it's not good for our participatory democracy. It's hard. I want you to work with me. I want scholars and journalists to think about it. Don't just abdicate and say, "It's the First Amendment." It's not. It's not. So it's hard, yes [to define where the limits are].

Do I think that the government should tell a journalist what to print? No. But do I think that the European Court of Human Rights – different, I know it's different – that says some speech encouraging violence is not protected free speech is wrong? Maybe not. I don't know. What about Skokie? Different. Skokie's different. Speech does not have to be nice to me all the time, but I wouldn't spend so many hours watching some television programs, to say nothing about some talk radio. How many of you listen to talk radio on a regular basis?

**Mr. Jones:** I do not. Who does? Who wants to admit it?

**From the Floor:** Does NPR count?

**Chief Justice Marshall:** No. (Laughter)

**Chief Justice Marshall:** I mean you can't not notice it's awful stuff.

Now if I'm an official of the government, if I'm on the bench, you can say whatever you like about my opinions. That is your absolute right as an American citizen. You don't like *Goodridge*. You don't like this. You have an absolute right. You think I'm being paid off by somebody? You have a right to say that. I'm a public official. I don't think there's any question around it. I am never bothered by that. Do you want to call Obama a birther? From

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my point of view, that is nasty. I'm not going to challenge that. But private conduct, I have a different feeling, a really different feeling.

**From the Floor:** Wonderful, dear friends and wonderful Chief Justice, one of the most amazing game changers, I think, in history of the world. But let's look ahead and let's assume that we have Hillary and Elizabeth and

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we have Christy and Jeb. Are they going to do anything to inhibit free speech? Do you have any hope that we're going to have a decent dialogue looking two years down the road?

**Chief Justice Marshall:** I have enormous confidence in this country, enormous confidence. I have less confidence in America's capacity not to take everything day by day, so I tend to look in 25 year tranches, 50 year tranches,

100 year tranches, and if you're asking specifically about the United States Supreme Court, I believe in the system. I don't like what they're doing at the moment, and I think people have to tell them. They may not necessarily change their mind. I'm not asking them to overrule recent decisions, although they seem to be quite comfortable about doing that too. So I just want to have us discuss it and talk about it and be open about it and not just shy away from it.

Here's a test, and Professor Fried, you may not answer, and Mr. Cullen, you may not either if you know the answer. So I'm going to give you one piece of data, and I'm going to ask you a question. The data, the information, is the following – and neither of the judges can answer this either: In 2009, if you took every case filed in every federal court in the United States, from Maine to Mississippi, Florida to Alaska, every case filed in every federal court, trial court, court of appeal, United States Supreme Court, all those per se petitions, excluding bankruptcy, there were in 2009, 338,000, give or take, filed in the federal court, 338,000 cases that our federal judges had to decide. How many cases do you think were filed if you took all the cases filed in every state court, trial, appellate, Supreme Courts, excluding traffic offenses? Murders, whatever the number, whatever do you think were filed?

**Mr. Jones:** Millions.

**Chief Justice Marshall:** Be more specific, Mr. Jones.

**Mr. Jones:** Twenty million.

**Chief Justice Marshall:** Forty-eight million.

**Mr. Jones:** It wasn't a bad guess. (Laughter)

**Chief Justice Marshall:** So who comes to those courts? Your governments, federal and state, plaintiffs, defendants. Thousands of cases. It's where democracy, the judicial branch, works, not because the federal cases are not important, they are. Did you take a read of today's headlines in The Globe, Mr. Cullen?

**Mr. Cullen:** I did.

**Chief Justice Marshall:** There's a case going on in state court right now. All right, we don't have elected judges in Massachusetts, and there's criticism of a judge today that she appeared to be lenient. Would you feel different about her outcome if she had raised a million dollars and that one of the litigants in the case had contributed to that? You bet you would. How many states don't have elected judges? Three?

**Mr. Jones:** A dozen or more.

**Chief Justice Marshall:** Not more. Some or all. Retention elections. Final elections. Maybe four. Not more than five. Sandy, how many?

**Ms. Lundy:** Three.

**Chief Justice Marshall:** Three, I thought I was right. This is not funny, and how many newspapers are following that day after day after day after day? Not the individual case here. How many of you know about the Iowa Supreme Court Justices? Show of hands. Yeah, of course, you all do. Now, they covered that. Yeah, it was a nice cause, gay marriage, good cause. Great court, right? Money poured in. Terrible. Day after day after day. And guess who's paying the price? Criminal defendants. Our sentences get longer and longer and longer, and we incarcerate more and more and more. But you have the First Amendment to announce your views. You'll probably have the right to go raise money from the parties. Justice Scalia, I don't always disagree with you, but, boy, I disagree with you on that one. I just do. And you can fix it. You really can.

**Mr. Patterson:** *Citizens United* I think is the clearest case where you go from questions of the First Amendment to questions of the democratic process, and we get a little bit of that with what's happening with judicial elections. Where the court is tracking on First Amendment and free expression issues, it strikes me that it's tracking in a different kind of way when it comes to the democratic process. So we have decisions about the Voting Rights Act, we had the decision about gerrymandering, we have decisions about voter ID laws that in some ways they're almost cavalier about the democratic process – whereas they almost have this absolutist position on the First Amendment. I'm wondering if you'd like to talk a little bit about how you think about how they ought to see the democratic process?

**Chief Justice Marshall:** You mean that they're being cavalier about the legislation that's enacted?

**Mr. Patterson:** Well, it's not as well encoded in constitutional law – what the rights of citizens are in terms of voting, and so on – as they are around areas such as free speech and the like. And the court, to me, is kind of narrowing citizens' rights in the context of the democratic process so that the voter ID laws, for example, begin to shrink access and so on.

**Chief Justice Marshall:** Sure. So there we're more out of the constitutional realm and into statutory, but you're putting a constitutional overlay over it because that's what courts do. Somebody challenges things, and a judge decides. I think the best I can do right now is to discuss the affirmative action case in which Chief Justice Roberts said the way to end discrimination is to end discrimination, and Justice Sotomayor wrote a very cutting dissent [addressing that point]. Now the affirmative cases and the Michigan cases, those were state institutions, but the Court has done this with private institutions [universities] as well.

There is a piece in *Slate* magazine, and I apologize to the journalist that right now, of course I am 70 years old, I cannot remember the name of the journalist, but he, it's a "he" [John Paul Rollert] I think, used a phrase that I thought captured that, Tom, and in a slightly different way. He talked about "empathetic laziness," that as a society we're becoming "lazy." He was in essence saying what Sotomayor was saying. She wasn't accusing the Chief Justice, her Chief, of racism, but that he was "lazy empathetically," he couldn't take the time to listen to what the other side was saying. In some ways, I think that about the Voting Rights Act as well, and the gerrymandering cases.

We have such a long history of denying black people in this country the right to vote. We have had a very long history of denying women the right to vote, but at least since 1952 when Massachusetts finally allowed women onto a jury, the Chief having taken the position that even though you had the right to vote, you still didn't have the right to be on a jury, right? I mean women pretty much exercise their right to vote now, and we don't have a lot of women going into courts saying – or a lot of people going into courts saying, you know, "You shouldn't allow women the right to vote." I think the voting rights cases are terrible, the gerrymandering [jurisprudence] is terrible, and I think some legislatures are going to figure out some ways to attempt to stop that.

The whole thing of dealing with our constitutional values, it's not just the courts, it's executive, it's the legislature, and frankly, it's you – it's we, the people. Massachusetts amended the constitution, and you can amend a constitution. That essentially provided for more sophisticated ways to grow boundaries, and they come first to the court. The legislature proposes it, and they come to the court, and we take a look at it and it looks okay.

And then if you're a black voter, under the Voting Rights Act, you can go to the federal government, and the federal government gets to take a look at it – and we said it was okay, and our federal judges said it's not okay. See, you have a lot of whites. But when you have one court that is constantly going in the opposite direction, but you've still got the state courts, so all of these are not easy issues. They're just not easy. So in a way, I criticize the United States Supreme Court, but it's really a cri de coeur to the United States, to us, to the people, to say "Do we want to tolerate this?" I think there's quite a lot written about the Voting Rights Act, and Professor Guinier is extremely eloquent about it, and she's here at Harvard and she talks broadly and widely, and I think her husband would say she's away too much, but she feels passionate about it because she started her career and she knows how much we've lost.

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**The whole thing of dealing with our constitutional values, it's not just the court, it's executive, it's the legislature, and frankly, it's you – it's we, the people.**

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I want to mention just one other thing, which is the death penalty. If you haven't heard Bryan Stevenson's TED Talk, he's a wonderful lawyer who does nothing but death penalty cases in Alabama. Please go home and listen to it tonight.

The United States Supreme Court won't be able to decide any death penalty cases if there is no death penalty, and the people who make no death penalty are state by state by state. I mean it's not just nine people.

By the way, one little thing you may not know about the United States Supreme Court, this is the first time in our history – get this – where not one person on that court has had any experience in any state form of government – executive, legislative or judicial. Do you think it makes a difference? What? It makes a difference. I love law professors, but I don't want them to make all of our decisions. (Laughter)

**Chief Justice Marshall:** Right? I don't want people only who have been trained at the great law schools, who teach, primarily, federal law, for good reason, and then go to clerk for one or two federal judges or three, and then go to work in a federal prosecutor's office, and then get a job in the federal Solicitor General's Office and then go to the United States Supreme Court. That seems to me to be a lot narrower group of people from whom you're choosing nine people, and I think it's reflected in the narrowness of their view. It really is. That's a long question that didn't answer – a long answer that didn't answer your question. (Laughter)

**Mr. Jones:** You gave a superb lecture. Thank you very, very much.

**Chief Justice Marshall:** Thank you. (Applause)

**Mr. Jones:** I thank you all. I think that I can say that this was really superb, outstanding, thought provoking and profoundly wise. Justice Marshall, Chief Justice Marshall, thank you so much. We were honored. We were very glad to have had you with us tonight. Thank you, Frank Stanton, thank you, Richard Salant, and thank you all. (Applause)



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