Nina Totenberg: Good afternoon, everybody. I'm delighted to be back. There are just a couple of things I wanted to say before we start. First of all, believing in accuracy, I wanted to correct something I said yesterday that Ted White reminded me of. I attributed to whoever told Holmes that it was time for him to retire a quote which actually I had in the wrong timeframe. It was Hughes who went to tell Holmes the time had come for him to leave; he was beginning to lose it. And somebody else who went to see Stephen Field [ph?] and asked him if he hadn't had a duty, something like this, with somebody earlier, and it was Field who said, "And a dirtier day's work I've never done." So I just wanted to set the record straight on that. And I wanted to welcome you all back after, we hope, a nice lunch, and to introduce this panel, which is going to be on the culture wars, a very-- maybe modern phenomenon and maybe not. I'm going to introduce the panelists. To my immediate left, Judge Michael McConnell, who I first got to know when he was a law professor at the University of Chicago and then he went to the University of Utah, where he still teaches in addition to being a federal judge. He clerked for Justice Brennan on the Supreme Court. Let you not think that that makes him some sort of a liberal law professor. Not so.

Hon. Michael W. McConnell: Some sort of liberal law professor.

<laughter>

Nina Totenberg: And I must say one of the saddest days, to me, is when he went on the court because he then couldn't do interviews with me for NPR and they were always so interesting. And to his left is Heather Gerken, who clerked for Justice Souter and is now a professor at Harvard Law School.

Professor Heather Gerken: Yale Law School.

Nina Totenberg: Sorry.

<laughter>

Nina Totenberg: Yale Law School. Whoo-- bad move. I actually even knew that. I just screwed it up. And immediately to her left is Michael Dorf, who clerked for Justice Kennedy and is a professor at NY-- at Columbia Law School.

<laughter>

Nina Totenberg: Whoops!

Professor Michael C. Dorf: That was deliberate.

Nina Totenberg: I could have done a two-fer. I could have said that you were at Brigham Young. <laughs>

Hon. Michael W. McConnell: Or on the 9th Circuit.

Nina Totenberg: Or on the 9th Circuit.

<laughter>

Nina Totenberg: Or the 4th. So I'm going to-- this panel, everybody has assured me that they do not have opening remarks they wish to make, so there's nobody I have to cut off. So I'm going to just try to be as unobtrusive a traffic cop as possible with a few basic questions, and my opening question to this panel is: When did the culture wars start? Was it the Vietnam War? Was it Roe versus Wade? Was it the pill? Was it the draft? Was it, you know, something else? Maybe it isn't really a 20th century phenomenon, maybe the culture wars go back a great deal before that. So Judge, why don't you start. Rank hath its privileges.

Hon. Michael W. McConnell: I'm tempted to say the Garden of Eden.

<laughter>

Hon. Michael W. McConnell: But at least the culture wars go back to the founding, I mean, if by culture we include issues of religion, for example, which I think are high on the list of culture war issues. Religion has been a contentious political matter from the beginning, including during the Revolution itself when the leading apologists for the Tory position were almost without exception Anglican ministers and the Congregationalist and Presbyterian ministers and the Baptists led the Revolutionary cause. And then with the new government, how secular the new government would be was one of the first debated

issues for almost a month in Congress when they were debating the protocols for George Washington's inaugural. This was on the front burner, and controversially they decided to include attendance at divine worship services as part of the first inaugural. George Washington's own contribution was to end the constitutionally prescribed oath of office with the words, "So help me, God." That's not in the Constitution, but it has been with us ever since. Every president has had to deal with that. To be sure, some of our current culture war issues are pretty new, but that doesn't mean we haven't had them from the beginning.

Nina Totenberg: Heather?

Professor Heather Gerken: I actually think it's almost hardwired into the system that there are going to be culture wars involving the presidency and the Court because they're two institutions that, in some senses, have to act. So the president has to make policy; the lower courts, at least, have to decide these questions and once they do, it's hard for the Supreme Court to resist the impulse to go forward and decide them as well. They're capable of acting, so that in contrast to Congress, which is often subject to the problem of gridlock, both the presidency and the Court are fairly nimble in terms of moving things forward. And then also when they act, they speak, so they don't just render a decision, but they actually explain why they're rendering the decision. And I think that those three factors, in a sense, almost guarantee that the presidency and the Court will at some point be involved in the issues that we're fighting about. It's almost impossible to avoid.

Professor Michael C. Dorf: Much as I'd like to disagree for the sake of generating controversy--

Professor Heather Gerken: Your job is to disagree.

Professor Michael C. Dorf: Right. So I'll agree, but disagree a little bit. That is, when we talk about the culture wars today, I think we have in mind a constellation of issues such as abortion, gay rights, women's rights-- we can't really talk about that because that was supposed to be in the previous panel, but we talk about that in the same way we talk about racial issues, the role of religion in public life, and then a whole set of free speech issues. And there are undoubtedly more. And some of those issues, especially race relations, have been with us from the founding. Others have been controversial only in the last 70 years, 50 years, 30 years, and 10 years in some of these cases. And what I think distinguishes what I would call the modern period, say early '70s through today, from earlier periods is that these issues emerge as a matter of national politics to a much

greater degree than in previous times. Now maybe they're just replacing previous issues that were equally divisive and equally cultural in some sense, but I think it's nonetheless a useful category in terms of how we think of how people vote, for example. So, you know, there's the claim of some analysts that the coalitions of the two parties now divide along cultural issues rather than economic issues, which is the way they might have been divided a generation earlier.

Nina Totenberg: You know, Presidents Eisenhower, Kennedy, Johnson, they all got consequences from their appointments that they probably didn't bargain for-- school prayer, limits on parochial school aid, limits on the death penalty, the whole progression of birth control, leading to privacy cases, the diminishing of rural power from one person, one vote. Do presidents, though, do they like these culture war issues? Do they use them to their advantage and therefore like them, or do they dislike them? Do they just get in the way?

Hon. Michael W. McConnell: Well, they like them when they're-- I mean, we can't lump them all together. They like them when they unite their party and get their supporters to the polls, and they dislike them when they divide their party and create embarrassment. So I just don't think we can lump them all together.

Nina Totenberg: But is there ever a case where they really unite them? If you take the least freighted one now, if we look, for example, reapportionment, in each party there were people who liked it and people who hated it.

Professor Heather Gerken: I think one way to think about some of those issues is that-- this is actually drawn from Keith Whittington's [ph?] new book, which is won-- I don't know if it's come out yet, but it's a wonderful book. And Whittington basically argues that presidents love having courts around, particularly when they're trying to enforce a national agenda on a regional outlier. So the issues that you just described, so one person, one vote, no one in the federal government was really able to do anything about one person, one vote-- the problems of malapportionment-- except the Court because Congress depended upon those state legislators to draw their districts. And so in some ways the Court sort of cut the Gordian Knot on that question. Or think about the issues of race or even Griswold versus Connecticut. So what's happening is the Court, as a national institution, is sort of enforcing a norm that's growing nationally on regional outliers. It may be the religion cases could be understood that way, too. It depends on how you think about it. But I think that's what gets the Court into the culture wars. On the other hand, if you were president you can imagine why-- assuming you're part of that

national consensus-- it would be awfully convenient to have the Court doing your dirty work for you rather than having you do it.

Hon. Michael W. McConnell: Of course, sometimes the Court imposes an outlier upon a national majority. You take, you know, Roe versus Wade, where the laws of at least 45 and arguably all 50 states were overturned, or the more recent, you know, partial-birth version, or even school prayer, which was quite widespread at the time. So the Supreme Court's not always engaged in a mopping up operation.

Professor Heather Gerken: No, that's right. I just think that presidents are able to use the Court or to be-- presidents, I think, have reasons not always to run against the Court. And even on the abortion case, it's hard for me to imagine that having courts decide abortion decisions hasn't actually helped keep some coalitions together at times when that fractious issue might divide them because presidents can always say, "I'm pro-life, but I believe in adhering to the law and the Court has to decide this question." It's a convenient way of keeping a coalition together.

Hon. Michael W. McConnell: You know, I'm not a politician, but I think a lot of working politicos would say that as a matter of practical party politics, Roe versus Wade has worked to the benefit of the Republican Party and to the detriment of the Democratic Party, notwithstanding the fact that the two parties tend to in both cases take the position which is contrary to their partisan interests.

Professor Heather Gerken: So that Roe versus Wade helps energize your base without you having to do anything about it to energize the other base. That's the benefits.

Professor Michael C. Dorf: But to come back to Nina's question, I said that the conventional wisdom, then, is you want to-- not as a president, but as a presidential candidate-- you want to mobilize your base by signaling to your base that you are going to be strong on that issue. If you're a Republican candidate, that means you're going to appoint justices who will vote to overturn Roe, if you're a Democratic candidate, justices who will reaffirm it, but then try to soften that in the general election. So it's a complicated relation. Culture war issues are useful for primary candidates. They're harmful for general election candidates, who then have to try to soften their positions on this.

Nina Totenberg: And aren't they always almost harmful for Supreme Court nominees, because then they're stuck in a confirmation hearing trying to walk the tightrope?

Hon. Michael W. McConnell: Undoubtedly that's true.

<laughter>

Hon. Michael W. McConnell: Sometimes lower court nominees.

<laughter>

Nina Totenberg: Sometimes.

Hon. Michael W. McConnell: Or as the Constitution so charmingly names them, inferior court nominees.

Professor Michael C. Dorf: Right. Which has all sorts of spillover effects, right? So one side effect of culture war issues making confirmation hearings more difficult is that you see fewer people like Judge McConnell being nominated because it's just not worth the effort to get somebody with a paper trail through, you know? If you're going to name an academic, maybe you'll name an academic who made his or her name in antitrust or tax law or something that's thought not to be quite as fraught.

Nina Totenberg: You know, I'm wondering. Presidents have always had something that they really cared about in terms of Supreme Court nominees. FDR wanted to make sure that he picked people for the Court who would uphold the New Deal legislation, for example. I don't think he really thought particularly about civil rights or civil liberties or any of those other things. I think President Reagan, at least as far as I can tell-- and you guys are much smarter than I am, but as far as I can tell-- was the first president, and his successor Republican presidents have carried that forward even further, who had a very elaborate agenda of things, more than just law and order, more than just abortion, also executive power questions, federalism questions, a whole lot of everything. Can that survive? Can that kind of all-encompassing criterion and then for all these different issues, can that survive without really hurting the Supreme Court, the confirmation process and the presidency, or is it the way of the future?

Hon. Michael W. McConnell: You see, I'm not sure that I accept the historical premise. I that the New Dealers had just as comprehensive a set of constitutional principles as the Reaganites did. I do think that in between that there's some administrations that are not particularly concerned, but those two, I think, were. Now in both cases, you can't think

about everything and so, you know, Felix Frankfurter turns out to be, you know, a New Dealer with respect to the issues that are on the front burner and looks like a bit of a conservative by the time the new issues of the Warren Court come about. And I don't think that the New Dealers had thought all of that through, but you could say exactly the same thing about Reaganite judges, that yes, they had certain things they were looking at that looked pretty comprehensive, but 20 years later, those people are deciding the issues of their day in unpredictable ways, you know? And so you have, you know, quite Libertarian-leaning judges named by President Reagan and you have quite, you know, judicial-restraint types that'll uphold whatever the government does also appointed by Reagan. They don't look very similar today.

Professor Michael C. Dorf: I want to disagree strongly with that. And although I didn't make an opening statement, I'm now going to, in 30 seconds, describe the thesis of a recent law review article of mine.

Nina Totenberg: Oh, goody. That means I don't have to read it.

<laughter>

Professor Michael C. Dorf: I'm going to read you a list of 12 Republican justices. These are all the justices appointed by Republican presidents since President Nixon. I'm going to divide them into two lists. Here's the first list: Berger, Rehnquist, Scalia, Thomas, Roberts, Alito. Here's the second list: Powell, Blackmun, Stevens, O'Connor, Kennedy, Souter. The difference between the two lists? Everybody on the first list had federal executive branch experience before going on the Supreme Court; nobody on the second list did. What that tells me, at least, is that federal executive branch experience is a way of identifying for Republican presidents at least over the last 40-some odd years those people who, when they become justices, are going to be more or less loyal to whatever the Republican ideology is. And we could do the same thing for Democrats. It's just there are only two of them. And of course I agree with Judge McConnell that there will be issues that you can't predict that arise anew, but in an era when parties are more ideologically coherent in the United States than they've been in a very long time, I think there will continue to be a lot of coherence between sort of conservatives on the one side and moderates and liberals on the other.

Hon. Michael W. McConnell: Very interesting lists since the first name on the list was Warren Burger, who was the author of Lemon versus Kurtzman, you know, the strongest

separationist opinion and Establishment Clause. He was in the majority in Roe versus Wade. He was the author of the first mandatory busing for desegregation decision.

Professor Michael C. Dorf: So he's less conservative by modern standards, but if you look at the statistical analyses of the voting patterns of the justices under the so-called attitudinal model, he codes quite conservative and certainly more conservative any of the contemporaries on the second column that served with him. But I agree that by modern standards, there are issues in which he's an outlier.

Nina Totenberg: Well, if we look at sort of the iconic case that conservatives view as judicial activism and it's the lightening rod case of all the confirmation hearings, it's Roe versus Wade. And I wasn't around at the time of Griswold covering the Court. I was there when Roe was decided, and it really wasn't nearly as unpopular on the day it was decided as it probably is today or was five years ago. It wasn't that big a deal. It didn't become a national issue in a national election until seven years later. And maybe I'm wrong about this because there now is an effort by some to make contraceptives not available or at least make restrictive laws involving contraceptives, but I still have the impression that Griswold, while law professors didn't like it, they saw it as a penumbra activist opinion. Its predecessor, Poe versus Ullman, is still considered very interesting, good law. And Griswold isn't enormously unpopular as a general matter compared to Roe. So what was the transformation? How did that happen? How did we get from it not being such a big deal to being a very big deal?

Hon. Michael W. McConnell: Well, one thing to notice is that at the time Griswold was decided, Connecticut was, I think, the only remaining state that made use of contraceptives by married couples illegal, so the rest of the country had already adopted this. And so whatever one might think of the rather extravagant majority opinion in the case-- which, you know, I think law professors still poke fun at regularly, whether they like the result or not-- whatever you think of the reasoning of it, it was not a remarkable decision in terms of the actual social policy reflected; Roe versus Wade, quite the contrary. Roe might have been much less so had it been less ambitious, had it confined itself to the details of the Texas statute, but having gone as sweepingly as it did, it made a major change. And so you are, I think, right that the controversiality of that sort of slowly dawned on people. Part of that is a religious cultural story because abortion had not been much debated in religious circles at a time when it was illegal almost everywhere, and it looked like a Catholic-Protestant divide. And Protestants, I think, when the decision first came down, tended to think, "Oh, well this is fine because only Catholics care about that." And then as abortion became more a part of our national life, you had major Protestant leaders like Francis Schaeffer who energized the Protestant groups and especially the more evangelical side of Protestantism, and pretty soon it

became a point of union between evangelicals and Catholics rather than a point of difference between them. And, you know, seven years is not that long for that to have taken place.

Nina Totenberg: Does any of it have to do with actually-- this thought just occurred to me-- the place of Catholics in America in the early 1970s and before. In other words, when Justice Brennan, for example, was named to the Court, he was asked very specific and we would today say probably politically incorrect questions about whether he could be a neutral justice, a fair justice, despite his Catholicism. Of course, today there are five Catholics on the Court. And just as President Kennedy, when he was candidate Kennedy, had to assure the Baptist ministers that he would not be beholden to the Pope, for example, that there was some notion of separateness between religion and the Court that today-- it's not that justices are dictated to by any religious figure or even by their religion, per se, but that it's much more acceptable to consider that the law also has some moral questions that need to be resolved, somewhat in the context of religion. Where am I crazy?

Professor Michael C. Dorf: So, you know, there's this wonderful book, "How the Irish Became White." I think someone should write a book called, "How Catholics and Jews Became Judaeo-Christians," right?

<laughter>

Professor Michael C. Dorf: And you're free to use the title. Not only are there five Catholics on the Supreme Court, there are only two Protestants, right, which is a remarkable fact, given American history. It's because religion in the sense of what mainstream sect one belongs to is no longer a major cleavage in American politics in the way that it once was. There's a much more substantial cleavage between people who are religious at all or not religious but, you know, whether someone is any particular Protestant sect or Catholic or Jewish isn't really politically salient for the most part.

Professor Heather Gerken: It's interesting. Jeff Stone [ph?] actually caused a little bit of a stir among law professors by writing a column about the fact that there are five Catholics. And the reaction was mostly sort of what Michael would have predicted, that is, mostly people thought it didn't really matter that much. And some people-- in contrast to Brennan, it was something, I think, looked on as sort of, "This is not an appropriate way of framing the justices." So, for example, during Bush v. Gore and almost every political question ever since, every time you see a judge listed on a program, often listed

is an affiliation or who nominated that judge. So it's very-- the partisan divide is quiet salient, and people feel like that is a predictor. But they don't-- I think that's right, that they don't think of Catholicism or religion as an obvious predictor of the way they-- and they don't feel as comfortable talking about it as they do with partisanship.

Hon. Michael W. McConnell: Well, they may not feel as comfortable about it, but I do think it's come forward as something that people do consider to be a major predictor. I don't--

Professor Michael C. Dorf: But not Catholic versus, you know, Baptist.

Hon. Michael W. McConnell: No, but I think, you know, what kind of Catholic you are and what kind of Baptist you are does make a difference. I was once-- before being on the court, I was at a meeting at the-- if Juan Williams can drop names, can I say--

Nina Totenberg: Yes, you can.

Hon. Michael W. McConnell: -- with President Clinton about enforcement of the Religious Freedom Restoration Act. And I was sort of the legal person there, and there were representatives of a number of denominations there, including two Baptists, and one of them a rather conservative Baptist and one quite a liberal Baptist. And they introduced themselves to the president saying, "One of us is a good Baptist, and one of us is a bad Baptist. We're not telling you which ones are which."

<laughter>

Hon. Michael W. McConnell: But these things, I think, are markers. And one other point that I think, thinking about the Court, when I was a law clerk, which was in 1980, we would also go around and talk to-- we would have lunch with the other justices. And then I was curious about their religious interests and I believe that at most one member of the Court at that time had any kind of regular worship attendance. I mean, they had nominal affiliations but I think at most one justice would be in church or Synagogue or-- certainly not mosque-- more than, you know, on a High Holy Day. And today I believe that six or seven of them are regular attenders. That means we have a Court that is not only much less Protestant than ever before, but also a Court that's much more religiously engaged than at least when I was a youngster, which I think is kind of interesting.

Nina Totenberg: It is interesting. One of our audience asks whether the controversy over Roe versus Wade related to the rise of feminism and the changing role of women, and whether the pro-life movement is somehow code for-- and this is, again, the questioner's term-- keeping women in the home.

Professor Michael C. Dorf: It depends, right?

<laughter>

Professor Michael C. Dorf: I can't imagine that there are any, you know, pro-life activists who would describe themselves as doing that, nor believe that that's what they're doing. Part of the art of politics, whether presidential politics or any other level is defining your opposition, so if you believe strongly that women should have a constitutional right to abortion, you know, it's to your advantage to portray people who believe the opposite as not really caring about the life of the unborn but really wanting to keep women in the home.

Professor Heather Gerken: And the pushback actually has been interesting, as is obvious from the most recent abortion case, that is, the pushback has been to recast the pro-life agenda as one about protecting women, not just protecting the fetus. And that clearly seeped into the Supreme Court's most recent abortion decision, to the outrage of some and to the delight of others. But the shifting ground has been one of the sort of things that makes it difficult to generalize.

Hon. Michael W. McConnell: And one of the things I think is most unfortunate about our current political culture is the extent to which people are very quick to ascribe either evil motives or stupidity to people who happen to disagree with them. I think it's very important for people who favor abortion rights to try to understand why others don't share that view, and vice versa. There was an excellent book-- I think the author was Faye Ginsberg-- who was a sociologist who looked at the abortion wars, if you will, in Wichita, Kansas, which for some reason is a particular hotbed for demonstrations and counter-demonstrations.

Nina Totenberg: Because they do third trimester abortions there.

Hon. Michael W. McConnell: In any event, she went and she did a series of interviews with activists on both sides, and among the things-- it's been awhile since I read this

book, but I remember one of her conclusions was that the most dedicated activists on both sides tended to be women, and that the pro-life women had a type of feminism-- not an anti-feminism, but a type of feminism-- just as the pro-choice women did. I thought this was an extremely interesting-- Contested-- I can't remember the name of the book. Contested something, I think, was the title.

Nina Totenberg: Actually, I first noticed this decades ago when I was in Iowa covering some Republican presidential primary thing or other. And I spent a couple of days with a lovely, very smart woman who was a pro-life activist. And they're, for my money, there really wasn't much difference between her and the pro-choice activist except the core issue that they were fighting about. And they were both incredibly dedicated to what they were doing and very creative and inventive about how they were going to do it. One of our audience also says, "Are the culture wars really new? What about the mobocracy of Adams and Jefferson period, the Jacksonian democracy, manifest destiny and the white man's burden, prohibition and the great experiment in no-nothingism? Weren't those all culture wars, too?"

Hon. Michael W. McConnell: Sure. I'm not sure what this category means exactly. I mean, it's sort of convenient to lump various issues together, but really is a culture war issue? I assume it means one in which there are-- that there's some sort of moral or cultural difference and that they're very controversial. But, you know, that describes a whole lot of things. Certainly, the fight over slavery was an enormous culture war issue, even if it was also a civil rights issue. And Jim Crow was an enormous culture war issue, even though it was also a civil rights issue. I would say, you know, abortion, gay rights, religion, these are culture, you know, culture war issues. They are also civil rights issues. Thinking legally about this, I think it's an extremely unhelpful category because it cuts across the question of constitutional theory, and especially it lumps in-- some of these issues are ones that the Constitution directly addresses, and some are issues that the Constitution does not directly address. So I don't see, when we think about the Court's involvement in these issues, there is no way that a Court faced with the First Amendment can avoid free speech and freedom of religion issues, all right? But as to some of these issues-- same-sex marriage, abortion, assisted suicide, just to name a few-- there's nothing obviously in the Constitution about them. The Court need not have gotten involved in those issues, and it's kind of a matter of choice for the Court. But some culture war issues are really at the heart of the actual Constitution as in, you know, the document with words in it. And the Court is necessarily going to be involved in that.

Professor Heather Gerken: So trust the first law professor to counter the hypothetical and the second one to disagree. I think it's a useful category for at least one reason, which is it raises this question about how self-conscious the Court should be about

running into political questions of various sorts. So call them cultural, call them political, whatever they are, they're controversial. And whether or not you think that the Court has to address, for example, the question of gay rights, when they address it, I think the harder question is how do they think about it? So one of the interesting things about one of the justices, Justice Scalia, is that he puts the culture wars on the table in his dissents, so he accuses the Court of intervening in the culture wars; he has a macro, I think, in his computer so that every time he has a case about gay rights, this little macro spits out a bunch of words about bestiality and masturbation and pornography and, you know. So he immediately pulls in--

Nina Totenberg: Polygamy. Don't forget polygamy.

<laughter>

Professor Heather Gerken: Polygamy? Yes, I forgot polygamy. But he immediately pulls in all of these questions of extreme salients, even though what he is nominally addressing at that moment is a different question. And so the question is: Is Justice Scalia doing the right thing? So when he writes his dissent and he invokes the culture wars and he sort of offers what is in some sense addressed as much beyond lawyers as it is to lawyers, is that the way the justices should think about it? Should they not think about it at all in their role as a judge? Or should they be aware that when they are deciding these cases, they are intervening in one direction or another in the culture wars and try to think about the consequences?

Professor Michael C. Dorf: If we can think about it in terms of presidential politics, I want to agree with Heather that this is potentially useful framing for the following reason, all right? The Roosevelt New Deal coalition consists of northern liberals, Dixiecrats, right, African Americans. You've got people who today get driven apart. Now, why were they together during the New Deal and, you know, until basically-- the 1968 election is conventionally thought to be the reason that it falls apart-- because economic issues are thought to be the primary driver of national politics. It's only when issues of first, race, and then all these other things that we're calling culture wars but are not pure pocketbook issues become nationally salient and more nationally salient than economic issues in some ways-- notwithstanding President Clinton's "It's the economy, stupid"-- all right? It's only when those issues become nationally salient that national politics now turns to some extent on culture war issues and, as you said earlier, those issues are bubbling up to the Supreme Court. And, you know, I don't think the Supreme Court has ever been able to avoid these sorts of questions, right? It may be that there's a textual hook for them staying out, but even then there's something they're going to be in on. So they're going

to be in on equal protection. Or Justice Black, who is, you know, a great believer in-- also appointed by President Roosevelt-- a great believer in, you know, the text of the Constitution, he gets embroiled in these questions because he has views on the stuff they cant avoid, like the First Amendment, like the Equal Protection Clause.

Nina Totenberg: It's really interesting when you look at the polling data in presidential elections or even big congressional election years that culture war issues become very salient. They become dominating issues when the economy's okay and we're not at war. You get yourself a hot terrorist attack or a real live severe recession, and those issues tend to recede. They come back always, but they do recede.

Professor Michael C. Dorf: I heard David Frum last week, who's now signed on to the Giuliani campaign, say that national security is a moral issue, right-- using moral issue in the way that we're using sort of culture war issue-- as a way of explaining why Rudolph Giuliani is appealing to voters who might not share his views as a matter of legislative preference on culture war issues. Now, it's true he's sort of softening those positions by saying it's not going to affect how he'll appoint justices and judges and so forth, but I think the fact that Frum and I assume, therefore, the Giuliani campaign--

Nina Totenberg: And Pat Robertson.

Professor Michael C. Dorf: -- right; of course, right-- wants to frame national security as a moral issue suggests that even, you know, with the dominance you expect national security and economic issues to play, there's still value to framing things as moral/cultural war issues.

Hon. Michael W. McConnell: But I still think we can distinguish between some of these things. Take the difference between freedom of speech on the one hand and, I don't know, same-sex marriage on the other. When the Court is active with respect to freedom of speech, it is not taking sides in the culture war in the same way that it is on, say, the same-sex marriage issue because everyone has the interest in freedom of speech. One day it may be, you know, pro-life marchers walking down the street. The next day it may be anti-war marchers. And a vigorous protection for freedom of speech therefore cuts in various different ways, right? It's not really taking sides. In any one point in time, say at the height of the Vietnam War, where you have a particular set of issues, it may temporarily appear that way. But over time, you know, freedom of speech it seems to me is not a taking of sides but rather is a way of maintaining governmental neutrality with respect to culture war issues. When the Court is asked to decide something like shall we

have the right to same-sex marriage or to assisted suicide or whatever, it is being asked to become a decision maker on one side or another of the culture wars questions. They, of course, do that from time to time, although I thought the Court was very wise with respect to assisted suicide in not taking the bait, right? I think they would have been wise not to take the bait at the time of Roe versus Wade as well, so they do sometimes do it. They sometimes refrain. But when they do it, they make themselves more partisan, more controversial in a way which they don't when they're engaged in other kinds. And free speech isn't the only example of where an activism of the Court is not necessarily partisan. One person, one vote also has, you know, various ramifications politically. Protecting freedom of religion has various ramifications across the culture wars, whether you're taking about the right of Native Americans to ingest peyote or whether you're talking about the right of a parent to have greater control over the education of their child, these things cut various different ways. If the Court isn't self-conscious about voiding the more partisan side of this, I think it should be.

Professor Heather Gerken: I was going to-- can I disagree?

Professor Michael C. Dorf: You go ahead. I'll disagree with everything that he says that you don't disagree with.

Professor Heather Gerken: Okay.

<laughter>

Hon. Michael W. McConnell: Are you all going to divide it up ahead of time?

Professor Heather Gerken: Right.

<laughter>

Professor Heather Gerken: So I think that what you just articulated is highly dependent on a particular view of the Constitution and a particular view of what judges do. So, for example, just to return to the question of gay marriage, you could portray that as taking a side in the culture war, or you could portray it as part of the grand tradition of the Court in protecting minorities, or you could portray it as an effort to help everyone. We all want to marry. Maybe this is just sort of something that cuts across everyone. It cuts for some and not others at different points.

Hon. Michael W. McConnell: Oh, you're not serious about that.

Professor Heather Gerken: No, I am serious.

Professor Michael C. Dorf: Or you can frame it at the level of generality of protecting fundamental decisions about family life.

Professor Heather Gerken: Like liberty.

Professor Michael C. Dorf: So for example, the right to educate your kids.

Hon. Michael W. McConnell: Only by penumbrating into the atmosphere--

Professor Heather Gerken: But there's a different question--

Hon. Michael W. McConnell: -- and with a high level of generality can you possibly say that.

Professor Michael C. Dorf: So no right to home education of your children?

Hon. Michael W. McConnell: I'm sorry. What?

Professor Michael C. Dorf: There's no right to home education of your children under Meyer and Pierce.

Hon. Michael W. McConnell: There has never been a single constitutional case in any state of the Union upholding a constitutional right to home school your children.

Professor Michael C. Dorf: And you think that people who are on the religious right side of the culture wars would not disagree with that?

Hon. Michael W. McConnell: It was an enormous social transformation that was achieved entirely through a grassroots political movement, and it's stronger by virtue of that. Had the home schoolers, when the first issue ever came up, you know, 25 years

ago, gone and gotten the Supreme Court to give them the right to do that, I think it would be a controversial question today. But instead, they did it the slow political route, and it is not particularly controversial.

Professor Heather Gerken: But Judge McConnell, can we just separate the-- there's two questions here. There's the question of the issue, and there's the question of thadology [ph?]. So on gay rights, there are two ways to decide the right to marriage question. One is to say, as you say, define liberty at a certain level of generality and argue that the right goes across everyone, or you could do it under conventional equal protection analysis. Now you may think that conventional equal protection analysis shouldn't apply to gays and lesbians or you may not. But it's not that hard to imagine the Court, in its long tradition, doing that in a doctrinally respectable fashion. So again, going to Roe v. Wade, the problem with Roe v. Wade may be that it was a culture war issue, or it may be that the Court used a set of judicial tools that not even liberals can respect them for using. So there's two sets of questions here about what courts should do. And it may be that, as long as courts are doing what courts do and what they do well, then intervening in the culture war issues is part of their job.

Hon. Michael W. McConnell: I don't disagree with that. I mean, it may very well be that a judge, a justice of the Supreme Court, says, "I really don't wish we could avoid getting into this. I think it's going to be a lot of trouble, but the legal materials drive me to the conclusion and I'm going to do it anyway." And, you know, for all I know, same-sex marriage could be such a thing. I'm not arguing the legal doctrine of it. I'm saying that they ought to be leery of doing it when they don't have to. That to be able to leave issues of this sort to a decentralized, state-by-state political process has enormous institutional advantages, not just for the Court but for the country as a whole and for democracy-- small D-- democracy. And I think that-- when the constitutional materials force them, fine. But lets not be leaping unnecessarily into these things when the constitutional materials don't force us to do it.

Professor Michael C. Dorf: Tocqueville notices in the 19th century, right, that in America everything eventually becomes a constitutional question for the courts, or at least a legal question. And part of the reason we have that problem-- and I agree, as a matter of sort of legal strategy that that can be problematic-- but part of the reason we have that problem is because we have a decentralized legal system in which the Supreme Court speaks last, and national movements and organizations don't get to control what cases are brought. I do a lot of work consulting with various civil rights organizations on what cases to bring, and they are routinely terrified of the following scenario that comes to fruition. So say I'm working with some gay rights organization which decides, for much of the reasons that Judge McConnell points out, this is not the

time to push a same-sex marriage case to the U.S. Supreme Court because the Court's not best suited for it, the country isn't ready for it, it'll inspire backlash. And the lo and behold, somebody who doesn't really care about the national political agenda but just wants to get married brings one of their cases somewhere with some lawyer they've hired out of the phone book, and that person has a right to take their case up the chain. And so there's a different question for what the people in the movement should be doing versus what the judges and justices should be doing once they get the case. So I take it what you're arguing for is a kind of, you know, version of the passive virtues. Don't decide cases unnecessarily. Don't reach out. The problem, I think, is that these cases are sometimes thrust upon them, even though people in the respective social movements don't necessarily want to do it either.

Professor Heather Gerken: And just to-- I think we were talking about Lawrence, based upon your reference to defining liberty at a high level of generality. So Lawrence versus Texas is the most recent gay rights decision to come down, where the Court overruled Bowers v. Hardwick, which was a case decided not too long ago.

Nina Totenberg: 1986

Professor Heather Gerken: Thank you. And what the Court said in Lawrence is, in essence-- it was a prohibition against sodomy in Texas and they overturned it-- and what they said was, in essence, that gays and lesbians-- actually, all people-- have a certain right to privacy. Now, the question is: What should the Court have done in Lawrence? One read of it would be to say this is a culture war issue. That's what Justice Scalia said. The Court shouldn't reach out and grab onto this question of gay rights. We have to settle it in a democratic way. It would be better for everyone if we just let the decision go out. On the other hand, as a student of elections I wonder how exactly is it that you settle an issue in a democratic system where some part of the subpopulation can actually go to jail or be discriminated against in all sorts of ways because of an existing law? Or, more broadly, how can some part of the subpopulation compete in the democratic system when stigma exists and that stigma is embodied into the legal system? So I find these questions harder than the-- to stay out of them.

Hon. Michael W. McConnell: The answer is that this movement is in fact very politically powerful and in the early 1960s, every state in the Union made homosexual sodomy a crime and many of them were enforcing it. By the time of Bowers versus Hardwick, it had flipped to-- I don't remember the exact numbers, but something like 27 states it was then legal and no one was really enforcing it. By Lawrence, there are a few more and, you know, again, I'm no practical politician, but I can read the polls. If you look at the polling

data on attitudes toward homosexuality divided by age, you see that this is an issue which is going to be a non-issue-- I'm not speaking normatively here, but just as a matter of looking at the polling data, this is going to be a non-issue real fast. And so maybe Lawrence was properly decided on the basis of the legal materials. Maybe there's something in the text of the Constitution that points that way. Maybe there were some precedents other than Bowers versus Hardwick pointing that way. But let's just hypothesize for a moment that it really didn't make much sense as a matter of legal doctrine, right? So the Supreme Court took it upon itself to resolve something that was going to be resolved politically pretty fast anyway, and at a cost in terms of now taking upon themselves yet again this hubristic notion that they are the ones that get to decide contended moral questions for the American people.

Professor Michael C. Dorf: But it's only hubristic if we assume that it's wrongly decided, right? Of course, they shouldn't do it if they think it comes out the other way.

Hon. Michael W. McConnell: I'm saying maybe it's right. Maybe they're right morally, right?

Professor Michael C. Dorf: No, no, I mean as a matter of legal doctrine. I agree that it's hubristic to take a case and decide it the wrong way as a matter of legal doctrine.

Hon. Michael W. McConnell: Absolutely. But I think that if you took a poll of people who agree with the result in Lawrence versus Texas and you asked them how impressed are you with the legal reasoning and you guarantee them anonymity that it will not get a very resounding--

Professor Heather Gerken: I'm not sure that's true.

Professor Michael C. Dorf: Of Justice Kennedy's opinion or the opinion that they themselves are going to get to write?

Hon. Michael W. McConnell: I'm talking about Justice Kennedy's opinion.

Nina Totenberg: Let me just say here that--

Hon. Michael W. McConnell: That was your year, I think, wasn't it?

Professor Michael C. Dorf: No, no. I'm much older than that.

Nina Totenberg: Yeah, he was long gone.

<laughter>

Nina Totenberg: An interesting thing, though, happened in Lawrence, and I'd like to make a couple of sort of historical observations about this and get you guys to talk about it a bit. The first is that when Lawrence was decided in whatever it was-- 2001, 2003, I don't remember-- that was the Texas case where these two guys-- a cop walks into an apartment because the door was unlocked to serve some, I don't know, traffic warrant. I can't remember. Finds two guys engaged in--

Hon. Michael W. McConnell: Actually, those are the facts of Bowers against Hardwick.

Nina Totenberg: No, it was also the facts in--

Hon. Michael W. McConnell: Where they blunder back into the--

Nina Totenberg: Yeah. It was also the facts in Texas.

Professor Michael C. Dorf: It seems to keep happening.

Nina Totenberg: The guy actually spent a night in jail-- one of the guys or both of them spent a night in jail, unlike I think they never did in Bowers, but I don't remember. But it doesn't matter. So the Court says, and I think that Texas and maybe there was one or two other states left that still made this a criminal offense to have private, consensual, homosexual relations, and the Court invalidated the statute in large measure, at least on paper, because the state couldn't come up with a compelling reason to have the law. Now, just whatever number of years-- 15 years earlier, 16 years earlier-- the Court had decided Bowers versus Hardwick and come to the opposite conclusion. And whatever you think if these two decisions, whether you like them or hate them or are somewhere in between, the fact is-- and I was not smart enough to bring you some of the language from the Bowers opinion, the 1986 opinion-- the language used in Justice White's opinion and Chief Justice Berger's concurring opinion is language that would be barred in most workplaces today, that would get you fired if you used. If you made those kind of

comments to people about the way they conducted their lives, you would be fired. It is not politically correct, it is unacceptable; you can think it, but you may not say it. You could go out and you can campaign against gay marriage easily, but you cannot engage in that kind of conversation, really, about a gay lifestyle, for want of a better expression. So in the space of 16 years, the whole tone of the country changed, and I think having watched it that it changed a little bit because the Court reached a decision that was already behind the times when it was rendered. I don't know how it would have done better, but it might have done better to reach the same conclusion with different language. And I don't know how that happened. I remember the first time somebody called me and asked me what did I-- in my workplace-- what did I think about the possibility of gay marriage, and I thought they were out of their cotton picking minds. I never heard of such a crazy idea. And now, if you ask your 30-year-old conservative Republican or 28-year-old grad student, they likely don't think this is an issue for them. It's just not an issue. It's just a very different place we're in, and I'm not quite sure how it happened, but I do know that Lawrence got cubed, as it were, because right afterwards, the Massachusetts Supreme Judicial Court decided that the state laws against gay marriage violated the state constitution as well as the federal Constitution, but for all practical purposes, the state constitution. And then in the body politics' mind, the whole thing somehow got merged into one. So I toss that out for what it's worth. I'm not sure I have a question.

Hon. Michael W. McConnell: I mean it's clear that this was a remarkable and an extremely rapid social transformation. It's not the only one we've had, but it's remarkable. And the Supreme Court was not leading it, right? It happened anyway. I think it might be a hint that we don't really have to have the Supreme Court telling us what to do as a people. We can sometimes do it on our own.

Professor Heather Gerken: I'm not in disagreement with that, although I'll just say two things. One is, when the Supreme Court read Lawrence-- they have this moment at the Court, it's called the hand down and when the justices read the opinion-- every lawyer knew that that's the day that Lawrence was going to be handed down, and there were people weeping. The Supreme Court bar is not, you know, known as sort of a warm and fuzzy group. They're extremely able practitioners. They were weeping as the decision was being handed down, and the reason they were weeping, I think, was because Bowers was, just as Cuddy said it was, a stigma that the Supreme Court had perpetuated, and that by overturning that decision and calling it a stigma while colleagues of his on the bench who had joined that opinion were still sitting, I thought, was remarkable. So one question is: If the world is moving, should the Court catch up with it? I agree that it doesn't have to be the leader, but also I think that it's a mistake to say just because we've seen it move quickly that that means that somehow everything is only

pointing in one direction. So in the wake of the Massachusetts-- we have some people in here who know this stuff very well, but in the wake of the Massachusetts decision, you could notice two things. You could notice in Cambridge, Massachusetts, where I was, on the day that the licenses started being issued and gays and lesbians started to get married, there was no rioting in the street, there wasn't any massive protests, of people being bussed in-- because Cambridge, needless to say, doesn't have that many people against the issue. But people weren't, you know, so riled up about it that they decided to go protest in Cambridge. On the other hand, in the next election we saw a bunch of initiatives that were being put on the ballot in response to this, and I don't think if you talk to gays and lesbians in those states that they would particularly feel like everything is moving in the right direction and this is easy. My worry is, you know, in the days of the-- whenever you talk to someone who was in the middle of the civil rights movement, you got the feeling that every day it was incredibly tenuous. They had no idea which direction things were going, and it mattered what the Court did, even if it only mattered symbolically. It mattered.

Hon. Michael W. McConnell: But sometimes the Court generates a backlash and may actually make it harder to move in that direction. And also I'd like just to point out sometimes the American people are not persuaded by the Court. Nina was saying, you know, when Roe versus Wade came out, it was not particularly controversial. Well, I have news. It's very controversial now, and if you look at that same sort of age-based polling data, you'll find that the younger cohorts are slightly less supportive of abortion rights than the-- not than the very oldest, but than our age cohort.

Nina Totenberg: The middling oldest.

<laughter>

Hon. Michael W. McConnell: We're the strong pro-choice cohort on this end of the panel.

Nina Totenberg: Yeah, those are the children.

<laughter>

Hon. Michael W. McConnell: But the point is the Supreme Court's going to be right sometimes. The Supreme Court's going to be wrong sometimes. I'd like to say a word

for the idea that important moral issues deserve widespread debate. I think federalism is a great system for issues of this sort, where we don't have to have one national answer and it can be debated in New York, it can be debated in Utah. People might come to different answers, and we can learn from one another. We can see the experience. I think, for example, of the assisted suicide experiment going on in Oregon. Now, I'm not in favor of assisted suicide, but I think the fact that a state is doing this and we can find out whether some of the unfortunate consequences that I would predict are, in fact, going to take place, that's a good thing. I think it's good that we have a voucher experiment going on in Cleveland. I think that federalism, which gives an opportunity for different answers, for experience, for widespread debate-- not just some lawyers in front of nine other lawyers at one time, one-time-fits-all decision-making like we get in the Supreme Court-- I think it's just a better way for a free people to go about deciding important questions.

Professor Michael C. Dorf: And in the wake of Supreme Court decisions upholding the New Deal, you're not going to get it because these issues have become nationalized in Congress as well. So the most recent abortion case is the federal Partial-Birth Abortion Ban Act.

Hon. Michael W. McConnell: But I think that proves the point, because if the Supreme Court had not been as aggressive back at the first one-- in Steinberg versus Carhart, when they hold that the state partial-birth abortion law is unconstitutional-- if they had held back, there never would have been a national law. I think the national law is-- it seems to me it's a situation nobody really should want. Wouldn't it have been better if they had said to themselves, "Look, this is a proposition that even most people who support abortion rights seem to think that partial-birth abortion crosses some kind of very difficult-to-define line; not everyone, but large numbers of supporters of abortion rights think this. Let's let this go, and we can at least see how it progresses." But instead, no; five justices in a five-four decision say, "You can't do that." And now we have a national law.

Professor Michael C. Dorf: I don't want to litigate the merits of the decision, but I do want to-- I mean, neither of us can prove it because we can't run the world backwards and then see how it happens the other way, but I do think there are very few sincere politicians anymore who will say, "I think that I-- my position is X, but I'm going to vote against X in Congress because I think it should be decided at the state level." So, you know, the one person who's sort of campaigning for president on this platform on a culture war issue is John McCain, all right? And he's taking a lot of heat for it, right? He says he's against a constitutional amendment banning same-sex marriage because he

thinks it should be decided on a state-by-state level, and more generally he's supportive of leaving things at the state level.

Nina Totenberg: You forgot Vice President Cheney. He says that, too.

Professor Michael C. Dorf: Right. But he's not running for anything anymore.

Nina Totenberg: No.

Professor Michael C. Dorf: And he said it quietly when he was running for vice president. My point is only that I think the period in which culture war issues could be left to the states if only the Supreme Court didn't meddle is gone because federalism is something that politicians invoke when it happens to suit their particular ideological position. I wish that were not true. Maybe I'm wrong, but that's how I-- you know, you see it not only on partial-birth abortion. You saw it on assisted suicide, right, that the Ashcroft Justice Department tried to nationalize this.

Hon. Michael W. McConnell: And did not succeed.

Professor Michael C. Dorf: On administrative law draft.

Hon. Michael W. McConnell: Now, if the people of the United States want to nationalize it and if it falls within an enumerated power of Congress, well, and doesn't violate any, you know, anything else, you know, that's where we are. But my sense is that frequently-- not always; I'm sure you'll be able to come up with some counter examples-- but frequently getting the Supreme Court involved nationalizes questions that need not have been nationalized, or ordinary politics would, in fact, leave at other levels.

Nina Totenberg: You know, we live in sort of extraordinary times in terms of American history when our wars are not equally shared and are fought by really a very few people. Now, if that were to change, would it change our society or what we expect of our courts and our presidents? Would it change, oh, access to abortion services if you're in the military; would it change don't ask, don't tell, if we had conscription?

Professor Michael C. Dorf: Yes. So one quick way of putting your question I think, Nina, is whether the culture wars are a real phenomenon or whether they're something

that's generated by politicians. So there's this study by Morris Fiorina and a bunch of other people-- he's at the Hoover Institute-- wrote a very good book called "What Culture War," in which they argue that in fact if you look at polling data, America is not nearly as polarized as we've been led to think by the red state, blue state maps that we see every two or four years. That yes, there are some differences, but they're differences of degree rather than kind on all of these issues, and they sort of fade and there are a lot of purple states and so forth. But that because of the nature of national politics, politicians try to mobilize their bases and find wedge issues and so forth. Okay. But if they're wrong, if there really is this, you know, deep cultural divide, then I take it one effect of mandatory national service is you would bring people together and they would learn that the one who's, you know, pro-choice, the other who's pro-life really have a lot in common and they could work together and, you know? Or that you'd have greater racial integration because the military is the most successful site of racial integration in our country. And, you know, I think you'd have some of that, but I guess I also tend to think that to the extent that the culture wars are real, they're real even among people who live and work together.

Nina Totenberg: Let me ask some questions about religion-- religion in the public square, religious expressions, subsidies in one way or another for religion. I think it's pretty well accepted that we have a Court now that is considerably more-- accomodationist in its view is the technical term. That is, accommodating, wishing to have religion more accommodated in the public square. And I would have to say, as somebody who goes out and gives a lot of speeches, that, oddly enough, I don't get huge numbers of questions when I talk, for example, before a high school audience about abortion or gay rights. I get questions about prayer-- prayer in public school. Why can't we pray in public school?

Hon. Michael W. McConnell: The question I always get when I'm in a high school audience is whether the police have the right to search your vehicle when they stop you for speeding.

<laughter>

Hon. Michael W. McConnell: Every time.

Professor Heather Gerken: You're going to different high schools.

Nina Totenberg: Well, I have a higher class of audience, obviously.

<laughter>

Nina Totenberg: So, I guess, let me ask you to be a bit of a predictor on this. Do you think that it is possible that we will have a return, if not to a moment of non-denominational prayer, at least a moment of silence as a permissible thing?

Hon. Michael W. McConnell: Well, actually the way I read Wallace versus Jaffrey is that a moment of silence is constitutional today, and they exist in many states. And I think we're there. I don't think people find them particularly satisfying.

<break in audio>

Hon. Michael W. McConnell: -- school prayer led by the teacher, I think that the answer to that is just no. My impression from leaders of the so-called religious right is that they don't even really believe in that, at least their legal arms tend not to believe in that anymore. It's really not a very good idea. And from a religious person's point of view, it's not a very good idea, much less anyone else. I don't think it's going anywhere. I think it's a dead issue.

Professor Heather Gerken: I always think that Justice O'Connor, of all the people in Washington, is actually the most effective politician in the sense of this, that she always was able to put her finger kind of right where the middle was and she had a good sense for where the country was. I don't think she's here anymore. And I think that her Establishment Clause jurisprudence, which has been subject to much criticism for its coherence, in some ways captures what the rough accommodation is right now, which is people are willing to give more on religion questions. So I think Judge McConnell's probably captured it well, although I will say there's still this huge divide. I find my students, who are a pretty liberal bunch, will say things about religious minorities that they would never say about any other minority of any sort. And they process the claims of religious minorities as an effort to enforce a patriarchy on them, which is something they would also never say about almost any sort of minority. And so one of the things that's interesting to me--

Nina Totenberg: Like? Can you give us an example?

Professor Heather Gerken: Students will basically, they'll talk about The Christian Right as if it's a monolith. They will talk about efforts for requesting things like prayer in school

or moments of silence, they won't see them in any way as an effort by a minority group to do what every minority group does, which is fight about public symbols and public recognition. And so in some ways that divide, I think, still exists in an extreme way, and it's actually not the middle of America that's divided. It's sort of people who go to elite institutions like Yale Law School, where I think that that fight is still quite salient.

Professor Michael C. Dorf: Yeah, I agree with Judge McConnell's legal analysis. I will say I have two daughters. The older goes to a public elementary school. The younger daughter goes to a religiously affiliated nursery school. And I feel like my older daughter is getting more religious. I never thought I'd say this, but I think there is a sense that there's a kind of weird secular religion in the public schools. So, for example, because they can't celebrate any of the actual religious holidays that the students' various religious faiths celebrate, they, you know, they make a huge deal out of Halloween, right?

<laughter>

Professor Michael C. Dorf: Which is, you know, this-- right? Because that's-- which I realize some people think, "Well, that's like a pagan holiday." But, you know, basically for the kids, all this is, you know, candy is like this basically. It's the one day of the year my daughter doesn't have any homework so that she can go trick or treating, which struck me as bizarre. And then, you know, her first-grade teacher cooks with them once a week, which is a very sweet thing. It teaches them math skills, planning, all these other things. But then before they eat, she makes sure everyone has their thing and then she says, "Bon appetit, now you may eat," which is sort of a cute phrase. And everyone goes, "Well, this is sort of a substitute for a little prayer or grace." And I almost wish they would just say something like, "Let's be thankful for this food," you know, without even specifying whom they're thankful to--

<laughter>

Professor Michael C. Dorf: -- because, you know, it's the difference between what the law actually is, right, what the constitutional law actually is, and what people think it is, which is that you have to sort of purge all reference to prior religious traditions in some sense. In that sense, I have some sympathy for the, quote "Christian Right" view of this movement.

Nina Totenberg: And what about money for faith-based programs as opposed to programs run by religious organizations, but that remain secular in nature? Do you think the Court is going to look favorably on that now?

Hon. Michael W. McConnell: I think the issue needs to be broken down into what is going to be the particular thing that comes up. There's such a variety here. Faith-based organizations, of course, have been major recipients of assistance for a long time. This is not a new thing. The rules have been very inconsistent with, you know, one department, you know, being, you know, much more exacting than another in terms of what kinds of secularization strings there are. So will homeless feeding shelters have to remove the religious posters from their wall or the crucifix from the hallway as you go into the church basement to get your meals? I mean, that would be a question. Will religious organizations be required not to staff themselves with their ministries with people in their own denomination if they receive money? I remember my church in Washington, D.C. had one of the largest homeless feeding programs in the city, and it got large enough that one set of regulators told us that we had to get a different kind of oven system that would comply with, you know, with the rules, and there was available a FEMA grant to help defray the cost of this because we didn't need it for church purposes. But then it turned out that if we accepted the FEMA money in order to comply with the regulations to feed the homeless, then our Wednesday night church supper could not use that oven--

<laughter>

Hon. Michael W. McConnell: -- because it was a prayer group meeting in connection with the dinner. These are the sorts of things I don't think that you can generalize. My guess is that there will be various cases involving, you know, questions of degree and there won't be one sweeping decision saying, you know, a faith-based program's okay; a faith-based program's not okay. It'll be-- this is a very complicated set of questions.

Nina Totenberg: Do you two agree? Do we have a unanimous court on this?

Hon. Michael W. McConnell: Saying that something's complicated usually gets agreement from law professors.

<laughter>

Professor Heather Gerken: Yes, exactly. I also think it actually-- what Judge McConnell describes, as he said, also captures a little bit of the style of where the Court is going on some of these culture war issues. So what you see nowadays-- and I don't know if it's an effective-- how much pressure's been put on the Court of late, but it reminds me of our discussion yesterday about a cocktail discussion-- it's really the taxation power that you should be thinking about-- where the Court, I think, sort of engages in proxies on these issues. So in a lot of the really highly freighted issues nowadays, what you see the Court doing is using statutory construction instead of constitutional analysis to do constitutional analysis. I work a lot with the Voting Rights Act, and the Voting Rights Act is this, I mean, it's sort of an American symbol, and embedded in it are these really hard questions about race and politics. And the Supreme Court probably is not going to say that the Voting Rights Act is unconstitutional next year when it gets the case, but it is death by a thousand cuts. So what the Supreme Court does every year is it narrows it a little bit, tweaks it by statute. And the motivations for that narrowing are, I suspect, constitutional. That is, a particular vision of equal protection. Or in Hamdan, you know, many people sort of read that case. It was really a separation of powers case, but the Court was doing it by interpreting a sort of ambiguous statute one way versus another. So I think what you may see is the Court, on these highly freighted issues, sort of doing it piece by piece; not issuing broad pronouncements. And Chief Justice Roberts seems to me kind of an interesting example because so far, much to the chagrin of Justice Scalia, he really hasn't-- with the exception of the desegregation cases-- overturned precedent or even said he would vote to overturn precedent. What he's done is he's trimmed away and chopped away in a sort of way that it's harder to get your troops rallied up about, excited about it. It's actually harder to explain, because it's much more technical. So it's a little sort of a-- it's a gentler approach by the Court. And I don't know if Justice Roberts is something new and a sign that the pressure has become pretty intense or if it's just Justice Roberts.

Professor Michael C. Dorf: Yeah, I think the funding cases are fundamentally complicated because of the following intuitions. I think everybody would share the intuition that neither the federal government nor the states, whether under the federal Constitution or state principles of constitutional law, can build a church, right? You know, this is the state church. On the other hand, I think everyone would also agree that if there happens to be a fire at the church, the fire department, which is locally funded, can go and put out that fire, right? So you can provide certain kinds of direct services, but not other kinds. Then the question is: Well, what if somebody is, you know, wants to attend a religiously affiliated school for fire fighters, right? So there are all these immediate questions, right? And at that point, right, you're just haggling over price, is the punch line to the joke.

<laughter>

Nina Totenberg: You know, listening to this I'm reminded of how much more complicated it's gotten in many regards; that when the school prayer case was originally announced, President Kennedy called Archibald Cox and said, "I'm having a press conference today. What do I say?" And Archie Cox once said to me that he said to the president, "Well, let me think about it," and he couldn't come up with a good thing to say. And then he turned on the press conference and the president said something very astute, good, political, everything, you know, about how prayer is really-- it's something personal we do by ourselves. I don't remember all the things he said, but it was-- and he got away with it. I'm not sure-- you know, these issues have become more complicated now, and therefore presidents can't get away with it quite that easily. And you were talking, Judge McConnell, earlier about freedom of speech, and I'm looking at an Internet pornography kiddie porn case this term. You know, there's lots on the Internet these days. There are Viagra ads. There's child pornography. And until now, libel laws don't count for much because you can't sue a blogger for libel. They most of the time don't have anything for you to get from them, to seize from them. There are no assets. So I'm wondering if a candidate were to run to change some of this-- cleaning up the Internet, protecting people from false charges on the Internet-- would it ring a bell with the public? Would the Court back down if some candidate were to prevail on this, if this became an issue in a national campaign? What do you think?

Professor Heather Gerken: I'd actually like to thing that the Court wouldn't back down. I mean, I agree with you that it's a politically salient issue. I mean, just-- one of my colleagues was looking at his e-mail and he said, "I've concluded from my e-mail today that my sex life is very important, my credit rating is unimportant, and some of my colleagues are self-important."

<laughter>

Professor Heather Gerken: You know, so everyone has experienced an Internet search that went awry and suddenly what you thought was one thing you end up on an entirely different site. So I think that everyone shares that question. But I think that the one thing that's wonderful about the Court when it does engage in these issues is that it looks at it at a different level of generality. And so it addresses questions that in some ways legislators just can't address because they're talking about the concrete. So the Clinton administration in the Communication Decency Act, the CDA-- I don't know enough about it but I know some-- I suspect the Clinton administration wasn't really a big fan of the CDA. But if you're President Clinton, you're going to sign a bill with that included in it.

And then you maybe should be quite pleased that the Court, when it looks at it at a different level of generality and isn't just thinking about the concrete politics of it but the First Amendment implications, you might actually be quite relieved when the Court goes ahead and invalidates it for you. And so I think that in some ways this is one place where the Court, I think has a great comparative advantage because just by the way that issues are cast, it thinks of things at a different level of generality than presidents and legislatures do, and that's quite useful.

Professor Michael C. Dorf: In the previous panel, the question came up of why didn't President Eisenhower lend moral support as opposed to sort of, you know, actual troops and, you know, saying he agreed with what the-- he said he has to carry out the Court's-- I mean, why didn't he lend moral support to the principle announced in Brown. And I think that's an interesting historical question, but I think generally that's not what courts are good for for politicians. Courts are good for at least two sorts of things. One is what Heather just described, which is that there's some decision that you're going to make that's going to be unpopular, so you don't want to make it. So you make the opposite decision, and hope the Court will bail you out by invalidating what you've done and you're secretly relieved. And the other thing that they're good for is for beating up on, right? So, you know, if the Court makes an unpopular decision, you can campaign against that Court. And all, you know, in my memory, every president has done that on some set of issues, usually invoking the same sort of rhetoric, the rhetoric that goes back to President Roosevelt's fireside chat for the Court-packing scheme, right? Yes, of course I believe in judicial independence, but here they've gone too far. Here they're legislating from the bench. And that's what you use the Court for is to-- it can be sort of a whipping boy.

Hon. Michael W. McConnell: I wanted to say something about what Heather was talking about, the Court being able to look at things at a different level of generality. I think there's a lot to that, but another thing the courts are able to do is wait until the passions and consensus of the moment have passed and to evaluate legislation down the road and in light of how it's actually been administered. In this connection, I worry about the tendency of many organizations to file suit the next day. And sometimes Congress, even, includes provisions in the statue waiving ordinary jurisdictional limitations so you get quick review. And often, you know, a court will enjoin the statute before it can ever be put into place. I want to suggest that that's actually a mistake and that it would be-- not always. There may be times when the issues are really clear and that needs to be done. But often what happens is that the Court ends up affirming the constitutionality of somewhat dubious legislation because it has been passed in the first full flush of popularity and then, you know, 10 years later, when all the problems have come along, then they're stuck because of stare decisis and find it hard to deal with it. It seems to me there have been quite a few examples of this. I wonder, you know? McCain-Feingold is

an example. And here, I think the Court did a partial corrective when it said, "Well, that was a facial challenge where we upheld it. Now we are going to entertain as applied challenges to specific things." Whatever one thinks about the underlying decision, I think as a matter of sort of institutional practice that's good. But I also think, you know, as a sitting judge, we hear all kinds of sentencing cases. The Sentencing Reform Act was passed with absolutely huge bipartisan support. Everybody, you know, from Strom Thurmond to Teddy Kennedy thought it was a great idea. And then there was an immediate challenge based upon the most obvious problem, which was the separation of powers problem-- rejected in Mistretta. And then over time, now there's a great deal of belief that this wasn't such a hot idea, and by the time the Court is ready to really seriously consider the way it actually operates, they've already rejected the most obvious constitutional claim and then they latch onto the-- well, I may be getting too technical here, but they latch onto the jury trial right, the Sixth Amendment claim, which leads to a very strange decision which is tearing the courts apart-- I mean, in a practical sense, it's just a mystifying decision because they held that the problem with the sentencing guidelines was that judges rather than juries are the ones finding key facts that determine how long the sentence is going to be, and then they said the remedy to this is that now district judges have even more discretion than before to-- and with no additional jury findings whatsoever. So it's a very strange disconnect between their remedy and the supposed constitutional violation. I think that one of the morals of this story is if the Court were less confident that it's going to get it right the first time out, if it's a little-- it ought to wait and go slow and get some experience and not go for these immediate sweeping facial challenges, but be a little bit more modest about the role. And then, I think, maybe in the end they might even strike down a few more things, but on a more focused sensible experience-based judgment about what their effects are going to be.

Nina Totenberg: I'm going to close out this panel with kind of a broad question. When Justice Scalia says that his opponents in a particular case have taken sides in the culture wars and others say, "Well, no matter how you decide, you're taking a position," and then I get a lot of questions here the core of which is, "I thought the Supreme Court was supposed to protect minorities when their rights were being trampled, when they were not taken into consideration enough because they can't win in a democratic process. There are, by definition, minorities. Conversely, we believe that, by and large, this is a democracy and that difficult questions are supposed to be decided by our legislative and executive branches, the elected branches, not the appointed branches of government." And it seems to me that whenever I have a philosophical discussion at all with any judge when they write something and I get to talk to them about it, it always comes down to that. So how do you reconcile those two views, each of you, and then we'll take a short break and come back for the next panel.

Hon. Michael W. McConnell: Well, it can't be that minorities always win because they're minorities, and it also can't be that majorities always win because they're majorities, because we do, after all, have a Constitution that limits majorities. So I think it's kind of a silly dichotomy. What you have to do is you look at the--

Nina Totenberg: Are you saying my question's silly?

<laughter>

Hon. Michael W. McConnell: Only the dichotomy, okay?

Nina Totenberg: Okay, okay.

<laughter>

Hon. Michael W. McConnell: We have a Constitution that guarantees minorities some rights and leaves other questions. Minorities might care very deeply about some things that aren't constitutionalized; where they don't have any constitutional protections. I think the courts ought to be paying a lot more attention to the document-- that is to say, the Constitution-- along with its history and its history of interpretation and so forth, and less to question of whether it's a minority or a majority that's bringing the claim. They are, after all, in office in order to enforce the law, not in order to decide these issues that, you know, at least by my reading, the Constitution leaves to the people to decide, at least in some cases.

Professor Heather Gerken: So John Hart Ely actually had a famous book in which he defended the role of the courts, and he said, "Courts are supposed to do two things. One is they're supposed to protect minorities who can't protect themselves in a democracy. And two, they're supposed to clear the channel of political change." So he's thinking, of course, about one person, one vote, right? You can't actually have a democracy that works particularly well unless you make sure that everyone can cast an equal vote. And I think that there's a perspective among voting rights scholars that in some ways the mistake was to divide those two things, and to sort of-- it doesn't quite remove the tension, but to imagine the role of the Court in protecting minorities, part of your role is clearing the channels for political change, that is, to put minorities in a place where they can protect themselves. So the Voting Rights Act, I think, is the best example of that, and I think the most important civil rights legislation that's been passed because, unlike

lots of other pieces of civil rights legislation, what the Voting Rights Act did was it put a bunch of black and Latino officials in place all over the country. And black and Latino officials were able to use their power, once they got in office and once they were embedded within a party, to protect their own. So there's a great piece by Sam Zakarov [ph?] and Pam Carlin [ph?] that says that almost all the advances of African Americans in this country have mostly come in places like government hiring. And those are places where-- the reason why that is so is because that's a place where elected officials are actually able to exercise some power to help their own community. So it doesn't solve the problem, but I think that it's useful to imagine ways in which you can connect those two things so that it's not about protecting minorities so much as empowering minorities so that they can fight the good fight on behalf of themselves just like any other group does.

Professor Michael C. Dorf: Much of our discussion on this panel has been devoted to the question of whether judicially mandated legal change is effective in the long term, if so, how effective, or is it counterproductive? And that's a long-standing debate. I think there is sometimes false assumptions in that debate, like the false assumption that civil rights litigators or civil rights organizations always run to the courts as the first thing that they do. I've done a lot of work with these organizations and they almost always have a legislative strategy that is dominant, but that they go to the courts because often that's not working and they think they have a legal claim. I do want to say something about how those claims develop. I fully agree that, as a practical matter and as a legal matter, not all minorities are going to be successful nor should they be successful. In fact, there's a-- but there's a question of how you get to the point where your social movement can be successful. So, you know, the movement for women's rights in the 19th century was a fringe movement, right? We look back now upon the formative event-- Seneca Falls and so forth-- and we think, "Well, that was--" we're looking back on it because it was successful in the 20th century in the same way that the movement for gay rights prior to the 1960s and even well into he '80s was a fringe movement, right? It's become successful. And they only get any recognition by the courts after they've had some success in the political sphere. The question, then, of, you know, the relation between that political social success and success in the courts is a very complicated one. I think the dynamic goes back and forth. To some extent, courts can be catalysts, but they can also inspire backlash, and so it's very hard to generalize about that. You might be tempted, I think, to conclude, therefore, that what happens in the courts doesn't really matter that much because it's just going to be a matter of timing, right? When do the people with the old views age out and they're no longer voting. But I'm reluctant to say that. I think that presidents and voters, in choosing presidents, are right to think that who is on the Supreme Court matters. It's not the only thing that matters. But that, you know, when Gerald Ford said shortly before his death that, if it came to it, he would be willing to be judged solely on the strength of his appointment of Justice Stevens to the Court, he

was not saying something that was absolutely crazy, right? That is to say that these people are there for a long time. What they decide matters. To some extent, they have a choice. To some extent, they feel they don't have a choice. But that, you know, for better or for worse, the Supreme Court is a powerful institution in American political life. Not as powerful as the presidency but one that, you know, from time to time plays a very large role, and so it's not just some eppy [ph?] phenomenon on social movements.

Nina Totenberg: So, I just have one other thing to say here leading into our next panel. In the lunch break I was asked by a television interviewer why we should care about the presidential libraries and I said, "Because they're a part of our DNA as much as our parents are a part of DNA. They're a part of our national DNA, and who we are." And that is never more clear than in the subject of executive power and the limits on executive power in wartime, which is the subject of the final panel of the day after we all have a short break to do whatever we have to do.

<applause>

End of Session 4