

Center for American Progress



SPECIAL PRESENTATION

“SUPREME INJUSTICES”

INTRODUCTION BY:

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MODERATED BY:

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FEATURED PANELISTS:

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MR. MARK AGRAST: Good afternoon. My name is Mark Agrast. I'm a senior fellow here at the Center for American Progress. It's my pleasure to welcome you on behalf of the Center, and our co-host, the Alliance for Justice, to this special screening and discussion of the Alliance's new documentary film, "Supreme Injustices."

The federal judiciary, and particularly the Supreme Court, plays a vital role in safeguarding our liberties, upholding the rule of law against governmental intrusions and excesses, and ensuring that every person is accorded due process and equal protection of the laws. How well it performs that role is a function of the qualities of mind and spirit of the justices who are called to serve.

From 1994 to 2005, the court enjoyed a rare period of relative stability. For 11 years, the membership of the court remained unchanged. The court's liberal and conservative wings were in rough equilibrium with two swing justices, Anthony Kennedy and Sandra Day O'Connor holding the balance of power. That situation abruptly changed with the death of Chief Justice Rehnquist and the retirement of Justice O'Connor. President Bush found himself in the position to name two new justices to the court and in so doing, to alter its ideological balance.

The two new members of the court, Chief Justice Roberts and Associate Justice Alito quickly became predictable members of the conservative bloc, voting with Justices Scalia and Thomas in the overwhelming majority of contested cases. While the views of the new chief justice closely resemble those of his predecessor, the appointment of Samuel Alito to replace Justice O'Connor has brought about a significant shift to the right. His vote has made the difference in a series of five/four decisions, and he joined the conservative majority in cases dealing with employment discrimination, school integration, abortion rights, student speech, church and state, criminal justice, environmental regulation, shareholder suits, price fixing and restrictions on campaign advertisements.

With the departure of Justice O'Connor, Justice Kennedy has found himself at the center of a closely divided court. Both lawyers and his fellow justices tailor their arguments to win his support. Last term, 24 cases, more than a third of all the decisions issued by the court, were decided by a five/four margin, and Justice Kennedy was in the majority in every one of those cases. He leans to the left on certain issues, including capital punishment, sexual privacy, the treatment of detainees by the executive branch, but in 13 of the 19 cases that were decided along ideological lines last term, he provided the crucial fifth vote for the conservative block.

Justices appointed by President Bush will continue to shape the direction of the court long after he leaves office, and it is certain that his successor will have the opportunity to make at least one and possibly several appointments. Whoever is in the

White House, those appointments will make an enormous difference to the lives of ordinary Americans.

The film you're about to see introduces some of the people whose lives have been affected by the decisions of the Roberts court. Following the film, we'll be joined by two distinguished commentators in considering what these decisions mean for democracy, social progress and the rule of law.

It's now my pleasure to introduce Nan Aron, who will present the film. Ms. Aron, as many of you know, is founder and president of the Alliance for Justice, a national association of public interest and civil rights organizations that works to advance the cause of justice for all, strengthen the public interest community's ability to influence public policy and foster the next generation of advocates. Under her leadership, the Alliance has worked to monitor and influence judicial appointments, preserve access to the courts for all Americans and protect and enable the advocacy rights of nonprofit organizations.

She is a nationally recognized expert on public interest law, the federal judiciary and citizen participation and policy formulation. She has served as executive producer for multiple award winning films on immigration, courageous judges, legal services for the poor and the death penalty, including the film you're about to see. She is an outstanding lawyer and leader and we're honored to have her with us today.

Nan Aron. (Applause.)

MS. NAN ARON: Well, I'm delighted to be here and to see so many of you. We've done this now two years in a row with Center for American Progress, and are very grateful to Mark and the staff here. And I'd also point out that joining us in the audience are some amazing advocates and lawyers who have played a central role in judicial nominations going back to the last 20, 30 years, and played a very, very critical role in the confirmations of Sam Alito and John Roberts.

As Mark said, this event takes place against the backdrop of a very important election. Who's ever president in November will be able to shape the future of the court, not just for the next four years, but 40 years, with one justice having his 88th birthday this year and several others in their 70s, there are very high stakes in this election and certainly, we're hoping that everyone, not just people in this room, but people across the country, think about this issue as they go into the voting booth in November.

Every year at Alliance for Justice, we produce a film which we're happy to report is seen now in almost every law school in the country. I think the only school that doesn't see it is Pepperdine – (laughter) – for obvious reasons. And these films serve as centerpieces for discussions and important debates that take place in the fall at these law schools. We also, this year, entered into a partnership with a very popular progressive blog, Firedoglake which featured this film and now features, on the first Monday of every month, a discussion on the topic of justice. Members of Congress have seen this film,

conferences have all looked at it, and I'm happy to say that it's also been on YouTube and MySpace and Facebook, so we're looking for every opportunity that we can to get the message out.

This year, we tackled the topic of the Supreme Court, and as you will see in this film, we try to humanize what the court does through the telling of two cases. We hope you'll like it. We are thrilled to have our filmmaker, Glen Percy, here joining us today, and look forward to the discussion afterwards.

Thank you very much. (Applause.)

(Begin video segment.)

LILY LEDBETTER: A hired hand at Goodyear Tire and Rubber Company in Gadsden, Alabama, February 5th, 1979.

BRADLEY WHITFORD: Lily Ledbetter, she worked for Goodyear Tire and Rubber in Gadsden, Alabama, for almost 20 years. Toward the end of that time, she got an anonymous tip on a slip of paper. It turned out she was being paid less than men doing the same work – a lot less.

MS. LEDBETTER: I was shocked, because there was so much difference in their pay versus mine.

MR. WHITFORD: By then end of 1997, Ledbetter was being paid \$44,700 a year, while her male counterparts were making 25 percent more. She sued.

MS. LEDBETTER: I thought and believed that if I had a problem, that I could carry it to a court system, whether it be local or federal or to the Supreme Court.

MR. WHITFORD: Jump to the year 2000, Louisville, Kentucky, children thriving at a grade school. Why? Because of a local school board's voluntary plan to integrate, a plan like hundreds of others across the country, enacted by elected officials with popular support chose to pursue the vision of one nation, indivisible.

ROBERT WAGNER [Principal, Elementary School, Louisville, Kentucky]: Eighty percent of the parents said that they were in favor of the managed choice program that we had, that we were implementing.

MARY REDDEN [Parent, Wheatley Elementary School, Louisville, Kentucky]: All they were doing was trying to assure that every school had a mixture.

EMILY REDDEN [Student, Wheatley Elementary School, Louisville, Kentucky]: I like learning new things and I like meeting new people.

MR. WHITFORD: But some families didn't like the school board's program. They sued to end it. What do these two cases have in common? This place: the Supreme Court of the United States, where Americans have sought justice for over two centuries, where an ordinary person can stand equal with the government, with a large corporation, with the rich and powerful, with the protection of our laws and our constitution.

Almost a century after President Lincoln ended slavery, black Americans still suffered many forms of discrimination; among the worst, segregated schools. In 1954, the Supreme Court declared unanimously such separate schools unconstitutional and ordered the integration of public schools, *Brown versus Board of Education*. It's served us well for more than 50 years. And in 1965, Congress went even further, enacting the Civil Rights Act. It prohibited discrimination in employment, not just on the basis of race, but also on the basis of sex. Applying this law, a jury of Lilly Ledbetter's peers awarded her compensation for the pay discrimination she'd suffered while working for Goodyear.

MS. LEDBETTER: The jury had understood what we were telling them, they saw the proof, and there was no doubt.

MR. WHITFORD: Who could disagree? The Goodyear Company. It appealed the decision, arguing that the law said that such cases must be brought within 180 days. They said that 180 days started when Ledbetter received her first discriminatory paycheck, even though she didn't find out about the discrimination until 16 years later. So Lilly Ledbetter wound up before the Supreme Court and so did voluntary integration programs in Louisville and Seattle. And there they ran into a problem. President Bush had recently appointed two very conservative justices: John Roberts and Samuel Alito. And despite the lower court rulings and the Supreme Court's own precedents, they ruled against both the Louisville School children and Lilly Ledbetter.

LOU DOBBS: (From tape.) A major legal setback for workers in this country, the Supreme Court limiting employees' ability to file lawsuit against pay discrimination.

MS. : (From tape.) The U.S. Supreme Court in a narrow five to four split sided with Goodyear and handed big business a major win. But Justice Ruth Bader –

MR. WHITFORD: Justice Ruth Bader Ginsburg took exception to the majority's decision. She quoted the Supreme Court's own precedent which said that each discriminatory paycheck is illegal, not just the first one. Besides, she said the decision was unrealistic. Goodyear prohibited all its employees, including Ledbetter, from discussing their pay. She'd had no way of learning the truth until long after the discrimination had begun. Ginsburg concluded: "This court does not comprehend or it is indifferent to the insidious way in which women can be victims of pay discrimination."

MS. LEDBETTER: She was exactly right, and I knew that she knew where I had been and how hard it is, and I felt like that she had been mistreated through the years as well.

MR. WHITFORD: Just a month later, school children experienced the same sting of injustice.

ELAINE QUIJANO: (From tape.) The Supreme Court ruled today that race cannot be a factor in assigning children to public schools, and the conservative majority that made that decision was of course, partly shaped by President Bush, a mark, Wolf, of one of his legacies.

WOLF BLITZER: (From tape.) Today, as Elaine just noted, the court issued what will likely be a landmark decision, one that some say threatens the historic decision a half century ago that outlawed racial segregation in schools.

THEODORE SHAW [President, NAACP Legal Defense and Educational Fund]: It is a betrayal of *Brown*. It's a decision which promotes segregation, which stands in the way of voluntary desegregation.

ROGER WILKINS [Clarence J. Robinson Professor of History and American Culture, George Mason University]: What Louisville and the Seattle schools systems were doing was attempting to improve the educational prospects of all the kids, because this is truly a multiracial society now.

MS. REDDEN: And I find it very ironic that what the court originally ordered Jefferson County public schools to do, it's now ordering them not to do.

BRENDA GREEN [Second Grade Teacher, Louisville Schools]: I felt that the children again would not get the equal opportunity if we went back 50 years ago. I think we're going backwards instead of forward.

MR. WAGNER: I think it's almost a stab in the back to public education.

MR. WHITFORD: But both Alito and Roberts were all coached for their confirmation hearings.

SEN. DICK DURBIN (D-IL) [Assistant Minority Leader]: (From tape.) Do you believe that the Constitution protects the right of children in America to be educated in schools that are not segregated?

JUDGE SAMUEL ALITO: (From tape.) Absolutely, senator. That was one of the greatest, if not the single greatest, thing that the Supreme Court of the United States has ever done.

SEN. EDWARD KENNEDY (D-MA) [Judiciary Committee Member]: (From tape.) So do you agree with the court's conclusion that the segregation of children in public school, solely on the base of race, was unconstitutional?

JUDGE JOHN ROBERTS [U.S. Chief Justice]: (From tape.) I do.

MR. WHITFORD: They pledged to be open-minded, fair and to respect precedent.

JUDGE ROBERTS: (From tape.) I need to decide those questions with an open mind on the basis of the arguments presented, on the basis of the record presented in the case and on the basis of the rule of law, including the precedents of the court.

ANTONIA HERNANDEZ [Former President, Mexican-American Legal Defense and Educational Fund]: They misrepresented to the American public and to the Senate their intentions, and they're really not concerned about precedent, about continuity and stability, about assuring the American public that the laws will be equally applied, equally interpreted and that they will seek to protect the rights of all Americans.

JUDGE ALITO: (From tape.) And the presumption is that the court will follow its prior precedents. There needs to be a special justification for overruling a prior precedent.

EDWARD LAZARUS [Attorney and Author]: They turned *Brown* on its head. They actually say that the lesson of *Brown* is that you can't use these actually rather modest measures to integrate the classrooms, and that's a perverse reading of *Brown*.

SEN. JOSEPH BIDEN (D-DE): (From tape.) Is gender discrimination, as you've written in a memo, a perceived problem or is it a real problem?

JUDGE ROBERTS: (From tape.) Of course, gender discrimination is a serious problem. It's a particular concern of mine.

MS. LEDBETTER: Those justices had no idea what it was like in the real world, working in a factory, trying to scrounge out a living and to be a female at that.

JUDGE ROBERTS: (From tape.) And I will remember that it's my job to call balls and strikes and not to pitch or bat.

SEN. BIDEN: (From tape.) As much as I respect your metaphor, it's not very apt, because you get to determine the strike zone, what's unreasonable. Your strike zone, unreasonable or reasonable, may be very different than another judge.

ERWIN CHEMERINSKY [Alston & Bird Professor at Law, Duke University]: I think John Roberts should have been ashamed for analogizing the Supreme Court justice to an umpire. Anyone who's been around courts, and John Roberts certainly had, knows that the Supreme Court justices are anything but umpires. Umpires don't make the rules. The Supreme Court justices do make the rules. I think John Roberts used that analogy to try to make it seem at the start of his confirmation hearings like his views don't matter, and that therefore, there's no need to talk about his views during the confirmation

hearings. We've seen in his two years on the court that his views matter enormously, as any justice's do, and he has conservative views that constantly reflect in his decisions.

MR. SHAW: This isn't about calling balls and strikes evenly. We're talking about the opportunity to play the game. And I think the decisions that have been made in these past few months by the Supreme Court compromise the ability of people to have the opportunity to play the game fairly.

MR. WHITFORD: These are dark days for Americans who look to the Supreme Court to protect our basic rights and liberties. The Ledbetter and Louisville decisions show clearly what the radical conservatives on the Roberts court have in mind: an ideological agenda, little regard for the court's own precedents, even less for the values of equality and fairness that animate our constitution and our laws. Justice Breyer put it this way in his dissent in the school case, "It is not often in the law that so few have so quickly changed so much."

ROBERT POST [David Boies Professor of Law, Yale Law School]: This court had five votes. They're going to rewrite every case that comes before them as much as they can.

SCOTT LEMIEUX [Assistant Professor of Political Science, Hunter College]: This is not a restrained court, but it's essentially a court that is – (unintelligible) – the Republican agenda through another branch, and that's especially true of Bush's appointments.

MR. POST: And they're not patient; they're greedy. They're not careful about how they're reshaping the law to accommodate their values. They're moving very quickly and very hungrily, with little thought for the ability of the country to assimilate the change. The exude contempt for those of us who disagree with the views of the five.

MR. WHITFORD: John Roberts is the youngest chief justice in 200 years. Samuel Alito is just a few years older. They could be making decisions for decades to come. But that must not stop us from doing whatever we can to protect liberty and to seek justice.

MR. CHEMERINSKY: Unfortunately, most people don't realize that what the Supreme Court decides affects their lives on a daily basis. For women, whether or not there will be access to safe legal abortion, depends on who justices of the court are. For the millions of people who are victims of discrimination, whether there's going to be a remedy depends on who the court is. For people of a loved one who's a defendant in the criminal justice system, whether there's really going to be a fair system under the constitution depends on who the justices are.

And I think we need to do a much better job before the 2008 election of showing people that one of the most important – maybe the most important thing the next

president is going to do is determine whether we'll have justices and judges who will enforce the constitution.

MR. WHITFORD: This is not just about politics or some abstract issue of the law. This is about justice. This is about human beings like Lilly Ledbetter, a woman who has worked hard and honestly all her life, not famous people, but Americans entitled to justice

MS. LEDBETTER: Fairness, fairness.

MR. WHITFORD: We need to bring fairness to every American: you, me, the student in Louisville trying to learn, or a woman in an Alabama tire plant just hoping to be treated fairly. This is our time and this is our place. We cannot turn our backs on the struggle when we see a court turning its back on justice. We cannot ignore the need to defend the constitution when we see the court is ignoring its words. So get involved and get active, for among the senators voting on judges is your senator. Among those who seek to be president, it will be your president. Don't just hear them out. Let them hear your voice. That's how we bring fairness to every American.

(End video segment.)

MR. AGRAS: With us to discuss the film are two distinguished commentators who approach these issues from diverse perspectives. Roger Wilkins is Clarence J. Robinson professor of history and American culture at George Mason University. Professor Wilkins is a past chairman of the Pulitzer Prize Board. He served as assistant attorney general in the Johnson administration. During his distinguished journalistic career, he worked at the *New York Times*, the *Washington Post* and was associate editor of the *Washington Star*.

While on the editorial page staff at the *Post*, he shared a Pulitzer Prize in 1972 for Watergate coverage with Woodward, Bernstein and Herblock. His acclaimed autobiography, *A Man's Life* was published in 1982 and reprinted in 1991. His other works include *Quiet Riots* which he co-edited with Fred Harris and *Jefferson's Pillow: The Founding Fathers and the Dilemma of Black Patriotism*.

Our second guest is David Frum, a resident fellow at the American Enterprise Institute who writes a daily column for "National Review" online. Mr. Frum previously served as a speech writer and special assistant to President George W. Bush. He contributes frequently to the editorial pages of the *Times*, *New York Times* and the *Wall Street Journal*, as well as to Great Britain's *Daily Telegraph*, Canada's *National Post*.

His published works include two *New York Times* best sellers, *The Right Man: The Surprise Presidency of George W. Bush*, and *An End to Evil: What's Next in the War on Terror* which he co-authored with Richard Perle. In 2001, Judge Richard Posner's study of public intellectuals listed Mr. Frum as one of the 100 most influential minds in

the United States. And we're particularly glad to have him with us here in the lion's den. Welcome, David. (Laughter.)

Let me begin by asking each of our panelists to share some initial opening thoughts with us about the film and about what are your thoughts. David?

MR. DAVID FRUM: I thank you for that generous introduction. I'm very glad to be able to see this ultra-glitzzy room from the front. I've often been in the back, and it's even more impressive from up here. I also I think probably should make clear, in the interest of full disclosure, that Judge Richard Posner meant that as a bad thing, not a good thing about me. (Laughter.)

This is a very impressive and successful documentary. And I recognize that documentary makers don't do their work on oath. There is no obligation to be fair. So I will approach this not from the point of view of do I think that the documentary offers an accurate or apt assessment of the legal situation, but with this question in mind, that if I were its maker, I would be wondering about. Just does this documentary move opinion in the way that I wish it to do? Will it have an impact on my target audience? Nan gave us a very good idea of who the target audience is. It's not the general public; it's law students.

And I think that as you contemplate, why has there been such a conservative legal revolution on law campuses, why have the law schools over the past 15, 20 years followed economics in a rightward direction? I think this movie may illustrate part of the problem, because you all, or many of you in this room, know these cases very well, and you know that the movie omits important and crucial elements of the story. It makes very serious accusations; it accuses judges of – nominated justices of misrepresenting their views under oath; it accuses them of contempt; it accuses them of a variety of sins. And the law student audience, people who are immersed in these debates, are going to notice that there are things missing here.

They will notice, for example, that what is persistently described in the film as a voluntary plan was not voluntary from the point of view of the conscripted parents. It was voluntary from the point of view of the town or the city or the municipality. If you put this on YouTube, the YouTube audience may not know that, but a law student will. Law students will know, of course, that the Lilly Ledbetter attorneys had a choice of statutes to use in making their case. They chose the one with the shortest statute of limitations, when there was one with a longer statute of limitations, the Equal Pay Act that was also available to them.

Law students will understand that statutes of limitations serve important purposes of justice too. After all, Lilly Ledbetter, her claim was that she was doing equal work. The defendant's claim was that she had not performed as well on her performance review, that is, the base pay was the same, but the male employees were getting higher raises because they performed better.

Now, who knows whether that's true or false? The only way, that is a question of fact that has to be tried, and to try it after 20 years is very difficult. That's why we have statutes of limitations and that why they're important elements of justice for defendants, both in the civil and also in the criminal matter. Law students will be aware of that and will notice that that is a problem that is (alighted?).

They will know – they might ask this: why is there a sympathetic face in the sex discrimination case, but yet, no individual person mentioned in the Louisville case? Was there a plaintiff in the Louisville case? Who was that plaintiff? Did they have a story? Who was – that plaintiff has a name: Crystal Meredith. Who was Crystal Meredith? Why did they bring suit? Because they did not like the plan, as was said in the documentary, or because that person also experienced a feeling of injustice? We could talk about these at great length, and many of these same points will have occurred to you.

But one of the things that I would challenge you, and I would challenge both the Alliance for Justice, but also the Center for American Progress, who has become an important new entrant into the Washington think-tank world, and which is trying to influence the debate in a new kind of way. This is to say, can you influence the intellectual debate when you don't do your intellectual work with the fullest and highest aspirations to presenting the complexity and difficulty of situations, when you don't do full justice to all of the factual data, when you don't talk to your target audience on the assumption that they are as well informed as you?

Those are questions that if I were judging this from the point of view of effectiveness, I would want to consider. As someone who is not sympathetic, of course, to the underlying argument, I consider them too from the moral dimension, but that's a subject that I think is one that probably is beyond the scope of our exercise this afternoon. Thank you.

MR. AGRAS: Thank you. Roger.

MR. WILKINS: First of all, I want to say that I believe in continuity, but I don't believe in it as much as you might think from that film and me today. To my horror, I see that on that film I was wearing the same shirt and tie. (Laughter.) I want to assure you that back in my closet at home, there is at least one other shirt and one other tie. (Laughter.)

I'm going to challenge David's attack on the integrity of the film we've just seen. Nan and Mark are here and they can do that. I'm going to talk about this as a citizen, and I have to say to you that even though this is a lawyer's issue, and I did go to school and pass a bar once, I haven't been a lawyer for more than 45 years. And I don't think like a lawyer anymore, but I will give you a sense of my sense of these issues.

I suspect that I'm the only person in this room who was born in a segregated hospital. I suspect that I'm the only person in this room who began his educational career in a one-room segregated school house. I suspect that there is no other person in this

room who lived in either de jure segregation or de facto segregation for the first 13 years of his life.

I am here to be witness to the fact that the injustice of that culture and the power of that culture was more destructive than my power of language can ever convey to you. I can say that at the cusp of my 76th birthday, those damaging years still affect me in a way that I think diminishes me. But in those years, when I was growing up in segregation, I did get a sense that beyond this place where we were – this situation in which we were living, there was a better America.

And I got that from my parents' conversations with each other and their friends, and I got it from the B movies, the B World War II movies that us kids of that age saw all the time, in which a just and decent America was portrayed relentlessly. And I suppose I went to law school with a sense that there was an America that rested on something that was quite opposed to the segregation that I had experienced.

And I now realize that that sense of what that America was was based on the Constitution of the United States, particularly the 13th, 14th, 15th and 19th Amendments, of the preamble, the values of the preamble, the Declaration of Independence and the Gettysburg Address. All of those values I thought came into play in *Brown v. Board of Education*, and those were the values that I thought would guide the country that I lived in and loved, that had scarred me, but had nurtured me as well.

Those were the values that the country would live by, because I believed in – (unintelligible) – I believed the justices would follow it, particularly since it seemed so morally right and so much in line with what we say about ourselves and what we say we believe and we try to live by. Well, and I thought the courts were open to do justice and not to limit access to the courts.

Well, the court in the last term, this court in the last term, shattered virtually every one of those expectations that I and others like me had. And I asked myself, what can you do about it? And I look back at the Thomas, Roberts and Alito hearings and I say to myself, well, the only protector for us of those values is the Senate of the United States. And in some way or another, it seems to me that the Senate has to find ways to do aggressive and skeptical examinations of people who are presented to them as being fit to be chief justice or associate justice of the United States, with of course, limits that the senators not stoop to underhanded behavior or psychic brutality, but that the examinations be clear, rich and favorable to the prospect of having a full examination of who it is that is going to be put on the Supreme Court.

With Alito, Thomas and Roberts, we took large chances. We didn't really know who these people were. We didn't know what their intentions were, what their values were. I don't believe the Senate should engage in witch hunts, but I do believe, I do believe, that in these cases, it failed us because we had no way to know how these people would perform on the court and therefore, no way to try to influence our own senators, those of us who don't live here in Washington and who have senators who they can

influence. We don't have that, and we've been, as citizens, I think we've been ill served by the Senate.

I simply conclude by saying that as a person whose highest achievement in the law was achieved when he was a – (unintelligible) – intern with Thurgood Marshall at the Legal Defense Fund, and who was assigned a memo the first day that he got there by Marshall and was – then gave the memo back and the Marshall held it for several days and then came into the full library of the Legal Defense Fund – a lot of lawyers were sitting there working, I thought, including Bill Taylor (ph) there. And Marshall said, after reading this memo of mine to himself, and I realized he was reading my memo and I felt awful, and he finally looked up cheerfully, and looked around the room and he said, hey, you all, this boy ain't as stupid as he looks. (Laughter.)

Well, I hope that this observation about what the Senate needs to do is not as stupid as it sounds to me as it comes out of my mouth, because be it stated more elegantly, but I think fundamentally, we have been failed and our highest values have been failed and we're going to suffer for a long, long time because of it.

MR. AGRAS: Thank you, Roger for those comments. Let me just pose a few questions to both of our panelists, and then we have so many distinguished people in the room who have thought so hard about these issues for so long, I'd like to maximize the time that we have for audience questions. Let's talk a little bit about the two cases that were presented, and then let's talk a little bit if we can about the general character of the Roberts court, what we do and don't know about it at this point.

First, on the schools case, the Seattle and Louisville case, David, one of the striking features of the school integration plans in both of those cities, and you alluded to the issue of voluntariness. One of the striking features surely is that they were popular measures. They were developed by local school districts, approved by local communities. They weren't ordered by courts or mandated by the federal government. Shouldn't localities be permitted to take these kinds of steps voluntarily through the democratic process? Granted, not everyone will be happy, but democracy doesn't guarantee universal accord, only that majority rules and minority is heard. Isn't that a principle to which conservatives subscribe?

MR. FRUM: Well, I noticed you featured in the film my law school classmate, Eddie Lazarus. And I have great affection for Eddie, but I don't regard him as an oracle and when he says that these cases turned *Brown* on their head, that raises – goes exactly to the point that you make. In *Brown*, the court was confronted with arrangements that were classifications based on race that were locally popular and they overturned them.

Here, in this case, they are faced with classifications based on race and they were locally popular. It seemed to me that the argument, the structure of the argument you offer is exactly parallel. This is not turning *Brown* on its head; this is exactly *Brown*. Classifications based on race are wrong; then they are wrong, and the fact that they are popular doesn't alter that fact.

I often have a sense – you know the story about the people in this Irish prison who have been in the same prison cell so long they stop telling each other jokes. They just say number 37 and everybody laughs, number 42 and everybody laughs. You know this particular structure of the argument, but that is the conservative answer. It was articulated, I think, by Ted Olson at the time. If these classifications are wrong, then they are wrong, and the fact that they are popular doesn't offset it.

MR. AGRAST: Roger?

MR. WILKINS: I'd like to answer that. There's a great distinction between classifications which separate people because one category of those people are deemed inferior to the people who have all the power, and who are therefore shunted aside and stuck in the rot bin to rot their lives away, as opposed to public policies voted on by elected representatives of the people in the city not to notice people's race in order to segregate them, but to notice their race in order – and to arrange them in schools in order to enhance their educations and their educational possibilities.

If you can't see that distinction, then I have to say that the world is nuts because the distinction is quite clear, and it seems to me that the enmeshment of what Louisville and Seattle were trying to do with what the State of South Carolina, the State of Virginia, the State of Delaware, the State of Kansas and the District of Columbia were trying to do to minority students. There's a vast, vast difference, as big as the Grand Canyon in my view.

MR. FRUM: Let me add one sentence very briefly. I know you want to go to more things. That – what Roger says, these are obviously – it's a serious point and it's a difficult problem. But when, in the film, Justices Alito – I think it was just Alito who was accused on this point – are accused of bad faith for answering a question from Senator Kennedy. Kennedy says, do you agree that it's wrong to classify people solely on the basis of race? I forget now, I think it was Alito who was asked this question. And he said, yes. And the film then suggested that there was something in bad faith about that answer. But I think as our discussion here has just illustrated, that he was answering that question in the more literally truthful way.

And you may not like – you may think that that attitude is not in keeping with the spirit of the times, that the rule laid down in *Brown* was maybe too fundamentalist and it needed some modification, that intent matters more than the actual rule itself. But that was the question he was asked and that was the question he answered. So to accuse him in some ways of misrepresenting himself, or misleading people, or allowing them to draw false inference when he stated the exact truth to the more obvious meaning of the question.

That's what I mean about the nature of that film and the nature of that representation. You can say that the film could have said everything Roger just said, which is you answer the question literally and truthfully, but that's a simple-minded point

of view. It doesn't do justice to the complexity of the situation. It's a different thing from saying he's a liar.

MR. AGRAS: Let me ask you about the concurring opinion in that case. Justice Kennedy, who really wrote what is the law in the case, he refused to join those parts of the Robert's opinion that sought to foreclose all use of race-conscious remedies for segregated schools. And he wrote that the court was too dismissive of the legitimate interest government has in ensuring that people have equal opportunity regardless of their race.

And he suggested various different measures that he would deem permissible. Justice Breyer wrote a very forceful dissent in which he said that the options left open by Justice Kennedy had been shown to be insufficient, impractical, ineffective. So I guess I'd ask both of you what you think about the fact that Justice Kennedy recognized that there is a legitimate, compelling state interest here, and yet, the earnest efforts of the people of Louisville and Seattle had somehow fallen short of the mark. Where does that leave us?

MR. FRUM: Five to four. (Laughter.)

MR. AGRAS: Where does that leave the citizens of –

MR. FRUM: Well, it leaves us as in many areas of life, making guesses as to the behavior of the court. And that, I think, is one of again, one of the challenges. Let me say that the attitude implied – this film partakes very much of the attitude of the kind of liberal court worship that was such a strong feature of public life in the 1960s and 70s, that the court is this temple, this – I forget the exact terms that the script uses, of our hopes and fears and dreams and aspirations. But of course, aside from rare romantic moments in the American history, that is putting on nine people, who are very conscious of the other 300 million and their different views, a burden that they're going to flinch from.

And so, in fact, on lot of the things where you would most want to have an answer from the court, it is precisely these areas where the court's answers are most oracular. How squiggly can a voting district be before it gets too squiggly? How burdened can the right of abortion be before it becomes too burdened? All of these questions become more and more unanswerable, not less and less. And maybe that tells you something about this project of looking to this institution to decide.

MR. AGRAS: Roger?

MR. WILKINS: Well, I'm not sure that I noticed any great romance with the liberal court. I remember people being very upset with the members of the court, some of them were people for whom I had great respect. I do believe that the intention of some people to – well, I heard Justice Scalia say it one day. He said that we're not here to give

people rights they didn't have before. We're here to deal with the rights they had and to prohibit the growth of a whole bunch of other rights.

I don't know what he meant. I do know that I believe in Jefferson's view of an expanding, growing constitution far more than I believe in the originalist view. And secondly, as somebody who potentially got more rights under the 14th Amendment under the *Brown* decision, I thought it was the right thing to do. I thought it was a good thing to do. And I thought that reaching back to issues of fundamental fairness and the doctrines on which this country is based wasn't romantic. It was just decent, and to my view constitutionally correct. So I don't really – I don't get David's point. I just don't, period.

MR. AGRAS: Let's talk a little bit about the Ledbetter case, *Ledbetter v. Goodyear*. Some court observers, and I think it was certainly the position of the film, see *Ledbetter* as part of a growing body of case in which the Roberts court is attempting to restrict plaintiff's access to courts, in fact to close the courthouse door. There're a lot of examples that could be cited that would support this proposition and maybe also a few that go in the other direction.

Just to mention a couple, the five to four decision in *Bowles v. Russell*, that's the case in which Justice Thomas overturned two 40-year-old precedents to rule against an inmate who missed the deadline for filing an appeal because the judge had given his lawyer the wrong date; or the five-four decision in *Hein v. Freedom from Religion*, the court ruled that taxpayers lacked standing to challenge expenditure for the Bush administration's faith-based initiative, despite a 1968 precedent that granted taxpayer standing under very similar circumstances. Quite a few other examples one could cite.

One major exception that one could cite is the case of *Massachusetts v. EPA*, in which a five to four majority, led by Justice Stevens, ruled that the EPA had the authority to regulate greenhouse gas emissions and that Massachusetts had standing to sue, but presumably the case turned on a notion of deference to states rather than to plaintiff's private parties and so forth. And in any case, the justices we've been talking about were in the minority in that case.

So I guess I'd ask both of the panelists, do you see a pattern here? And if so, is it a pattern you applaud or a pattern you deplore?

MR. FRUM: Think – let's think for a moment. If you were the lawyer who had the responsibility for defending Goodyear in the *Ledbetter* case, how the court that allowed this case to proceed, how you would have done it. Ms. Ledbetter's claim is essentially this, that over a period of 20 years, she received less favorable performance reviews – unfairly less favorable performance reviews than her male peers, and a cumulative effect of that was overtime to give her male peers about \$1,000 a month more pay.

Now, by the time we get to the recent performance reviews, even if she had begun to get great ones, it wouldn't have done a lot of good because her pay had been depressed

over a long period of time before that. So what we now have to do is find some way to show whether those performance reviews from 1980 and 1981 and 1982 were fair or unfair.

Now, I'm the current management of Goodyear. I don't even know those people. It's probably changed hands many, many times. So I'd have to defend their performance reviews. Where are they? Are they here? Are they dead? Are they – they're in no way available to – I cannot begin to articulate a defense. So I really have probably no choice but to pay up without being offered the chance to defend myself.

Now, if this were a case of – a criminal case and it were a criminal defendant, I think everybody in this room would instantaneously, overwhelmingly and spontaneously understand the importance of the statute of limitations. But since the defendant is a corporation, everything is different. The principle, I think, is the same – that it is very hard to defend cases 25 years after the alleged offense. So that's why we have these statutes.

Now, different laws have different statutes. The Equal Pay Act, as I understand, has a four-year basis. And if she had pursued that avenue, she might have done a little bit better. But for reasons of legal strategy that I don't understand, she chose a different way. But I think it is generally true that the federal courts at least are seized of the idea that a lot has gone wrong in American civil litigation and that it is becoming a big problem. It's unjust. It's uneconomic.

And they are looking for ways to restrain the efflorescence of civil litigation they had in the 1970s and '80s. And so they're taking resort to some basic principals that were very important parts of American civil law before the '70s and '80s, things like standing, things like statute of limitations. And sometimes, that was hardship in individual cases, but the opposite would work hardship for the defendants in those cases. And so I think you need to take seriously what is there responding to and what is driving them? It is not – this is not about discrimination law as such. It is about righting the battles between plaintiffs and defendants in civil litigation generally.

MR. AGRAS: Just to follow up, your point about statutes of limitations is obviously well taken, but would that really be a problem if the court had adopted the position of Justice Ginsburg, who said that the –

MR. FRUM: Who said the first paycheck – that you can litigate the first paycheck.

MR. AGRAS: You can also litigate the last.

MR. FRUM: You can litigate the last, but the last paycheck doesn't tell us anything. What the last paycheck will show us there is this gap and what it will show as well – I don't know what the later performance reviews look like, but the point is the arithmetic tells us that even if they were absolutely terrific, she was not going to catch up

because of all of the previous ones. So you would have to – in order to make your case based on the last one or the last few, you would probably have to open up the whole thing in order to get the magnitude of the damages that she has – (unintelligible).

MR. WILKINS: If I were Mr. Goodyear, I wouldn't be sitting here. I'd be in Florida. And the Congress passed the Civil Rights Act of 1964 and put a Title 7 in it and you are required to deal – you knew under statute you're required to deal fairly with your employees, both as to race and as to gender. I think as Mr. Goodyear, I would save documents that demonstrated that I was dealing with my employees fairly and if there were disparities, I would have in my records proof of a rational reason to treat them differently. So I don't really see that the poor Mr. Goodyear that David is worried about really was so badly off at all, that those records, in a well run company, would have been somewhere that somebody could have put the hands on and proved yay or nay.

MR. AGRAS: But what does all this mean for the Roberts court as whole, for the direction of the court in the future? After the 2006-2007 term, Linda Greenhouse of the *New York Times* wrote that the Roberts court was, and I'm quoting, "the Supreme Court that conservatives had long yearned for and that liberals feared." Now, some scholars consider this an exaggeration and see only a more modest shift in a conservative direction, like Jonathan Adler who has an article in the materials from *National Review* saying, "Reports of the conservative judicial revolution are a bit premature." Are they?

MR. FRUM: Well, I'm not an expert court watcher and I don't study the whole docket as carefully as I'm sure many people in this room do. So I can only speak from general impression. But what seems to me to be happening is the court is moving in different areas of law with different degrees of confidence. And so the area where it looks like the Supreme Court and the federal courts generally are going with the greatest certainty is toward constraining civil litigation.

That – if you're looking at – areas where they seem to act like, "We have a clear idea where we're going and there's a large consensus." And on those cases, they often bring the more liberal members of the court along with them, like Stephen Breyer, who is – let's not forget – the intellectual father of airline deregulation. Stephen Breyer is somebody who's a very sophisticated student of the workings of the American economy.

So on that – now, I think we are probably going to hit very soon, if we had not already hit the limits of how far the federal courts are going to go, but they are becoming much less hospitable plaintiffs for civil plaintiffs than they were 15 years ago. I think that's a good thing. Others will disagree, of course.

In other areas, you see the moving much more cautiously, and if you think about, for example, where they have gone on sodomy laws, where they have gone on the president's claims of executive authority to do – with regard to enemy belligerent detainees, it looks rather less dramatic, I think. And in fact, the sodomy laws look like the most – a dramatic move in the opposite direction. It is – if it isn't already true that sexual orientation is a de facto prohibited ground of discrimination in the federal courts,

we are probably about 15 minutes away from that being true even with no changes in corpus now.

MR. AGRAST: Roger?

MR. WILKINS: No.

MR. AGRAST: Nan?

MS. ARON: Well, I guess I would say if – I think if a case – take abortion, were to be taken up by the Supreme Court, challenging the holding in *Roe v. Wade*, I think some of the ultraconservative zealots on that court would not in the best interest of the Republican Party overturn *Roe v. Wade*. I don't think you even need another election to do that. It's there. And I think that remains to be seen, whether or not some challenge to *Roe* is made. I certainly think in the area of civil and women's rights, the court has gone backward. I think lowering the wall of separation between church and state, I think is a – it's very problematic. The Supreme Court heard a challenge to the photo identification laws in Indiana and I don't think many of us hold out much hope on a case like that.

On the other hand, the issues concerning executive power, I think Kennedy will hopefully restore habeas corpus in the case being argued, but certainly, I think the point is that Roberts and Alito will be clearly on the other side of Justice Kennedy on any challenge to expansive government authority. That's the way they ruled as lower court judges and I see no reason to believe that they'll do anything different now on the Supreme Court.

MR. AGRAST: Some court observers have argued that Roberts and Alito were stealth nominees who hid behind bland euphemisms and ritualized formulas like stare decisis and judicial restraint during their confirmation hearings and professed their allegiance to precedents like *Roe v. Wade* that they had no intention of upholding.

David, I know you took exception to aspects of the film that suggested that those statements were dishonest statements. But it's also possible that this is a problem not of dishonesty per se, but of a process that encourages obfuscation. It shields the public and the Senate from really finding out who these folks are, whether or not they are prepared to commit themselves to a particular judicial philosophy and whether they're prepared to be frank and candid about that philosophy. So it may not be the fault of individual participants in the process as much as is a fault of the process itself.

So I guess my question is, is the confirmation process broken and if it is, what can be done?

MR. FRUM: That's a very profound question and one I have thought about a lot. Essentially, what we have is a high stakes process played by low stakes rules because I – you don't really want to know who they are. You want to know who are you going to be

because they're there for a long time and people change. And they change often in very unexpected ways.

And I know that there's now – that some people – I think Larry Tribe or somebody like that has written some clever article about how presidents get what they want. And you have to be as inventive and ingenious as Larry Tribe to be able to construct that argument because it would defeat any lesser mortal because the president certainly thought they were surprised.

So if you are going to have a court with this much power and lifetime appointees in a closely partisan-divided country, it is probably inevitable that the questions are going to become more and more searching. And yet we have very strong conventions that limit how the searching the questions can be. And so that then breeds a game of craps where we had – that usually, by the way, backfired in the attempt to entrap Alito and you don't get to be – there is not a more straight-arrow person in the United States than Alito and more – now, that – so of course, it horribly backfired on the people who tried to do it.

So I'm increasingly partial to an idea that's been quoted by a couple of law professors whose name I forgot, that we should have the judges come up at staggered intervals, and they should serve 19-20 years, that you should have a judge come up every two years. And then in that case, knowing that the partisan ebb and flow, then it would be a little bit easier to have deference to the nomination of the president.

In general, I think the Senate should – we have – I would say we need a lot more deference. I would say anyone who's been through a confirmation process of any kind – in fact, many people in the room may soon have executive branch appointments and you will be amazed at the pettifogging absurdity of the questions you are asked, including list every foreign trip you've taken in the past 15 years, the date you left the country, the date you returned. Can anybody here do that?

If you – for those of you who are writers, if you – when do your financial disclosure, there's a special rule on writing, where you have to list every single article you've been paid for in the past seven years and the amount you were paid for it. So if you're a lawyer, you can write down \$135,000 – (unintelligible) – do I have to write the \$200 for the *Wall Street Journal* on April 16th, \$75 from this. This is impossible.

Even with the judiciary, there's maybe more a claim for senatorial role, but if we could make the – make the result more low stakes, we can have a more low stakes process, which is probably the right way to go because the thing you want to know is a thing you cannot know. Who will you be 15, 20, 35, 40, 50 years from now?

MR. AGRAS: But assuming that recommendation does not become law next week, do you think that the level of deference that is accorded by the Senate at present is too much or too little?

MR. FRUM: Well, it's both. There is – the intent to trip people up, entrap them, and make them make a mistake on television is way excessive. It's also counterproductive because you're going to ultimately coach people on how to defeat that and because I think there's a broad sense in the country, those questions are often illegitimate.

And the rule that a judge can't comment on things that are going to come before him, that seems like pretty good rule, that you don't want him to be – because we know how the human mind works also. Sometimes we say we believe it's an equally – it's equally true that oftentimes, we come to believe what we've just said. And so you force people to take stances on things they haven't thought about clearly. They've now defended in front of the Senate. Now that's their view and how do they ever retract from it – a retreat from it if they decide later, I don't think that was right or haven't thought about this particular problem.

So I think the way to do it is to go through the record. People are coming with extensive paper trails. Both Roberts and Alito had extensive paper – you couldn't – the questioning is a waste of time. You want to know what they think? Read it. It's all there. And I think it would probably be a better thing all round if you ever had senators who would say, "I have no questions for the nominee. I want to say your family story is wonderful. You're obviously a brilliant man. If I were in trouble, I would turn to you to represent me with – but I've read your results. I don't like the way you decide cases and my vote is no. And I wish you well in all of your future endeavors and – (laughter) – and let's have lunch next week." That – it should be possible to do that.

MR. AGRAS: Roger?

MR. WILKINS: Well, I think I said what I have to say about the process and the only thing I'd say about what David suggested is that suppose you sit there as a conscientious senator and you spend all night, three straight nights, reading all this stuff and you come upon stuff that you – that troubles you. Shouldn't you have an opportunity to ask the – shouldn't you have the opportunity to ask the candidate what she intended by this particular act or decision or memorandum?

Isn't it fair for her to get the chance to answer that question? And isn't it, in fact, fair for the senator to get to ask the question because maybe the answer would illuminate all kinds of things? So I don't really see how you get rid of the hearing. But I tell you this, you really made me feel very good because I am so old, I will never get a presidential appointment again and I'll never have to figure out any of those kinds of – (unintelligible) – again.

MR. FRUM: I have a quick response to that. If – I'm not saying it's unfair. I'm just saying it's useless. What I would say more – some of the people in the room may know I was very involved with the Harriet Miers battle. I worked very closely with Harriet Miers and I knew her quite well. Actually, it was one of those awful moments where you discover that something it would happen in Washington, you're one of like

four people with the answer to the question, and then you'd have to decide whether you're going to pipe up about it and the consequences can be pretty unpleasant.

But – so I wrote a lot about the nomination and said I thought it was a big mistake, both for quality reasons and for ideological reasons. But I think if you're a senator, I think much more likely than the – you read something. You're troubled by it and you think you're going to get anywhere by asking a question. The real problem is that they send you somebody about who nothing is known. There's no record.

I think – I would not have a problem if I were a senator saying there's no record here. I can't vote for you. I don't have enough information about you to make a decision, nothing personal. And I think that is going to be where you get to the most anxieties when there's not a record. And all that happens when you're troubled about the record is you end up exactly where you are or where you were at the beginning.

The person's able to answer the questions. You're not able to answer the questions you want. You don't even know what the questions are. And so the stealth – the so-called stealth candidates are not that stealthy, and when they are stealthy, being stealthy, I think, in itself is an enormous problem and presidents shouldn't choose stealthy people. They should choose people – this is the Supreme Court. They should choose people about whom a lot is known.

And in the case of John Roberts in particular, he's one of those famous lawyers in Washington. He was extremely well known. Everybody knew where he was. And the people who care about these things knew him well. He actually is somewhat less conservative. He's very conservative, but not quite as conservative as Rehnquist and I think he has ended up, or he is ending – he is right now just about where everyone who cared enough about the court to follow it closely would have guessed he would be.

You don't agree.

MS. ARON: A little disagreement. He was the choice of the legal establishment in this city, John Roberts. We had a joke in our office that John Roberts went to lunch four times a day with various lawyers and judges and reporters. There wasn't anyone who didn't love this guy because they had all spent time with him. And this is a job that he spent years working to get.

So I – and what I hear from people is surprise. They didn't realize just how conservative, just how much of a vision he has. In fact, I hear just the opposite. They knew him personally, and law firms around the city really liked him. And you heard his – saw and heard his performance before the Senate Judiciary Committee, where he razzle-dazzled these senators.

I would argue, David, that the senators know what to ask. Each of them, with some exception – (laughter) – are prepared for hearings. But I think, going to Roger's point, they didn't have the will to say to a John Roberts or a Sam Alito, "You didn't

answer that question,” or “You’re evading my question. You didn’t give me an answer. And you know what? I can’t vote for you until I hear your answer.” None of the Democrats really did that and I think because they lacked the will; they didn’t lack the preparation for doing it.

I would suggest that one help for the confirmation process might be for each side, in addition to senators questioning the candidates because you’ll never get a senator to move out of the camera – the lights of the camera, to each of them appoint a lawyer who can also ask questions. And I think someone who – each side having someone expert in the law, I think would be quite helpful actually in trying to get candidates to actually answer.

Finally, there was one comment you said about – I can’t let it go – Sam Alito’s answer on *Brown v. Board of Education* in civil rights. I think we’re parsing it too carefully. What I think was going on is Sam Alito, as well as John Roberts, knew that if they expressed a viewpoint critical of *Brown v. Board of Education*, they would never have gotten confirmed. And I think – you might say that that’s the folly of the confirmation process, but I think the two of them were sufficiently coached to know where to stop and just basically not to answer the question, or as you say, just give a platitude and move beyond it.

MR. FRUM: Just on that point, everyone here who has been to law school knows that when you doodle, they asked – the right answer to any law school question is always right result, wrong reason. And so it is a parlor game in the legal academy that everyone agrees, I think, that – everyone agrees that the result in *Brown* was right, but there is widespread complaint about the way in which the result was reached.

So to – all that you would get if you pressed a Roberts or Alito – in the middle of the night, you got a skilled lawyer. You turned off the TV cameras. They would tell you what they would say, if they were candid, was I agree with the result, but of course, the case is terrible. And the way they should have done it – they way I would do it – and that’s a paper. It’s not really relevant to – no one who was watching this on television cares how they get there.

Now, as lawyers, how they get there is important because of where you go next. What is the meaning of the case? What is – what does it imply for future things that have not come up? But to suggest that they are not completely convinced that that was right answer – everybody thought it was the right answer. Some people think it should have been done on the – you know this stuff – privileges and immunities and there’re some other fancy ways of doing it.

And of course, had they been there, they would have discovered why – those same smart ideas occurred to people who were there at the time. But I think that – and as to your suggestion of having a skilled lawyer there, that happens already. It happens in the senators’ chambers. The problem is do you do it with the TV cameras on and then you turn the whole thing into even more of an inquisition than it already is? You make it

even more partisan. And you probably make the whole atmosphere around the case more poisoned when I thought at the beginning, the goal was to make it less poisonous.

MR. AGRAS: Roger, last word before we turn to audience questions?

MR. WILKINS: I've heard enough of us. (Laughter.) Let them talk.

MR. AGRAS: Okay. Well let's move to our question period. When I recognize you, please wait until the microphone is brought to you. Who has the mike? Right over here. And please state your name and affiliation. We're taping this. We want to be sure that we get it right. And to be sure we can take as many questions as possible, we ask that you please refrain from making statements from the floor and that you keep your questions as brief.

Q: I'm Bill Taylor. I'm a civil rights lawyer. Since I fancy myself a civil libertarian, I think everybody's entitled to a defense, even the most powerful judge on the most powerful court in this country, and even when he dissembles as he did in a number of cases, but particularly in the Louisville and Seattle cases. He said he tried to convert *Brown v. Board of Education* into a color-blindness case, and almost suggested that it enacted the elder Justice Harlan's dissent. And I don't know anybody – I've been around for about as long as Roger has –

MR. WILKINS: Longer. (Laughter.)

Q: I don't know any constitutional lawyer, any academic, who would – there's disagreement about *Brown*. I don't know anybody who would say that *Brown* was that. And most people would find that the essence of *Brown* was in the footnote of *Strauder v. West Virginia*, which struck down the statute preventing blacks from serving on juries and said that they enjoyed an immunity from hostile legislation aimed at them specifically because of their race.

So I don't – I think it was improvident and not honest for Roberts to say – and I've heard more comment about that than any other. It's not just a question of people's party or anything. A distinguished conservative, Alex Kozinski, wrote in the Ninth Circuit that the classification in the Seattle case, which was the same as the Louisville case, was – did not even have to have strict scrutiny because it was not designed to stigmatize anybody. It was not designed to deny anybody educational opportunity.

And I guess I'd ask Mr. Frum if he cares to comment on it. You criticized the film for not showing the view of the plaintiffs in that case. What exactly do you think they could have said, other than all racial classifications are reprehensible, that would have shown the injury they said they suffered in the way that the other parties did, in the way that Lilly Ledbetter did?

The other quick question – I'm sorry to take some time when there isn't much time left – but I want to ask Roger what was the mystery about Thomas or Alito or

Roberts? I read, I regret to say, all of the memos that I could discover that Roberts had written and then eventually wrote about them in the *New York Review of Books*. I don't know – he expressed himself on many of the issues that are still pending before – that still may come up before the Supreme Court.

He said the Reagan administration wasn't tough enough in supporting a denial of opportunity for a public education to the children of the illegal aliens, and that it should have been tougher and maybe they would have gotten – (unintelligible) – vote. The defense of these people – the defense of Roberts is that he was very young and he was very ambitious. Why should we not have taken him at his word? Why should we not have taken Alito at his word on the cases that he decided?

And wouldn't that – if we did that, maybe that would advance us a little along the road. I don't know what the solutions are to improving the process. I think maybe we should close the hearings to the relatives and friends of the nominee, so that we don't have emotional displays that seem to have an impact on things. But I don't know why we shouldn't take these people and ask – maybe ask them whether they differ now from what they said on paper or what they said in opinions before.

MR. WILKINS: Well, I think you heard me say that I thought that the members of the Senate really are not doing a terrific job and I think that's a perfectly fine idea. I must say, if I had been a member of the Senate and some guy told me that he had never discussed *Roe v. Wade*, I would vote against him. But – so I don't disagree with you at all.

MR. FRUM: As to the question that was asked to me, here is, I think, what you could have seen. The plaintiffs in the Louisville case said they – there was a school close to them that they wanted their children to go to, that they were not allowed to go to that school. They had to go to a more distant school. They claimed that their children who were in elementary school had very long commutes. I forget now the exact number of minutes, but they were long commutes and they had been denied their opportunity to make a voluntary choice.

And I'm sure you could have done a very heartrending 45 seconds showing what it's like to put some nine or 10-year-old child on a bus for a long period away when there's a school next door or nearby because of some abstract scheme. That would be the story. There are individuals on all sides of these cases. And they're in the Goodyear rubber company. There are individuals there too.

MR. WILKINS: I would say that –

Q: (Off mike) – preference in those cases for people who lived in the neighborhood.

MR. FRUM: There was a formula of living in the neighborhood and race. It was – but it was – if people feel like their fate is not – that there are these institutions beyond

their control that are assigning children in ways that are not accessible to them, that are not – where the parents don't have a lot to say, you can see how people would feel they had a real grievance.

MR. WILKINS: David, I served on the school board in this city and before that, I served on the board of the University of the District of Columbia. When people didn't like what you're doing, they would come in and they'd yell and scream at you and they would tell you, you were stupid and you were wrong. And you had to justify – as a public official, you had to justify to them why it was that you're doing these things that you were doing.

But you and they were part of the same polity and you could say to them, "This is for the good of all the kids in the city." Yes, you – it may be less convenient for you, but what you get at the other end is a much better education for your child than your child was getting in the essentially segregated situation that they're in now.

And I'll tell you something. You can make heartrending descriptions of putting a kid on a bus and sending her to school for reasons that she doesn't understand. In Louisville, in Seattle, they tried very hard to explain to those parents why what they were doing was required. They didn't say jack squat to me when I was five years old and they took me half way around Kansas City to go to a primary school, but it was pretty clear that after I passed all these nice white schools and got to the crummy school, their evaluation of me was pretty clear. I didn't have to ask anybody any questions. And there is, I can tell you, a huge difference between Kansas City in the '30s and Louisville in the '90s – (unintelligible).

MR. FRUM: The argument that we think about things from the point of view of the good of the polity as a whole, and that individuals need to choke back their personal assessments of their rights and subsume their personal claims for the good of all, if we take – that is an argument that is so at variance with everything that the whole argument for the court – I thought – the thing I've been hearing from everyone is it doesn't matter. You have rights and you pursue those rights and you're entitled to pursue those rights. And if you're allowed to do that, that applies to everyone who thinks they have rights, that they get to say, "I'm going to – never mind about the good of the polity. This is bad for my kid."

MR. WILKINS: David, did you ever get drafted?

MR. FRUM: I never got drafted.

MR. WILKINS: I'll tell you something. It isn't fun and I didn't want to go, but I had to go and they said it was for the good of the polity. And I thought it over after a while and I said, "Well, yes, right. It's the right thing. I don't want to do it, but I'm going to do it because that's the rule."

MR. AGRAS: Let's take another question, the gentleman in the back.

Q: Thank you.

MR. AGRAS: If you can give us your name and your affiliation.

Q: My name is – (unintelligible). I'm from the University of Texas at Austin, though I'm not asking this on behalf of the University of Texas. One of the great virtues of my younger generation is we don't have the time nor the patience to ask a six-minute question. So with that in mind, I would like to ask, regarding the current makeup of the court, if you look at the backgrounds of all the justices, they all brought some sort of federal judiciary experience to the court.

As it relates with – the two recent exceptions being Justice Rehnquist and Justice Powell – as it relates to the confirmation hearings, how do you think, for better or for worse, does this affect the way the senators ask them questions, their judicial records, as opposed to maybe a political record if they were to nominate the senator to the court?

MR. FRUM: Well, that's – what you say is exactly right and probably we could stand to see some more diverse legal backgrounds in the nominees. It's been a long time since we had a great commercial lawyer. Powell, I guess, was the last one. In the 19th century, that used to happen all the time. People who knew a lot about the relationship between law and business, who had personal experience of the way that most Americans spend most of the hours of their day, that would be a good addition. Maybe somebody with a criminal background, that would be a good addition. And I think part of it is because of the increasing acrimony of the confirmation process. The fact that somebody survived a confirmation hearing once before is a pretty good insurance policy that probably they can survive it again. If that process were less rancorous, presidents might be tempted to – might have the opportunity to go outside the circle of the previously confirmed.

MS. ARON: Yes, for the next president or – we had hoped very much to get justices appointed by Clinton who didn't come from circuit courts, and you're right. Every justice now on the Supreme Court comes from a circuit – a lower circuit court and you may want someone with commercial experience. We'd like someone with civil rights, public interest, environmental experience in there.

MR. AGRAS: Next question.

Q: Thank you. I'm Dane Von Breichenruchardt with the U.S. Bill of Rights Foundation. It sort of seems like a déjà vu all over again. I go to a lot of conferences here, to – (unintelligible) – other places and this kind of forum has been done before about how bad the left side is and then you go over to Heritage, and they'll tell you how bad the right side of the court is.

And what occurs to me is that do any of you all have any ideas about – aren't we always going to be torn apart? The Left is never going to like what the Right did. The

Right's never going to like what the Left did in their perceptions, and particularly in the court. And that would just – how can we end it? What remedy would there be to get everybody on the same page? Do you get all of the think-tanks that are from the Left to pose questions to the think-tanks on the Right and vice versa, and come to a public forum and hammer it out and then agree to go forward and sin no more? What is the remedy for stopping this cycle?

MR. FRUM: I would just revert to my point about the stakes are high. Make the stakes lower and the contest will be less intense. And that means some a more modest view – if we had a more modest view of the judicial role, if people vested more hope in the political process and less in the legal process, then, I think, you might see a diminution of attention to every twitch of every justice. And I – there are various moments in the past 15 years when I had some optimism that that might be happening. And I continue to have long-term optimism that can happen in the future.

MR. AGRAS: Last question.

Q: Hi – (unintelligible) – from Cybercast News Service. Two really quick questions. One, looking at the other federal judges that this administration has appointed, sort of what do you think we'll see from them policy-wise over the next couple of years?

And then, two, looking at the three presidential front runners, it's a little premature, but what do you think the judges that they will appoint, or will have the opportunity to appoint, how will that affect the American public?

MR. FRUM: I think two of the free frontrunners, Hillary Clinton and Barack Obama, have very strong views on this question, and the third, John McCain, really probably does not have strong views, and sees this much more as a political problem where he has to finesse the demands of his party and his desire to get along well with what will probably almost certainly be a Democratic Senate, probably almost certainly a much more Democratic Senate.

So I – on the list – so I think that it will be something that – in a funny way, you would want to see the Democratic front runners talk about in their debates because I suspect they have some important differences and the country would like to know. And it's something that they are probably prepared to answer in a way that I think John McCain just has given less of his mind to it.

MR. WILKINS: You mean if we call John McCain at three o'clock in the morning and asked him who you're going to appoint to the Supreme Court, he would go blah, blah, blah?

MR. FRUM: No, he wouldn't go blah, blah, blah. He would say, "Before I answer that question, I need to know how strong are the Democrats in the Congress going to be and how strong is my conservative Right going to be because I have to find some

way not to get caught in the crossfire between them, where I desperately want not to be on this issue.”

MR. AGRAST: Any final comments?

MR. WILKINS: No. (Laughter.)

MR. AGRAST: I just have a couple of final announcements that –

MR. WILKINS: Wait a minute, she says she –

Q: The first part of that question was the judges, the federal judges, who are appointed now, looking below the Supreme Court, sort of what their –

MS. ARON: We have a report at Alliance for Justice which talks about George Bush’s other court appointments, which I’d be happy to give to you. And this is not a political statement, but John McCain has said much more than either Clinton or Obama on the topic of judges. He’s had to do it in order to placate the ultraconservatives in his base to kind of establish his bona fides, but certainly, he has said that he’d appoint more Scalias and Thomases and Roberts and Alito. And I should just mention that he’s voted for every single one of George Bush’s extremist candidates, so in a way, I think his record – just judging by longevity in the Senate is much more obvious and apparent than either Obama’s or Clinton’s at this point. And I wish they would talk about it more.

MR. AGRAST: Right. Of course, we take no position on any of this – (laughter) – on any of the candidates here at the Center. And I think you should note also that McCain was a member of the so-called Gang of 14, so he had a role as these nominations were going through the Senate that certainly bear looking at.

Before we close, I just want to express thanks to our event’s team, to my fellow assistant Mike Rugnetta and to Kellye McIntosh at the Alliance for Justice for their fine work in putting all of this together.

Please note that a complete video and transcript of this program will be available at our website at www.AmericanProgress.org and at the Alliance website, at www.AFJ.org.

I want to thank you for being with us and please join me in thanking our excellent panelists.

(Applause.)

(END)