
FIFTY YEARS OF TEACHING AND SCHOLARSHIP: AN AFTERNOON WITH PROFESSOR REINSTEIN*

On March 22, 2018, Professor Robert J. Reinstein sat down with Temple Law Review editorial board members Kevin Trainer, Sonya C. Bishop, and David A. Nagdeman. The following is a condensed transcript of their conversation.

Temple Law Review: You graduated from Harvard Law School fifty years ago this spring, in May 1968, the year Mark Kurlansky deemed “the year that rocked the world.”¹ Abroad, in January, the Viet Cong and North Vietnamese Army initiated the Tet Offensive, which, despite the Johnson Administration’s claims to the contrary, was one of the largest military campaigns of the Vietnam War. The My Lai Massacre, also in Vietnam, took place in March (though we did not learn about that until the following year, when Seymour Hersh broke his stories in the *New Yorker*). The so-called Prague Spring, the beginning of the political liberalization of Czechoslovakia, began in January of 1968, when a reformist was elected First Secretary of the Communist Party of Czechoslovakia, and led, in August 1968, to the Soviet Union and other members of the Warsaw Pact invading the country to halt the reforms. In France, there was a volatile period of civil unrest, punctuated by massive general strikes as well as the occupation of universities and factories, which significantly affected the French economy and caused Charles de Gaulle to secretly flee France for a few hours.

At home, that period was no less tumultuous. Martin Luther King, Jr. was assassinated on April 4 in Memphis. The Fair Housing Act was passed the next week. Robert Kennedy was assassinated in June in California while campaigning for the Democratic nomination for President. Kennedy’s assassination led, in part, to Richard Nixon’s election and a strong showing by the George Wallace, the racist and segregationist Governor of Alabama, as a third-party candidate.

What was it like to be a law student and to graduate from law school at that time?

Robert J. Reinstein: I’m not sure if, fifty years removed, I can fully describe what it was like to graduate from law school at that time. I think there was a lot of turmoil at other law schools. At Columbia, for example, where one of my colleagues David Kairys was attending law school, there was turmoil. Harvard may have been an exception; one would barely know that any of this was happening. Now, later, especially after the Kent State shootings, things blew apart at Harvard Law School. But while I was a student there were very few other students interested in becoming civil rights lawyers or talking that much about the war in Vietnam, or participating in any kind of antiwar activism.

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1. MARK KURLANSKY, 1968: THE YEAR THAT ROCKED THE WORLD (2005).

Harvard was, at that time, pretty much a factory for producing corporate lawyers. I was an exception, and there were a few others like me, but we were sort of outliers.

And I was not really happy with the quality of teaching at Harvard Law School. I thought the professors were more concerned about their scholarship and their consulting. The teaching, most of which took place in these gigantic classes, was simply adequate. Henry Hart was one exception. Hart, of course, has become the very well-known author of the Hart and Wexler Federal Courts textbook. He was really inspirational and he actually encouraged me to go into teaching. He was really a remarkable professor. He changed the way I thought about law—he really stretched my mind, and stretched the minds of all his students.

TLR: Were the professors similar in their disinterest with world or domestic events?

RJR: It's really hard to say because professors (both then and now) tend not to bring those kinds of things into their classroom unless they're relevant. I don't recall any professors really discussing these world events. That doesn't mean that they were disinterested, of course.

Several Harvard Law School professors did become active in Robert Kennedy's campaign. So I'm sure they were concerned. But as far as the general student body was concerned, and as far as the way the classes were being run and even the discussions that were taking place in the cafeteria, one would barely know that these events were taking place.

The one exception was when, in April, Dr. King was assassinated. That was a tremendous shock. King's assassination pretty much stopped the law school for a day or two. But then things went back to normal. Kennedy's assassination occurred in early June, after my graduation.

TLR: What was your political involvement like during this period?

RJR: I had been involved in the civil rights movement in college, and I went to law school to become a civil rights lawyer. The lawyers I really admired were civil rights lawyers. Thurgood Marshall, for example, really was making this country better and more democratic. Lawyers like Marshall were making this country a country where there were more opportunities for all people and combatting the kind of prejudice that my parents experienced in Europe. So I really admired civil rights lawyers, and I had gone into law school wanting to become one.

Actually, the dichotomy between the antiwar and civil rights movements when I was in college was interesting. By my final year of college, in 1965, the civil rights movement produced tremendous achievements and was a central topic of discussion. But the Vietnam War remained popular. Even for many involved in the civil rights movement, if I asked them about the war, they said they were supporting it. The antiwar protestors were viewed as pretty odd. Some of us didn't understand why we were fighting the war. It was clear to us then that getting involved in the war was not in the national interest because it was a civil war in Southeast Asia, which was an outgrowth of supporting a country (France)

trying to regain a colony.

I also did not support the war because, with Johnson's Great Society programs, I thought we had this genuine opportunity to really confront and minimize, if not eliminate, poverty in the United States. Looking back, it is remarkable how much progress was made in the early and middle 1960s. The Civil Rights Act was passed in 1964 and the Voting Rights Act was passed in 1965, as just two examples. But Vietnam made it impossible for many Great Society programs to work because of how expensive it was and how divisive it became. And so the domestic impact of Vietnam really was quite strong.

TLR: President Johnson won in a landslide in 1964, which, in contemporary political speak, gave him a mandate to make good on his campaign promises. And for a period of time, he began to. But, approaching the election of 1968 support for Vietnam was at least wavering, and Johnson's electoral prospects began to weaken.

RJR: Vietnam was just this incredible albatross for Johnson. In my second year of law school, I worked on a ballot referendum in Cambridge. At that time, Cambridge was different than it is now. Cambridge was a working class city. So a Cambridge antiwar referendum was not then, as it might be now, a referendum among the faculty and the graduate students of Harvard and MIT.

TLR: And this was a referendum on the Vietnam War?

RJR: Yes, this was an antiwar referendum. I worked on the campaign to get it on the ballot and then worked to publicize it and try to get support for it. (As an aside, we were pretty sure that our office manager was a mole for the FBI—he purported to be an antiwar zealot and was always asking our political opinion. And seemed to know things that none of us knew, and he always dressed in a suit unlike all the rest of us.)

The referendum did well. We lost, but the vote was in the low forties, probably about forty-three percent or so. And so it showed us that there was a change in public attitude toward the war, especially because, as I said, Cambridge was working class, and many Cambridge kids had gone to fight in Vietnam.

And, more importantly, I think that the referendum encouraged Eugene McCarthy to challenge Johnson in the primary.

TLR: Before McCarthy entered the race, in late 1967, the war was not going well, and some notable figures came out against the war. Martin Luther King, Jr. came out against the war very strongly in 1967. J. William Fulbright, who was the chairman of the Foreign Relations Committee, had come out against the war. Walter Cronkite, on a national broadcast, concluded that the war was unwinnable.² So speaking out against the war was no longer some idiosyncratic kind of thing. But these were famous people. Not many people knew about Senator Eugene McCarthy. They know about another McCarthy, who is a bit more infamous. But they don't know about Eugene McCarthy. Tell us a little bit

2. *Report from Vietnam: Who, What, When, Where, Why?* (CBS News Broadcast Feb. 27, 1968) (Walter Cronkite's famous 1968 special reporting on the atrocities of the Vietnam War).

about Eugene McCarthy.

RJR: McCarthy was a pretty unknown junior senator from Minnesota. When he announced that he was going to run for President, I think most people thought it was sort of either a shoot the donkey attempt or just a joke.³

I signed up for his campaign. And I thought there was a possibility that McCarthy's campaign, given that the country's opinion of Vietnam seemed to be switching, could have emphasized the link between the cost of the war and the domestic damage done as a result. None of us thought McCarthy had a chance of winning the presidency.

TLR: How did you learn about McCarthy's campaign?

RJR: Just on the television. I think most of the people against the war and in favor of civil rights progress, college and graduate students, had hoped that Bobby Kennedy would enter the race and take on Johnson. But even into early 1968, Kennedy appeared to not want to enter the race. The Kennedys did not go on fool's errands. They ran where they thought they would win. And at that point, most thought he could not beat Johnson, even if he wanted to. Most thought that Kennedy was waiting for the election in 1972, where Johnson could support him. But I don't know, I didn't have any dealings with him or with his campaign.

So McCarthy was really the only Democrat politician—either with the courage or the recklessness—to challenge Johnson.

TLR: President Johnson had some significant success early in his presidency implementing the Great Society programs; how did that success impact your involvement in the McCarthy campaign, your feelings about the war, and your belief that McCarthy could deliver domestically as Johnson had or had not?

RJR: Well, as I said, a principal reason I was strongly against the war was that the war was destroying the Great Society programs. Johnson wouldn't ask for a tax increase. The war was hemorrhaging money and was also dividing the country.

The Great Society initiative was so bold that it required enormous political support for it to work. But when Dr. King came out against the war, Johnson lost support. And Johnson losing support meant the Great Society programs lost support. So there was a certain split in the civil rights movement. Johnson took Dr. King's coming out against the war very personally. All of that, I think, doomed the Great Society programs, which was, in itself, as good a reason as any to be against the war, unless one thought that the war was critical to our national interests. But I couldn't then fathom an argument for why the war in Vietnam was in our national interest. I thought a lot of people were dying for nothing.

TLR: The early days of the 1968 Democratic campaign were centered in New Hampshire. It was the first primary, in early March. Is that where you were spending most of your campaign energy?

RJR: Yes and no. I started—I don't remember what month I started working for the McCarthy campaign, but I started in Boston. The Massachusetts

3. PATTON (20th Century Fox 1970).

primary was scheduled as the fourth or fifth primary. So I and a few of my classmates tried to put together a campaign in Massachusetts.

I'm speaking mainly about Charles Fishman, who had graduated from Howard Law School and had been active with civil rights cases. He became a lifelong friend. At that time, the faculty at Howard had some fantastic civil rights lawyers who were bringing or working on the most important civil rights cases in the country. It was a natural bond. And what we decided to do was to put together a civil rights coalition in Boston to support McCarthy. We focused especially on trying to get African American support for McCarthy. We didn't ignore the rest of Boston but we really felt that it was important that McCarthy not be solely an antiwar candidate.

TLR: Boston at that time certainly had some racial barriers. How did you find taking up a civil rights platform within the Boston Democratic Party at that time?

RJR: The year before, when I worked on the referendum in Cambridge, which was predominantly white and working class, there was a lot of antiwar sentiment. I think part of it was the draft. The reality was that if you came from an upper class family, either black or white, you had little chance of being drafted. Otherwise, if you had opportunities for deferments, you could get them. I got deferments for going to college and going to law school, and for the clerkship that I had after law school. There was a very heavy correlation between class status and who was serving in Vietnam, and I think this caused a lot of working class families to really question the validity of the war.

There was, however, tremendous civil rights conflict in Boston, with its school segregation case, for example. I don't think it influenced the McCarthy campaign because he was running as a single-issue candidate. And it may not have influenced him because nobody thought he had a chance.

TLR: Even McCarthy thought that he had little chance, correct? At the time the McCarthy campaign was pouring most of its resources into New Hampshire. Did you and your colleagues in the Boston and Cambridge offices turn your attention to New Hampshire at some point?

RJR: Yes. I was summoned up there to manage the get-out-the-vote campaign in Manchester, the largest city for the McCarthy campaign. I was commuting back and forth to attend class and, well, it got pretty exhausting. The campaign really had no money for TV advertisements and the usual things. It was a campaign with a lot of student volunteers as well as the group that John Kerry was helping to form, Vietnam Vets Against the War.

And what we did was go door to door, canvassing for McCarthy. When we would knock on doors to acquaint people with McCarthy, and to see if they would vote for him, people were, surprisingly, reacting pretty positively. Or, I should say, they were reacting pretty negatively toward the war and toward Johnson. So I spent a lot of time in Manchester; actually I was there through the primary. Being in Manchester also gave me a chance to see Nixon campaign. He was campaigning as the "new Nixon," and he ran on some secret plan to end the war, so he wasn't running as a hawk. His seeming strategy to wind down the war suggested that his people believed the war was becoming deeply unpopular, at

least among the people in New Hampshire.

TLR: How did you address the “pro-progress in Vietnam” propaganda being issued by the by the White House?

RJR: The official message at the time was that we were marching toward a great and inevitable victory. From all the reports: so much progress being made; the North Vietnamese military and economy are about to collapse.

And then Tet. Within all the propaganda, suddenly the North launches this nationwide offensive in which they took over a lot of cities, from which they had to be dislodged, at great cost to Americans and South Vietnamese. It was a real blood bath. Tet did not send a message that the war was going well. I think a lot of people were just incredulous. That was a turning point in the war. I think it was also a turning point for President Johnson.

TLR: I read that Sam Brown, who was the youth coordinator for Senator McCarthy’s campaign, said that one reason he signed up was so that he could go door to door and say, “Down with the Vietnam War! Down with the Vietnam War! Oh, and also, by the way, there is this guy McCarthy.”

Did you feel that when going door to door in Manchester that you were leading with the war, and then saying, by the way, here’s the guy that you should support?

RJR: Yes. The message I gave to people was that this is your opportunity to send a message to Washington about the war. And McCarthy was the only vehicle for doing it. And we had to lead with the war because nobody knew McCarthy. He campaigned there, and he gave some speeches, but he was practically unknown.

And then the primary came, and he lost, but it was close and was thus treated as a tremendous victory, and not just in the McCarthy camp. The media treated it as if McCarthy won. McCarthy got either forty-two or forty-three percent of the vote. So Johnson did win, and he won by a substantial margin, but the fact that this really unknown senator could come out of nowhere against an incumbent president who had been reelected in 1964 by a landslide, and get over forty percent of the vote, was treated by the media as a tremendous defeat for Johnson and correspondingly a major victory for McCarthy.

What it also did of course was put McCarthy in a spotlight that he hadn’t had before because he was seen as some kind of Don Quixote on some kind of helpless crusade. And suddenly he was viewed as a potentially credible candidate.

TLR: The next primary was Wisconsin, I think about three weeks after New Hampshire. After the result in New Hampshire, what was the campaign strategy? How did the strategy change? Did you have to reformulate a plan for what his campaign actually represented?

RJR: I wanted to go back to Boston to attend classes! But what happened in the McCarthy campaign was interesting, indeed. There was a revolt by the students who were canvassing for McCarthy. At first, I think most people in the campaign were satisfied with McCarthy’s singular focus on the war. But across the country there was this symbiosis of the civil rights movement and the antiwar

movement, and the civil rights part started getting more attention. But civil rights was just something that McCarthy didn't want to talk about.

There were these polls (either public or internal to the campaign, I don't remember) showing an overlap between people supporting McCarthy and George Wallace. Both were populist candidates. Both were revolting against the establishment, albeit two different strands of the establishment.

McCarthy was very idealistic and went into the campaign really for the good of the country, even if he was going to make a fool out of himself and not get reelected to the Senate. My sense is that after New Hampshire, McCarthy began to believe that he could win the nomination. After New Hampshire, and all of the publicity he received, the internal polls were showing he was going to win Wisconsin. He started thinking he could get elected President.

But he seemed to be very, very skittish about civil rights; it was just something he didn't want to talk about. So he stayed running as a single-issue candidate, and there was a revolt by the student workers who were the backbone of the campaign. They basically went on strike. They demanded that he take a pro-civil rights position. Because, up until that point, the only civil rights activity going on in the campaign was the work we were doing in Boston.

And we had lined up African American activists who were supporting McCarthy and were doing a canvassing campaign in Boston. So the campaign manager, Curtis Gans, called Chuck Fishman and me, and said we want you to come to Milwaukee. And bring the African American activists, because we've got this problem. So we did. And they sort of showed us off. And then, McCarthy, in a huge auditorium, to a packed audience, in late March of 1968, gave a strong pro-civil rights speech. And that ended the internal revolt.

Around the same time, toward the end of March, Johnson was also seeing these same polls showing that he was behind or even way behind in Wisconsin. And then, at the end of March, March 31st, Johnson withdrew. Whether McCarthy's probable victory in Wisconsin was the reason he withdrew, well, we thought so, but when you're in the campaign you're obsessed with the campaign and you think that the campaign is everything, there is a loss of connection between what you're doing and the effects in the real world.

But I do think McCarthy's strength in Wisconsin was one of the reasons that President Johnson withdrew. It is also clear that Johnson was really depressed that he was stuck in Vietnam and that he felt like he couldn't get out. And that escalating the war wasn't doing any good. So he almost felt like a prisoner. So he decided to withdraw from the presidential race, saying that he would stop the bombing and start peace talks, and that he would not run for re-election.

TLR: What was the reaction inside the campaign after Johnson withdrew?

RJR: I should first say what happened after the New Hampshire primary and how I got fired!

After we were employed to reassure the doubters that McCarthy's campaign was a civil rights campaign, we were in Wisconsin and with us were two professors from Howard Law School, Herb Reid and Frank Reeves. Both were very well-known civil rights lawyers, really iconic figures. These are the

people that Chuck Fishman had worked with when he was in Howard Law School.

It's important to remember that New Hampshire and Wisconsin were very white states. But after Wisconsin, the next several primaries were in states with a larger minority population. So one of us got an idea—why don't we see if Dr. King will endorse McCarthy? King had given this very passionate antiwar speech in April of 1967, which broke with Johnson. And Johnson took King's break very personally.

So Frank Reeves and Herb Reid contacted Dr. King and they asked him if he would endorse McCarthy. And, after discussions, King said he would but that he needed to be reassured that McCarthy really was pro-civil rights and not just antiwar. He didn't want to endorse McCarthy if McCarthy was just against the war but wasn't going to do anything for civil rights.

King's concerns were particularly warranted because the Fair Housing Act was pending, which was, as hard as it is to believe, almost as controversial as the Civil Rights Act and the Voting Rights Act. There was a lot of opposition to the Fair Housing Act, including in the north, where there was (as there still is) a lot of residential segregation.

In any event, we got very excited that with King's endorsement McCarthy could get a lot of support in minority communities, and the other civil rights leaders would come along too because of King's monumental stature, being the acknowledged leader of the civil rights movement.

So we go to Curtis Gans, McCarthy's campaign manager, and say that we have great news—Dr. King is prepared to endorse McCarthy and just wants reassurance of McCarthy's pro civil rights position. Gans went to talk to the Senator about it and he came back and he said that the Senator is not yet prepared to accept King's endorsement. He thought it would be premature.

This was really pretty shocking to us and really depressing. And then, the campaign manager said, you all had no authority to see King and to get this endorsement. And he fired us. We would have left, anyway. But he fired us first. So I went back to my classes at Harvard.

We debated among ourselves about whether we should tell the story to the press, but Herb Reid was very adamant that we shouldn't. We have never told the story before now, fifty years later.

TLR: Tragically, King's endorsement quickly became moot. The Wisconsin primary was on April 2nd and King was assassinated on the 4th.

RJR: Right. April 4th. King's assassination was an incredible tragedy. And, I don't remember if Bobby Kennedy officially came into the race before or after Johnson withdrew, or before or after the Wisconsin Primary, but everybody knew what was going to happen in Wisconsin.⁴

4. Kennedy entered the race on March 16, about two weeks before President Johnson announced he was not going to seek reelection. *Chronology of Political Events: Nov. 1967–Nov. 1968*, in *CQ ALMANAC 1968, 19-974 to -978* (24th ed. 1969). Kennedy did not appear on the Wisconsin primary ballot because he entered the race after the filing deadline for that primary. Chris Foran, *When Paul Newman and Other Stars Campaigned in the 1968 Wisconsin Primary*, MILWAUKEE J.

And so Kennedy came in. And, actually, McCarthy's failure or refusal to accept King's endorsement and to try to get support among minority voters may have cost him the nomination because he and Kennedy then went head to head in the primaries, and they pretty much split a lot of them. And, generally speaking, Kennedy won in states that had large minority populations.

TLR: Like California?

RJR: Yes. California was the deciding state between the two of them. And Kennedy won, I think it was forty-six to forty-two percent. So it was close. But Kennedy probably got over ninety percent of the minority vote in California, which made the difference.

And then Kennedy was assassinated. And then you had the convention, which was a total catastrophe. And you probably remember all the violence at the convention, and Richard Daly's police force in Chicago. And party leaders were not about to make McCarthy the nominee, and that's when Humphrey was given the nomination, despite McCarthy, I recall, winning the primary popular vote. Now Kennedy hadn't competed the whole time, Johnson hadn't competed the whole time. But nevertheless McCarthy won the popular vote. He just couldn't get the delegates at the convention to support him.

TLR: Was it just because they thought he would lose to Nixon?

RJR: Maybe, but I think the real reason is that he wasn't one of them. He was this outlier figure. At the time, a much greater percentage of candidates were chosen through the various political machines. And McCarthy was this outlier figure, and the party didn't trust him.

Of course, I'm sure if Kennedy had lived, he would've received the nomination. I'm also convinced he would have beaten Nixon by a lot by putting together a coalition that included both working class whites and African Americans.

TLR: To your mind has there been a candidate since then that has been able to acquire a constituency similar to the constituency Kennedy could have had in 1968 or the one McCarthy did have in 1968?

RJR: Well McCarthy didn't try, I also don't know if he had the same kind of credibility and passion as Kennedy. With respect to white working class voters, there is a certain symmetry between that election cycle and the few most recent. Many voters who supported Obama in 2008 and in 2012 shifted to President Trump in 2016, for example.

TLR: And there's a certain affinity between the 1968 campaign and that of Bernie Sanders—a lot of his supporters, early on, in New Hampshire and other places, ended up voting for President Trump.

RJR: Yes, and Sanders, in certain respects, reminded me of McCarthy, although Sanders is to the left of McCarthy on most issues. But Sanders was taking on the establishment the way that McCarthy was and was a very powerful

candidate.

TLR: It's maybe easy to forget you were still a law student at this time. And you still graduated, in May of 1968. How did these experiences inform what you wanted to do as a lawyer, and how did they influence your first few career decisions?

RJR: Well, I wanted to be a civil rights lawyer. Nothing really changed about that. And I had this opportunity to do a clerkship with Judge Frank Kaufman, and that was a fabulous opportunity. I think I learned more about law in that year than any other year in my career. So that clerkship was very valuable, and then after I left that clerkship I volunteered as an attorney for the NAACP and worked on civil rights cases.

TLR: What kind of boss was Judge Kaufman?

RJR: He was a professional. He demanded a great deal of his clerks. He had no conception of time! He was working all the time and thinking all the time, and he was a judge who was determined that every decision he made, from the smallest ruling on discovery or evidence to a ruling in a really major case, had to be correct. There was no amount of research that was too much for him. So, I learned how to imitate him. I saw the routines of a perfectionist.

TLR: How did his perfectionism manifest? Was it devotion to justice for the individual? Was it the idea of justice as a machine that needs to be perfected?

RJR: He was very committed to the idea of the rule of law. And he did have this deep devotion to justice. And, a lot of times, after all the research was over and he made his decision, the decision was one he didn't want to make. But he thought the law either required him to make that decision, or the arguments on that side were more persuasive than the others.

If it was a very close case, I could see him tilting in the direction of what he thought was the more just result.

TLR: Do you know what he thought about the Vietnam War?

RJR: No. We were not allowed to talk about politics. The only time politics came up, actually, was when he told me that I couldn't work on anything even tangentially related to the war because of the history I had with being in antiwar demonstrations and working with McCarthy. We had a lot of conscientious objector cases. Conscientious objector status was granted only to those who opposed all wars, not just the Vietnam War. So there were a lot of cases where conscientious objection was denied, and there were a lot of those cases in federal court, and my co-clerk worked on those cases.

There was one notable exception. As you might know, the antiwar movement was discredited in the public sphere because of the violence of the Weathermen. But, in addition to the Weathermen, there were groups who choose not to commit physical violence, but to damage institutions.

We had the Catonsville Nine trial. This was a group of priests and nuns who broke into a Selective Service Office, and came in with gallons of blood, and just poured blood all over the Selective Service files, the draft files. They were prosecuted.

And this prosecution was on the heels of the Abbie Hoffman trial in

Chicago—the Chicago Eight—which had turned into a circus. The judge there, Julius Hoffman (no relation), became a national figure of scorn because he took things very personally. Abbie Hoffman and the other defendants would insult the judge or the judge’s sense of justice and, in return, Judge Hoffman acted dictatorially; he was really grabbing the bait from the defendants and acting in a way that looked pretty tyrannical.

In the Catonsville Nine trial, there was a lot of concern that the same tactics would be used in the trial to provoke Judge Thompson, who was my boss’s colleague on the district court, into losing his temper and acting injudiciously, and overreacting to provocation.

So Judge Kaufman said to Judge Thompson: I have the perfect solution for you. One of my clerks was active in the antiwar movement, he knows some of the defense lawyers, and he can advise you on how to react to provocations. I was assigned to advise Judge Thompson, not on the law, but on his behavior and how the defendants might try to exploit it, and on the defendants’ likely behavior.

Here’s an example. The first thing Judge Thompson would do when he entered the courtroom was to say, “All rise.” Well, the defendants and their supporters didn’t rise. And when this happened with Judge Hoffman in the Chicago Eight trial, Hoffman he went crazy, cleared the courtroom, and said to the defendants, if you don’t rise, I’ll hold you in contempt. My advice to Judge Thompson was to ignore it. Just take your seat and announce court’s in session.

The case was interesting, as well. There were serious issues in play, but no real defense on the merits. But what the defendants wanted to do was to make the case a referendum on the Vietnam War. And that arose twice. Once when the defendants took the stand and, in their defense, wanted to explain why they did what they did. Which would of course turn into major antiwar speeches.

And, I don’t know if it was because of my advice—Thompson was an excellent and independent-minded judge—but the judge had sort of figured out by then that to try and silence the defendants would backfire. So he allowed the defendants to make antiwar speeches on the stand.

The second time broad antiwar themes arose was at the end of the trial, when the lawyers for the defense wanted to argue jury nullification.

All of the district court judges got together to make a collective decision about whether the defense should be allowed to argue jury nullification. I don’t know what the vote was because clerks weren’t allowed to attend the conference, but Thompson held that the defense could not argue jury nullification. However, Thompson also ruled that the defense would be allowed to explain in closing why they did what they did. So the defendants’ lawyers made strong antiwar speeches to the jury but weren’t allowed to argue for jury nullification.

After the jury went out to deliberate, one of the defendants asked Judge Thompson if they could pray. Thompson said yes, everyone in the courtroom rose, and most people said the Lord’s Prayer. Then the marshal announced that the jury had reached a verdict. I thought, maybe there are miracles. But it was not to be—the jury found them guilty on all counts.

TLR: Immediately after your clerkship with Judge Kaufman, you came to Temple Law School. But during that time, you also did quite a bit of work for the NAACP.

RJR: Yes. And many of the cases were in Philadelphia. I did not expect to do a lot of cases in Philadelphia, but there was a lot of racism here. Especially within the police department, there the amount of racial discrimination was actually pretty shocking.

Although maybe I should've expected it. I went to school in Boston, and race was an issue in Boston. I grew up in Baltimore, and race was an issue in Baltimore. But I think that Philadelphia had a bigger racial problem than Baltimore.

To give you an example: When I first came to Philadelphia the large law firms were segregated not just by race, but also by gender and religion. It was totally remarkable. The city firms were, with a few exceptions, white male. And then there were the Protestant firms, the Catholic firms, and the Jewish firms. And then, there was one very, very distinguished African-American firm. The firm included Judge Clifford Green, whose is the namesake for the chaired professorship I now have. He was really an incredible lawyer, an incredible federal court judge, and incredible state court judge, an amazing person. He turned down a seat on the Court of Appeals because he thought he could do more good as a district court judge. As a federal judge, that's where the action really is—not at the Supreme Court, not at the Court of Appeals.

But Judge Green couldn't get a job at one of the big firms. Same with Judge Higginbotham who, if the timing was different, could have been appointed to the Supreme Court. So they formed this outstanding African American firm.

Bill Coleman, who became later the secretary of transportation under President Ford, was an exception. He practiced for a time at Dilworth Paxson. Coleman was truly remarkable; he was the first African American to clerk on the Supreme Court.

But generally speaking, the firms were segregated. When I saw that they were segregated by religion, it was just beyond description. At that time, I don't know if there were many (or any) women who were partners in the big firms. Dolores Sloviter, now a Senior Judge on the Third Circuit, became a partner at a city firm. But she and Coleman were absolutely exceptional.

And then Philadelphia was also segregated residentially, in a way that seemed even more segregated than other cities. Philadelphia was always proud of its neighborhoods, and that may have caused some of the exclusion.

My first Philadelphia case was a discriminatory hiring case against the police department. I also worked on a discrimination case against the fire department and the state police and against a Philadelphia-area labor union. These were all class actions. I also got involved in some of the police brutality cases although that was not my area of expertise; there were other lawyers who were much more equipped to handle those cases. I was particularly interested in discriminatory hiring.

TLR: During this time, you stayed busy not only with your work in

Philadelphia, but also with national-level work. You were centrally involved in the revelation of the Watergate scandal, correct?

RJR: Yes. And this involved my representation of Senator Mike Gravel.

TLR: You really have, I think, a particular skill for attracting eccentric senators. This one was from quite a bit farther west than Minnesota; Gravel was from Alaska. Why don't you introduce us to Senator Gravel?

RJR: He was similar to McCarthy. He was this virtually unknown senator from Alaska. I think if you took a public opinion poll only a very small percentage of the population would even recognize the name. He hadn't sponsored any major legislation. He was a backbencher, just like McCarthy.

He did, however, give some very strong antiwar speeches. But his stature meant that nobody really was paying attention to his speeches. And then the Pentagon Papers broke. They were commissioned as an historical study by Robert McNamara, the Secretary of Defense. And the study went through 1968. And the chief author of the study was Daniel Ellsberg, who leaked it, I think, first, to the *New York Times* and then to the *Washington Post*.

And the Nixon Administration overreacted. I still don't know why because nothing in the Papers dealt with Nixon. The Papers, of course, really revealed all the lies that had taken place, not only from the Johnson Administration to the public but also inside the Johnson Administration. Internally, the CIA kept saying we can't win the war. But that was not the message that the Johnson Administration transmitted to the public or, in some cases, wasn't the message that President Johnson was receiving. A lot of times the message Johnson received was filtered up from the field agents to the upper-levels of the CIA, to the cabinet, through the Secretary of State, through the Secretary of Defense. So the message Johnson received was not always the information the field agents were gathering.

Anyway, Nixon, for his own reasons—perhaps because some presidents are obsessed with leaks, I'm not sure why—but Nixon tried to get an injunction against the *New York Times* to prevent the *Times* from publishing Ellsberg's leak. So Ellsberg then started practicing whack a mole—searching for other outlets to publish the information. And this was a lot of work because, at that time, it's not the digital era, he's sitting over a Xerox machine making copies. Thousands of copies. He's Xeroxing all of this. He next gave it to the *Washington Post*, which started publishing while the *New York Times* could not because of an injunction. So the *Post* started publishing, and the government went for an injunction against the *Post*.

TLR: Did Ellsberg give the papers to Senator Gravel?

RJR: I don't know if I can talk about that. I don't know whether Gravel ever revealed the source. But Gravel got the Pentagon Papers and, well, he needed legal advice. He and his people were thinking that a Senator had immunities that newspapers did not because of the Constitution's Speech and Debate Clause, which says that members of Congress "for any Speech or Debate

in either House, they shall not be questioned in any other Place.”⁵

Chuck Fishman, my friend from the McCarthy campaign, who had become a law professor at Howard and, for reasons I still don't quite understand, became a political consultant and then joined Gravel's staff.

Chuck told Gravel, I know this constitutional lawyer who is teaching at Temple. He's a good friend of mine. He'll have a sense of what to do.

And, at the time, nobody really knew much about the Speech and Debate Clause. There were very few cases in the Supreme Court on it; there was very little interpretation of it. There was nobody in the country who had any sort of expertise on the Clause, on the scope of the immunity for members of Congress.

So, we had to figure out how to make use of this Clause to assist in making the Pentagon Papers public. The Senate leadership wasn't helping.

I can't tell you what advice I gave him, but I can tell you what he did. It turned out that Gravel was the chair of this obscure subcommittee. Something related to the upkeep of the grounds in and around the Capitol. Truly obscure, but somebody has to do it. So Gravel called a meeting for late at night. I don't remember if it was midnight, but it was around that time, expecting nobody else to come except the press. Gravel's staff told the press, something big is going to happen relating to the war in Vietnam, make sure you're here. He wanted to make sure the press was there. So he called the committee to session, said that he had a quorum, which was him.

TLR: And was that actually a quorum?

RJR: No, of course not. But, for Gravel's purposes, a quorum was whatever the chair announces unless it's objected to. But there wasn't anybody else there so there was no way another Senator could object.

Then Gravel gave a small speech in which he said, The grounds around the Capitol are in terrible shape, And he said, Why is this? It's because everybody's short of money. Why are we short of money? Because we're spending all this money fighting the war in Vietnam. And then he said, So it's reasonable to ask, is it more important to fight the war in Vietnam and to spend all of this money in the war in Vietnam than to renovate the Capitol and grounds surrounding the Capitol?

This was his speech. And then he said, So I have the answer! And he started reading the Pentagon Papers, and he just read for several hours. And then he said he was putting the rest in the Congressional Record. That's how he released the Pentagon Papers, and it was front-page headlines the next morning. This happened the day before the First Amendment case involving the *Times* and *Post* was to be argued in the Supreme Court. I think that what Gravel did may have affected that decision because it became clear that the government couldn't stop the release of the Pentagon Papers.

Gravel then arranged for Beacon Press to publish the Pentagon Papers. Actually, there was one chapter that he did not release because he was concerned there could be a contemporary effect on the war in Vietnam. I don't

5. U.S. CONST. art. I, § 6, cl. 1.

know if the *Times* or the *Post* had that chapter, but they didn't publish it either.

And Beacon Press was based up near Boston. And the connection there was Harvey Silverglate, who was and is a famous civil rights lawyer in Cambridge. He was a criminal defense lawyer, which I was not. So we thought not only do we need a constitutional lawyer, we probably need a criminal defense lawyer.

Which proved to be true. The Department of Justice convened a grand jury and, in that process, subpoenaed one of Gravel's aides. His name was Rodberg. And we moved to quash the subpoena, which is why this case became pretty famous. Of course, it was sort of an uphill battle because if you look at the language of the Clause, it's difficult to justify that it covers publications outside of Congress.

Our position was also difficult because our client was the aide, not Senator Gravel. There was a precedent that seemed to say the privilege was personal to the member of Congress and didn't apply to the aide. And then the government was also, of course, focusing on his subcommittee hearing, saying that it was completely fraudulent.

TLR: Did the Senate at any point take any actions to invalidate the subcommittee hearing?

RJR: No. The Senate actually came in on Gravel's side, and they argued for him in the Supreme Court. Senators Sam Ervin and William Saxbe argued for the Senate as amicus in the Supreme Court in support of Gravel. I'm sure they didn't approve what he did, but they wanted to defend the prerogatives of Congress. They argued it was not just Gravel's privilege but the Senate's privilege.

So the first issue was whether the aide should be treated like the Senator because members of Congress can't function without them. And we also argued that permitting the privilege in this context wouldn't create the same kinds of problems as with the Executive Branch because congressional functions are much narrower than Executive functions.

So we argued that and we won on that. We also argued separation of powers and the political question doctrine—that the courts could not get involved in the legitimacy of a Senate hearing; that was up to the Senate to decide. The courts couldn't dictate to either House their internal procedures. If the Senate moved to discipline or even expel Gravel, then they would have the power to do it. The Court agreed with that also.

The third argument was on the republication and that was a tough argument because of the language of the Clause, and the conventional wisdom was they're protected only for what they say on the floor, so we had to first extend that to the committee. Which we were successful in doing, but then the publication by the Beacon Press was very tough, and that actually got me into legal history for the first time.

To prepare the Supreme Court brief, we did a lot of research into the history of this particular immunity, starting in England, to the Founding, to present. We eventually argued that the immunity had always evolved, functionally, as Parliament evolved. And as Parliament developed different

functions the privilege extended to those functions.

We said that in the United States one major function of Congress was overseeing the Executive Branch and being able to reveal misconduct by the Executive Branch to the people. How could Congress do this except by publishing the proceedings? We lost on that.

I think part of the problem might have been that this privilege is unique because it's not a qualified privilege. This is an absolute privilege in both civil and criminal cases. So I think there was some reluctance to extend it as we argued it should be extended. And the court, while they didn't say so, may have been thinking about the libel situation where members of Congress are immune from libel suits for what they say in Congress. But if they go out and reproduce what they say in Congress in the public, it's always been assumed that at that point they could be sued for libel.

We lost on that but the Justice Department gave up and disbanded the grand jury, so in terms of being criminal defense lawyers we were successful, and nothing happened at all to Gravel or Rodberg.

TLR: You mentioned that that case was your first real foray into legal history. And with Harvey Silverglate you published an article in the *Harvard Law Review*. In the Gravel case, there was a separation of powers issue between the Executive Branch and the Senate. What values do you think a historical approach to constitutional crises brought to the table? And how might that approach apply to some current constitutional crises, like the release of all the NSA documents, for example?

RJR: Well, in Gravel, we got into the history because we didn't have anything else! But the significance of history to the framing of the Constitution includes not just the United States, but also includes the impact of British constitutional doctrine on U.S. constitutional law, or the Whig version of constitutional history, I should say.

As it turned out, what provoked the Speech or Debate Clause in the English Bill of Rights was a republication. It was by the Speaker of Parliament. He had given a speech against the Crown for which nothing happened to him. And then he had it republished in the newspapers, and he was prosecuted. This is one of the incidents that led to the Glorious Revolution and the English Bill of Rights, which contained a speech or debate immunity for members of Parliament. So, we thought we had some pretty strong history to help us.

But I have always been interested in history, and I really got engrossed with constitutional history and saw its importance in trying to figure out why the Constitution is structured the way it is and why certain provisions were put into the Constitution and what the Framers really had in mind.

TLR: It sounds like you approached the legislative privilege clause as a functionally evolving privilege.

RJR: I had interpreted the Clause as it was interpreted in English constitutional history as a functionally evolving privilege.

TLR: And another paper you did later talked about originalism as a form of functionalism. Do you view the Framers' intent at the Founding, and in their

construction of the Constitution, as constructing a functionalist document that would change through time based on this English history?

RJR: Well, not just based on the English history, but yes. The paper I wrote to which you referred had two parts, and in one I defended the doctrine of original intent, or original public meaning. It's a very controversial and divisive doctrine.

But I thought there was a lot to be said for it, depending on how it was applied. For example, if we're looking at originalism, we ought to ask the question of how laws were interpreted at the Founding. Well, if you go back to Blackstone, Rutherford, and just everybody who wrote about this, including judges, they said good government was the intent of the authors and that you had to look at laws as a whole. And you had to see how the different provisions related to each other. And try to figure out why certain provisions were put into the Constitution and how did that relate to the interpretation of the document, or similarly to a statute.

So I thought the doctrine of original intent—or actually original public meaning—was a valid doctrine. I don't think anybody was talking about trying to psychoanalyze or get into the mind of Hamilton or Madison or things like that.

So that was the first part. In the second part I argued that this doctrine should be a starting point for constitutional interpretation. It shouldn't necessarily be the ending point. It's got some problems, the most obvious is that history can be very complicated, especially when presented by antagonistic advocates. So a lot of times, the historical analysis that you read in law reviews, or even the Supreme Court opinions, just happen to coincide with the ideology of the author. And so it's a tool that can be manipulated, as other tools of constitutional law can.

It's not like there's one right way of constitutional interpretation. And on our faculty, we have a lot of people with a lot of different approaches. But my approach does put a lot of value on history, though I am very careful with it and try to be honest about it and not cherry pick the best stuff for a particular purpose.

I think that's one problem, the other problem is: how broad of a lesson do you draw from the initial history? This is a difference that I have with a lot of the originalists. So if I can give you an example. Can a defendant in a criminal case testify on his or her own behalf? Or, to put it negatively, can a judge refuse to allow a defendant to testify? Well, the current answer is no. That would be a violation of due process of law.

But at common law at the time of the Founding criminal defendants generally were not allowed to testify. So, if you are an originalist of the Judge Bork or Justice Scalia variety—though even Scalia called himself one time a “faint hearted” originalist because he understands this problem—but, if you're really a strict originalist, you would say, well I haven't found any historical evidence from the Founding to suggest that criminal defendants have a right to testify on their own behalf. There was no right. Defendants were not allowed to testify, period, for their defense.

I would look at a more general way. What did the Framers have in mind when they put the Due Process Clause in the Constitution, and, obviously the answer there is that they wanted there to be fundamental fairness in criminal trials.

We can't let history stop in 1789 or 1791. There were reasons for not allowing defendants to testify that we would never accept now. For example, one principal reason criminal defendants were not allowed to testify on their own behalf was religion. Defendants would be under oath and would likely commit perjury. And committing perjury would subject them in the afterlife to more serious punishment than anything that could happen here.

Well we don't do law that way anymore. And we certainly wouldn't use religion as a reason to justify something like not allowing a criminal defendant to defend himself.

So to me, originalism is not just looking to see if a certain practice existed at the time of the Founding and, if it did, then concluding that it is correct today.

On the other hand, if other practices were condemned at the time of the Founding, I do not think we necessarily need to condemn them forever. I think we have to look at the *reasons* behind the provision we are construing. And we have to look at the history that has taken place from then to now, and the insights that we've generated from that history.

Another great example is free speech. The Framers didn't define what they meant by freedom of speech, and there's a big debate in the literature about what they meant. One of the early Congresses, of course, passed the Sedition Act. And an originalist would look at this and say, well, this was an early Congress, they passed the Sedition Act, and so the right to freedom of speech must have been thought to be very narrow and thus should remain very narrow.

I would agree that the passage of the Sedition Act is an indication that, at least to a segment of the Founders, freedom of speech was a narrow concept.

TLLR: Was it a Republican Congress that passed the Sedition Act?

RJR: No. It was a Federalist Congress. And the cases initially brought were by Federalists against Republicans. But, when Jefferson became President, then the cases brought were common law sedition cases against the Federalists.

In any event, I think we have to look at the evolution of the country and what lessons we draw from that evolution, because the Sedition Act was a disaster. And other major attempts, during wartime, or during crises, to suppress freedom of speech, or to suppress political speech, in retrospect, I think, are attempts that most people in the country wish we had not done.

Well, we ought to learn from this. And we ought to learn from the insights of people who have analyzed the values of free speech and their relationship to democracy, and the growth of democracy in the United States.

The United States is not the same as it was at the Founding. It's a much more democratic institution than it was then.

To give you an anecdote about this: the law school has a masters of law program in Beijing for Chinese lawyers, judges, and prosecutors. They come here for a summer and, many times, Justice Scalia was gracious enough to meet

with the group. And it was fascinating because he would give a different talk each time and then take questions. And this one particular year he discussed his views of statutory construction, which was the plain meaning of the text governs. It's an originalist approach to interpreting statutes.

One of the students was a judge on the Chinese Supreme Court and had studied American constitutional law and freedom of speech in our program. And so when Justice Scalia asked whether anybody had questions, this judge raised his hand and he said, the approach you just gave us gave us regarding originalism and textualism in constructing and interpreting statutes, would you apply that to the Constitution? And, of course, Justice Scalia said even more so to the Constitution because any other approach would be dangerous.

And then Justice Scalia said, well you're a judge what do you think? And the student said, well to tell you the truth, I have learned more about the importance and the scope of free speech from Justice Brandeis's concurring opinion in the *Whitney*⁶ case than from everything I've studied about your Founders.

And Justice Scalia looked over at me and he said—You put him up to that! And I said I didn't (because I hadn't). But we do get insights on things that the Framers, in their time, took for granted.

A lot of that has to do with history and the historical evolution of the country. And I think that if one wants to be an originalist, one has to say, the Framers contemplated this kind of evolution in the application of the general words in the Constitution. In the words of Chief Justice Marshall in *McCulloch*, the Founders wrote a document to serve as an outline that was intended to be adapted to the exigencies of human affairs, and one that will endure for ages.

TLR: One of the first issues that you mentioned with the potential problems with originalism, and perhaps with historical research in general, is the tendency to abuse it, the tendency to cherry pick it—there is a lot of history out there, let me just take the stuff that is good for me. Because there aren't always good checking methods, could you speak to what role law reviews might play in checking, validating, or refuting historical theses?

RJR: I think the law reviews have to do a better job. There is a tendency of the law reviews simply to check the accuracy of the citations. But I think the law reviews have to do a better job in conducting their research and finding if there are contrary views and whether those contrary views should be expressed or refuted by the author. Or just ignored.

I've read some law review articles that have made a novel historical claim, and are then relied on by other scholars, and sometimes by courts, where to me the history is either incomplete or wrong.

And, with respect to the law review editors, it's not that footnote 68 isn't accurately cited, and it's not that the footnote doesn't support what was said in that specific sentence. But that sentence can be totally incomplete, it can be

6. *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

taken out of context. Articles quoting one of the Framers often take quotes out of context or ignore important disagreements.

So I think the law reviews have to be a real check on authors' claims. My son is getting a PhD in history, and the historians are different because journal editors send submitted articles out for anonymous reviews, and it's not to make sure the citations are accurate, but to get feedback about whether this is a legitimate way of looking at history. And I say a "legitimate way" because history is really complicated, and there are different ways of looking at historical events, all of which could be legitimate. But I think one has to be honest about what one is doing. And it's not like historians don't have their own agendas, too. Anonymous peer review is not a perfect check because sometimes the people *reviewing* have their own agendas, which may or may not coincide with the author's.

But it is a criticism that I have of law reviews, that there is not more peer review or, more generally, not enough commitment from lawyers to make sure that legal scholarship is accurate. For a law review article dealing with legal history, the law review could or should send the article to historians or legal historians for opinions. Some of them are doing that now, but I would like more to do it.

TLR: Do you think this speaks to pedagogical issues in law schools more generally, with respect to the law school curriculum being more practice-oriented, rather than, say, focused on historical methods or awareness of legal history? Because asking a second year student to figure out whether an argument from the eighteenth century is correct might not be a skill they come to naturally.

RJR: That's a great question, and I don't know what the right answer is. I mean, you took my constitutional law course, and I think I was trying to teach the history surrounding the cases so that people could understand the historical context. I assume other professors do that too.

But, yes, there is this propensity among law reviews to publish provocative pieces with new ideas. Especially if the new idea has a chance of being picked up by the courts or by legislatures.

I think the law reviews have to be more careful. How to do that is an open question. As I understand it, some law reviews now are sending certain articles to scholars with expertise in the relevant field to ask for substantive feedback.

TLR: What do you do in cases like *District of Columbia v. Heller*,⁷ where, in what I think was a total victory for Justice Scalia, Justice Stevens, who wrote the principal dissent, was forced to meet Scalia on Scalia's originalist turf. Is it not enough to say, in a case like that, five Justices for Scalia, four Justices for Stevens, one cannot uncover what the original public meaning of the Second Amendment really is or really was and, because of that, we must incorporate other values to decide the case?

RJR: There are very few major decisions of the Supreme Court that are

7. 554 U.S. 570 (2008).

purely originalist. *Heller* is almost unique in that respect. There are a lot of opinions that use history, but even those use Court precedent or historical developments that occurred post-1788 or post-1868 for Fourteenth Amendment cases.

Heller is pretty unique. My own view of *Heller* is that Justice Scalia is wrong because there is a contradiction in what he did. He used his method of constitutional adjudication to interpret what he thought the Second Amendment meant to the Framers. But if you're really going to be an originalist, what you have to use is the method of interpretation of the law that was prevalent when the law was written.

Justice Scalia starting with what he called the operative clause—"the right of the people to keep and bear Arms, shall not be infringed"—and parsed each word in that clause. And he concluded that the operative clause meant the people had the right to possess firearms for self-defense.

And then he went to introductory clause—"A well-regulated Militia, being necessary to the security of a free State." He called it the prefatory clause, and he asked, well, is the introductory clause consistent with the operative clause?

Such an interpretive strategy is the exact opposite of how a judge or a legal scholar in 1791 would have interpreted the Second Amendment. At that time, the rule was, look at the provision as a whole. And if there were ambiguities in what's called the operative clause, then one must look to the overall purpose of the provision. And of course there are ambiguities in the Second Amendment's operative clause because the phrase "keep and bear arms" can either have a military connotation or not. Justice Scalia's answer was, well, we've gone back and done research, and there are some situations where this phrase has been used to refer to the military and some others where this phrase has been used to refer to an individual right.

And Stevens' answer was Yeah, but usually it's used with military connotations. So it's ambiguous. It could mean either or both, and according to the method of statutory interpretation prevalent at that time, interpreters must look to the purpose clause, if present, to resolve ambiguities.

Justice Scalia never called the introductory clause the "purpose clause"; he called it the prefatory clause. But it's not, it's a purpose clause. It tells you the purpose of the right. It's practically unique—as Justice Scalia even admitted in the opinion⁸—because it's the only provision in the Bill of Rights that has such a clause.

It is the purpose clause that tells you which interpretation of the operative clause to follow. Well the purpose clause of the Second Amendment is all about the militia. And it's all about having a well-regulated militia and preserving that as against the fear of Congress taking over the state militias and neglecting them. And not having the state militias as a potential barrier against a military coup in the United States which people feared at that time, particularly because the

8. *Heller*, 554 U.S. at 578 (“[T]his structure of the Amendment is unique in our Constitution . . .”).

Constitution authorizes standing armies in peacetime.

And Justice Scalia also put a lot of weight on the relationship between the English Bill of Rights and the Second Amendment. And many of the provisions English Bill of Rights were incorporated into our Bill of Rights, sometimes word for word, such as the Speech or Debate Clause.

So it's sort of a natural to think, well the provision of the right to bear arms, it's like this other provision in the English Bill of Right. It's the same thing. What our Founders were doing was incorporating the English decision to codify the right to bear arms for self-defense as a fundamental right.

But the Arms Clause in the English Bill of Rights is phrased differently than the other provisions in that bill of rights. And this troubled me. I wrote an article about the relationship of the British Constitution to the American Constitution and said in a footnote that I'm not sure that the Second Amendment is the same as the arms clause in the English Bill of Rights. First of all, the analogous provision in the British Constitution only applied to Protestants. It was part of the warfare going on between Protestants and Catholics and the exile of James II. So it was the right of Protestants to keep and bear arms. And the English version had this unusual phrase at the end, which was completely ignored by Justice Scalia, which was that the right of Protestants to keep and bear arms shall not be infringed *except pursuant to law*. Well, that "except pursuant to law" did not appear within any other provision of the English Bill of Rights. And what these words appeared to do was to create a right enforceable against the Crown and to put legislative supremacy over the militia and over the right to bear arms.

This provision of the English Bill of Rights seems to address completely parliamentary supremacy over the Crown in governing the militia. And, so in the *McDonald*⁹ case, which concerned whether to apply *Heller's* interpretation of the Second Amendment to the states, there was an amicus brief filed by British constitutional historians. And they said *Heller* is wrong about the English Bill of Rights. (One agreed with Justice Scalia's opinion in *Heller*.)

One might think that this might give the Supreme Court at least a little bit of pause. Being told by British constitutional historians: We really appreciate your dealing with our constitution, but we hate to tell you this—you got it wrong. Well, in *McDonald*, Justice Alito, who wrote the majority opinion, just repeated what Justice Scalia had written about the English Bill of Rights, as if the views of British constitutional historians on a fundamental English constitutional document didn't matter.

So I think there's a problem with originalism both in manipulation of history but also with how it ignores the reality that the country was different in 1791. The people of the Founding generation didn't think like we did about law. They had a different historical perspective that was largely this inheritance from Britain, and their study of its legal system and other legal systems.

But there are plenty of examples where the Founders' view of law is very, very different than our own. And we're not going to bring that view back.

9. *McDonald v. Chicago*, 561 U.S. 742 (2010).

Another example I wrote about in one of my law review articles was that the Founders accepted, very easily, the proposition that the Law of Nations—which we now call international law, though there are some differences—was part of the law of the United States, and it both empowered and restrained the Executive Branch. Congress, by statute, could overrule a principle of the Law of Nations. But if it didn't, it was binding, and it was enforceable in the courts.

There were hundreds of cases where it was used in the courts, including some very famous cases by Chief Justice Marshall, in which he declared actions of the Executive illegal for violating the Law of Nations. Our view right now is that international law is not part of law in the United States unless Congress makes the international law part of U.S. law by statute or if it's a duly ratified treaty and there is evidence that the President and the Senate wanted the treaty to be part of U.S. law.

One might think that an originalist would reject the contemporary view and say international law is part of the law of the United States because that's what the Framers thought, and I don't think you can seriously argue that they didn't. But unfortunately a number of people who call themselves originalists both say we're bound by the original public meaning of the law as it existed then, and also that it's a violation of U.S. sovereignty to apply international law as part of the law of the United States. They become legal positivists.

TLR: Talking a little bit about some of these foreign affair powers and some of your work in legal history, you wrote a really sharp article about the Haitian Revolution and in it you talked in particular about your intention to “excavate this important forgotten history,” that also detailed the creation of “precedents for the expansion of executive power, whose legacies exert a significant influence today.”¹⁰

There's a certain intrinsic tension in the idea of forgotten history that can create precedents. There is a set of things that happened and became precedential, but we don't remember them despite the fact that they're precedents. We're not really aware of them, but they're still exerting this influence in the development of historical doctrine. Could you discuss this tension inherent to the concept of forgotten history that is still exerting these precedential, influential powers?

RJR: I got interested in the Haitian Revolution for a couple reasons. One was I had written an article about the recognition power. The first article on recognition was in the *Richmond Law Review*.¹¹ And in the course of writing that article, which was really about the original understanding of the recognition power, I concluded that there was no such power if you used an originalist approach. Incredibly enough, it just wasn't on the radar screen of the Framers.

And I thought the reason for that was it was really important for the United States to get recognized by European nations, not the other way around. At the

10. Robert J. Reinstein, *Slavery, Executive Power and International Law: The Haitian Revolution and American Constitutionalism*, 53 AM. J. LEGAL HIST. 141, 146 (2013).

11. Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. RICH. L. REV. 801 (2011).

time, the idea of the United States recognizing Great Britain as an independent member of the community of nations was a little ridiculous. Of course, if the French Revolution and the overthrow of the monarchy had occurred before the Constitutional Convention, I suspect that the Framers would have given a lot of thought to the need for a recognition power in Congress or the President, or both.

In the course of writing that article, I read a lot of material on the evolution of the recognition doctrine post-Framing. And the most important book was by Julius Goebel. And his thesis was that the Jeffersonian position on recognition had been consistently applied through the nineteenth century. This was a practical realist view asking, “Is this a functioning state? Is this government really in charge?” This view was taken mainly from the Law of Nations. According to Goebel, the government adhered to this approach throughout the nineteenth Century until we started intervening in South America and Central America.

Haiti was an anomaly. Haiti had been a colony of France. There was a slave revolt. After a series of wars, Haiti declared independence. The Haitians had defeated the armies of Spain, France, and Great Britain. Including Napoleon! This was early in Napoleon’s career, and the French invasion of Haiti was a catastrophe for him. It was also a catastrophe for Great Britain. How much more do you need to establish the reality of independence? Haiti should have been recognized under the realist doctrine but, of course, it wasn’t. This was an anomaly.

The obvious answer why Haiti wasn’t recognized was slavery. The United States in the early 1800s and late 1700s just was not going to recognize a country formed by slave revolt. So I thought—this is interesting because it’s the first time the recognition power was used for political purposes, it was a departure from the norm, and yet it was as if it was being washed out of history, like it didn’t exist. Nobody talked about it. In all the books I read on the recognition power, nobody talked about Haiti. It just didn’t fit, so Haiti was an anomaly, even though the reason for the anomaly was so obvious.

So I started getting interested. I knew the Haitian Revolution had a big impact domestically. But since I was dealing with executive power, I was also interested in seeing how it related to our constitutional structure more broadly.

TLR: Was there a domestic impact because of the foreign relations implications or because of the trade implications?

RJR: Neither. There was a domestic impact because of the terror that the Haitian Revolution struck in South Carolina, Virginia, and other slave states. This was the first (and, it turns out, only) permanently successful slave revolt. It even led some southern states to pass laws banning the foreign slave trade because one lesson they drew was that one state must not have too many slaves.

They number of slaves in Haiti outnumbered the number of whites, I forget exactly, but something like five-to-one or ten-to-one. It had repercussions in the United States even up to the Civil War. Haiti was always cited by the defenders of slavery for what could happen after emancipation.

So I started getting more interested in the Haitian story. And it took a couple of turns. During a substantial part of this period, incredible as it sounds, the United States was supporting the leaders of the slave revolt because the United States was engaged in a quasi-war with France, and forcing France to expend more resources in Haiti helped the United States.

This is a good example of one of those forgotten history precedents. President Adams entered into a secret alliance with Toussaint Louverture, a former slave, and the British, to intervene militarily in the Haitians' attempt to win independence from France. And to me this said something about slavery. At the time all this was well known.

It says something about the difference in the conventional view towards how slavery was always the trump card. The conventional view now is that slavery would always win in foreign affairs. Well, this was a counterexample. Actually, both Adams and Jefferson supported the Haitians when they thought it was in the self-interest of the United States. This is something that would have not happened later, when slavery became a much stronger ideological issue in the United States, and, for white southerners at least, it became an issue for which there was no compromise.

But, during the early period, if it came to a choice between the national interest of the United States and slavery, the national interest of the United States would win. This included Jefferson who was a racist and a defender of slavery.

So I thought that was important. I thought it was also important to see the growth of executive power with respect to Haiti both by Adams and by Jefferson. By Adams—the war power. Adams's military intervention in Haiti, and alliance with Louverture, was really the first instance of the President exceeding congressional authorization in conducting foreign affairs.

Yes, this is forgotten history. And you raised a great point about, well, if it's forgotten history, how can it be a precedent? I would say that, it's a precedent in two different ways. One was that when the United States gets involved with a war it really maximizes the power of the Executive. And the intervention in Haiti is the beginning of a pattern where the Executive Branch exceeds its authority and acquires power. Secondly, it's forgotten now, but it's not like it was forgotten then. The alliance between Louverture and Adams was kept secret but became public when Adams turned the papers over to the Senate when it was asked to ratify the treaty that ended the quasi-war. The military intervention in the Haitian civil war was covered in the American press. So it's forgotten now. But it had an influence then.

And then, of course, you also had Jefferson and the Louisiana Purchase and this incredible expansion of the treaty power, which was contrary to all of his arguments of strict constructionism. It was too good of a deal to turn down. I'm not sure that Jefferson was ever convinced that what he was doing was constitutional. But his cabinet was, and they pulled him along. But the Louisiana Purchase then because the precedent for the treaty power for years and years, both pressing for using the treaty powers to acquire territory and using the treaty powers to govern that territory.

Your question is well taken. I thought that this history was valuable, and I thought it would be valuable to show how issues related to slavery and emancipation were dealt with early in the history of the Republic. I also wanted to show the dangers of getting involved in war or the threat of war, which really is the milk that nurses the Executive Branch.

TLR: One of the reasons, I think, that we forget is in order to minimize the danger that current administrations engage in this kind of behavior, which, even if it was permitted then, we may think it unconstitutional now.

RJR: Yes, exactly. And your observation correctly suggests that the history can be used in the other way—by people in power who say, look at what they did back then. So, I think the history's important, as are the conclusions we draw from it. Because, sometimes, one can draw contradictory conclusions from the same facts when applied to constitutional law.

But that was fascinating piece and I really appreciated the help I had. I had two great research assistants who researched the unpublished correspondence between the consul in Haiti and the Secretary of State reporting on his discussions with Louverture.

TLR: The recognition power was also implicated in *Zivotofsky v. Kerry*,¹² not only an important case in and of itself, but also one in which your scholarship played an outsized role in resolving the issues.

But before getting to that, let us set the stage. As you mentioned, a unifying thread of your scholarship is this idea of constitutional anomalies, or just legal or historical anomalies more generally. How did anomalies come up in your early work, especially your work on the recognition issue and your work on Haiti?

RJR: Well, that's how I got involved with the recognition issue. I wrote this pretty long article about executive power.¹³ I wanted to see the connections between the English Constitution and the American Constitution. I wanted to explore those connections because many provisions in the English Constitution came into the U.S. Constitution. Bernard Bailyn and others have written extensively on this. On the other hand, there were some notable differences. A lot of the prerogatives that the Crown exercised over the imperial empire were transferred to Congress. And almost all the powers given to the President were checked by some other, potentially countervailing power. For example, both the treaty power and the appointments power were curtailed by the "advice and consent" power given to the Senate. Congress also had other powers over appointments, which is what we think of as an executive function. Even the President's pardoning power is limited to crimes against the United States, and it doesn't apply in the case of impeachment. All of these competing powers were written in the Constitution very carefully.

Then there's this one provision in Section 3 that just says the President "shall receive ambassadors and other public ministers."¹⁴ The conventional

12. 135 S. Ct. 2076 (2015).

13. Reinstein, *supra* note 11, at 844–45.

14. U.S. CONST. art. II, § 3.

wisdom, which I accepted in the article, was that all of the Crown's royal prerogatives had either been given to Congress or, if given to the President, were subject to a legislative check. Except for one—the recognition power. And I thought this fact was important because my argument was, in part, that we need to look Article I and Article II not just as federalism articles but as articles distributing and separating the government's powers. The real fear is that of one person exercising enormous power—which really is an argument for congressional supremacy.

This exception of the Reception Clause just bothered me. The royal prerogative was the prerogative to send and receive ambassadors. The appointment of ambassadors—that's explicit; it requires the consent of the Senate. The reception of ambassadors didn't. Hamilton wrote in the *Federalist* that this was just a formalism. The President has two roles, not just Chief Executive but he was also the Head of State. And as Congress wasn't always in session, it was more logical that the President would receive foreign officials as a matter of dignity. And he said, this has no legal significance.

Well, I bought into the argument that, yes, Hamilton wrote that, but later, during the Neutrality Crisis Hamilton argued very strongly that the Reception Clause does give the President the power to recognize foreign states. This occurred in the middle of the Neutrality Crisis and concerned whether to recognize the French Republican government as the legitimate government of France, and whether the old treaties with France were still valid.

But Hamilton's argument kept bothering me because the reception power is not in Section 2, which certainly concerns the powers of the President. The Reception Power is in Section 3, which seems more precisely to list the duties of the President. And I couldn't wrap my head around why an issue as important as recognition would be unilaterally vested in the President, when lesser powers, which had been exercised by the Crown, were either given totally to Congress or were given to another branch with a check provided to Congress.

So that led to the first article that I wrote on recognition. I wanted to see if there was any originalist evidence or historical evidence of this. What I found was that there was *nothing*—which was quite interesting. There was nothing in the Constitutional Convention about the reception power. In fact, when Hamilton proposed his constitution, which gave the Executive a good deal of power, the "receive ambassadors clause" is totally absent. So how important could it be? And then in the ratification debates you have Hamilton's statement, and a few other Federalists who say the same thing—basically, nothing to see here. But as to the anti-Federalists who were attacking everything about the Constitution, they're not saying, "Wait a minute, we're giving the President the unilateral power of recognizing foreign states and governments?" They don't. So that was the anomaly I was trying to explore.

Anyway, that's how I got into it, and then I got interested in Haiti and also the Washington Administration. Both the Washington Administration's reactions to the Haitian slave revolt and the anomalous refusals to recognize Haitian independence, which, as I said before, has practically disappeared from the historical studies of recognition.

TLR: Could it be that one anomaly was just superseded by a bigger anomaly, namely, Haiti independence was won through the only slave-led revolution?

RJR: Yes. Exactly. That got me interested in two things. One was the actual status of international law at the time of the Founding and thereafter. I wrote a lot about that in the Washington piece, including the origins of the executive exercise of this recognition power, which was recognizing the revolutionary government of France. But that was part of that article. And it was also part of the Haiti article.

In the Haiti article, I was much more interested in international law, which at the time of Haiti's independence was considered to be part of domestic law. So how do you justify not recognizing Haiti? I was also interested in another conventional wisdom, which was that slavery always dictated American foreign policy. So why didn't we recognize Haiti? Because of slavery—this was the only successful slave revolt.

So I started doing research into Haiti, and it turned out to be much more complicated than that, and in fact, John Adams came very close to recognizing Haiti. And the American government actually had a secret alliance with Haiti. This became a very interesting article about the limits of executive power and the exercise of executive power in the early part of the Republic. Even more interesting was that Jefferson supported Haiti against a French invasion. And Jefferson had called the Haitians cannibals and said they were a threat to the south.

TLR: So Jefferson's position was—*At least they're not as bad as the French?*

RJR: Yes—correct. For Jefferson, it was all about Louisiana. If the French invasion had succeeded, Napoleon's plan was to recreate the French Empire in the Western Hemisphere. And for that he needed to retake Saint-Domingue as it was called—Haiti.

So I read those articles and books. And in reading about all this it appeared that the issue of recognition started coming up, and there were arguments about the recognition of Haiti. But then there was a big argument about recognition over the Latin American republics after the Bolivar revolutions against Spain—and when and if the United States should recognize these Spanish colonies as independent nations. So it appeared to me that the history was actually more complicated.

And while all my research was going on, there was this case, this endless, Dickensian case, that was bouncing up and down between the D.C. district court and the court of appeals—the *Zivotofsky* case, the Jerusalem passport case. Here we have this modern case of recognition that was especially interesting, I thought, because, it's in our era where there's a lot of instability in the world, whether the President or Congress has the recognition power can become very, very important.

So that led me to the Article in *Temple Law Review*.¹⁵ The major part of the

15. Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 *TEMP. L. REV.* 1

Article was an historical analysis of the disputes on the recognition power from the Founding to now. And I thought that I found some really interesting stuff, and I thought it was important because I didn't believe there was an originalist basis for recognition. So we're really talking about post-ratification history. And, again, there was this conventional wisdom that Congress always yielded to the President and always acknowledged the President's recognition power, which turned out not to be true. On the other hand, the number of arguments between Congress and the President were few, as you would expect. What would provoke this argument would not be abstract theories of constitutional powers.

That was the first part of the article, which was the bulk of the article, and which I was really happy with. The second part of the article was applying it to the case, and the question whether the President's recognition power is exclusive. And there, I applied Jackson's framework. I wasn't that happy with that part of the article. I'm still not that happy about it.

TLR: Why not?

RJR: Well, first of all, in one of my articles I had criticized the Jackson framework and still don't believe that it's particularly helpful. I decided to apply it to this article because it was the accepted framework in the Supreme Court. But I shouldn't have just accepted it without revisiting my criticism. Also, I was pondering an alternative argument, which was actually similar to the reasoning eventually endorsed by the Supreme Court. I still think I was right that the President's recognition power is not exclusive and that it can be overridden by Congress. But there was an alternative argument that I was playing with that I wrote in a footnote, which was maybe there was a distinction between a core recognition power that didn't carry with it anything else, so that Congress could actually make the recognition virtually meaningless by stopping diplomatic relations, by prohibiting treaties—because all this requires the consent of the Senate, the exercise of foreign commerce power and the war powers if necessary. All of these are affected by recognition, but they are core powers of Congress (or the Senate).

TLR: How would have the article looked had you followed through on the alternative framework?

RJR: I'm not sure. But it would have just been helpful to elaborate on the alternative which, I think, still needs to be explored. I got the idea from the Taiwan Relations Act, which I had dealt with extensively, and so it sort of surprises me that I didn't elaborate on this. The formal recognition for the People's Republic of China (PRC) was done by President Carter. And then Congress passed the Taiwan Relations Act, which for all practical purposes treats Taiwan as a separate country, which is totally contrary to the recognition of the PRC and which the PRC objected to very strongly. But they wanted to normalize relations with the United States, and they went along with it. So I think I should've picked up on that as a model—that is, that the President has the formal recognition power but that Congress has its own powers that can nullify the some of the practical benefits of recognition. But I thought the

historical part was very important. And I think it was helpful in the Supreme Court.

TLR: *Zivotofsky* went up twice to the Supreme Court. The first grant of certiorari was to resolve a justiciability issue—whether the case presented a nonjusticiable political question. That was in 2009. And it didn't come back up until, I think, 2014 or thereabouts. When did you learn about the case? When did you decide that the case was something you wanted to write about? And then how did you come to write a law review article as opposed to something else, like an amicus brief?

RJR: I don't remember when I learned about the case. I just knew about this case because it was important. I was interested in the case more because of my interest in federal jurisdiction and the political question doctrine. But then I realized there's this underlying recognition issue that may get decided. But initially it was bouncing around the courts over questions of standing, implied causes of actions, and (as you mentioned) the political question doctrine. So I was following this case, and at some point I thought I thought it was unlikely that the Supreme Court would decide the merits of the case. I thought that they were going to deny certiorari both times. But, much to my surprise, they granted cert both times.

Zivotofsky's lawyer relied extensively on my first article in his petition for certiorari and in his opening brief. Even though, theoretically, the question before the Court was about the political question doctrine. He thought that in order to win on the political question doctrine, he had to make a plausible argument that the President's power was not exclusive. And in his brief he relied heavily on that first article that I wrote.

TLR: Do you know how he got your article?

RJR: Google or Westlaw, I guess.

TLR: You didn't send it to him though.

RJR: No I didn't. He called me.

TLR: This is the article in the *University of Richmond Law Review*?

RJR: Yes, this is the *Richmond* article. So he used that. He relied on it heavily to show that there was another side to the side presented by the government. And he thought that my article was important to persuade the Supreme Court to hold that the question presented was not a political question.

And, in fact, Chief Justice Roberts wrote an opinion saying there is another side, that the merits are not easy. And you have to remember that there are members of the Court who are originalists or who are very influenced by originalism.

Then I did these other articles, then I went back to the second *Zivotofsky* article. I said to Eleanor Bradley, then the editor-in-chief of *Temple Law Review*, that I was writing this article, and that I didn't want to send it out, that I wanted to give it to this Law Review and—this was actually before I wrote it—if she wanted it, the Law Review could have it. There was, I thought, an outside chance that the case would be decided on the merits in the Supreme Court. So, Eleanor got pretty excited, and she also gave me a research assistant, Brian Slagle, who

was on the editorial board, and he helped on the article. He did fantastic work.

And that may be why I'm not very happy about the second part, because I think I may have rushed to get it in print. So, it was used, again, very heavily by Nathan Lewin, who was the lawyer for Zivotofsky. He wanted me to write an amicus brief, but I refused.

TLR: Why did you refuse?

RJR: Throughout my writing process, I was trying not to be an advocate. I was trying to present an accurate view of history and how I think it should be used, and the history was not all one-sided. Of course, Nate's brief using my stuff was all one sided, but the article wasn't. In fact, I said that the history is ambivalent on this. My view was that if you're going to use Jackson's approach, the Executive hadn't met the burden of proof of showing why it could violate an act of Congress. Jackson's third category was really strong; it was an enormous burden of proof. That got watered down in *Zivotofsky*. So I was uncomfortable turning into an advocate.

But there was another reason, which was that in a couple of the articles that I wrote about this, including the one published by *Temple Law Review* that got cited, I got help from the State Department.¹⁶ There were some issues that I wanted to explore where documents were not available, except in the archives in the States Department. Well, you can't just march into the State Department and view two-hundred-year-old documents. So in two of the articles I was able to get help from historians in the State Department (like Anne-Marie Carstens) who gave me access to the archives. And the second time around the historian said that they checked with their superiors, and they were a little bit concerned about whether I was using this to write a law review article or to oppose their position in *Zivotofsky*. And I assured them that I just wanted to use it for historical purposes. So I didn't want then to just turn around and write an amicus brief using their material.

TLR: This case presented a quintessential tug of war between Congress and the Executive, and I think Jackson's framework presupposes that kind of political tug of war.

RJR: It does and Jackson's framework also presupposed, until this decision, that if you were in a situation where the President wasn't exercising an enumerated power, and there was a conflict with an act of Congress, the President's burden was substantial and he almost always lost. And that's where it got watered down by the majority in *Zivotofsky*. Although they did that with one hand, with the other hand they watered down presidential power. So it's a fascinating decision.

TLR: Can you elaborate on the ways in which the Court watered down presidential power?

RJR: They repudiated *Curtiss-Wright*¹⁷ and the idea that the President is the chief actor on foreign policy. And the Court did say there's a balance of

16. See, e.g., Reinstein, *supra* note 15, at 10 n.45.

17. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

power; that the President must share with Congress. And they made the argument that I was actually toying with in this footnote, which was, yes, the President has recognition power, but that doesn't mean Congress has to go along. They can't overrule the President in terms of recognition. But recognition usually connotes a lot of interest and a lot of rights that are under the control of Congress.

So a recognized government can sue in the United States courts. Well, the Supreme Court has said that by statute Congress can prohibit suits in the federal courts because Congress has clear power over federal court jurisdiction. A recognized government can invoke the act of state doctrine; well, no, not necessarily. Recognition means diplomatic relations; well, no, not necessarily. Look at Cuba right now. President Obama tried to normalize relations with the Cuban government. We don't have diplomatic relations with Cuba because the Senate will not confirm an ambassador to Cuba, nor will Congress allow a Cuban embassy to be put in the United States, and by statute Cuba doesn't have the full benefit of the act of state doctrine. There are no treaties with Cuba, and Congress has severely limited commercial intercourse with Cuba. According to *Zivotofsky*, all of this is within the powers of Congress. So, in the long-term it's hard to say who won. It's a toss-up.

TLR: This is related to anomalies—to what extent have Jerusalem and Israel, and all matters related to those physical places, been anomalies within United States history? Could that affect the results in this case? Justice Kagan said it several times in oral arguments—something like, “What we do here matters.” Recognizing (or not) who has jurisdiction over Jerusalem matters. Do you think that impacted the opinion at all?

RJR: Sure.

TLR: How so?

RJR: I thought that that was Lewin's biggest problem factually. If he had won the case, it would have really raised uncertainty because the title of the statute was United States Policy Concerning Jerusalem “comma” Capital of Israel. So if he had won the case, it would have been viewed in the Middle East as if Congress was recognizing that Jerusalem was the capital of Israel.

The position I was taking in the paper was very different than my political position. I thought the United States should not recognize Jerusalem as the capital of Israel; the status quo had worked since the creation of Israel; and there was no reason to upset the status quo; and that this was the kind of thing that could lead to a new uprising and also diminish U.S. power as a mediator. And, in fact, when President Trump recognized Jerusalem as the capital of Israel, the response among the Palestinians was, “You're no longer a neutral arbiter. We don't want you involved in the peace talks. We don't care what you have to say because this act is so antagonistic.”

TLR: Do you think that the Supreme Court considered whether Congress passed that law with the status quo in mind and the notion that there was tension between the Executive and Congress, and that it perhaps wouldn't be enforced?

RJR: Presidents Bush and Obama ignored the statute, but there was a

predecessor to this and that was with Taiwan. There was a passport statute that was practically identical to this one, which allowed U.S. citizens born in Taiwan to put down place of birth “Taiwan,” not “Taipei comma PRC.” This really upset the People’s Republic of China, the PRC. But the Administration enforced the statute. And, the parade of horrors didn’t happen.

I think the reason that the Jerusalem statute took on such symbolic importance was because of this lawsuit. And because the State Department refused to enforce this statute. Somehow, they created a difference between this statute and the Taiwan statute. They probably thought this one was more politically explosive, and that since the PRC had lived with the Taiwan Relations Act they’d live with the passport statute because the Taiwan Relations Act was much more—the Taiwan Relations Act creates an obligation on the United States to provide arms to Taiwan to resist an invasion, so this passport statute is almost trivial by comparison.

I’m not sure that the Jerusalem statute would have taken on such importance if it was enforced quietly. This passport statute took on such an important life because of its visibility in litigation. And that occurred because the State Department took a different position than it did with the Taiwan statute and refused to enforce it which provoked the lawsuit.

TLR: That was part of Zivotofsky’s argument. They said, we’re asking for something quite simple here. We’re asking for several letters on one passport. What’s the big deal?

RJR: Yes. Right.

TLR: And at oral argument, the Justices who eventually dissented followed the same lines. It’s really not a big deal, they said, or why would President Bush sign this in the first place if he thought it was a really big deal? What did you expect after the argument?

RJR: I thought Zivotofsky was going to lose because, yes, there were some of the Justices who thought it was not a big deal and there were some Justices who thought this was a very big deal. So yeah, I think the fact that it was such a delicate problem with respect to Jerusalem did have an effect on the majority. And Justice Kennedy’s opinion started off with that.

The first sentence was, This case relates to one of the more delicate problems, which is Jerusalem. And some of the Justices, Justice Kagan in particular, said it’s not just a passport statute.

TLR: Given that they already resolved the political question case, why are political facts like that in an opinion, anyway?

RJR: I was surprised that the Supreme Court took the case, both times. I was surprised that they granted cert the first time, and then I thought they’d decide it’s a political question. Because it’s Jerusalem, and this is a very explosive issue. Instead, they really cut back on the political question doctrine. And said no, this is just like an ordinary legal issue.

Then when it came back, I thought they would deny cert because the D.C. Circuit ruled for the government, and this wasn’t just an ordinary legal issue. And of course as you expect the Solicitor General really hammered that home in

its brief opposing cert. It's all speculation because you wonder if it was a different, less controversial issue whether the Supreme Court would come out the same way. But it's hard. The Israel-Palestine conflict was like the eight-hundred-pound gorilla in the room.

TLR: I have a question that's a little bit of a detour, but it's been lingering. Your undergraduate training is in physics. You do not have any formal training as a historian, or even in the social sciences. But much of your scholarship is deeply historical. How did you gravitate toward that approach and what have you done to get into the mind of a historian, not an attorney or even legal theorist? Or is there a difference?

RJR: Well, when I was in college, I took a lot of courses outside of physics. Because I wanted that well-rounded education, and that came in handy when I decided not to be a physicist. I've always been interested in history, so I read as much as I can. I think I know my own limitations because I'm not a professionally trained historian.

That said, what I try to do is use original materials as much as possible rather than rely on secondary sources. You get ideas from secondary sources, and I cite them. But one thing I started training myself to do was to use original sources. A lot of what I did early in my career, especially like with the Gravel case, was to learn about English constitutional history. So this article that I'm working on now deals heavily with the relationship of the English imperial constitution to the American constitution.

I think most of us are not trained as historians. And you know, would I be doing a better job if I were? Probably. But history's become and always has been itself pretty ideological. So I'm not sure about that.

TLR: How do refrain from being an advocate when you're writing as a historian? Is there really such thing?

RJR: I'm just trying as much as I can to be objective. There's this thing called the magnetic point. Which is, a magnet's always facing one direction, even if you turn around. And there's a tendency in legal scholarship, definitely when I am doing historical work, which I have to fight against, not to cherry pick and just try to find things that support my thesis and to discount other things. I think unfortunately that that's a pretty endemic problem for legal scholars trained as advocates. So we just try to fight that.

On the recognition issue, I didn't go into it with an idea that I'm going to prove that the President doesn't have exclusive recognition power. I went into it because I thought this is really interesting. Because of this anomaly.

TLR: And the way you described it, it didn't sound like you had a hypothesis when you were going into it. Is that your approach to all of your legal scholarship or was that simply your approach to the recognition problem?

RJR: When I'm writing about historical events, especially in constitutional law, my primary objective is to find out why the Constitution was written as it was, why certain provisions were put into the Constitution and why others may have been left out.

This approach can help us in a couple of ways. One, we can better

understand the document as a whole. We have a tendency of focusing on specific clauses, even specific words. Well, one thing you learn when you do historical research of the Founding is that that's not the way law was approached at the time of the Founding. Legal documents were viewed as a whole. And a lot of the provisions in the Constitution were put in as reactions to what was happening at the time, and I don't know that you can understand them if you don't understand the historical context and where they came from.

As I said, and one of the insights I had, which I think is important, is to view Articles I and II not just in terms of federalism but in terms of separation of powers, as the transfer of a lot of executive powers to the legislature. So sometimes when you do this work you see the reasons why the Framers did what they did, and then you have to make an evaluation because a good deal has happened since. So, to me, an understanding of the Founding era is the starting point.

Sometimes you may come to the conclusion that those reasons aren't valid anymore. Which calls for a *McCulloch* kind of approach, adapting the terms of Constitution to the modern era. Other times we find that maybe everything's changed for a country in a lot of different ways, but the reason for what they did is still valid. One example I'll give you is if you look at the war powers, it's absolutely clear that they did not want the President to have the unilateral power to start a war. And they had very good reasons for that, and I think those reasons are still valid now. So, I think that understanding not just what the Constitution says but what their reasoning was can be very, very, very important.

And it can go the other way too. I've been teaching this doctrine of substantive due process in class, which is a pretty wild concept. And, of course, there is one group led by Justice Scalia and the late Chief Justice Rehnquist that relies heavily on the status of the common law: whether rights were recognized under common law, whether they were recognized historically. What I'm trying to get people to think about is the *why*. I want my students to figure out not just whether certain rights were or were not conferred at common law, but *why were they conferred or not conferred?* And if, for example, the reasons why a certain right was not conferred at common law is no longer applicable, then the fact that it wasn't recognized as a right then doesn't shed much light on the question of whether we should recognize them now.

TLR: Can you give an example?

RJR: Sure, well, the sodomy cases or the birth control cases. Why was sodomy a crime at common law? Why was birth control a crime in common law? Because, according to religious doctrines, the purpose of getting married was to have sex and the purpose to have sex was to have children, and here we're talking about sexual practices that don't lead to children. That's the reason, that's the only reason.

Adopting that belief to the United States in 2018 is, to me, preposterous. It's utterly preposterous. A substantial percentage of children right now are born outside of marriage. And, I think, our historical (and to many people, present) ideas of sex are not just heavily affected by religion, but also by attitudes of men in power towards women.

Not only were women property, but also part of a woman being property was the obligation of the woman to bear and raise children. And that led to a considerable amount of a caste system in society, and to the repression of women. So if in equal protection terms we can no longer justify laws on the basis of the historical roles of men and women, it's not clear to me how you can justify laws that, for example, discriminate against gay people, which were based on the same kinds of doctrines which we now regard as forms of prejudice.

I think that exploring historical context is important and, conversely, exploring just "this is in Blackstone; this is what the common law said" is not a sound methodology. It is important to trace the origin of these ideas. But we also have to understand the historical contexts in which they were formed and existed. And we must understand why it was that these rights were recognized or not. That applies also to the rights and the powers that are in the U.S. Constitution.

TLR: Who gets to make the determination that reasons that justified past practices are no longer good?

RJR: If you're really claiming to be an originalist, or if you're really interested in how the Constitution would be interpreted at the Founding, then one thing that should be important to you is what were the methods of statutory construction that were used at the time. And one of them was that you had to look at the instrument as a whole to uncover the purposes of the law. There was no such thing as a law without a reason. Yes, if the text was clear, we should follow the text. But at that time, looking for the reasons for the law was critical if the words were not crystal clear. And they had a doctrine, which was if the original reason for a law became archaic so did the interpretation of the law.

TLR: Which seems to make a lot of sense.

RJR: It makes a lot of sense. Modern textualists don't accept that. So there's a contradiction between originalists saying, We want to look at the original meaning of these words but not looking at the original meaning in the way the Framers would have looked at the original meaning. What I'm giving you is hornbook law on statutory construction in 1791, not just in England but in the United States as well. And the reasons for laws was critical to them.

TLR: Where did they get those reasons? Was legislative history as much of a thing as it is now?

RJR: No. If the words were clear, that ended the analysis. Otherwise, judges would try to deduce the reasons either from their own knowledge of history or from looking at the instrument as a whole to determine its purpose. Or sometimes the statute would have a preamble, and they would use the preamble if the terms were ambiguous. They used the preamble as explanatory for the terms. I've already discussed one important example, the *Heller* decision, and why I think Justice Scalia's opinion is wrong.

That's why I think history is important, and like every other legal doctrine history can be manipulated. And you have to be very careful in using it. Being trained as advocates, we know that history becomes dangerous in the hands of lawyers.

TLR: Do you think your training in science has disciplined you?

RJR: Yes. I guess I should have gone back to that. I majored in engineering physics but what I was really interested in was theoretical physics. Physicists approach things very differently than lawyers do.

My favorite example is Newton's law of gravity. It's an interesting term because it was a theory. It's a theory of physics. It became so accepted that it became a "law." But there was an anomaly, it was a well-known anomaly, which is that Newton's equations did not accurately predict the movement of the orbit of Mercury. They came very close, but they were measurably off, and generations of scientists tried to use Newton's laws to fix the problem. And it was unfixable, and some physicists decided that a new theory was required. Eventually Einstein just broke off from Newton developed his theory of general relativity, which predicted the orbit of Mercury correctly, and also predicted some other astounding things. No matter how many times Einstein's theory is confirmed, including with the detection of gravitational waves, physicists have learned their lesson. Einstein's is still the "theory" of general relativity. It's not the "law" of general relativity. What happened in the early 1900s made physicists and the teaching of physics more of an exercise in humility.

TLR: Do you think that coincided at all with legal realist movement?

RJR: No. I think physicists live in a world of their own. But it did give a real discipline of don't take things for granted. And just because you have a theory, unless your theory's validated by experiments over and over again, every single time, don't accept it as true, always question it.

And I do think that that kind of discipline has helped me a lot in law, not just as a historian, but when I was litigating cases, I always thought about the other side—if I was representing the other side, what facts would I use and what arguments would I make? Sometimes, I would think more about what I would argue for the other side than what I would argue for myself. We have to make the strongest arguments, so even as an advocate, I think you have to have an open mind and not get stuck with this magnetic point of we're going straight forward.

TLR: The historians of science, in particular Thomas Kuhn, talk about the shift, for instance the shift from gravity to the theory of general relative relativity, as paradigm shifts. And the idea is that these theories are no longer capable of explaining events that have always been ongoing or explaining contemporary events. As a historian of law, how do you do you relate to that idea in terms of the law changing? And is your role to bring out some of these conflicts as the law is becoming obsolete? And how do you identify when a law is becoming obsolete?

RJR: I don't know, I've struggled with that a lot. The law and the Constitution are practical instruments, so we can't divorce them from reality of the society. And, ultimately, we just have to make value judgments. I can't prove to you that my value judgments are right.

When we argue about Supreme Court cases, sometimes there are analytical flaws, there are historical flaws, but when you're talking about value

judgements—they are what they are. So things that I may find anachronistic, others may not. For the example I gave you, like the case I taught today, which was the sodomy case, which I would prefer to think was really about intimate sexual relations. As I said before, I think the reasons for the common law's ban on sodomy are anachronistic. Other people disagree. There's no way to prove that I'm right and they are wrong.

But the idea that the purpose of sex is just to have children is not one that is widely shared by the population. Is it conceivable that we would apply the sodomy laws to straight people? That seems inconceivable. Much of the country would be criminals. And if this is a constitutional right for straight people, what is the reason, except for historically embedded prejudice, for denying that right to gay people?

Sometimes you can point to evidence that old notions of the law have been repudiated just in practice. When we're talking about the Constitution and the legal system, we have to make an attempt to at least conform legal theory to the values of society as they've evolved over time. That in itself can be a historical phenomenon, a historical analysis. But I don't know how you can divorce legal doctrine from its effect on real people.

That's the best answer I can give you. It may not be a good answer. And, of course, we're living in a legal system where the common law approach has been used by judges for hundreds of years. And they always take into account questions of policy and how their rules would have an impact on society. And I think a lot of constitutional law is common law decision making. And one of the things that should inform it is history—both the original history of the development of the Constitution and also the historical changes or the continuing historical validity of the laws.

TLR: That's one of the powers of common law—the jurists possess the ability to overrule and change with those continuing historical circumstances.

RJR: Yes.

TLR: We noticed that you've dedicated your *Zivotofsky* article to Judge Pollak, the longtime judge on the Eastern District of Pennsylvania (and Dean of Penn Law and Yale). Why did you do that?

RJR: Judge Pollak was a remarkable person. I really liked and admired Judge Pollak. He was one of the lawyers who worked the briefing and argument in *Brown*.¹⁸ He (along with Judge Green, who was like a father figure to me) represented everything that was right about a judge, especially judicial temperament. He was brilliant, but there have been a lot of brilliant people. But he brought to his life a humanity and a dedication to make the country better. I'm not saying that many people don't already live and work to make the country better. Only that the level at which Judge Pollak worked to make the country better was very unusual.

18. See, e.g., Leanna Lee Whitman & Michael Hayes, *Lou Pollak: The Road to "Brown v. Board of Education" and Beyond*, 158 AM. PHILOSOPHICAL SOC'Y 31 (2014).

I also dedicated an article to Thurgood Marshall, because I think he was one of the greatest and most influential lawyers of the twentieth century. And another article I dedicated to Henry Hart, one of my teachers in law school because he had a major effect on me.

TLR: Were you and Judge Pollak deans at the same time?

RJR: No, he was a federal judge by the time I was dean. He had been dean at both Yale and Penn. When I became dean, he shared with me his experiences as dean. He was really a remarkable person. He's a role model.

TLR: In 2011, Chief Justice Roberts said something about law reviews, along the lines of they're too theoretical, they're not worth anyone's time. He also called social science research "gobbly-gook." Do you think that's a valid critique? Do you think that there's more that we could be doing?

RJR: I am probably the wrong person to answer this since he not only quoted me, he complimented me on my law review articles, so you might want to ask someone else.

I think there is some truth to what he was saying. He overstated the point, of course. Like the other Justices, at the same time they complain about legal scholarship, they also get ideas from legal scholarship, and they rely on legal scholarship. They're more uncomfortable with social science data and conclusions because few judges understand mathematics and statistics so they have a lot of trouble evaluating social science studies. In the employment discrimination cases that I worked on, we used a statistician who had a wonderful capacity for explaining statistical analyses in simple English. That was a great help to the judges who tried those cases. This is much harder to do in appellate briefs.

One of the first big criticisms of legal scholarship was by Judge Harry Edwards, of the D.C. Circuit. He was a former professor. Until the 70s or 80s, legal scholarship was very heavily oriented towards the bar and towards the judiciary, with the thought that by doing legal scholarship we're assisting in the development of the law. So a lot of legal scholarship was doctrinal. Some of it was historical, but I think even those who were doing legal history felt, like me, that we're not just doing it because of the history but it can have an impact on how one thinks about law.

Then there was a change that started with the law and economics movement, and other movements in scholarship that whether consciously or not borrowed from the humanities and social sciences disciplines.

TLR: Is the law not a humanities and social science discipline?

RJR: Well I suppose it is. You could say that. But we borrowed from the sociology departments, the history departments, the economics, and the political science departments. A lot of the articles that were being published were really addressed to a really small audience of other academics and were pretty much divorced from helping the bar with legal problems, or writing articles that could be useful to the courts. There were segments in academia that I thought became pretty parochial, and the law reviews picked up on this because these were fads. So they started looking for articles, and it became self-reinforcing proposition.

I think Edwards was the first judge to complain about this publicly, that legal scholarship was becoming divorced from the practice of law and becoming so theoretical that judges thought it to be practically useless.

That being said, I think also that one has to also have a little sense of humility in the genre of scholarship that you're doing. Because I do view scholarship very much like art and music. We all have our prejudices of what we like, and what we think about what kind of art, what kind of music is good and will actually last over time. And we're usually wrong. So my view of scholarship is that there's nothing inherently right or wrong about any field of scholarship. The judges are looking at it from their own parochial point of view.

I think the exercises in theory may very well have gone overboard, but you can say that about any form of scholarship or any form of art, any form of music. What lasts will be determined by history, and if we don't experiment in different areas, it'll have a stultifying effect. So through the 50s and maybe the 60s, legal scholarship was quite doctrinal. And I think the movement into more theoretical areas of scholarship has its good points and its downsides.

TLR: And by more theoretical here you mean law and economics or perhaps even critical legal theory, where there's this question of what's the overarching policy objectives we should have when we're deciding cases?

RJR: Yes. I think a lot of the judges were and still are actually quite offended by critical legal theory, as a lot of academics were, because they viewed the thesis as there's really no law, it's all politics.

TLR: They apparently missed the realist movement to the 30's.

RJR: Yes, there's certainly a connection with the realist movement.

TLR: Have you ever subscribed yourself to any jurisprudential school of thought or philosophical school of thought, or any other one of these movements?

RJR: I don't think so, not consciously. My approach to scholarship is actually quite conservative. If there is a jurisprudential school of text, history, and doctrine, I belong to it. One thing that gives me satisfaction about the scholarship that I do is it gets cited both by the left and right. One piece I published in *Temple Law Review*, which I don't know if you read, is on the relationship of the Declaration of Independence and the Constitution.¹⁹ It's actually my favorite piece. My argument was that the Section 1 of the Fourteenth Amendment is the constitutionalized version of the Declaration of Independence.

TLR: That's cool.

RJR: It's cool, yeah. This article has been cited a lot, but it's been cited both by liberals and by conservatives. It's a favorite of the Cato Institute.

The bottom line for the kind of scholarship that I do is to try to stay objective and to keep questioning my own tentative hypotheses. It's sometimes a struggle, but this is a struggle that legal scholars face, and I'm sure that many are

19. Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 *TEMPLE L. REV.* 361 (1993).

more successful than I am.

TLR: Well, Professor Reinstein, there was never going to be an easy way to wrap up this conversation neatly. We've covered a great deal of ground. But we thank you for agreeing to share with us insights into your fascinating career. And, more than anything, on behalf of the generations of student you have taught, congratulations on fifty wonderful years.

RJR: You're welcome. And thanks to each of you. This has been very enjoyable.