Lawyers, Guns & Money Podcast

Rachel A. Shelden on The Political Supreme Court: A Forgotten History

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This is the Lawyers, Guns & Money podcast.

Hi everybody. Welcome to the Lawyers, Guns & Money podcast. And today we have a real treat. I'm joined first of all by my colleague, uh, Paul Campos of the University of Colorado Law School, who you're very familiar with. And we have a terrific guest today. Rachel Shelden who is, and I want to get this title correctly a professor of history and the director of the George and Ann Richards Civil War Era Center at Penn State University.

And she will be joining us cause she has a fantastic new book, The Political Supreme Court: A Forgotten History and we don't actually show the video, but it, so it's like I run dick have it. I still like to, you know, put the book up just to get, get the vibes, uh, uh, going which is a book about the 19th century, uh, Supreme Court. And as somebody who has just you know, as has created a Supreme Court and American political development class, I've been trying to learn a lot more about the Supreme Court during this era. But I still felt like I, this, this reminded me of how much I don't know. And that can be very h bling when you're teaching something and like, wow, does I so, uh, it was a really, uh, a fat and a fascinating read. And I think that it it's, uh, it's a book.

And this is also why I structured my class that tells us a lot about the Supreme Court now and debates about the Supreme Court now without being direct, you know and, and without in any way being, you know, heavy handed, you're not going to read every page of this and think, oh, you know, but you know, I think that in learning about what the Supreme Court was you know, and then you, you say this towards the end, you know, we can start rethinking about what the Supreme Court could perhaps could be you know, not a non-political institution but a very different kind of political institution. So I think it's, it's, uh, it's really fascinating. So let's, uh, uh, dive right into it. And I, I guess I, I would say that the, uh, and, and, uh, I'll let Paul give his take on a second. I think one, and I think this is true whenever you think about Supreme Court in the 19th century, uh, is how little you can understand the court in this era, just by focusing on landmark cases.

Not only because there weren't all that many of them, but one lesson of APD is that if you dive into cases like Marbury and Dred Scott and Dartmouth college, their actual material impact on American politics is very limited. Like, you know, barely anything would have changed had the cases not been decided at all or come out the other way that they sort of, you know, what they stand for is more important than how they impact the politics in the era. But that doesn't mean that the Supreme Court didn't matter. And especially doesn't mean that the court and its justices were not involved in politics in a lot of different ways. So if that, if that's a fair, uh, one of the key takeaways of your book, I'm wondering if you would, would agree with that. And if it would explain a little more about, about, uh, uh, how, how you approach the court during this era. Yeah. Thanks so much. And thanks so much for having me.

I, this is a great question and I hope you'll excuse me for going off in a slightly different tangent just to start us here. But there's an old, uh, debate between two law professors, uh, from the 1980s

about the least important justice, the most insignificant justice, uh, to serve in American history. And, uh, among the consensus candidates is a guy named Thomas Todd, whom no one has ever heard of. I very rare when I'm speaking to someone, have they heard of Thomas Todd? And the reason that these folks give for why Todd is not important is that he didn't author any important cases. If you had asked Americans living in the 19th century, how important Thomas Todd was, they would tell you he was super important because he was very relevant to what was going on at the time in terms of circuit writing. So let me explain circuit writing. I'm sure some people know what it is, but maybe not everyone.

So in the 19th century, the, the federal courts were organized in a similar way to they are, to how they are today. So district circuit and Supreme, uh, but in the 19th century, the circuit courts were did not have separate judges who sat in their courts. Instead, it was district judges and Supreme Court justices writing circuit. And also importantly, these were primarily trial courts, uh, courts of original jurisdiction. So the justices would go out on circuit and they would hear cases that were, uh, relevant to the region and also to the nation, but they would do it, uh, in front of people of a particular area. So justices were not sort of holed up in Washington. They were very much involved in basic conversation with the people and in deciding cases that mattered to the people of their region. So Thomas Todd was, uh, became a Supreme Court Justice in 1807. And, uh, that was the first time that the Western States had a Supreme Court Justice.

He was a, he rode circuit in Kentucky and Tennessee and Ohio. What was then the West, certainly not the West now, but then the West. And people thought he was super important to making sure that the West was incorporated into the United States. There were real concerns that the U.S. Would break up as a society. And the West in particular might leave the union. And so Todd helps provide this connection, uh, between what's going on in the Capitol and what's going on in the West. He was a man of the West. He was from Kentucky. And that mattered a lot to the people there. So the idea that a justice, uh, was representative of his region, uh, was really important to the makeup of the Supreme Court. And there was a lot of balance on the court as a result of that. Can I give one follow up before we turn over to you, Paul? Yeah.

And that's, I think one really fascinating thing is that, you know, I think like most people you know, I associate circuit riding most with the constitutional hardball between the Adams and Jefferson administrations. You know, the way I've always looked at is that, well, of course it made sense to eliminate circuit riding and have permanent circuit court judges. It's just that, you know, the Adams administration and the Federalist Congress made a huge mistake by using that to pack the circuit courts with Federalist nominees after they'd already lost the election. And so very understandably the Jeffersonians took the constitutionally dubious you know, but, uh, probably inevitable step of just canceling those, those judgeships. But I don't think I properly understood is that that wasn't just retaliation, although that was part of it. But it was also that, uh, the Jeffersonians very sincerely, affirmatively believed in the value of circuit riding.

You know, that obviously had, you know, came from the British tradition. And the idea, again, despite how arduous and difficult it was I know it wasn't, was a chase to almost drown because he fell through the Susquehanna River and he crashed. It was pretty, uh, you know, very unpleasant to take horse and buggies all over the country, but they sincerely believe that you know, this was a way that, you know, judges would get to know the local politics of, of that region would get to understand the cases. And that was the real way. And also to ensure that the Supreme Court would not be the sort of over weaning, you know, dominant federal institution, but you know, would sort of represent the regions and, and not, uh, be the sort of dominant force.

So it wasn't, it was, it was more, you know, that definitely there was retaliation and as, as a, you know, reaction against that sort of overreaching by the Federalists at the end of the Adams administration, but there was a real affirmative belief that circuit riding was good, which is why it actually persisted until after the Civil War. It wasn't just about you know, uh, a temporary political dispute was really much deeper dispute about what the nature of, of the court should be. And especially what the nature of federal court should be. Yeah, that's exactly right. And I think it actually, circuit riding lasts all the way into the 1890s. It's a pretty long time.

Technically the Evarts Act provides an opportunity in 1891 provides an opportunity for the justices to stop riding circuit, but they keep doing it, because it's so ingrained in American culture that the justices are meant to travel to their assigned region and, and hold cases, and that they are meant to be accessible to the people. And that is a very different circ stance from what we deal with now. Yeah. Yeah. I was, uh, just to continue on this particular theme, I was very struck by the ways in which there's a certain degree of parallelism here with the, uh, the English practice in which the, uh, the sort of majesty of the court was really critical to the sort of political legitimacy of the system and that the sort of ceremonial aspects of going before the people and to hold these very, uh, uh, sort of spectacular given the context of the time, uh, trials and public events was a way of reinforcing the, the, uh, the authority and the legitimacy, you know, of the system.

And I think one thing that we've lost sight of in law schools, uh, is, you know, that whole aspect of judging. I think, you know, one of the things that your book does extremely well is to emphasize essentially the really disproportionate, uh, attention that legal academics give to, uh, opinions as being the most important sort of manifestation of the political and cultural, uh, uh, sort of authority and substance of the court. When, in fact, that's really more a byproduct of law school pedagogy than it is of the, uh, of the political realities of the 19th century, uh, in particular.

And one thing in reading your book that I was, yeah, I came away with a very strong sense of, was the extent to which law schools have essentially created this kind of mythological canon of cases, very much starting with Marbury, uh, to create a, a kind of 19th century sort of retro engineered Supreme Court, uh, that just really didn't exist at the time, but that we're just sort of, uh, projecting our own particular current political situation, you know, onto. So I think, you know, that's just an extremely valuable contribution. And you know, I certainly learned a lot from it. Thank you so much. Especially weird in the case of Marbury, which is now cited as the, this is the case that created judicial review when it wasn't even cited by the Supreme Court until the late 19th century.

It was really an attempt by that court to try to create this seamless, you know, this has always been, you know, recognized when in fact, you know, it was basically considered a relatively minor case at the time and really only took on, you know, the idea that it would be considered the most important Supreme Court decision ever at any point in the 19th century would just, would just be absurd. You know, so I think with Paul, again, I think it really goes to the sort of the sort of case, you know, the case, the, the lying down methodology more than, and I think that that's one contribution I hope that sort of, that APD scholars have made is to sort of recover the broader context of, of the court. Well, one thing that I think is really useful to remember if you're thinking about Supreme Court decisions versus circuit courts is that justices would miss terms of the Supreme Court so that they could hold circuit court and that would be crazy today.

Like what, how could that circuit court possibly be more important? But the people thought it was more important and as a result, so did the justices. One thing that I was particularly struck by was just thinking about just how much more interesting it was to be see a Supreme Court justice in the 19th century than it is today. And relatedly, how much more interesting of a person you really had

to be in order to be a Supreme Court justice than what, you know, today we have these just sort of incredibly sort of academicized, like cloistered, you know, bureaucrats. And back then it was more like, you know, Mark Twain with a law book, basically. Yeah, I mean, they were all politicians. That's, that's the part that's, I think, been lost is that, you know, you didn't have justices who came from longstanding careers in, in the judiciary, either state court or federal court. There were lots of folks who had really no experience in the courts and, and they were lawyers.

But to be a lawyer in the 19th century was to apprentice with someone, almost nobody went to law school. And if you went to law school, you weren't being taught the casebook method, because that's not invented until the end of the 19th century. So it's a, it's a completely different kind of person that is becoming a Supreme Court justice in this period. Yeah, no, it's a very, it's a completely different world. And, you know, one thing that I found very amusing this past week was then there, I don't know if you're familiar with SCOTUS blog at all, but you know, there's Sarah Isgur when there was just, you know, the question of was Samuel Alito going to step down during the lame duck session, you know, came up, and she sort of just sort of incessantly mentioned, well, it doesn't really matter because the Senate could confirm a candidate, even if there isn't an opening. And then when an opening does occur, the president can just, you know, sign the certificate at that point.

And then there'll be a Supreme Court justice. And I, you know, I had to do a little research, you know, like Aaron Rodgers or something, that was actually true. And it is true, apparently, at least as a formalistic matter. But what was so striking to me about all that was that in this discussion, no one seemed to notice that this was just sort of a weird little twist on Marbury, because like nobody remembers what that case is actually about, at least not in law school, for the most part. And again, that just sort of goes to show the extent to which we use our own modern preoccupations to sort of, to sort of reverse engineer them onto a completely different society and a completely different world.

And I think, you know, your book is such a valuable corrective to that because, you know, we don't really pay any attention to the 19th century jurisprudence in law school, except in terms of a few essentially highly idiosyncratic cases that have been sort of completely rewritten for the purposes of sort of modern, you know, canonical understanding, which is, you know, your point about the least significant justice is, you know, right on in regard to that, because that's not at all, you know, how they thought about those things at that time. Yeah, I think a lot of people would say that in addition to Marshall, Joseph Story is the most important justice. And boy, there were a lot of people who disagreed with that in the 19th century. You know, his his views about judicial power, about how voting should work about even about race, I think we're really different from what the average American thought in that period.

And he, you know, he's, he's everyone's favorite, maybe he's not my favorite. Yeah, he's a law professor's idea of, you know, yeah, a great way to write the treaties, if you want to be concerned. Right, right. Yeah. But who read those who thought they were important? This is always like the question and Marbury is such a good example of this, because lots of people didn't know about it. Jefferson doesn't even really get all that involved with it until the 1820s. So yeah, it's just a different world. Yeah, the you know, even in the 20th century, there's a now, you know, Taft is kind of forgotten just run back. Another one, this is a point Mark Tushnet really makes in his book about the Hughes Court is Willis Van Devanter, who again is considered a non-entity because he had literal writer's block, but played a huge role in the 1924 judges bill, which has far more impact on the federal judiciary than any single opinion.

You know, so that the idea that like, you know, he saw his role as being a procedural expert who helped people their opinions, but then was this liaison to Congress who could basically convince people like we need more staff, we need this pompous new building, we need control over our docket. And all that is vastly more, you know, so that in a sense van Devanter is this, you know, forgotten, you're just one of the four horsemen and you know what it, you know, is actually has this like huge lasting impact on the court far more than most people, because again, opinions are not always the most, you know, and opinions are also just kind of overdetermined by, you know, the particular context of their time. And so I, you know, and so that's obviously becoming increasingly unusual.

But, you know, again, that, you know, that these justices sort of leaving, you know, who would see this having the greatest impact in retrospect is very different than who had, you know, the greater, the greater impact of the time, and then this coming through again and again, and just really, you know, and, and also putting the justice in there, you know, that there are, so I guess this is the other point to is, you know, going to Paul's point about how much different and more interesting these people were is that almost everybody ass ed that being a Supreme Court justice was just one political office. The John Jay was that, you know, I'm, he's an ambassador. He briefly serves Supreme Court justice. He's asked to do it again. He's like, I'd rather be governor of New York, which can you imagine John Roberts saying, I think I'll be governor pretty great, actually. But somehow I don't think that's going to happen. But, you know, and, and really, in a sense, it's a fluke.

The only reason probably that John Marshall served for 30 years, there's this political party died on the operating table after he was elected. So there really wasn't, you know, an opportunity, you know, to pursue in a context which everybody had to call themselves the Jeffersonian. You couldn't really have ascended to any higher office until, you know, he was already, you know, past 60. You know, so I think it's really to that, that, you know, we now think of short term justice as sort of being minor, but at the time it was just ass ed that, that, you know, and again, so there wasn't a strict separation between law and politics, because we just sort of ass ed that being a federal judge was just kind of another political office. It wasn't something you would do permanently. And especially given the arduous nature of circuit riding was something you did, probably with an eye.

And I forget what percentage, but just a huge percentage of Supreme Court justices during this era were serious presidential candidates. Yeah, yeah. So I found 1919 of the first 51 justices were presidential candidates, including Marshall. In 1812, there were quite a few people who thought he would make a good federal as presidential candidate. I think Marshall's read the tea leaves well, he wouldn't have had much of a chance in 1812. I also think Marshall is a great example of how the partisan circ stances of the moment really had an impact on whether somebody stayed on the court or not. So Marshall was a moderate Federalist. He did not agree with a lot of policies in the Federalist Party. And in the early 19th century, I think he was really hoping that parties would rearrange themselves. So I mean, we sort of can't imagine this today, but political parties in the 19th century were really fluid. They rose and fell.

As you mentioned, Marshall lost his party somewhere in there and almost everyone did because the parties changed so much. So had the parties changed earlier, I think there was a pretty good chance Marshall could have left the court. It just didn't happen. Yeah. Marbury is a great. Oh, go ahead. Go ahead, Paul. Oh, yeah. I was going to say, I think one of the real oddities of American hiStory is that because John Marshall had to be, you know, John Marshall, I think an American jurisprudence is kind of like what, you know, Voltaire said about God, you know, if he didn't exist, it

would be necessary to invent him. So it was necessary to invent this, you know, this kind of titanic, you know, protean figure who birthed, you know, the majesty of the Supreme Court, which is, you know, an extremely modern idea. And I, you know, I shocked my students at the beginning of their first year, by having them read an essay about Marshall's slave trading, which was incredibly egregious.

I mean, he wasn't, you know, he wasn't one of these bashful slavers like Jefferson or Washington. He was extremely enthusiastic and made himself a fortune through aggressive slave trading. And all of that, you know, went down the memory hole when it became necessary to make him, you know, the great John Marshall of Marbury and, you know, the guy who opposed Andrew Jackson and so forth. And all of that, I think, just reflects this, you know, this construction of a judiciary that did not exist in the 19th century in point of fact, but which we sort of pretend did now for the purposes of, you know, creating this whole kind of ideology of the three co-equal branches and, you know, all that stuff.

And, you know, here, I just wanted to, this seems a little, you know, this kind of goes maybe to somewhat in the opposite direction, but I find it striking listening to what Scott was saying about the trajectories of these people's careers that Arthur Goldberg, like, actually, you know, quit the Supreme Court to be the U.S. Ambassador to the U.N. In the early 60s. And can you imagine something like that happening today? I mean, what was essentially basically a symbolic position that he, you know, that he left the Supreme Court to take something like that. I think that shows that even as recently as, you know, a couple of generations ago, this kind of sort of mythological picture of the Supreme Court that we have today was much, much less established than it currently is anyways. So, you know, this is, I think this has all been fluid for a very long time. Yeah, certainly the interest of the justices in other positions in the presidency continues well into the 20th century.

In the 19th century, there were several justices that left the bench to have other political positions, including one of my favorites, David Davis of Illinois, who is elected to the Senate in 1877. And there were others who were confirmed for cabinet positions and turned them down, which is actually, I don't think in my book, but it's a very, is a very, was a very common thing in the 19th century. So yeah, they're, they're, they're both around. They don't care necessarily to stay on the court. It was hard work. It was, it was a lot of work to be on the court in the 19th century. If you had to travel by horseback hundreds of miles. Maybe we should like somehow try to revivify that a little bit, you know, that might solve the hearing. Also you have to, also you have to do it by horseback. I mean, there's no way we're ever going to get rid of any of these people unless we start making it a little bit more challenging.

Have either of you read Laura Kalman's book about LBJ and Nixon in the Supreme Court? I teach that and that's, it's really a fact because what happened with Arthur Goldberg, you know, it's very much, you know, LBJ was almost like the last gasp of this 19th century where he really wanted justices who were personally loyal to him that so much of this is bound up in his paranoia about the Kennedy. So it's like, I can trust Thurgood Marshall. I can't trust Tom, you know, this is very, you know, I can trust Abe Fortas. Now it started out to be just a complete catastrophe for American liberalism because if you just left Goldberg alone and appointed just some normal person rather than like elevate Fortas, you know, Nixon wouldn't have immediately taken over the Supreme Court. So I'm not emulate that going forward. But yeah, it was just this very weird time.

And also another thing about that era, can you imagine a democratic justice resigning to allow the other party to appoint somebody over the kind of, you know, penny, you know, what, you know, basically what Abe Fortas did is like a good hour for Clarence Thomas, but that was enough in that

era to, to force a while, you know, it was just a, but really in a sense, that weird sort of partisan relationship of the fifties and sixties, seventies, it was really the last gas was something like a 19th century court where, you know, presidents wanted to have, and you also think of Kennedy nominating Byron white, all of Tr an's Supreme Court nominees. There's that weird time again, where presidents sort of expected to know Supreme Court justices. But the thing is, it's, there's not all bad either.

You know, I think that we remember, you know, we were, I think, you know, we remember Tr an's nominees as mediocrities, like that, but, you know, there was something to be said for, you know, having the former governor of California, the Supreme Court, having people with political experience, you know, having a more variable, having somebody with Thurgood Marshall's extraordinary life story, you know, on the Supreme Court, that we've also lost something too. And I think that's one of the points of your book is that having a, a Supreme Court that is, you know, is formally non-political, but it's much more political in some ways, you know, that that, you know, that that we've lost, you know, that now that everybody comes from the same three law schools, the same three graduate schools, same three, you know, that, that we've really lost something. Some of the same high schools, even. Yeah, yeah, absolutely.

That we've really, you know, so that, and that's one reason I like to pair a discussion of the 19th century court with Kalman is that you can still see, you know, that didn't die entirely, that actually takes a long time, that the new paradigm Supreme Court justice is actually a relatively modern invention. And as both you and Paul are saying, I'm not sure is it entirely good. In fact, I'm sure that it's not an entire, you know, I think that there are, there are aspects of, you know, and in particular, as is off of the case, LBJ had good ideas he took too far. But, you know, I think that there is something there too that, and I take one of the points your book is that we need to come back to that to some degree. Yeah, I think, you know, the main problem is that this court suggests that it is more legitimate because it is further away from the people. And so it's got more authority because it doesn't engage with the people. It's outside of politics. It's outside the people.

But how should we respond to that? I mean, that's not how it was designed. It was designed to have more interaction with the people to get its legitimacy. So I think part of the problem is there's a real disconnect now between what the court was meant to do to get its authority versus what it used to be. Let me, there's another, and since you're speaking of story, another one of the center pieces in your book is the whole story of Luther v. Borden, which is fascinating in a lot of ways. First of all, the fact that, you know, that the doorbellion happens in 1843 in the case decided in '48 or '49.

So there's the six that, again, as you say, at the time, there was nothing, you know, again, and the court is a peripheral enough player that you just go years, you know, between controversies happening, the Supreme Court actually issued an opinion, for which reason the opinion, again, is not very consequential because the underlying issue has long since, you know, been resolved, which I think is fascinating. But also, you know, if you want to elaborate on, you know, story, in a sense, was one of the first justices to have this very modern conception of, you know, that judicial power as being sort of remote from the people. And so he very much sided with the charterists, you know, with the people who supported the Rhode Island Constitution that had not been rewritten since literally before the revolution, you know, against the Dorr Rebellions. And also not coincidentally, Story also opposed, you know, the expansion of the universal male suffrage.

You know, I don't think, you know, that they don't necessarily go together. But I think you're right that none of this was a coincidence, you know, that, you know, that I think it says something that

the person with the most modern conception of the Supreme Court was also, you know, this sort of very, you know, and much more so than even Marshall himself, for example, a very sort of aristocratic figure who likes federal judicial power, in part precisely because it was a, you know, a direct check on any kind of democratizing force. So I think that that episode, I think, is so fascinating in terms of these different visions of the court. And again, it's striking now that Story is seen as one of the most important justices of the era, which is not much less, he had much less stature in his own time. Yeah, I think the fascinating thing about Story is that he's constantly trying to build judicial power, but he's also engaged in politics everywhere.

So he's writing policy, he's talking to all the people involved in the Dorr Rebellion, he's trying to get Daniel Webster, who's Secretary of State, to make the president do something about what's going on during the Dorr Rebellion. So he's simultaneously saying, "Oh no, the court has to have more power, it's got to have judicial authority, but also I'm going to keep doing what I'm doing," which is to have a huge influence on politics of all kinds, on the federal level, on the state level, on the local level. And part of how he does that is he's serving as a Harvard law professor and has lots of law students who then go on to be politicians. And those people remain close with him and he's able to influence them in a variety of different ways. It gives you a sense of how closely tied law schools were to the political world as well.

Yeah, there's a story that reminds me of just showing how the sort of creation of American law schools, which as you know, didn't really exist prior to the late 19th century, has played such a key role in the sort of ideological framing of the of the contemporary court. The stories, there's a thing. There's a project in American law called the Restatement, which is essentially law professors writing up treatises to try to rationalize various areas of law. So there's like a Restatement of contracts and a Restatement of torts and stuff like that. It's like super late 19th century sort of pseudoscientific Langdalian project, trying to make the law more rational and bureaucratic. And so anyways, the first Restatement project started when the deans of I think it was Harvard, Col bia and Yale and someplace else got together and said, well, we need to do this, you know, we need to rationalize the law. And we're going to write these Restatements.

And so anyways, they invite Brandeis and Holmes to their initial meeting. This is like in like 1915 or something. And so Brandeis goes, but Holmes doesn't. And then Brandeis gets back to Washington and Holmes asks them, you know, what are they doing? And Brandeis says, well, they mean to restate the law. And Holmes says, well, I restate the law every day. Which I really thought was, you know, kind of charming in this kind of Holmesian way. But I think what that story helps capture, which is something that your book is like so, you know, important in terms of sort of teasing out, is that this moving target of what it means for there to be a distinction between law and politics, you know, has been constantly changing. So this whole concept of what it means to be legislating from the bench is, you know, in many ways is a very, very sort of contemporary debate/frame for the politics of the Supreme Court.

And again, that's another thing that, you know, hiStory is, you know, so valuable for in terms of reminding us that, you know, our current frames for thinking about these things is not necessarily at all the way they thought about them, you know, 50 or 100 or 150 years ago. Yeah, a couple things about that. I love that. One of the characters in my book that I find most interesting is Salmon Chase, who, you know, was Chief Justice starting in 1864, nominated by Lincoln, has been in the news of late because he is the author of the Griffin's case, which played a big role in Tr p v. Anderson. And that case was a circuit case. And it is a great example of the way that Chase operated, which was to say, how is this going to work in terms of practicalities? Okay, well, it'll be a

problem to all of a sudden have all of these cases thrown out. So I'm going to rule this way in Griffin's case. And then, you know, like six months later, rule completely differently in a different case.

But it tells you that these are not designed to be cases that we use in the way that we use today. They were meant to be part of the political conversation about what was happening at the moment. And I think the other key element of that is that we ass e that constitutional questions for the justices stop at the courtroom. We recently we've had a little bit of commentary about cases by members of the Supreme Court, but it would have been unusual to have a justice who did not talk more about constitutional questions and decisions outside the courtroom to continue the conversation, to start the conversation when they were politicians before they were on the court, to get on the court, have these decisions and then continue to talk about them. Because this was all part of a constitutional conversation and everyone participated in it, not just the justices and not just lawyers.

Yeah, I've written an extremely uninfluential article saying that even today, judicial supremacy is just the completely wrong way to think about judicial power. By nature, the judiciary does not perform solos. Hamilton is still right, that ultimately, without getting the assent and political authority from other sources, and even when the court can change baselines, it doesn't preempt constitutional discussions. It doesn't end conversation, just that it's not so. I don't think I've convinced anybody, but I still think that that's correct. Well, I love that, but I'll tell you as someone who does not work in a law school, most people will tell you they can't comment on constitutional issues because they're not lawyers. It's just so common, and I always say to people, that's not true. You're just as much an authority in some ways. One of the great points of your book is that nobody understood this more than the Supreme Court just themselves, that they spent more time.

McCulloch was the end of the story. It was like Marshall and his allies and their opponents trading anonymous op-eds. Again, it's like we think of McCulloch and Gibbons standing out there. The politics of the Jacksonian era just completely ignored those of me, just did not have the same suggestion at all. And the same thing, I don't think Taney wasn't all surprised that Lincoln would take office and completely ignore pointedly sign legislation banning slavery in the territories and order a Secretary of State to issue passports to free African Americans. It wasn't even like that was some kind of, as you point out, it wasn't even like that was some kind of consciously paradigm shattering move. What Lincoln said was just straightforward. It's like the Supreme Court said is binding between the two parties. And if the Jacksonians win five more elections, then we can start talking about this being constitutional rule.

But like the Supreme Court saying something in one case, I'm not, I'll still vote to ban slavery in the territory. Obviously, that doesn't pre, the idea that any Supreme Court decision could settle a constitutional issue for all time is just not, you know, I don't even know what wasn't even like, is barely almost went without saying, in a sense. And again, it was it was that was well known by every, you know, and again, John Marshall, same thing, somebody very, very was aware and again, as part, you know, part of his survival, as you say, was he was a much more just as Madison was every Federalist favorite Jeffersonian Marshall was kind of the Jeffersonian favorite federal that he wasn't as hardcore as as Hamilton. But part of it is that he just, you know, he ducked boy, he knew, you know, if there was a power struggle between the court and other branches, the court would lose.

And starting with Marbury itself, he was just very, very, you know, he picked his spots and only wrote nationalistic opinions, where he thought that the bottom line of the opinion wouldn't be

objectionable to most people. You know, so I really think that the justices themselves were sort of aware of that fragility. And even though the court is a more powerful institution now, that that still is not, you know, the idea that the court could just, you know, clear the field. And, you know, and I always find ironic that, you know, the decision most associated with aggressive assertions of judicial supremacy is Cooper v.

Aaron, which is the ultimate protesting too much like these straws saying, you know, well, going since since Marbury, everybody's always understood that only the Supreme Court speaks on constitutional questions, when the most famous Supreme Court opinion in 20 centuries being, you know, completely ignored, in almost every jurisdiction, which is, you know, it's like, like, no case ever shows how fundamentally weak the courts still are in the face of resistance, that Cooper v. Aaron. And yet, you know, kind of what Paul was saying, this sort of construction of the case is that, well, yeah, I mean, Cooper v. Aaron proves that only the Supreme Court speaks on constitutional questions. That's not the lesson I take from it. Yeah, I do think though, that I want to say that I think that the sort of cultural sort of prestige of the Supreme Court, I think maybe reached its peak about 25 years ago or so, and has been gradually sliding since then.

And I mean, here, I'll just give you a statistic, which I would just, I looked up the other day, I was so shocked by it because I taught Bush v. Gore in my class. And I was wondering, well, what was the public reaction to that decision, which essentially consisted of five members of the Supreme Court just stealing the presidential election on the basis of arg ents that they would have found utterly laughable if they had been presented to them behind some like Rawlsian veil of ignorance or something where they didn't know who they were voting for, right? Well, here's the stat from the Gallup. Do you approve or disapprove of the way the Supreme Court is handling its job? August 2000, you know, that is four months before Bush v. Gore, 62% approve. June 2001, so six months after Bush v. Gore, 62% approve. The disapproval, 29% in August 2000 and 25% in June of 2001. I mean, isn't that amazing?

You know, I do think though that something that has changed radically over the course of this generation is that there is no way the reaction today to something like Bush v. Gore would be anything like that. There's just no way. And I think that's all to the good. That's very surprising, actually. But, because I would have ass ed, perhaps incorrectly, that it would have been 9/11 that actually changed the way that people thought about the court, that there was a gap there maybe between Bush v. Gore and 9/11 and then everybody forgot about the court and moved on. That was sort of my working hypothesis. You know, I mean, that's sort of like the seat of the pants, the reaction is, well, Bush v. Gore was this extremely controversial, highly delegitimating kind of thing. But then 9/11 came along and everybody just, you know, agreed to forget. But that's not what the stats show at all. They show that, you know, the public just swallowed Bush v.

Gore whole, which goes to show, among other things, that the Supreme Court at that time at least had an incredible reserve of institutional sort of legitimacy that it could draw upon, which I think it has very significantly depleted, you know, since then. Well, I will say I think it did have an impact on some people because that was the first election I voted in and it certainly helps them staying power with me. And I think actually for lots of academics, the one thing that I often hear is that constitutional history doesn't matter anymore. Constitutional questions are the purview of law schools and political science departments and historians have lost interest in that. I think there's been a real revival recently, but I, you know, you might, you might think that this was a result of people feeling like the court was not something that anybody should study or worth studying after 9/11 or after Bush v. Gore. So, but yeah, that's surprising to me. Yeah, go ahead, Scott. Sorry.

Well, and follow up. Yeah. And really as recently as 2016, a really critical factor in that election is that that was still a situation which a) people generally thought more positively on the Supreme Court, but liberals actually had a more positive, you know, reaction to the Supreme Court than conservatives did. You know, so conservatives cared more about the court, but were more upset about it. It was this, it was this very, you know, it was this perfect position for Republicans where, you know, the court has had a Republican meeting vote since 1970, but there's been this trickle of very high profile liberal outcomes that still gives people the impression that Earl Warren is still alive. This is very weird.

You know, there was just this absolutely perfect sweet spot where the Supreme Court had this reputation as being a liberal institution simply because it's greater quantity of conservative opinions or just things that attract much less, you know, that they're just, even something like Shelby County just does not, you know, get that kind of public attention. One interesting, you know, and this is something that I've been playing around with is that, you know, you know, and I don't know what's going to explain the very high African-American turnouts in the last midterms, but you really wonder if Allen v. Milligan was sort of the one bridge too far, in part because it was something you had to notice, you know, that the typical person does not really care about pre-clearance or the technical or, you know, the rewriting section too, but you certainly can notice when every single majority minority district is written out of the side, like that you have to notice.

And, you know, I think that that gets to Paul's point about how, you know, the Supreme Court, having this high level of public approval for a long time, seemed to convince the justices that this was some sort of permanent, and of course conservative intellectuals are now convinced that the Supreme Court is entitled to that no matter what, that it's just outrageous to, you know, suggest that anything could be. A big point of your book is that Supreme Court is like anything else. It's legitimacy in a democracy is not pres ed. It has to be earned. Judges of the 19th century seem to understand that. And our current justices are acting as if, you know, they're completely invulnerable and don't need to worry about it. And in the short term, as long as Republicans have 40 votes in the Senate, they're probably right. But hiStory is longer than that. That's right. I mean, I think that they have no reason.

There's been so little legislation changing the nature of the court or even the nature of the lower federal courts for for so long. I understand why they think that they are outside these questions because we we haven't done anything about it. We haven't changed it. And I think the the change in the way that liberals understood the court during the Warren years and after, which is the subject of lots of great books, including by Laura Kalman and also the recent book by Nikolas Bowie and Daphna Renan, I think that's a that really changed the way that people thought about whether the court was an institution for good or an institution that was reactionary. And the 19th century court did not do a lot of good stuff. Let's be clear about that. They were they were the justices were mostly enslavers, mostly people who were in favor of white supremacy did a lot of stuff that was, as in stories case, that was, you know, anti-majoritarian.

And I think the difference is that they suffered for that. There was a reaction to that kind of thing. And now there is much less, at least by Congress, whenever the court was engaged in something that people disliked, they responded in person at the circuit courts, and they responded in print, and Congress responded, sometimes in ways that made the court calm down, and other times in ways that really changed the court. So we just have totally lost that. Yeah, I just wanted to say that the extent to which people just romanticize the Supreme Court is just, to me, I feel like this is all tied up somehow with like the demographics of the baby boom, that basically, you know, it's always

1968 for so many people in so many ways that it's both on the left and the right of the political spectr you know, for all kinds of reasons.

And it's, of course, it also matters that you have this incredibly well funded propaganda operation in the form of the Federalist Society, which has just hammered home this arg ent about the supposedly liberal Supreme Court for like an entire generation in a way that is just wildly counterfactual. I mean, how could something like that survive Bush v. Gore is just like a really interesting question. You know, I mean, I had to reread that case for my class and I was just so, I was like just infuriated by the passage near the end, which I think, you know, everybody agrees that, you know, the election now I'm forgetting who it, but Scott, do you remember who supposedly wrote like the, the per curiam? I can't remember now, but I think, I think it was, I think it was mostly Kennedy's chambers. Yeah, I think that's right. It was mostly Kennedy. And in fact, one thing that was right, was writing that stupid career, even d ber.

There's this passage near the end that sounds so much like Kennedy and like this unbelievable pomposity, where he like, just says, well, you know, we just, we don't want to do this, you know, we have this unsought responsibility. And it's like, you motherfuckers, I'm sorry, I'm trying to not believe that out. But it's like, you know, you just you went, you basically did like a triple axel to like take this case when it was like, absolutely no reason that you should do so.

And now you're like, you know, crying, you know, this utterly absurd story about how like you were just forced to do this, you know, and, and I just think, you know, that part of what makes that possible is this incredible romanization of the Supreme Court that like a whole generation fell for, based on like the fact that for like 15 minutes, it was kind of liberal left, you know, so I'm sorry, it's even more amazing that like, as Kim Scheppele pointed out, like the, the are the equal protection holding was prefaced by the Supreme Court telling the Florida Supreme Court, do not issue statewide standards, like whatever you do, do not create a rule to count the ballots. And then so of course, they allow the recount to proceed on a county by county basis. And then this report says, we got you, there was no statewide standard, just as in every other American election.

So therefore the equal protection clause has been violated for this day only and for no other, you know, it's like literally the, the nights who say knee, it was just ridiculous. It's like, you know, and as Scheppele says, like, like catch 22s are not consistent with the rule of law. Like that's not how courts of law are supposed to operate. You know, it's just like, so it's just everything about that case is just remarkable. But speaking of Mark Tushnet, one of my favorite law review articles, you know, he, it's like, it's very brief reaction Bush v. Gore when he says, this opinion has allowed critical legal studies to rise like Lazarus from the grave. But he also goes through, here's the like eight techniques that like the legal world will use to just renormalize the Supreme Court and just like forget about the whole thing and just like go back.

And I think, as Rachel says, I think that the reaction is like a lot of people have taken that to sort of take a closer look at the Supreme Court and a more realistic one, but that, that wasn't true for everybody. Like somehow there's a lot of other people for which Bush v. Gore just, you know, like we find way I was an anomaly. They had to write the opinion in two days. It was a new, you know, it's like you know, it was just this sort of very, uh, you know, but, but it is, it is amazing that, you know, and there's another thing is that several of the operatives behind that litigation are now sitting on the Supreme Court in the United States. And then, you know, Jack Balkin wrote this article where he pointed out that really the single most disturbing aspect of the case is that these justices were, justices were essentially picking their own successors. Yeah.

And, uh, you know, and he also, he also asked a similar question about, well, you know, is this just going to be seen as this one-off freakish thing, like a judge getting bribed or something? Or is it gonna, you know, be more significant in terms of the sort of systemic effects? And I think the answer is very clearly the latter, you know, culminating in something that is actually even worse than Bush v. Gore, which is Tr p v. United States, which, you know, I would impeach all of the, uh, of the signatories, you know, to that opinion, just on the grounds that they're, they are violating the most fundamental possible precepts of the rule of law in our system. You know, on the basis of just, just, you know, we just made up this rule on the fly because we happen to have like a, you know, a mafia don as president of the United States, but it's a rule for the ages. Yeah, for the ages of Tr p. Like Gorsuch said in the, uh, in the oral arg ent, I, yeah, I, the Bush v.

Gore is one of the reasons that I got interested in this subject because there are so, there are so many historical references around it, particularly the election of 1876. And chief justice Rehnquist, uh, actually delivered a lecture and then wrote a book about why that was a great precedent for for 2000 for the 2000 election. And I, I think it's a great, it's yeah, it's a great indicator of what, of all of the ways that the court has misread history, because his conclusion, of course, is that this was a great moment for the court to step in and, and do these important things. And it gave the decision legitimacy, uh, to have the electoral commission rule with justices on it. And that's not at all what people thought at the same, at that time. They, they really saw the justices as members of the political community.

And so they were on the electoral commission in 1876 because of that, not because they were, uh, grand, grand men who were going to lead the country through this terrible predicament. So yeah, I think it's a, it's a great sort of early example of how the court has used history in such very uncomfortable ways for us historians. Yeah. I'm also you know, it's worth I elected to talk about as well, cause you talk a lot about, you know, how justices were selected and all because, you know, it's one of the most sort of grimace ironies of history, you know, scholars of the 14th amendment know that with the exception of Bingham, most of the frames of the first amendment didn't really care about the wording of section one because the light of Dred Scott, the light, you know, I don't care how we word this text. If you have a Roger Taney is the median vote of the street, it doesn't matter what we write, the rights will just be ignored.

So what they were really concerned about were section two and section three, which is how do we ensure that the abolition of the Three-Fifths clause doesn't mean that the court and the executive branch will be dominated by Southern Democrats who will just nullify whatever it is that we enact. But the grimoire is that they weren't cynical enough because what ended up, you know, nullifying the reconstruction amendments wasn't Southern Democrats taking over the Supreme Court. That work was done by Northern Republicans who dominated the Supreme Court during that era, but still, you know, slaughterhouse cases and Cruikshank and Reese and all, you know, like, you know, just to sort of, you know, just gutted the Fourteenth Amendment until well into the 20th century. You know, so we were talking here about, you know, nominees of Lincoln and Grant, you know, not, you know, not even the Republicans who didn't care about civil rights who were responsible for these opinions.

But I think you have a good explanation for why, you know, why that wing of the Republican Party came to dominate the Supreme Court and essentially turn against reconstruction even before, you know, the rest of the political class did. Yeah, I think one important thing about this is that people ass e that Lincoln nominated justices from across the aisle, the proverbial aisle. And that's not true because presidents thought so specifically about what was going on at the moment, the politics of

the moment, Lincoln nominated people to the Supreme Court who fit the moment and the moment was the war. So Stephen Fields, who people use as this example because he went back to being a Democrat, he was a union party man. The union party is a party people have forgotten about also. That was the party Lincoln was thinking about. I want people who will defer to my war efforts and the fact that Field was a laissez-faire, that just wouldn't have been something that he cared about.

People say that Nixon's nominations were surprising. All the stuff that Nixon cared about, civil rights and law and order, his justices were very conservative. There was a liberal outcome and Roe didn't care about it more, but it's different than that. I think people forget that too is that presidents think to some degree ideologically, but it's what issues, and as you say in the 19th century, that's not just the issues, that's party. Lincoln, the Republican party wasn't 10 years old. Lincoln was thinking of the, you know, same reason he picked Andrew Johnson as vice president. It's not to have somebody who believes in equal citizenship, it's somebody from the South who believed the South certainly seceded. It's perfectly logical at the time, even if it, you know, obviously the effects of it were unfortunate in the long term.

Well, in Lincoln's case too, the court had been completely remade over the course of the Civil War because there had been two Southern justices who left the court, one died and one left to go with the Confederacy. And the reorganization of the court to match new circuits in the Civil War meant that Lincoln needed to nominate someone from the far West. So if he's looking at California and sees, oh, I have a unionist who's from California and has so much political credibility, then he's obviously the choice. This is the, he was limited in who he could pick because he had to pick someone from the far West to represent the 10th circuit. So there's also that element. And I think one other element of this that's really important is that if you were a president who nominated someone that was from your party and the Senate was from the opposite party, you would, you would lose. They rejected nominees all the time on the basis of their party and nobody was trying to hide that.

It was actually quite out in the open and only later did it become important for these folks to become prominent lawyers. We were talking a little bit earlier about John Marshall as enslaver and when the moment is that the story about him comes to fruition. I think it's not a coincidence that it happens right around the time that Lucius Lamar joins the court, the first Confederate justice to join the court. And this is a moment where people oppose his nomination not because he's in a particular political party or because he was a confederate, but because he was not a prominent lawyer. So this is a real moment of change in the late 19th century that also allows for this new narrative that cuts out the history of slavery, the history of the Civil War, the history of reconstruction. Yeah, it's also a bit of that community, like, well, I can forgive you being a rabid white supremacist, but I can't forgive you not having a degree from Harvard. That's right. Yeah, that's connected to that.

There was a tremendous drive in the late 19th century by the elite bar to try to improve the sort of cultural standing of lawyers and their economic standing as well, because during the Jacksonian era, you know, law had become like a very open profession. And it, you know, in order to improve its prestige, it had to create a lot of barriers to entry. And then, of course, you have to create even more barriers to entry to the most elite institutions within the legal system. And, you know, all of that is really late 19th century development that would not have been recognizable to the Civil War era. That's exactly right. There's another, and we are getting closer to the end of time, but I didn't want to ask, let's maybe talk about a slightly more positive figure, since there aren't a lot of them. Another of the fascinating stories here is, of course, John McLean.

He's fascinating to me, first of all, because, you know, it's this rich irony in history that Andrew Jackson nominated one of the two, and really the only dissenter of Dred Scott, who was strongly anti-slavery. And I'm not, that's not a criticism of Curtis, but he was not particularly anti-slavery. You can criticize Curtis. That's okay. Yeah, I mean, for people who know, Curtis was Fillmore nominated in the Supreme Court because he was one of the few judges in Massachusetts who would aggressively enforce the Fugitive Slave Act. Curtis decided Dred Scott just because he thought that Taney's opinion was embarrassing and just wrong as a matter of legal craft. And then, of course, resigned because Tony kept trying to rewrite the opinion in response to his, you know, so he acted great Dred Scott, but, you know, then he opposes the Emancipation Proclamation. He's very involved in all this legislation. These cases in Reconstruction, he's not a hero in our story.

That was just one moment, right? McLean, who's much less talked about, is actually the one actual anti-slavery, you know, member of the Court. But amazingly, not only is he an Andrew Jackson nominee, he's nominated because Congress kept that vacancy open and wouldn't let Adams nominate somebody. And ironically, you basically get the most John Quincy Adams possible nominees nominated by Jackson. It's sort of amazing. But again, McLean is like, you know, he was somebody who had presidential ambitions throughout that period, you know, and was really, and obviously, you know, sort of went from Whigs, the Whig part of the Republican Party. So I think he's another, you know, very paradigmatic 19th century. And I think, again, is not talked a lot about in history, but I think it's actually a quite fascinating figure in a lot of ways, like somebody who who could have been president under the right circ stances.

Yeah, I think I think the reason that people don't talk about him is that they think he was only motivated by his presidential aspirations, because he did run for president every four years, he really wanted to be president. And but but I think that's the problem, right? We ass e that is unusual, whereas it was really quite common for justices to look for other offices. And so lots of the work on McLean, and there isn't a ton, but there are the work on McLean says, you know, like, well, this guy was just concerned with his presidential ambitions. That's certainly the case in the way people talk about McLean and Dred Scott, because he, of course, leaked a lot of the deliberations during the first hearing of Dred Scott, and they heard the case twice. And so there was an expectation that this was all about his presidential aspirations. McLean is the justice I had the most fun researching.

I think he is super interesting, and really is the only anti-slavery justice on the court in the 19th century. His Story was not anti-slavery in the way that John McLean was. And McLean was Abraham Lincoln's choice in 1856 for the Republican nomination. If McLean had run in 1856, it might have looked different, I think. But he loses out the nomination to John C. Frémont, who's a former Democrat, and in some ways the opposite of him. McLean, I think, is a perfect example of the way that justices engaged in politics in the Capitol, and then went out on circuit and engaged in politics at home. When he was in his circuit courtroom, he met with all kinds of political promoters, people who were going to go out on the campaign trail. Because in the 19th century, you did not run for president, actually. People ran for you. It had to be called to the office. It wasn't just Supreme Court justices who said they were running everywhere.

Nobody was allowed to say they were running for president, like I think that's been lost. Yeah, I think. And I think the reason he didn't get the nomination is the reason many people didn't get the nomination. Like Daniel Webster didn't get a nomination. He ran for president every four years. It was hard to get a nomination. The politics had to fall correctly for you. People didn't know going into presidential conventions who was going to get the nomination. It was not pre-decided by a

bunch of primaries. So, you know, there was a lot of maneuvering, and he had some bad luck. He lost out on the free soil nomination in 1848 because of some bad luck because the convention was in New York. So you get Martin Van Buren again, like total opposite of John McLean.

So yeah, he has a good bio for understanding how justices engaged with political issues, both as a candidate and also as someone with serious political views, because he promoted his political views all the time while he was on the court. Yeah. And I also like that you point over to the 19th century, people had a mature enough perspective to think that, you know, partisanship and impartiality are not necessarily complete opposites. You know, somebody can, you know, have views and still act appropriately as a judge. That wasn't, but do sort of, but it was kind of like, you know, grow up, like the idea that if you just, you know, and again, that, you know, that now there's this norm where like, if Samuel Alito says, like, well, I, of course I have no party.

I know that we just, you know, that, that, you know, that, that there was a certain, again, maturity, but again, not that the knowledge of the judges were partisans, you know, it was not to say that, you know, there was no difference to the judge or legislature that people, you know, presiding over trials, you know, shouldn't be sort of, you know, attempt to sort of, you know, approach the law and partially just those two things were not seen as being direct opposites, you know, and there's something about that that is sort of a more mature way of looking at things than the sort of bad faith in which we discuss these things today. I think that's right. And I think one other issue is the fact that we are, we hate politics as a society today. We think politics are dirty and bad and they indicate partisanship, especially indicates some lack of principle. And that's just not how people thought about politics in the 19th century. Politics were where it happened.

They were where a constitutional conversation happened. They were where governance happened. And if you were a member of a political party, you were a principled person because you believed in a particular ideological commitment and parties were organized around ideological commitments. They were not these giant conglomerations of people who have lots of different views. So it made it very easy to have the courage of your convictions to say I'm a Whig. I really believe in these policies because I'm a Whig. That did not cause any consternation. I guess I'm just wondering about your thoughts on whether the attitude towards the Supreme Court in particular might be starting to swing back to a maybe, I will maybe say not a 19th century perspective exactly, but to something that is maybe more recognizable within the context of that era than what it's been over the course of the last half century or not.

I was just wondering if you think that might be at least potentially happening in some way. Boy, that's a hard question because it requires some thoughts about the future, which I'm not sure I can give. I think there's a degree which people are paying more attention to the court now and which they feel comfortable saying the court was wrong publicly and strongly in ways that remind me of the 19th century. But until Congress does anything, I don't think we have a society in which the Supreme Court is having any kind of 19th century element to it. I think there's an impetus in the Democratic Party now to make change but we have to see it before anything happens. Did you see the I mean I have to say did you see the other day where Samuel Alito literally said something like Congress has no jurisdiction over the Supreme Court. Yeah, he said that in 2023 and it's totally insane. I mean it is so far afield from the way that Congress operates or the court operates. It would be crazy.

Can one of these clerks google exceptions and regulations like this is not a, no, there's not a controversial point, you know. No, I mean it's in the Constitution. It's so crazy. It's right there. But it's so indicative of what the court actually thinks because Congress has not done anything to regulate

them and I you know Steve Vladeck has a book I think coming out in the spring that is about this. It's a it's a real shame that even at moments when maybe the Congress was not unhappy with the court that it it didn't actually do more to regulate it. But but and even you know and again I think this is something that like we kind of APD people have tried to emphasize that conscious this Marbury myth like you know the courts the source of the court's power is Congress.

You know all these things we're talking about is that you know that you know the decision to have the Supreme Court justice be this incredibly cushy job where you pick all your own cases you hear 70 cases a year they're mostly not mundane you know tax law you know you get four clerks you know I think like Sandra Day O'Connor's last year was on the court she would get like 31 travel vouchers or something just you know just you know you've talked like it's just incredibly you know being you know and you're so vivid about this being a Supreme Court Justice of the 19th century this is very arduous you know it was like you know now Supreme Court Justice is far more pleasant than being a big law associate quite the opposite in the 19th century but all of this is because you know really starting with the sort of Republicans the late 19th century they considered judicial power to be useful and wanted the court to be built up you know and you know and I do think that this is you know to perhaps conclude and I think there's one thing is different is that the reason that judicial power you know has steadily increased over time is that we've generally had these sort of periods of partisan dominance you know I have very little good to say about the fuller court but you can't say it was out of the mainstream of American politics it pretty much reflected the politics of McKinley and Cleveland you know it was it was a laissez-faire time when I was in record the same thing you know liberals weren't going to dismantle the supreme you know there was that the Frankfurter-Douglas debate right you dismantle the machinery you turn on your enemies well you know during the 60s you know the the Supreme Court could be a valuable ally to to national liberals who had you know divisions within their party so again there was no need to sort of dismantle the Supreme Court so when the court relatively hues consistently to a governing majority power is going to increase but we have now is extremely tight partisan competition but the court being strongly affiliated with one party and really for reasons of pure contingency it's not like you know that you know the you know Democrats have won the popular vote seven out of the last nine elections and have only you know so you know I I do think that there is that that is something new under the sun that you know that to have a situation where you have close party competition and strong ideological polarization which is not the case in the late 19th century I really do think that that's a point of danger that this sort of you know that either Congress either adding to the power of the Supreme Court or not acting against it was it's very much a contingent thing based on the Supreme Court normally being useful to governing majorities even if they don't agree that every case you know if you get you know eight or twelve years of democratic governance starting in 2028 you know that's not the same thing I don't think the Democrats are going to act immediately against the Supreme Court but you know what happens if there's a major new health care bear and this time it gets struck down you know I really think that I don't know what what the two of you think but my sense is that if there's going if Congress is going to use its authority to constrain the Supreme Court it's going to have to be it result to a concrete unpopular decision it's very difficult to make the case in the abstract you're going to have to have like a bloody shirt to sort of get the public on your side I don't know if the two of you agree but that's that's the way I can see the the power of the court being checked is this is going to have to be a series of unpopular decisions in a context in which Democrats have like 58 senators like something like that is that how the two of you see it I think that the court has issued a great n ber of opinions that have upset people so I think we may already be there in that moment but it will take some political power and some political will and one thing I see my role in it is to is to educate people that this is not what the court used to be and it's

not what the court has to be and all of the rhetoric around what the court should be today has to be informed by that history because we we can change it if we want to yeah I mean I think that's right I do think that what is changing now is that the in in so many ways the relatively non-ideologically coherent and amorphous era in american politics has passed away to be replaced with something quite different and also here demographics make a big difference I mean you know as somebody who you know was in elementary school during the Warren Court I have a strong sense of just how far away that era is now and as people who have any memory of it certainly any memory of it as adults drop out of the political process I think the the willingness to think about court reform is going to is going to come back with a vengeance but it will need some kind of flashpoint gaze but I don't think that there's any real risk that we won't get that kind of a case right yeah definitely not yeah yeah and so yeah and I always want to remind people as well that you know we now see FDR's court reform as being doomed but most likely if you know if joe robinson doesn't die of a heart attack they probably add at least two if not four just you know uh you know uh even with that that the that the failure of that was was very contingent you know and so I hope that uh that that is people learn more about the history and more people can get informed you know we can we can start rethinking the court and so I want to conclude by saying again I really want to recommend that the people read rachel's book but despite the fact that it's on an academic press it's it's very accessible you know it tells a lot of interesting stories you know if you're interested if you're just a general reader who's interested in the court it's not it's not a book that pres es that you have uh you know a really deep background in either the Supreme Court or uh or an american political history and I will also say that as somebody who teaches this for a living I learned an enormous amount from this book uh and uh and a lot of it really fascinating and a lot of irrelevant uh again you know I really like the fact that you know you're a serious historian you don't uh strain to sort of you know create analogies of the 21st century you know but I really do think in recovering this history of of what the Supreme Court was and and how it evolved you know I think you have a lot to tell us about about where we are today and how things can evolve so uh I really want to recommend this to everybody and I wanted to see if you had any final thoughts you wanted to leave with our uh with our audience well first of all thank you so much I I do I do hope that people want to learn about the Supreme Court because I do think right now is a good time to do it it's a good time for us as a society to be rethinking what the court can be and knowing something about the past can help us do that and also help us claim a little bit more of our constitutional authority the way that people did in the 19th century so I hope so Paul did you have any any final thoughts well no I just want to echo what Scott said I mean I sort of do this for a living kind of and I learned an enormous amount from the book and it's one of those things that certainly probably you know all law professors should read because we don't know enough about this stuff and we certainly don't teach our students nearly enough about this stuff and it's really important and you know hiStory is a lot more complicated and interesting than it's described as being in Supreme Court opinions you're here exactly yeah my mentor uh Michael McCann recently retired and I told the story at his party that you know he once sat down and said you know Scott just make sure you're never in a position where you you have to read Supreme Court opinions professionally and as a Canadian poet said that was good advice I just didn't take unfortunately but but part of the reason I have I have created you know this court in american political development course is that you know I really want a Supreme Court class that teaches it as an institution that we're not reading Supreme Court cases that we're reading books like yours and because you know I do think on the one hand to teach political science without the Supreme Court is you know given the the power wheels is just crazy like you can't understand that but again the you know you can learn things by reading Supreme Court case law but you know there's so much about the court that isn't about that and so I hope

that that both in law schools and political science departments we can really you know start to think about you know the Supreme Court you know as a political institution and I don't even mean that in a pejorative sense just as as just a factual description of of what it is as something that you know really has an enormous impact on on american society and the lives of american society and we really need to to understand it like that and again I think your book is is something to help us understand that I think I think really looks at a pieces of Supreme Court history that's been really neglected and again just really revives a lot of fascinating figures who are major figures in their own time even if they're forgotten today so I really got a lot from this.

Thank you so much. Well Rachel thank you so much for joining us and Paul I'm really happy that that you could join us as well I always enjoy these uh these conversations uh and I would most of all like to thank our listeners as always thank you very much for listening if you enjoy these you can always consider putting putting a few dollars in our in our patreon you know we do we do try to to put a lot of preparation into these but honestly in this case it was not I can't really claim that it was a lot of work I really yeah I really enjoyed this so thanks very much for joining us Rachel and thanks everybody for listening.

Thank you again for listening to the Lawyers, Guns & Money podcast we would like to thank Elizabeth Nelson of the paranoid style for supplying as our intro and outro music I'd bet my lands and titles a track on the alb for executive meeting if you would like to support the Lawyers, Guns & Money podcast or any other aspect of the Lawyers, Guns & Money project please visit us at www.patreon.com/lawyersgunsandmoney or donate at the PayPal link on the website thank you