

## KEYNOTE ADDRESS

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The week of June 24, 2013, was an extraordinary one in the United State Supreme Court. On Monday, June 24, the Supreme Court decided *Fisher v. University of Texas at Austin*.<sup>1</sup> The Supreme Court significantly narrowed the ability of colleges and universities to engage in affirmative action. The Supreme Court in a 7–1 decision said it would not question whether colleges and universities had a compelling interest in diversity. The Court said it would not revisit, at least in that case, *Grutter v. Bollinger*<sup>2</sup> and *Regents of the University of California v. Bakke*.<sup>3</sup> But the Court said that if a college or university was going to use race as a factor in admissions, it would have to prove that no race neutral alternative could yield diversity. This is an important obstacle to the ability of colleges and universities, likely in the end public and private, to engage in affirmative action. It's too soon to know how serious an obstacle it will be, how hard the Court will make it for college/universities to be able to prove that no race neutral alternatives will work.

The next day, Tuesday, June 25, the Supreme Court decided *Shelby County, Alabama v. Holder*.<sup>4</sup> In that case, the Supreme Court struck down key provisions of the Voting Rights Act of 1965.<sup>5</sup> In a 5–4 decision, Chief Justice Roberts wrote the opinion of the Court. Justice Ginsburg wrote for the dissenters. This was the first time since the nineteenth century that the Supreme Court held unconstitutional a federal civil rights law. This was the first time since the nineteenth century that a law that was expanding rights for African-Americans had been invalidated by the Supreme Court. Chief Justice Roberts writing for the Court said that since only some

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1. 133 S. Ct. 2411 (2013).
2. 539 U.S. 306 (2003).
3. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).
4. 133 S. Ct. 2612 (2013).
5. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301-10314, 10501-10508, 10701-10702 (2012)).

jurisdictions need to get preclearance for the change in their election systems, this violated a principle of equal state sovereignty.

The next day, Wednesday, June 26, the Supreme Court handed down its decision in *United States v. Windsor*.<sup>6</sup> The Supreme Court, in a 5–4 decision, declared unconstitutional § 3 of the federal Defense of Marriage Act,<sup>7</sup> a provision of federal law that said for the purpose of federal law, marriage had to be between a man and a woman.

There were striking differences in the deference to the political process given by the conservative and the liberal justices in these cases. On Monday, in *Fisher v. University of Texas at Austin*, seven of the Justices, all but Justice Ginsburg who dissented and Justice Kagan who was recused, said no deference is to be given to the political process in deciding whether or not there is a race neutral alternative available to the university. On Tuesday in *Shelby County*, the four dissenting Justices said that deference should be given to Congress with regard to its choices in the Voting Rights Act. The five conservative Justices in the majority gave no deference to Congress. On Wednesday, the four conservative dissenting Justices said deference should be given to Congress in the Defense of Marriage Act. The five liberal Justices in the majority didn't want to give deference.

What's interesting is the four conservatives who were dissenting in *Windsor* were part of the majority in *Shelby County*. The four liberals who were part of the majority in *Windsor* were the dissenters in *Shelby County*. Only Justice Kennedy among those nine Justices was consistent in giving deference to Congress in neither instance. So it's worth thinking about why did civil rights fail on Monday, so badly on Tuesday, and succeed so much on Wednesday. It was the same nine Justices, same week in June of 2013.

Yet, I think this causes us to ask more generally: why do some civil rights arguments succeed and others fail? Or even more broadly: why do some civil rights movements succeed, while others fail? I think those are the questions that I'd like to address, and I know they're very much the focus of this symposium, as it's going to address it in many different contexts. Let me make three points in terms of my thinking in answer to the three questions I have just posed.

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6. 133 S. Ct. 2675 (2013).

7. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C and 1 U.S.C. § 7 (2012)).

First, involvement of the courts is necessary for the success of a civil rights movement, but it is not sufficient. Now, there are those that argue that the courts are not only unnecessary, but they're ineffective. Gerald Rosenberg's famous book, *Hollow Hope*,<sup>8</sup> has argued that the courts made little constructive difference in regards to civil rights in any area. I think that Professor Rosenberg is profoundly wrong. I think he confuses a sufficient condition with a necessary condition. He rightly shows that court action is not sufficient to bring about a change in civil rights, but that is not the same as saying it is not necessary. It is not the same as saying the court action doesn't make a difference. I also think he confuses what the courts *did* with what the courts could have done. What the courts did was often inadequate, but that doesn't show that the Court is inherently incapable of doing more.

I want to make this less abstract and look at the different civil rights movements and look at the difference the courts made. And I think this supports my conclusion that judicial action has been necessary, though not sufficient.

I start with race. I think that race has been the place where the civil rights advocacy simultaneously has been most successful and also most unsuccessful. I remember once, many years ago, hearing Leon Higginbotham, a judge in the United States Court of Appeals for the Third Circuit, say in a speech that, if you don't think we have made progress in regard to race, you should have seen what I saw growing up. There can be no doubt that our society has made progress with regard to race, but there can also be no doubt the tremendous inequalities exist in our society precisely on the basis of race. So in terms of why the progress happened, I think the easiest thing to point to is *Brown v. Board of Education*.<sup>9</sup>

*Brown v. Board of Education* ended fifty-eight years of the Supreme Court saying that separate but equal is constitutional. It didn't end separate but equal. It didn't end by itself the apartheid mandated by law. But it certainly made an enormous difference in the Court saying no longer would it tolerate, at least in the education, separate but equal. The question that I ask everyone to think about is how long would it have taken in the political process to come to the same conclusion? How long before state legislatures, in states like South Carolina, which was one of the states involved in the *Brown* litigation, before it would have come to that conclusion? How long

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8. See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE* (2008).

9. 347 U.S. 483 (1954).

before the elected state judges in South Carolina would have come to the same conclusion? In fact, how long would it have been before Congress came to that conclusion? Congress didn't adopt its first major civil rights act since Reconstruction until 1964.<sup>10</sup> And that took a number of different things coming together: having a President who was a southerner; having a President who appealed to the nation about the collective guilt over the assassination of John F. Kennedy and saying the tribute to the slain was the civil rights law; having a President who had been a majority leader of the Senate and was able to persuade the minority leader, Edward Dirksen, not to filibuster. Would that even have happened in 1964 if *Brown* hadn't preceded it by a decade?

Given the seniority system that existed in Congress at that time and the way in which southerners dominated committees and their ability to bottle up legislation, I think it is easy to say that this landmark law would not have been adopted if it had not been preceded by a decade of Supreme Court rulings ending segregation. So this is an example to me of how judicial action was necessary and made huge difference, but it certainly wasn't sufficient with regard to dealing with the problem, even in the area of public education.

A decade after *Brown* in 1964, not one black child was attending school with a white child in Alabama, Mississippi, or South Carolina. Even in North Carolina, which always prided itself on being a more progressive southern state, in 1964, only one-tenth of 1% of black children were attending school with white children. This to me shows the inadequacy of the Court acting by itself. It began to change after 1964 when Congress passed the Civil Rights Act of 1964.<sup>11</sup> Title VI of the Civil Rights Act of 1964 provides recipients of federal funds cannot discriminate on the basis of race.<sup>12</sup> Then the Department of Health, Education, and Welfare said that, as a policy position, any school that was segregated on the basis of race could no longer receive federal funds. That then was the sword that would be used to enforce *Brown v. Board of Education*, and from 1964 to 1988 by every measure, without exception, the number of black children attending schools that were 90% black, the number of white children attending schools that were 90% white, went down.

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10. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C. (2012)).

11. *Id.*

12. *Id.* § 601 (codified at 42 U.S.C. § 2000d).

The effects of *Brown* were realized once the legislature became involved.

This is a very important example of how legislative action was necessary, but so was judicial action necessary.

Another example that shows that court action is necessary, but it is not sufficient, is the movement for gay and lesbian rights. In *Obergefell v. Hodges*, on Friday, June 26, 2015, the Court declared unconstitutional state laws prohibiting same sex marriage.<sup>13</sup> That is an enormous triumph for civil rights. It is a result of an incredible amount of hard work by advocates over a long period of time. I believe with certainty that it wouldn't have happened without the Court's involvement. The initial court involvement began with the Hawaii Supreme Court in *Baehr v. Lewin*<sup>14</sup> saying that laws that prohibit marriage equality are a form of sex discrimination. The only reason that a man can't marry a man is because of his sex; the only reason that a woman can't marry a woman is because of her sex. The Hawaii Supreme Court didn't declare the law unconstitutional, but remanded it for the application of strict scrutiny under the Hawaii constitution. The Hawaii voters then amended the constitution to prohibit same-sex marriage, but *Baehr v. Lewin* was a crucial first step in a court saying that laws that prohibit marriage equality are a form of discrimination.

The Massachusetts Supreme Judicial Court's decision in *Goodridge*<sup>15</sup> in 2003 was the first to say that a state law that prohibited marriage equality violated the state constitution. Without *Goodridge*, without the cases that followed it, I don't think we would have had the Supreme Court saying that state laws that prohibit marriage equality are unconstitutional.

On the other hand, we can look at the areas where there is no prohibition of discrimination based on sexual orientation. There is no federal law that prohibits employment discrimination on the basis of sexual orientation. The federal statute, the so-called ENDA statute,<sup>16</sup> has never been adopted. Courts on their own aren't able to stop private discrimination on the basis of sexual orientation. Again, this shows that court action was necessary, but that court action also is often insufficient by itself.

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13. 135 S. Ct. 2584 (2015).

14. 852 P.2d 44 (Haw. 1993).

15. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

16. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong.

One other example that shows court action is necessary, but court action isn't sufficient concerns economic justice. One of the places where our country has failed miserably is recognizing a constitutional right to economic justice, a constitutional right to food, to shelter, to medical care. So many countries throughout the world in their constitution have a right to minimum entitlements, but not the United States Constitution. It probably seems almost unthinkable to us today that such a right might be found in the Constitution. I think I could develop the argument that if the Warren Court had continued another several years, such a right would have been found in the Constitution, but certainly the Court that succeeded it was not inclined to find such a right.

No right exists in our society to minimum entitlements; there is no constitutional right to economic justice. There's not really a statutory right to economic justice. Over thirty years ago, President Ronald Reagan said he wanted to cut back social programs to just leave a safety net and since then, what was ever left of the safety net has more holes within it. I don't think that we will ever have a right to economic justice, a right to minimum entitlements, without court action. This to me is an example of where court action is necessary, even though I'm not suggesting that it would ever be sufficient by itself.

If you accept my conclusion that court action is necessary, but unlikely to be sufficient, it's worth thinking about why: Why do we need the courts to be so involved? Some of my answers are obvious; some may be less so. I think one is the inability of the political process to protect minorities of all sorts. The political process is inherently majoritarian. The political process can protect minorities who are successful in building coalitions with others. Here I think the famous footnote 4 from *Carolene Products*<sup>17</sup> got it right, where the Court spoke of the need for judicial action for discrete and insular minorities. When we think of racial minorities, when we think of sexual orientation minorities, when we think of those who are poor, they are truly discrete and insular minorities. They are groups that are unlikely to succeed by themselves in the political process and have been historically unsuccessful in building coalitions.

There are other ways, too, in which courts can be very important. I think the fact-finding by courts can be enormously important. When courts do fact-finding, there is the appearance of

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17. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

objectivity that doesn't exist in the same way when it's the legislature doing fact-finding. I'm not making the strong claim that judicial fact-finding is objective. I'm not sure what it means to speak of objective fact-finding. But I am saying that there is something very persuasive about a court's expressly finding facts that's different than a legislature finding facts. Again, let me go back to my examples.

In *Brown v. Board of Education*,<sup>18</sup> Chief Justice Warren's opinion held that separate can never be equal, and he relied on social science studies that showed that segregated schools harm African-American children. Many have questioned whether it was desirable for the Court to have relied on those social science studies, but I think there is a reason that the Court did so. It offered the notion of objectivity, of fact, to underlie the decision.

My example with regard to gay and lesbian rights is federal district court Judge Vaughn Walker's opinion when there was a challenge to California's Proposition 8.<sup>19</sup> The California Supreme Court had ruled in May of 2008 that there's a right to marriage equality for gays and lesbians under the California constitution. In November of 2008, California voters passed Proposition 8 that amended the California constitution to say that in California, marriage had to be between a man and a woman. Two same-sex couples brought a challenge to this in federal district court in California. Federal district Judge Vaughn Walker held a trial. He let the supporters of Prop 8 present whatever evidence they wanted to show that it was justified. After all of the evidence was presented, he made detailed findings of fact. He found that there was no evidence whatsoever that children in same-sex couples do any differently by any measure than children with parents who are of the opposite sex. He made fact-finding in terms of other aspects of Prop 8, showing that no harmful effect. Now, Justice Alito in a footnote criticized this fact finding,<sup>20</sup> but if you read the district court's decision carefully, it was exactly what a judge should do: hearing the evidence, finding the facts. And I think those facts then become very persuasive, not just in litigation, but in society.

The court also plays an important function because the court can play the role, I'm going to need a better phrase, of a moral prophet. The court has the opportunity, especially a federal court, to

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18. 347 U.S. 483 (1954).

19. Perry v. Schwarzenegger, 264 F.R.D. 576 (N.D. Cal. 2009).

20. United States v. Windsor, 133 S. Ct. 2675, 2718 n.7 (2013).

articulate the best self for society. The court can speak to society and say that certain laws are inconsistent with what our Constitution is supposed to be about. The laws are inconsistent with who we want to see ourselves as society. I think of Justice Kennedy's opinion in *Lawrence v. Texas*,<sup>21</sup> where he spoke powerfully that if the right to privacy means anything, it's what consenting adults do in their own bedroom. The laws that prohibit consensual, adult same-sex sexual activity have a stigmatizing effect that is very harmful. I think that the *Lawrence* case too was an important step towards greater equality for gays and lesbians in society. It's the ability of the court to articulate that vision, what I called this moral prophecy, that I think is something that you're unlikely to get from a legislature or from an executive.

This then brings me to the second part of my remarks this afternoon, that the courts have generally failed over the course of American history in protecting civil rights. I believe that one of the preeminent roles of the court, one of the most important things that courts do, is to protect minorities. The majority can protect itself through the political process. It's the minority that needs the Constitution. It's the minority that needs the courts. I think the Framers of the Constitution were deeply aware of this. For them, the minorities they were most concerned about were the political minorities and religious minorities. They obviously were not concerned with racial minorities. The Constitution that they wrote institutionalized slavery. But they still saw an important role for the Constitution with regard to minorities, even if today we would articulate who needs protection differently than what they would have done. Yet over the course of American history, when you look at how the Supreme Court has done, its record has generally been dismal with regard to protecting minorities.

This is the thesis of my book, *The Case Against the Supreme Court*: The Supreme Court has often failed through American history, often at the most important times, often in the most important tasks.<sup>22</sup> I intentionally in the first chapter of the book focus on the Supreme Court and race. Long ago Alexis de Toqueville in "Democracy in America" said that race was the tragic flaw upon which the American Constitution was based.<sup>23</sup> If we're going to

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21. 539 U.S. 558 (2003).

22. ERWIN CHERMERINSKY, *THE CASE AGAINST THE SUPREME COURT* (2014).

23. ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2010).



evaluate the Supreme Court and especially evaluate the Supreme Court with regard to civil rights, we have to focus on how it has done with regard to race.

And everyone who is attending the conference knows this history; I hardly need to recite it. From 1787 to 1865, a period of seventy-eight years, the Supreme Court aggressively protected the institution of slavery. Every case that came up during that time protected the rights of slaveowners and rejected any claimed rights of slaves. One only needs to think about *Prigg v. Pennsylvania*<sup>24</sup> or *Dred Scott v. Sandford*<sup>25</sup> as notorious examples of this. From 1896 to 1954, a period of fifty-eight years, the Court articulated that separate but equal was constitutional and refused to deviate from it. Now, I always worry when I talk about this history with my students, their reaction was, “Well, that’s then, this is now.” But think of the case I mentioned in my introduction, *Shelby County, Alabama v. Holder*, from June 25, 2013, where the Court declared unconstitutional key provisions of the Voting Rights Act.<sup>26</sup> This past October, a federal district court judge in Texas found that the effect of the Supreme Court decision was a Texas law that was going to go in effect that would keep 600,000 people, almost all African-Americans and Latinos, from voting in the November 2014 elections.<sup>27</sup>

So, when we talk about the Supreme Court and race, there’s things to applaud: *Brown v. Board of Education* and the cases that followed from it are certainly to be appreciated. There are other Supreme Court cases that have done important advances with regard to race. But overall, I think we have to agree that the Supreme Court has had a poor record with regard to racial equality.

Let me talk about gender equality and the Supreme Court’s record there. Not long after the passage of the Fourteenth Amendment, a lawsuit was brought in Missouri challenging the Missouri law that provided that only men were able to vote.<sup>28</sup> A lawyer brought the lawsuit on behalf of his wife, arguing that it denied equal protection to keep women from voting. The United States Supreme Court in 1874 in *Minor v. Happersett*, upheld the Missouri law and said that the Constitution was not violated by keeping women from having the right to vote.<sup>29</sup> In 1872, in *Bradwell*

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24. 41 U.S. 539 (1842).

25. 60 U.S. 393 (1856).

26. 133 S. Ct. 2612 (2013).

27. *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014).

28. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).

29. *Id.*

*v. Illinois*, the Supreme Court upheld an Illinois law that prohibited women from being lawyers.<sup>30</sup> In fact, it wasn't until 1971 that the Supreme Court for the first time found that sex discrimination violated equal protection.<sup>31</sup> That's 103 years after the adoption of the Fourteenth Amendment Equal Protection Clause that the Supreme Court for the first time found that sex discrimination was unconstitutional.

And to pick one other example where the Supreme Court has very much failed: schools. I mentioned the statistics with regard to *Brown v. Board of Education*: how a decade after *Brown* there was little in the way of desegregation. Gary Orfield, who is a professor at UCLA, has found that since 1988, by every measure, American public schools are ever more separate and unequal. The Supreme Court deserves a great deal of the blame for this. In 1973, in *San Antonio Independent School District v. Rodriguez*, the Supreme Court said that disparities in funding of schools does not violate equal protection.<sup>32</sup> In fact in *Rodriguez*, the Supreme Court said that poverty is not a suspect classification. Discrimination against the poor doesn't get any heightened scrutiny. The Court said that education is not a fundamental right. I talked about the failure to find rights for the poor under the Constitution. *Rodriguez*, now over forty years ago, is an enormous obstacle to that. *Rodriguez* said that discrimination against the poor doesn't violate the Constitution. *Rodriguez* though went even further in saying that education is not a fundamental right. That's a conclusion that the Supreme Court subsequently reaffirmed.

A year later in *Milliken v. Bradley*,<sup>33</sup> a case coming out of Detroit, the Supreme Court said there generally could not be interdistrict remedies for segregation, that white students couldn't be taken from suburban schools and moved into intercity African-American schools, that African-American students couldn't be taken and moved into white schools. The result is that we now have separate and unequal schools. Let me give you the statistics from just a year ago, the most recent that are available: In Los Angeles, 8.8% of the students in Los Angeles public schools are white. In New York, 14.2% are white. In Philadelphia, 13.2% are white. In Boston, 13.7% are white. In Dallas, 5% are white. In Detroit, 2.4% are white.

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30. 83 U.S. (16 Wall.) 130 (1872).

31. *Reed v. Reed*, 404 U.S. 71 (1971).

32. 411 U.S. 1 (1973).

33. 433 U.S. 267 (1977).

In Baltimore, 7.7% are white. In other words, all of these school systems are overwhelming comprised of African-American and Latino students. No movement within the city is going to achieve desegregation in light of that. There are going to have to be interdistrict remedies. But the problem is not only that the schools are segregated, but they're terribly unequal. Again, I can give statistics.

A couple of decades ago, Harvard professor Christopher Jenks estimated that 20% less was spent on the average black child's elementary and secondary schooling compared to the average white child's elementary and secondary schooling. In terms of statistics, if you look in the Chicago area where I grew up, in the Chicago public schools, \$8,482 was spent per pupil, but in the Highland Park/Deerfield schools north of the city, \$17,291 was spent per pupil. If you look at Philadelphia, \$9,299 was spent per pupil, compared to lower Marion schools, a suburb, \$17,261. So because of the Supreme Court's decisions in *Rodriguez* and *Milliken*, we have separate and unequal schools. This is something that the political process will never solve. No state legislature is going to shift students from the suburbs to the cities; no state legislature on its own is going to equalize funding in the schools. So all of this is why I think that the Supreme Court, over the course of American history, has had a poor record with regard to civil rights. I'm not saying that the Supreme Court has always failed with regard to civil rights. I'm not saying that every decision of the Supreme Court has been a bad one. But I am saying that if you look over the course of American history, the Supreme Court's record is a disappointing one.

This then leads me to the third and final part of my remarks. If you've put together what I've said so far, that Court action is necessary but not sufficient, that the courts generally do poorly, the last thing I want to talk about is what accounts for when civil rights movements succeed and what accounts when civil rights movements fail. Again, I know this is going to be the subject for lengthy discussion at the conference. But let me offer some tentative thoughts as to what explains when civil rights movements succeed and when they fail.

One thing I've already touched on: When a civil rights movement can get initial successes in the courts, it's much more likely to succeed in the long term. When there are not successes to be had in the court, it's much less likely to succeed in the long term. I believe that civil rights for African-American, and civil rights for gays and lesbians, happened because of the initial court successes.

When there hasn't been the ability to get the initial court successes, then I believe it is much less likely that civil rights movements can succeed.

Second, I think that a sustained effort is crucial in order to have civil rights successes. Changing any institution in society is enormously difficult. When we're talking about civil rights, it's almost about changing every institution in society. That requires a sustained effort. I think here how the NAACP through its lawyers in the late 1940s planned a sustained effort to challenge the Jim Crow laws that segregated so much of American life. I think of the suffrage movement and how it planned a careful strategy to ultimately amend the Constitution and lead to the Nineteenth Amendment. I think of the movement for gay and lesbian rights, especially gay marriage equality. All of these successes were the result of sustained efforts over decades. I think of the successes with regard to the disability rights movement that culminated in the American with Disabilities Act. It, too, was a sustained effort over a long period of time.

But then I think of the civil rights movements that haven't succeeded. Here I point to the movement for economic justice that I've already talked about. The Occupy Movement very much was part of the news for a short period of time, but it then faded away. A movement for economic justice that is successful has to take what the Occupy Movement began and continue it over a very long period of time. Absent a sustained effort, a civil rights movement can't succeed.

Third, a civil rights movement to succeed must be able to have a strategy to win support from the larger society. The minority that has traditionally been discriminated against and disadvantaged has to find a way along with its supporters to appeal to the larger majority. This is always so. Now, many different kinds of appeals may work. It may be an appeal based on fairness and tolerance. It may be an appeal based on sympathy. To give examples of this, think about the civil rights movement. The civil rights movement in the 1960s needed to win support from the larger white society. If you've seen the movie *Selma*, which I thought was quite magnificent, Dr. Martin Luther King, Jr., expressly articulated this notion that in order to succeed, there had to be a coalition built with whites, and there had to be a way of getting sympathy with whites. Prior to the march in Selma, there were marches in Albany, Georgia, but the sheriff there did nothing to stop the protesters, and Dr. King, as depicted in the movie, expressed regret. They wanted to go to a place where there would be a resistance from a racist sheriff. That was the way of

winning sympathy. In fact, it's said that President John F. Kennedy was lukewarm with regard to his feeling about civil rights until he saw the civil rights demonstrators being beaten, being treated with firehoses, even being killed. Now that's of course an enormously costly way of building support and sympathy, appealing to fairness and tolerance, but it worked.

I think that the gay rights movement succeeded in part through being able to appeal to fairness and tolerance, to appeal to the shared experience. Once it became known that there were large numbers of gay and lesbian individuals in our society, it became much easier to build sympathy. This may sound facetious, but I think the TV show *Will & Grace* and the movie *The Kids Will be Alright* were crucial in building sympathy for marriage equality, for civil rights for gays and lesbians. Once it's broken down that it's no longer "us" and "them," it's all part of the "us," it becomes much harder to oppose civil rights. Once the senator from Ohio realized that he had a child who was gay, it was much harder for him to oppose marriage equality.

I think more, though, is necessary for a civil rights movement to build support than just appeals to fairness and tolerance or even just appeals to sympathy. I think it has to be conveyed to society that providing the civil rights protection will not be a threat to the larger society. The larger society must be persuaded that they're not going to be endangered by expanding the civil rights of the minority. I think one of the reasons why the efforts to amend the Constitution with the equal rights amendment failed was that there were, at least in enough states, people that believed that passing the equal rights amendment would threaten them. Now, it's hard for us to imagine why that was, but the appeal was made that privacy would be lost if the equal rights amendment was passed, and that was enough to defeat it in enough states to keep it from being adopted.

I think one reason why we have never succeeded in adequately protecting the rights of criminal defendants, especially in regard to the right to counsel, is because they're perceived as a threat. Also, I think in order to have sympathy, it has to be a group where we don't blame the individuals whose civil rights are violated. Criminal defendants are blamed for their own plight of being in the criminal justice system. I think unfortunately in our society, the poor are often blamed for being poor. It makes it very hard then to build the coalition to succeed.

Also, I think for a civil rights movement to succeed, it has to be perceived as having relatively low cost. The greater the financial cost of the civil rights movement, the harder it is to get success for it. I

think one reason that economic justice is so difficult as a civil rights issue is the perceived large cost to society.

Let me just mention then a fourth and final prerequisite to success for a civil rights movement. If it can operate simultaneously in multiple jurisdictions, it is much more likely to succeed. If a civil rights movement can operate at the state and at the federal level and in multiple states at the same time, it's more likely to be able to go forward. Again, here I can point to the movement for marriage equality. I think the lawyers who designed the litigation strategy for marriage equality were brilliant. They knew that if they went to federal court or if they even went to state court with a federal constitutional issue, it would go to the Supreme Court, and the Supreme Court at that time was unlikely to find a right to marriage equality. So they went state by state under state constitutions. They won in states courts in places like Massachusetts, Iowa, California. They lost in the state courts in New York. They won partial victories in some other states, but the state-by-state effort built support in that way. Even with regard to *Brown v. Board of Education*, the NAACP simultaneously chose to litigate in many different states. The case that came to the Court, *Brown v. Board of Education*, involved cases that had been brought in Kansas, in South Carolina, in Delaware, and in the District of Columbia. So being able to act in multiple jurisdictions has a benefit in building momentum in civil rights. There's an obvious cost: it's much more expensive to litigate in many states than in one place; it's much more expensive to have to operate in many state legislatures than just in Congress. But it also leaves the opportunity for building support.

So these are my initial thoughts in answer to the question that I was put. It's interesting you're holding this conference in 2015. Last year, 2014, was the sixtieth anniversary of the Supreme Court's decision in *Brown v. Board of Education*. It was the fiftieth anniversary of the 1964 Civil Rights Act. This conference, this year, seems such an important occasion for focusing on civil rights and how we can do so much better than we have done before in American history.