Money, Politics & the Constitution – Lani Guinier Closing Remarks Transcript

Closing Remarks: Lani Guinier (Harvard Law School)

Lani Guinier:

I don't call what I'm about to say closing remarks. I would like to think of them as opening remarks. I don't mean opening another day of conversation, I mean opening a different kind of conversation that includes some of the people we've been talking about, who have not been present in the room.

We spent a lot of time today talking about the role of courts, and it seems many of us are quite cynical about the role that this particular Court could play. But, an equal number of people are cynical that the courts can ever resolve these questions because the issue of what democracy means is so complex that it cannot be reduced to a judicially manageable rule.

Some people disagree: Mark Alexander just talked about the one-person, one-vote cases and the ability of Justice Brennan and Justice Warren to come up with a judicially manageable standard in that context. I take some issue with that. One-person, one-vote is certainly judicially manageable, but what has it gotten us? We now have districts that are essentially the same size, but that doesn't mean the districts are democratic and fairly drawn. On the other hand, the one-person, one-vote rule does reflect the same kind of debate we have witnessed today, illustrated by the debate between Justice Brennan, Justice Frankfurter, and, of course, Justice Warren. Justice Brennan was confident in *Baker v. Carr* that the Court could easily enter this area because they had the experience of all of the race cases. But he talks about the 14th amendment being the basis for consideration, yet the race cases that he cites are cases like the *Gomillion v. Lightfoot* which were decided under the 15th Amendment. So, there is a little bit of wackiness in the Supreme Court's decision to regulate democracy, not just in terms of campaign finance.

I want to suggest that it may be that we don't have all of the right people in the room, and that this issue is not going to be resolved by the courts. The courts alone, even under a different Supreme Court, may not be competent to enter the political thicket and coherently lead us in a particular direction where the people will follow.

This is not to say that the courts are irrelevant. After all, Chief Justice Warren said he thought that *Reynolds v. Simms* was the most important case decided during his tenure, suggesting that it

was more important than *Brown v. Board of Education*. He felt that it was the most important because it would level the playing field and create the kind of democratic space that a number of you talked about today. And yet, it was a case that, as I suggested earlier, has gotten us to the point where we have equally populated gerrymanders.

Yet, the one-person, one-vote rule, which came out of the Court, was a powerful symbol that was heard by the civil rights movement. If you ever look at *Eyes on the Prize*, the documentary about the civil rights movement, in particular the section on the bridge to freedom, you will see people marching in protest in Selma about the denial of the right to vote carrying suitcases or carrying briefcases in which the slogan "One Man One Vote" is prominently displayed. So clearly the Court has a role to play.

Even if its role is not based on doctrinal tranquility, the Court can provide symbolic legitimacy for activists. I think it is the activists, from whom we have not heard today, who are missing from this conversation, and who really need to be here for a number of reasons.

First of all, Vicki Jackson talked about amendaphobia; yet she suggested that she was leaning towards a Constitutional amendment. We also have seen President Obama during his speech to the joint session of Congress, lecturing, or some would say hectoring, the Supreme Court about its decision in *Citizens United*. So, we have an Executive who is prepared to take some leadership, even when we have a Court who is also taking some leadership. They're moving in opposite directions.

We talked a lot about the role of lawyers in the last panel. In fact Daniel Tokaji said he was glad he's not a litigator anymore because he's not sure what it is he could be doing. I think the role of lawyers is very important, as lawyers help to provide the factual context for this conversation; but it does worry me that most of the people in this room, if not all of the people in this room, are lawyers. While I think lawyers are playing a very important role, I think it's very dangerous when you have only lawyers speaking to other lawyers about what a democracy should look like, because our perspective is very much defined by our tools. I don't think that lawyers alone have the tools to make a great democracy.

So talking about the role of the public, I want to juxtapose the opening remarks between Michael Waldman and Donna Edwards. Michael says that the role or goal of the Brennan Center is to develop or build a jurisprudence between free speech and democracy. He stated that it's a multi-year project to build such a jurisprudence and he wants to begin to build a jurisprudential movement. Then Donna Edwards says she always carries a copy of the Constitution in her handbag, because she wants to be able to use it to criticize all of the politicians who are misstating what's in the Constitution. So she finds the Constitution a very important part of her tools. But she says that there needs to be a body of scholarship that would help her legislative efforts to pass a constitutional amendment, and she already has 23 co-sponsors, so I think having not just litigators, but also academics here is quite important for building that body of scholarship.

But it's still not clear after sitting here all day what the goal of that body of scholarship would be. What do we think the ultimate resolution of this problem should be? Some people think it should

be public financing. Some people think that we just need to have different rules about free speech, that we should analogize the problem of public discourse in the public sphere to the public discourse in the rules of the courtroom. But I would suggest that, in some ways, this goes back to something that Robert Post was talking about: communicative discourse.

We don't necessarily have the answers, but I think we have some really smart people who need to begin, including myself, to speak in plain language, so that ordinary people can understand and can help us formulate ideas about where to go from here. So I don't think it's enough to have lawyers or litigators or legal academics trying to develop the paradigm shift, or what some people suggested was a really potentially powerful political moment.

To explain or situate what I'm suggesting, I am going to rely on a paper that Reva Siegel wrote and also some work that she and Robert Post have done together on democratic constitutionalism. The paper that Reva wrote was about the ERA, and the way in which the ERA's failure to pass was irrelevant to constitutional jurisprudence. Because the Supreme Court is part of a culture in which the ERA was debated by feminists on the one side and Phyllis Schlafly and her cohorts on the other, the debate raised some of these issues to a level of public consciousness, and gave the Supreme Court permission to start adjudicating these issues. And so the title of her paper is "The Case of the De Facto ERA." Even though the ERA was never ratified by the states, it was in some ways ratified by the courts.

This is part of the democratic Constitutionalism project in which she and Robert are involved. There is a dynamic equilibrium of power, a dynamic of equilibrium of communication between the Supreme Court and activists, between the Supreme Court and what's going on in the public sphere. Just thinking of the Supreme Court as the only space that we're trying to influence excludes really important members of this conversation, and that is the public at large.

Now having said that, and having said that we all have competing concepts of what the solution is, I want to end with the concept that Robert whispered into my ear as we came into this meeting today. I attribute it to Robert, but it is also something that my husband Nolan Bowie has been pushing for a long time; so I think Robert has the pole vault to get to this issue.

The FCC should require all licensees to provide free airtime to candidates prior to an election and, I would add, free air time to members of the public who also want to speak and participate or ask questions to the candidates, etc. In some ways this is derived from what a few of the debates looked like during the presidential elections where people were allowed to post videos in which they inhabited their questions; they didn't just ask their question, they inhabited them.

I think that there is nothing that can come out of this conference that is more important than influencing the public discourse about money and politics, about the role of corporations, not just in politics, but in our democratic society more generally, and about the importance of the people themselves, speaking for themselves in this deliberation. So that it's not what we think alone, but it's what we are creating, a kind of deliberative space.

I really love the way in which this workshop room is arranged because throughout the day, I found myself not just looking at the speakers here, but looking at the other people in the audience

so that we were part of a group. We weren't just being managed by whomever was in front of the audience. So I would argue that it would be good to talk to sociologists, not just legal academics, about political opportunity structures. Is this in fact a moment where very dramatic political change might take place?

There are people like Michael Klarman arguing that *Brown v. Board of Education* was not really necessary because of the political opportunity structures at the time. Rather, the stars were aligned and the civil rights movement would have been successful in changing the norms of the South, even without *Brown*. And his argument goes further, that it wasn't really the Supreme Court's decision in *Brown* that changed things, it was really the '64 and '65 Civil Rights Act and the Voting Rights Act. It was only, in other words, when the Executive and the Legislative branch acted to back up the Court that the Court's pronouncements had real power behind them.

Now I think that Michael is being a little too reductionist, and I would give *Brown* a lot more credit than he does. And I would again go back to the idea of democratic constitutionalism, that in *Brown*, you saw a really interesting conversation going on between the lawyers of the NAACP who litigated *Brown*, but once *Brown* was issued, you also had an interesting conversation between the Justices of the Supreme Court and the activists like Martin Luther King Jr.

Indeed, on the day that Rosa Parks was arraigned in December of 1955, Dr. King took the podium at the Holt Street Baptist Church and gave his main speech to the citizens of Montgomery. There were so many people there that they had to have loudspeakers out in the parking lot outside the church, and he talked about the fact that if we are wrong, then the Supreme Court of the United States is wrong. If we are wrong, then God almighty is wrong. So he is, in some ways, invoking the authority of the Supreme Court and the religious authority of Christianity and fusing them to authorize the kind of risk-taking that the people in Montgomery ultimately took on. So you had 50,000 people in a single city boycotting the buses for over a year.

So, in thinking about the next step, I would suggest that we not focus just on what the lawyers think or what the judges think or even what the law professors think, but that we begin to create a space to have a much larger conversation in which we find out what the people themselves think. Thank you very much for allowing me to participate in this conference, I really learned a lot.