IV

REMARKS AT TUESDAY MORNING SESSION

By The Honorable John Paul Stevens
Associate Justice (retired) of the United States Supreme Court

By Carol F. Lee, Esquire
Justice Stevens's former clerk and ALI Council member

The Tuesday morning session
of The American Law Institute convened in the Ritz-Carlton Ballroom,
Washington, DC, on May 17, 2016.
President Roberta Cooper Ramo presided.

President Ramo: Ladies and gentlemen, it is my honor to introduce to this body the magnificent judge and Justice of the Supreme Court, John Paul Stevens, and Carol Lee. Please welcome them to the podium. (*Applause*)

While Justice Stevens and Carol get settled, let me formally introduce them. Justice Stevens, as you know, is one of the great icons of the American legal system. What you may not know is that he won a Bronze Star in World War II for his code-breaking efforts, which were enormously important.

What you also may not know is that he went to the University of Chicago as an undergraduate, but for some reason he went to Northwestern Law School, but he has managed to have an okay career anyway. (*Laughter*)

What I want to say about Justice Stevens, in part, are two things, because his career is so well known to this body and really to the world. When he was appointed, he was confirmed 98-0 by the United States Senate. After some point in looking at his career, President Ford praised him with these words, which I think, especially in today's atmosphere, are especially meaningful to me.

In 2005, he said, "He is serving his nation well, with dignity, intellect and without partisan political concerns." And I think that fact and the deep perception of the American people of that fact, Justice Stevens, were enormously important to them then and now.

Let me tell you one personal thing, though, about Justice Stevens that I think reflects, in part, the impact that he has had on our world. A number of years ago, Justice Stevens came to Albuquerque to play a little duplicate bridge in the summer, and he always said no one there ever really knew who he was. They just more were there to criticize his bidding.

And one of my partners then, who had been his clerk, Greg Huffaker, very nicely invited me and Barry to dinner with Justice Stevens, and we had a chat. And at the end of the chat, Justice Stevens said, "Greg, aren't you going to invite me to your firm so I can meet

your partners?" Which, of course, we had all been afraid to impose on you to do.

We invited him and he said, "Of course." And the next day, Justice Stevens made our lives so rich and gave those people clerking in Albuquerque, New Mexico, the ability to come back to their law schools and say, "So, as Justice Stevens said to me at the firm." (*Laughter*)

But what was really impressive to me was this. When Justice Stevens sat down with our clerks and, of course, everybody in our firm in a crowded room, after a few minutes, he said, "I want to ask you questions." Because he wanted to make sure he understood some things from the perspectives of lawyers practicing in Albuquerque, New Mexico, and the impact that the Court and the way they were thinking about had on us and our practice.

And so he was our questioner for over an hour, and the fact that he wanted to know these things and listened was deeply meaningful to all of us and, I think, reflective very much of his character and the reason he is, in so many ways, a great intellect.

Our Council member Carol Lee was Justice Stevens's clerk. She graduated from Yale not once, but twice with honors, was a Marshall Scholar at Oxford, and, as those in the body who have been here the last few years know, when she was elected to the Council, I was very appreciative, but I now believe that she is one of our deeply beloved friend Dan Meltzer's greatest gifts to The American Law Institute. And I think it wasn't Yale that trained her so well; I think it was Justice Stevens.

So Carol and Justice Stevens will have a conversation about the law, and I appreciate both of them very much. Thank you.

Justice John Paul Stevens (Ret.): Thank you. (*Applause*)

Ms. Carol F. Lee (NY): Justice Stevens, it's wonderful to have you here today to talk with me before the ALI. To begin with, would you like to say a few words about Justice Scalia, who was your col-

league on the Court for 24 years and who sat next to you on the bench for much of that time?

Justice Stevens: Well, yes. Nino, of course, was a good friend, and all of you know, as well as I do, that he had a wonderful sense of humor and was a wonderful person. But you know, with all the comments about Nino in the last few weeks, I don't think people have given enough attention to his skill as a writer. He really had a beautiful ability to express himself that I think very rarely does one find, either in judges or any other writing.

He was an amazingly articulate person that I think we ought to emulate as often as we can. He had a really very special skill. (*Applause*)

Ms. Lee: Now that Justice Scalia is gone, we seem likely to have a prolonged period of having eight Justices on the Supreme Court, which may last through this Term and much of the next Term. Do you have any thoughts about the effects on the Court of having only eight Justices for a prolonged period of time?

Justice Stevens: Well, of course, it's an unhappy situation. It happens from time to time, even without a prolonged period like this. But it's something the Court adjusts to and will recover from in due course. But the sooner the better would be the answer, because the Court is not operating effectively with only eight people, yes.

Ms. Lee: Merrick Garland is a member of the ALI, and as you know, he's been nominated by the President to the Supreme Court. Do you have any comments on Judge Garland or on his nomination?

Justice Stevens: Well, really nothing beyond what's pretty well known. He's a wonderful person and a wonderful judge, certainly well qualified for the position. And I think it's unfortunate that there has to be a delay in his receiving approval because, on the merits, he certainly is entitled to be approved for the Court as soon as possible.

Ms. Lee: Thank you.

Justice Stevens: Yes. (*Applause*)

Ms. Lee: Now I'd like to begin with legal methods. And to start with, the question of bright-line rules versus balancing tests. This is something that our Institute grapples with frequently as we develop provisions of Restatements or of the Model Penal Code and other documents. You and Justice Scalia took quite different approaches to bright-line rules versus multifactor approaches.

To quote a *Harvard Law Review* article in 1992, "If Justice Scalia leads the charge for rules on the current Court, Justice Stevens is his most consistent, standard-bearing antagonist. Justice Stevens has long favored sliding-scale approaches over categorical rule-bound approaches." [Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 88 (1992).]

Sliding-scale approaches over categorical, rule-bound approaches, do you agree with this generalization?

Justice Stevens: Well, I guess I do, but of course, you're talking about a general subject that has dozens and dozens of particular applications. And it always depends on the particular question that we're talking about to know exactly what school is a better approach to it.

But I'm not exactly opposed to bright-line rules. Sometimes they're very appropriate, but you can't generalize completely from those two categories of approach.

Ms. Lee: So, basically, you say that there is no bright-line rule on your approach to this choice? (*Laughter*)

Justice Stevens: Right.

Ms. Lee: Do you trace any predisposition that you might have back to your legal education or law practice?

Justice Stevens: Well, yes, of course, there's a famous statement that Nat Nathanson, a professor of constitutional law, used to make in law school over and over again, to beware of glittering generalities, and that's something I often think about. You can be more concerned with

how nice the rule sounds without thinking exactly how it applies in case after case.

Ms. Lee: Sometimes balancing tests are criticized for putting everything onto the table and not providing any guidance to the decisionmaker about how much weight to provide to any particular factor, so that there is a lot of discretion in the decisionmaker. How would you respond to that critique?

Justice Stevens: Well, I'm not sure I would. (*Laughter*) Maybe there's some merit to the point. But of course, in any situation, you're always looking at the particulars involved in the problem you're confronting at the time, and how you deal with it is a matter of—determines a particular issue that you're dealing with. So it's a little hard to generalize too broadly.

Ms. Lee: Turning to constitutional interpretation, you have taken the view that it is sometimes proper for the Court to recognize rights that are not expressly mentioned in the text of the Constitution, and you've sometimes written that certain rights are protected by the term "liberty" in either the Due Process Clause of the Fifth Amendment or the Fourteenth Amendment.

In your view, how do you determine what rights rise to the level of being liberty protected by the Constitution?

Justice Stevens: Well, that's a good question. Of course, you have to take each case as it comes along, and the most important one in recent years has been the whole same-sex-marriage question. [See Obergefell v. Hodges, 135 S. Ct. 2584 (2015).] And it does seem to me that the Court correctly approached that issue by, instead of focusing on equal-protection arguments, identifying the right to choose a marital partner as an aspect of liberty, and I think that their relying on that particular approach was eminently wise.

I think it's a much more persuasive opinion than it otherwise would have been, and I would have joined the opinion that Tony wrote. I thought it was an excellent opinion, and I think it was much stronger than if it had used the other rationale.

Ms. Lee: So having taken that position on same-sex marriage, it seems that you don't consider that a right has to be deeply rooted in the history and tradition of the law in order to qualify for constitutional protection.

Justice Stevens: No, it's really interesting because one of the by-products of that decision is putting an end to the notion that everything had to be well recognized at the time of the framing and so forth and so on. Because clearly, that decision rejected the original-intent approach to the constitutional interpretation, because I don't think anyone could claim that the Founders originally intended that kind of a relationship to be constitutionally protected. So it's a very dramatic decision for that reason, and it has really broader application.

Ms. Lee: So if you don't look to or require history or tradition, what is it that you look to? Is it how important the claim is to the lives of individuals?

Justice Stevens: Well, of course, it's a combination of factors, and I don't think I could spell it out in any one sentence any more effectively than Justice Harlan did in one of his concurring opinions, for example. But a variety of factors affect the decision.

Ms. Lee: The dissenters said that they didn't necessarily have any objection to same-sex marriage, but that it wasn't the role of the courts to decide, that it should be left to the democratic process, to the legislatures. How do you address that point?

Justice Stevens: The Court has cases and controversies that have to be decided, and they can't just say, well, we'll let the legislature confront this somewhere along the line. There are real, live controversies that need attention and decision, and they had to bite the bullet and make the decision at the time.

Ms. Lee: So now turning to the interpretation of statutes, which you are often called upon to do as a member of the Court, do you think that judges should approach this task differently from the way they interpret the Constitution? And if so, what are the differences?

Justice Stevens: Well, I don't have a neat category in which to place things, but you decide cases that come before you and you do the best you can with them. And certainly, a lot of your analysis in statutory cases follows patterns that you follow in constitutional adjudication as well.

But I don't think it's a question of putting one category as statutes, another category Constitution. You just try to decide the case as it comes before the Court.

Ms. Lee: How much weight should the Court place on legislative history in determining what the meaning is of a statute?

Justice Stevens: Oh, wow. (*Laughter*)

Well, that's true. Every case is different, of course, but you can learn a lot about a statute by studying the deliberations of Congress about the particular issue, what went before and what came later. I really think it's all part of the process, and it's an important part of the process to study the legislative history.

Ms. Lee: There have been some scholars who have counted the Supreme Court cases that used legislative history and didn't use legislative history, and they say that from the era before Justice Scalia came on the Court, when I clerked for you, and the present day, when you left the Court, the use of legislative history in majority opinions of the Court has noticeably gone down.

Justice Stevens: Oh, yes.

Ms. Lee: Do you think that that had an adverse effect on the quality of the results in interpreting statutes?

Justice Stevens: Well, I think a lot of it went down in the sense that it wasn't included in the opinions. Very often, people looked at the legislative (*laughter*) history, and they will not write about the legislative history when they realize that Justice Scalia is going to (*laughter*) disagree with the approach and so forth. And so, for example, I remember shortly after Sam Alito joined the court, he's a very careful examiner of the legislative history. And Nino tried to persuade him not

to follow that course, and Sam took it, just decided on his own that it was very helpful to him, and he went ahead and put it in the opinions.

And lots of times, it affects the deliberations about what to say in an opinion more than it actually affects the process of deciding the case. And that's true. Legislative history is an important part of the analysis, and I think everybody on the Court, with possibly one exception, agrees with that, but they don't necessarily feature it as much in their opinions as, I assume, they will in the future, because they won't run into a big debate about using it.

It's quite obviously appropriate to use that as a source of reaching the right answer, and it will continue to be used, I'm sure.

Ms. Lee: Now legal academics have sometimes called you a "common-law judge." The common-law approach is something that's close to the heart of this Institute. The founders thought of the role of the ALI as looking at legal issues as if they were aware of the entire body of jurisprudence and figuring out what that body of jurisprudence was, how it should be developed, or what trends, what directions it was going in.

So do you think of yourself as having been a common-law judge?

Justice Stevens: Well, not really, because I was administering statutes and doing everything else that federal judges do. But I certainly don't object to somebody making that reference. It's complimentary, I think, but I'm a little unclear on what it would mean to accept the label or reject it.

Ms. Lee: Well, one point that is related to the idea that you're a common-law judge is that you always placed great emphasis on understanding the facts—

Justice Stevens: Yes.

Ms. Lee: —of a case, the facts in the record. Do you think that those Justices who perhaps place less importance on the facts might have missed important things in the cases?

Justice Stevens: Well, no. Every case is different, and every judge is different. So I think—I still think it's very important to understand the facts as thoroughly as we can. And in fact, I can remember when I was a court-of-appeals judge, when John Hastings was a senior judge at the time, and I first met him and talked about the problem of writing opinions.

And I still remember his saying, "When you write out the statement of facts yourself, if you get the statement of facts accurately and adequately, the rest of the opinion will write itself." And I think that actually is true in many cases. You spend a lot of attention on the facts; it pays off in your later completing the whole opinion.

Ms. Lee: So from time to time, you commented in an opinion you wrote for the Court, whether it was a majority or a dissent, that you were voting to uphold a statute or policy that you didn't personally favor or that you were voting to strike down something that you actually thought was a good idea. Why did you make this point when you did so in your opinions?

Justice Stevens: Well, that's an interesting question, and I thought a little bit about this subject since you mentioned it earlier. But the answer, I think, is that from time to time, it is helpful for judges to make it clear that they are acting as judges, not as policymakers.

And if, occasionally, it's appropriate to say you happen to disagree with a policy judgment that the legislature has made, that illustrates the fact that your job is quite different from the job of the policymaker. And I think saying that, once in a while, in an opinion has a salutary effect and does some good.

Ms. Lee: It seems that there is a fair amount of public misunderstanding of whether the judges are favoring policy when they decide decisions, particularly in controversial areas. One thinks of, for example, the *Kelo* case [Kelo v. City of New London, 545 U.S. 469 (2005)] about eminent domain. The Court was portrayed

in many circles as favoring taking away the houses of poor widows and what—

Justice Stevens: Yes. (*Laughter*)

Ms. Lee: Do you think there is anything that can be done to lessen this kind of public misunderstanding?

Justice Stevens: No. I just think you should continue to write the best opinions you can, and explaining why the law requires the result, I think, is just the answer. The process will explain itself over time.

Ms. Lee: Sometimes critics of the Court say that it's engaging in "legislating from the bench." Do you think that's a meaningful term? Do you think the Court did this, on occasion, when you were on the bench, and if so, do you care to mention any cases in which you think this happened?

Justice Stevens: Well, you know, have you got a couple of hours? (*Laughter*) The most dramatic example, I think, is the whole doctrine of sovereign immunity and the Eleventh Amendment jurisprudence that started out way back in Chisholm v. Georgia [2 U.S. (2 Dall.) 419 (1793)] and so forth. That's a manufactured part of the law that did not have to develop the way it did, and I really think it's quite unfortunate that the whole sovereign-immunity concept became as important as it did over the years.

And I don't think it had to become that important. I think it's really an unfortunate development in the law.

Ms. Lee: Since you retired, Justice, you've published two books, *Five Chiefs* [(2011)] and *Six Amendments* [(2014)], and now I understand that you're in the process of writing your memoirs. Could you tell us a little bit about what that's like?

Justice Stevens: Well, I've always enjoyed writing, I have to confess, and I've enjoyed the work, and I've enjoyed trying to continue in that activity. I'm not as productive as I wish I were, but I do have some fun trying.

Ms. Lee: How have you decided how much time and space to devote to different aspects of your career in the memoir?

Justice Stevens: How did I decide how much?

Ms. Lee: How much, how long you're going to spend on your early life and on practice, and the Seventh Circuit and the Supreme Court.

Justice Stevens: Oh, the early life was really very interesting. It brought back a lot of interesting memories. I've enjoyed it very much, and I assumed—but I'm at the stage now where I'm on the Supreme Court. I've gotten over the prior history, and it's a formidable task. (*Laughter*) An awful lot of stuff to cover, and I don't know exactly how to go about it. I'm confused at the moment about how best to continue working on it.

Ms. Lee: In your book *Six Amendments*, you proposed two amendments that dealt with the political process, the electoral process. One of them was campaign-finance regulation. The other was on political gerrymandering. If you had to choose between these two amendments, which of them do you think is the more important?

Justice Stevens: The gerrymandering, without any question at all. It seems to me that the finance, as a matter, has developed over the years, going back to the *Buckley* case [Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam)]. But the gerrymandering is really something that could be very easily corrected if the Court would confront the fact that it's no harder to identify a political gerrymander than it is a racial gerrymander. You apply the same test. And it would make a huge difference in the operation of government.

The gerrymandering has had an actually adverse impact on the democratic process in electing members of the House of Representatives. There's no doubt about it. It has adversely affected the electoral process over and over again in big areas of the country.

This is something that could be corrected, and the correction of it would make a huge difference in the way the country is governed. I

think it's amazing to me that the problem, as simple as that one, has been not solved more promptly.

Ms. Lee: You made some efforts to persuade the Court during your time as a Justice. What do you think was the sticking point that kept the Court from agreeing that political gerrymandering ought to be addressed?

Justice Stevens: You know, I really don't know because I thought when Lewis Powell followed Karcher v. Daggett [462 U.S. 725 (1983)] and the Indiana case later [Davis v. Bandemer, 478 U.S. 109 (1986)], it really seemed to me that the right answer might follow from that, but it didn't. And I really do not understand what, to me, is a fairly simple problem, why it has been so long being recognized, and I really feel very deeply about that.

Ms. Lee: Now I'm going to ask you a question about oral arguments. This is not the question that you might expect that I'm asking. But it relates to the reduction in the number of cases that the Court is hearing compared to the 1980s. When I clerked for you, there were more than 160 cases decided on the merits, and now it's about 70.

But the question is not what is the right number, but if the Court is now deciding fewer cases and there is room on the argument calendar for more argument time, do you think that the Court should consider giving more argument time for individual cases?

Justice Stevens: Well, actually, they do every now and then.

Ms. Lee: Yes.

Justice Stevens: They do make exceptions to cases and grant extra time, and I think that makes sense in particular cases. But I think it's appropriate to do it on a case-by-case basis, because an hour for a side is plenty in the normal case, it seems to me, and I don't think there's a need for a basic change in procedure.

Ms. Lee: I think I read that when you were a law clerk, there was more time for argument. Do you think it just was more than necessary?

Justice Stevens: I don't remember that, to tell you the truth. (*Laughter*) It seems to me it was about the same as it is now.

Ms. Lee: On opinions and dissents, if you were advising a newly confirmed Justice, would you recommend that it would be a good idea to follow your example and to write their own first drafts of opinions?

Justice Stevens: No, I think everybody has his or her own style and way of doing things, and I wouldn't want to tell a future judge how to go about that particular task. Everyone has his or her own special skills and ways of approaching, and I think that's okay.

Ms. Lee: So how did you develop your own particular style on this?

Justice Stevens: Well, as I've indicated, I like to write, and I followed the example of Wiley Rutledge. He would write out a draft of an opinion on the yellow pad in his own hand from page one, all to the end to get the completed draft done. And Edna Lindgreen would type it up, and it would be just one draft for most of his work. Then we'd make the edits and suggest footnotes and things like that, but it was his own project.

And I really admired the way he put the opinion together. But I think everybody has his own style. Different lawyers have different styles, and you have to respect the individual's approach.

Ms. Lee: So as a law clerk to Justice Rutledge, did you actually ever have any visible impact on the decisions? (*Laughter*)

Justice Stevens: Not so much. (*Laughter*) He pretty well thought things through himself. He talked them out. We would talk about the cases ahead of time, but he had a practice, he would let his law clerks write the first draft on one opinion every year. I wrote the first draft in a case called Mandeville Island Farms v. something [Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948)].

And my first draft, essentially, it was a fairly straightforward case. I thought the question of whether a pricing agreement among purchasers of sugar violated the Sherman Act—I thought it was pretty

clear it did. It took me about five or six pages to explain it, and I gave him the draft. And about a couple of weeks later, the draft came back about 40 pages long, and my draft was sort of stuck in the middle as a paragraph that quoted from me.

And actually, I thought that an older case [U.S. v. E. C. Knight Co., 156 U.S. 1 (1895)] had already been overruled. But he quite correctly thought that it should be overruled. So he wrote a long opinion overruling it.

And oddly enough, time proved him right, because after I got on the Court, that particular issue came up in an opinion that Justice Thomas and I had different points of view on, and Justice Thomas thought the old case was correctly decided. And he would overrule the case that Rutledge wrote that he originally assigned to me. My good friend Clarence thinks that case should be overruled.

Ms. Lee: Well, I recognize the phenomenon because when I clerked for you, I did not write opinions. Occasionally, there was half a sentence, and I would think very proudly that is half a sentence that I helped with that shows up in the U.S. Reports.

Justice Stevens: Yes.

Ms. Lee: Also on opinions and dissents, when you were on the Court, sometimes you dissented from an opinion that was the majority of the Court, but then after that, you accepted it as precedent and you would accept cases that applied it. But there were occasions when you didn't do that, when you kept on dissenting. You didn't say, okay, the Court has decided that, we'll move on. And sovereign immunity is one of them.

How is it that you decided when you would accept when you were defeated and when you would just keep on fighting?

Justice Stevens: Well, that's a good question, and I've thought a little bit about it. I think the answer primarily is that in statutory cases, I would accept the decision of the Court even though I disagreed with it. And that happened on more than one occasion because, of course, Congress is available to amend the statute later on.

So I think the Court has a particular obligation, in the interest of trying to keep the law stable and coherent, to follow statutory precedent and let Congress correct the changes. Whereas, in the constitutional area or the whole sovereign-immunity debate back and forth, it seems to me I did for a while try to follow the early Eleventh Amendment jurisprudence, but I found that you couldn't very well join an opinion that moved the law farther in the wrong direction, so it was a different area. And I did dissent repeatedly in these sovereign-immunity areas and things like that. Yes.

Ms. Lee: So now I'd like to turn to a few substantive legal topics. Federalism. A majority of the Supreme Court has described states as sovereign in a very strong sense. They have constitutional rights against the power of the federal government. They have the right not to have state officials "commandeered" by federal law. They have the right not to be sued in federal courts.

You often have taken issue with that vision of the states. If states are not sovereign in that sense, do you have any vision of what their role is in the U.S. political system?

Justice Stevens: Well, I think the role is—the name you put on it I don't think is critical. It's okay to refer to them as sovereign, but the notion that their status makes their activities in the commercial world, for example, not subject to federal control is quite wrong. It seems to me that the Commerce Clause [U.S. CONST. art. I, § 8, cl. 3] gives Congress the ultimate power when there's a dispute between states in their proprietary—when they're acting as businesses, they should be regulated as businesses.

And I think also in their regulation of the environment and things like that, their role is subject to the paramount control of Congress. I really think that's quite clear.

But I've kind of lost what the question is right now.

Ms. Lee: I think the question is, what do you think is the role of states in the system?

Justice Stevens: Well, they have a role that Article VI makes the federal power supreme, and when there's a conflict between state and federal power, the federal power should prevail. It's really as simple as that.

Ms. Lee: Mm-hmm. And in your sense, that goes back to the intent of what the Constitution was about?

Justice Stevens: Yes.

Ms. Lee: I remember that you quoted at length from Justice Rutledge who had—

Justice Stevens: *A Declaration of Legal Faith* [(1947)], yes.

Ms. Lee: Yes. And you've done that in subsequent cases as well. So—

Justice Stevens: Yes.

Ms. Lee: —that view of the Constitution goes back to—

Justice Stevens: I think it's true, and it's interesting. He, of course, was best known as a civil libertarian, very—he gave importance to the First Amendment and so forth. But he recognized that the Commerce Clause was actually the product of the process that gave rise to the formation of the Constitution itself.

And I think that particular quotation from his book that I used in EEOC v. Wyoming [460 U.S. 226, 244-245 (1983) (Stevens, J., concurring)]—

Ms. Lee: Yes.

Justice Stevens: —was dead right, and it's something that has not been appreciated as clearly as I think it should have been.

Ms. Lee: Now let's talk a little bit about religion. Legal academics, including some perhaps in this room, have pointed out that when you were on the Court, you generally took a position unfavorable to religion, both in Establishment Clause [U.S. CONST. amend. I] cases and in freedom-of-religion cases.

So sometimes you have been described as hostile to religion. Then there are other academics who have sought to defend you from this characterization, including one of your former law clerks. (*Laughter*)

One academic has written that you treat religion "as a distinctive human good" that ought to be protected "from corruption by the state." [Andrew Koppelman, *Justice Stevens, Religious Enthusiast*, 106 NW. U. L. REV. 567, 568 (2012).] And there's another academic, one of your former law clerks, who has described your position as "respectful apprehension." [Eduardo Moisés Peñalver, *Treating Religion as Speech: Justice Stevens's Religion Clause Jurisprudence*, 74 FORDHAM L. REV. 2241, 2241, 2247-2249 (2006).]

In deciding Establishment Clause cases and religious-freedom cases, can you tell us a little bit about your concept of how the Court should deal with these claims of religion?

Justice Stevens: Well, I've thought about that a little bit since you shared that question with me before, and actually, the Establishment Clause was basically designed to protect Christian religions from discrimination from—protection within the Christian community. And it was not intended to protect Judaism or Mohammedanism or other religions.

And yet I wrote the opinion in Wallace v. Jaffree [472 U.S. 38 (1985)], which makes that very simple point that the Framers' actual intent was much more limited than the principle that they adopted. They adopted a principle that's much more protective of religion than was the original intent of the people who drafted the Establishment Clause.

And I think it's kind of interesting that that very simple point is often overlooked. Yes. And I do think that I wasn't hostile to religion either way, but I just—I did identify that example in Wallace v. Jaffree, yes.

Ms. Lee: Sentencing. This is a subject that is of interest and concern to ALI members. We're currently updating the sentencing

provisions in the Model Penal Code [Model Penal Code: Sentencing]. And over the years on the Court, you had the occasion to think about federal law as it dealt with sentencing. I'm particularly interested in the question of whether a criminal punishment was so disproportionate to the crime that it was unconstitutional. That's a subject that you've addressed. Do you think that the intention of the Framers is relevant to the way that the present Court should think about proportionality?

Justice Stevens: Well, on a very basic issue as to whether the Eighth Amendment includes a proportionality component. Of course, Justice Scalia and I disagree on that, and he wrote more than one opinion saying that it was not part of the Eighth Amendment. And I think he was quite wrong. I think scholars generally have rejected his approach.

But I do think it's important to recognize the fact that proportionality is part of the constitutional protection in the Eighth Amendment, and I think cutting that out would be quite wrong.

Ms. Lee: Do you think that your view will continue to prevail?

Justice Stevens: Well, I think the law has pretty well settled on that point, and in Harmelin v. Michigan [501 U.S. 957 (1991)], Tony wrote an opinion that adopted that view.

Ms. Lee: Another sentencing question goes back to the topic we talked about before, bright-line rules versus balancing tests. How would you apply your thoughts about whether there should be bright-line rules or all of the factors in the context of sentencing?

Justice Stevens: Whether there should be?

Ms. Lee: Bright-line rules or more discretion and more—

Justice Stevens: Well, there's got to be discretion in the sentencing process, no doubt about that. And but you also need—you need both. You need both, yes.

Ms. Lee: So how did that apply to your thoughts about the federal sentencing guidelines?

Justice Stevens: Well, I think it was quite right to make them advisory rather than mandatory, and that's a long story of its own. And that's an area in much of which Justice Scalia and I were in agreement on, much of that debate.

Ms. Lee: And you wrote two important decisions of the court in *Apprendi* [v. New Jersey, 530 U.S. 466 (2000)] and *Booker* [United States v. Booker, 543 U.S. 220 (2005)] that dealt with the role of the jury versus the role of the judge. Could you comment on your concept of what the role should be of the jury and why?

Justice Stevens: Well, actually, in *Apprendi* and those cases, I thought it more important that, one, that the standard of proof beyond a reasonable doubt be an important part of the sentencing process, that you couldn't jump from one category to another based on a preponderance-of-the-evidence standard. It was more that, than the jury trial, I thought, of importance.

Ms. Lee: Mm-hmm. Now to the death penalty. Back in the 1960s, the ALI's Model Penal Code included a Section on the death penalty, and some of the provisions in it were taken up by states in their post-*Furman* statutes [Furman v. Georgia, 408 U.S. 238 (1972)].

In 2009, after a memorable debate, the ALI withdrew that Section of the Model Penal Code, and the reason it gave was "the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment." [86 A.L.I. PROC. 217-218 (2009).]

Similarly, your own views on the death penalty have evolved. In 1976, you were part of a plurality with Justices Stewart and Powell in creating a framework for the revival of the death penalty. [Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).] And when I clerked for you in '82 to '83, you were still of the view that the death penalty, properly managed, was constitutional.

And I vividly remember, and my co-clerk Jeff Lehman remembers as well, that you came back from a talk with Justice Brennan, and

he said, "John, some day, you will come to believe that the death penalty is unconstitutional."

A quarter of a century later—it took a quarter of a century. (*Laughter*)

In Baze v. Rees [553 U.S. 35 (2008)], you proved that Justice Brennan was right, and you wrote that the death penalty, as it had come to be administered, was unconstitutional. [See id. at 78-86 (Stevens, J., concurring).] Can you tell us a little bit about how you made that voyage from one view to the other?

Justice Stevens: Well, it takes about 20 years of thinking to be summarized in one or two sentences. But there was a very definite process. We thought, at the time back in '76, that the death penalty could be confined and be administered pursuant to rather rigid procedures.

And over the years, we were disappointed, I was disappointed to find that I felt the Court liberalized the opportunities for imposing the death penalty rather than constraining it. And there are a number of disappointing decisions over the years.

But the thing that actually triggered my more dramatic conclusion in *Baze* was the realization that the death penalty was designed to be a form of retribution for very serious crimes, and the notion, as it's administered now, the death penalty cannot be administered in a way that causes any pain whatsoever on the defendant.

And it's such a complete change from the original purpose of capital punishment to this; put him to sleep on the table, just as if he's going into an operation. It seemed to me that the central purpose of the death penalty no longer exists, because there is no more real retribution involved in the process. And it just seemed to me that the whole idea doesn't really make much sense anymore. Granted that back in ancient history, it could be to treat the defendants the way they had treated their victim and so forth, but you just can't do that anymore.

And the whole thing is, it just seemed to me totally anomalous now, and it really does not fit modern society. It doesn't do any tangible good. The society would be much better off not spending any money fiddling around with that particular form of punishment.

Ms. Lee: Do you think that— (*Applause*) So do you think that in 50 years, there will still be the death penalty in at least some of the states in this country?

Justice Stevens: I'm sorry?

Ms. Lee: Do you think that it will be abolished altogether in, say, 50 years?

Justice Stevens: Yes, it's being done on a state-by-state basis. And I really think there's much less enthusiasm for preserving it than there was 25, 30 years ago. I think it's on its way out.

Ms. Lee: Now equal protection. One of your more famous passages was from Craig v. Boren [429 U.S. 190 (1976)], a case decided in 1976 about the drinking age for 3.2 percent beer, in which males and females were treated differently. You wrote, "There is only one Equal Protection Clause. It requires every State to govern impartially." [Id. at 211 (Stevens, J., concurring).]

What did you mean by "one Equal Protection Clause"?

Justice Stevens: Well, of course, that was in the context—at the time there was a three-tiered approach to equal protection, where you put the case in the right category and then the result would follow. It seemed to me it made much more sense just to analyze the reasons for the classification, the burden on the disfavored class, rather than trying to pigeonhole the three different categories.

Ms. Lee: Do you think that this is a question of description or a question of outcome? Do you think that if your approach were adopted, equal-protection cases would come out differently, or is it just a question of a more, in your view, accurate way of describing the process of decision?

Justice Stevens: Oh, I think it's a little of both. I think there is—there was one case, involving discrimination against the mentally retarded, I think may have come out differently. I don't remember the name of the case right now, but Byron White ruled just approaching—the one approach, rather than three-tiered approach, did help solve the case. [City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 (1985).]

Ms. Lee: And I got a note from Roberta that we don't have a huge amount of time left. Let me turn to campaign finance, because this is a question that I would like to ask. You dissented quite forcefully in the *Citizens United* case [Citizens United v. Federal Election Commission, 558 U.S. 310 (2010)], which struck down the federal ban on independent expenditures by corporations and labor unions.

Do you think that your view about political corruption and influence was affected by the fact that you came from Chicago? (*Laughter*) (*Applause*)

Justice Stevens: I don't know. Although I will say Bill Rehnquist and I used to kid one another from time to time. He came from Milwaukee before he lived in Arizona, you know? That was a law-and-order state, and Illinois was not. (*Laughter*)

And we used to say that you had a constitutional right to jaywalk in the Loop in Chicago, whereas in Milwaukee, you'd go to jail for jaywalking. But there was a difference in the culture, that's true. (*Laughter*)

Ms. Lee: So you have written, in *Six Amendments*, that the Constitution should be amended, if necessary, if the Court doesn't see the error of its ways and that the Congress should be permitted to make reasonable limitations on campaign expenditures. Do you think that legislatures can be trusted to enact reasonable limitations on expenditures, or would they find ways to adopt limitations that actually favor the reelection of incumbents?

Justice Stevens: Well, you know, every legislature is different. You can't be 100 percent sure. But I think they could handle the problem, yes.

Ms. Lee: Roberta, do we have any more time, or is this it?

President Ramo: One more question.

Ms. Lee: Okay. One more question. First Amendment. Sometimes it's difficult to pigeonhole your view of freedom of speech under the First Amendment. In some of your better-known dissenting opinions, such as *Citizens United* or the flag-burning case [Texas v. Johnson, 491 U.S. 397 (1989)], you disagreed with the Court's decision to strike down a statute on First Amendment grounds.

Do you recall any instances or categories of instances where your views were more protective of freedom of speech under the First Amendment than the majority of the Court?

Justice Stevens: Well, yes. Actually, it goes back to my years on the court of appeals. I really think that I was the—I wrote the first appellate-court opinion condemning the patronage system. [Illinois State Employees Union, Council 34, Am. Federation of State, Cty. and Municipal Employees, AFL-CIO v. Lewis, 473 F.2d 561 (7th Cir. 1972), cert. denied, 410 U.S. 928 (1973).] And I relied on the First Amendment analysis in that case. And at the time, that was considered a wild, wildly incorrect approach, but I think over the years, the patronage system has not survived and that my opinion did survive. (*Laughter*)

Ms. Lee: Well, thank you very much. (*Applause*) Thank you so much, Justice.

Justice Stevens: Thank you.

President Ramo: Let me— (*Applause*) Well, as they walk out, let me thank Carol for her incredible work and thoughtful questioning, and let me say, Justice Stevens, that each of us was elevated by listening to you today, and we'll try to do better to emulate you than we did before we heard you. Thank you very much.