

TRANSCRIPT
CIVIL LIBERTIES: THE NEXT 100 YEARS

*In honor of Professor Susan Herman’s distinguished academic career and tenure as the ACLU’s president, a panel was held on Friday, October 13, 2023 at Brooklyn Law School and on Zoom to discuss the current state of civil liberties in the United States. The participants also discussed Professor Herman’s new book, *Advanced Introduction to US Civil Liberties*. The transcription below captures the discussion among Susan Herman,¹ Erwin Chemerinsky,² Ellis Cose,³ Anthony Romero,⁴ and Nadine Strossen.⁵*

All panelists have approved of the overall substantive accuracy of this transcription. Any remaining errors in this transcript should be attributed to the Journal of Law & Policy.

Dean Meyer

I’m so pleased that you’re able to be here, so many of you in person and the others of you are able to join us by Zoom, and I welcome you as well. I know it was an unusually challenging travel day to be here and we are so, so grateful to all of you for being able to join us one way or the other for this special program. And I also want to acknowledge with gratitude the partnership of the ACLU in co-sponsoring this event, and to welcome the many officers and members of the National Board of the ACLU who were able to be here for this program today. It’s a great honor to partner with you and to have you here. The occasion for our gathering is the celebration of a new book by our long-standing colleague, Professor Susan Herman. And by “our,” I, of course, mean both Brooklyn Law

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⁴ Executive Director of the American Civil Liberties Union.

⁵ John Marshall Harlan II Professor of Law, Emerita, New York Law School.

School and the ACLU, because she is a longtime and legendary leader for both of us. Here at Brooklyn Law School, of course, she's been a member of our faculty for forty-three years, a renowned and prolific scholar of constitutional law and criminal procedure, beloved teacher and mentor to students and colleagues alike, and a respected leader within our faculty throughout her long time here—but also, somehow simultaneously, a longtime leader of the ACLU, and the inaugural holder of the Ruth Bader Ginsburg Chair here at Brooklyn Law School, which is, of course, tremendously fitting given that she follows in the footsteps of the Justice as both General Counsel and then President of the ACLU, with Professor Herman serving for more than a dozen years as president from 2008 to 2021.

Professor Herman's new book, *An Advanced Introduction to US Civil Liberties*, was published just a couple of months ago. And it's an ambitious and cogent analysis of the shifting landscape of civil rights in the United States, covering everything from the First Amendment and substantive due process to constitutional criminal procedure and beyond. And the topic of her book, and thus today's program, could of course, not be more important, nor more timely. As she observes in her book, the civil liberties protected by the Constitution have expanded and contracted through the years, not only because of constitutional amendments and changes in theories of constitutional interpretation, but also in response to external events. And today, of course, we meet at a time of unusual uncertainty about the future of the trajectory of civil rights in this country because of a confluence of seismic external events, increasing polarization in our politics that jeopardizes the foundation of our democratic process, changes to the composition of the Supreme Court that have, of course, overturned long standing precedent and invited reconsideration of long-standing doctrine. And, of course, we meet at the end of a terrible and horrific week of violence that ushers in war in the Middle East and dramatic new anxieties throughout our country and around the world about the prospect of terror and the state of human rights. Attempting to forecast the future of civil liberties under such intense pressure, as these developments that I've just outlined is of course, a daunting task, even to forecast it over a few years, much less for the next century. But fortunately, we are joined today by a truly star-studded panel of experts to take on the challenge, including the legendary

Dean Erwin Chemerinsky of Berkeley Law School; the acclaimed author Ellis Cose; Anthony Romero, Executive Director of the ACLU; and Nadine Strossen, John Marshall Harlan Professor Emeritus at New York Law School and former president of the ACLU. And before turning it over to Professor Herman to say more about the panel and to introduce the program, I want to acknowledge that she is a hero not only in her own work, her scholarship, and teaching but also in just being here today. Because she is suffering a very untimely and rather serious injury to her hamstring, which makes her presence here today a miracle and a testament to her will. So, with that, I will turn it over to Susan and get out of your way. Thank you.

Susan Herman:

Well, thank you for saying that. Now I don't have to decide whether to out myself, but that's why I'm limping around. So if I lie down, or leave, or stand at any point, just keep, keep going. Don't be distracted or alarmed. So that was a lovely introduction. Thank you. And ordinarily, I would say, I don't need to say anything, let's just get to the panel. But today is actually about me, so I am going to say a few words.

And the first word I want to say is Wow. Just looking at the faces of the people here, it boggles my mind to see people from so many different parts of my life: students and former students, colleagues from the law school and from the ACLU, my best friend from high school, and Paul, my husband—not to mention these great people up here on the panel. I'm just so sorry that I can't actually see the faces of all of you on Zoom, who include many beloved friends and family members.

As some of you know, I trace my identity as a civil libertarian to the day in my third-grade class where I learned for the first time that I was not allowed to take books out of my public school library if they had been placed in the boys' section. Now I knew about the girls' section, which contained collections of fairy tales and biographies of presidents' wives. But I had never known that I wasn't allowed to take books out of the boys' section until I tried. I thought this was interesting and somewhat disappointing. But when I told my mother about this, she wasn't just disappointed; she was furious. She called up the school and she gave them a piece of her mind for telling her daughter what she should read, what she should

dream, and what she should be. And in only a matter of a few days, the library policy changed.

The ACLU was founded in 1920 and works in fourteen different areas of civil rights and civil liberties. And victories don't always come as easily as that. Don't you wish it only took a phone call, Anthony? To say, "Oh, yeah, could you please? Oh, yes, thank you." That doesn't happen too often. The reason I wanted to start with that story is that the ACLU has been around since 1920 and some things have changed since then while many others have not. My brush with the school library was something that happened when I was in the third grade, in the 1950s. But is there anything happening these days involving schools that are still trying to tell kids what they can and can't read and what history they can and can't learn about?⁶

The opening line in my book is a quote from the ACLU's first executive director, Roger Baldwin, who liked to say, "No battle for civil liberties ever stays won."⁷ And that's a lot of what my book is about. It's about pendulum swings. The book talks about how, starting in the 1920's, the Supreme Court began to recognize various civil liberties—starting with the First Amendment, appropriately—and growing a whole bunch of different civil liberties that would be protected by the courts. But there's always something new and there are always recurrences of the same old problem.

When I stepped down from my role as ACLU president in January 2021, having served as president for almost precisely two terms of Barack Obama and one term of, need we mention his name?—there had been a lot of exciting things going on at the ACLU. So when Edward Elgar, which is a UK publisher, invited me

⁶ See generally Kasey Meehan & Jonathan Freidman, *Banned in the USA: State Laws Supercharge Book Suppression in Schools*, PEN AM. (April 20, 2023), <https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools/> ("PEN America recorded more book bans during the fall 2022 semester than in each of the prior two semesters."); Hillel Italie, *Challenges to Library Books Continue at Record Pace in 2023*, *American Library Association Reports*, ASSOCIATED PRESS (Sep. 20, 2023), <https://apnews.com/article/books-bans-american-library-association-42b34a284a6363439de20bbb65bb43b4> ("Through the first eight months of 2023, the ALA tracked 695 challenges to library materials and services, compared to 681 during the same time period last year, and a 20% jump in the number of "unique titles" involved to 1,915.").

⁷ See *Legacy of Liberty*, THE N.Y. TIMES, August 28, 1981, at A22 ("Roger Baldwin never considered a civil liberties battle permanently won . . .").

to write this book, which is part of a series they have of Advanced Introductions to this, that, and the other thing, I thought, *Well, yeah, that would be pretty good closure on my career as a civil liberties generalist.* I agreed to write the book and talked about the rise of judicial enforcement of civil liberties and the pendulum swings. I didn't go that heavy on the ACLU's role, although I could have. Maybe Ellis will talk more about the ACLU itself. Bringing the discussion up to date to the 2020's, I wrote about our recent discoveries, very painful discoveries, that a lot of the rights that we thought we had won have not stayed won. Civil liberties come; they go.

When my longtime friend and the law school's Dean of Research and Scholarship, Jocelyn Simonson⁸ said, "Oh, well, you're publishing a book, we should have a book event," my response was "No, it's not that kind of book. It's only 150 pages. It's part of a series, and I had a required format. It's really more informative, especially for people outside the United States, than it is transformative. So why would you have a book event about a book like this?" Jocelyn knowingly said, "Well, what if we also made it a celebration of your career at the ACLU?" Well, that caught me because when you look at the book, you will see that the dedication of this book is to the people of the ACLU: the board, the staff, and the affiliates. Now, I had dedicated my last book to my husband, Paul, so he was actually okay with sharing this one.

Anyway, that's how this event came about. Then after we decided that maybe it would be appropriate to have this event be about my role at the ACLU as well as being about my book and about me, the wonderful Andrew Domingue, where did you go Andrew? There he is, walking in and out as usual, because he's always doing something to make everything work. Right now, there he is making things work. Andrew, with the full support of his boss, this guy over here in the blue suit,⁹ said, we'll participate at the ACLU and co-sponsor this event for you. So, that is the reason that we are here on a Friday night, which is a tough night for people at a

⁸ Jocelyn Simonson, BROOKLYN L. SCH., <https://www.brooklaw.edu/Contact-Us/Simonson-Jocelyn> (last visited Dec. 4, 2023).

⁹ Reference to Anthony Romero.

commuter school, and a lot of people could not be here in person for that reason. But the people we planned the date around were the national ACLU board members who are meeting in Manhattan tomorrow and Sunday. So the people who were able to travel early enough today to be here are here. At the reception, look for all those name tags, and you will meet civil libertarians from all over the country. There's Rick all the way from Hawaii, for example. And so anyway, that's why we're doing this on a Friday night. I think that in addition to having all these board members here, as well as the ACLU senior staff—which is pretty amazing—there are all sorts of interesting people you can meet at the reception. But I thought that, given that this would be the audience, I was not really that interested in having something that was a *Festschrift*—that great academic word—where everybody would just have to talk about how great I am. And I wasn't that interested in having people just talk about how great the book is either, because it seemed to me that this book would be most interesting to those of here as a platform.

So what I invited my friends here, these civil liberties rock stars, to talk about tonight, is to use the book as a springboard, or a kind of prologue: thinking about the history of US civil liberties, how they developed, and how they've ended up where they are today, what can we learn to help us get the pendulum swinging back in the other direction? The speakers are going to proceed in traditional alphabetical order. You have quite interesting, lengthy biographies of them that are linked in the invitation. So, I don't need to spend the time that it would take to properly introduce each and every one of these really remarkable people.

As Dean Meyer said, Erwin Chemerinsky is the Dean at UC Berkeley Law School currently. He has been the Dean of other law schools. He's the immediate past president of the American Association of Law Schools. And one of the things that I learned decades ago about Erwin, when we used to fly around the country speaking everywhere from Key West to Anchorage, Alaska, is that among his many other superpowers, he doesn't get jet lag. Is that still true? So I felt less guilty about inviting him to cross the country to be here. He flew in last night, and he's flying back tonight. But here he is.

After Erwin, we will be hearing from Ellis Cose. Ellis is not a lawyer, the only one on the panel. He's a journalist, and he is both

an author and an independent radio producer. He was the first writer-in-residence at the ACLU. And he's the one who wrote the book about the ACLU. He wrote a history of the ACLU, for the ACLU's 100th anniversary in 2020, which is called *Democracy: If We Can Keep It*,¹⁰ and a bunch of other important books. So he brings a great perspective.

Next, the man in the blue suit. Anthony Romero, is the sixth Executive Director of the ACLU. Yeah, if you start doing the math, you'll see how long a tenure many ACLU leaders tend to have: he's only the sixth ED since 1920. The one other thing I will tell you about Anthony's tenure is that he got a real baptism by fire. He started the job during the week before 9/11, leading an organization whose headquarters are on Broad Street in lower Manhattan. Since then, he has proceeded under four different US presidents—and four very different kinds of presidents—to not only keep the organization steady, but to grow the organization in many impressive ways. And he still had the time to write a couple of books himself and to visit every single ACLU affiliate—fifty-one at this point—all around the country and also Puerto Rico, of course.

Last but not least, my predecessor, Nadine Strossen. Nadine was the sixth president of the ACLU. So, you can see here too, pretty long tenures. Nadine unbelievably served in that role for 18 years. And while she was doing that, she flew around the world probably 18,000 times. In her speaking engagements, somebody said at one point that there was no computer powerful enough to log her frequent flyer miles. I only recently learned, yesterday, that she says she has no sense of direction, which is actually remarkable given all that. At the same time, Nadine has also written several very important books on topics like pornography and hate speech, while also teaching at New York Law School—and going all over the place. So without further ado, I want to invite Erwin to start us off. I had suggested various questions that the speakers could address and general themes. But I also told them that in the end, they could also just say whatever they want. ACLU board members who knew me as president of the board know that I always thought it was rather ironic that one of my chief jobs at the front of the room of ACLU

¹⁰ ELLIS COSE, *DEMOCRACY, IF WE CAN KEEP IT* (The New Press) (2020).

meetings was to repress speech. Okay, but not tonight. I'm not repressing any of you so, Erwin, take it away.

Erwin Chemerinsky:

Thank you. It's such an honor and pleasure to be here. It's wonderful to celebrate Susan and this new book. As she mentioned, she and I spoke together at so many conferences for judges and lawyers all over the country. We've worked together on an enormous number of things over the years. And I just admire her tremendously as a teacher, as a scholar, as an activist. And I really liked this book, so you should get it. It's a terrific summary of civil liberties. As with everything Susan does, it's beautifully written. It's very clear, and it just provides so much information in a relatively small number of pages. We were asked to offer thoughts about the future of civil liberties and civil rights. And I would offer four comments in that regard.

First, the things that Susan, and everyone on this panel have been fighting for—civil liberties and civil rights—are as important or more important than ever. Think about the things that Susan's fought for, whether in the ACLU, or through her scholarship or other projects. Racial equality, racial injustice in our society is as great as it's ever been, at least in recent years. There doesn't seem to be any lessening of the gaps between whites and racial minorities with regard to income or wealth. Issues with regard to affirmative action are worse now than they've been in forty-five years.¹¹ Think about it with regard to sexual orientation and gender identity, the threat that occurs to gay, lesbian, transgender individuals, right now, in so many parts of the country, the continuing need to fight for sex equality.

In fact, the Equal Rights Amendment still hasn't been adopted. Voting rights and the threat to voting rights that exists in laws that have been adopted in so many states. We can go on and talk about the rights of criminal defendants, which Susan has been teaching and writing about for so long. We can talk about prisoners and the failure to protect their rights. We can talk about how the Supreme Court has obliterated the Establishment Clause and any notion of a separation of church and state. We can talk about the threats to free

¹¹ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023).

speech and the unique challenges because of the Internet. And I think if there's anything that should come from this discussion, it is the need for all of us to re-commit to fighting for the things that Susan, that these panelists, were fighting for for years.

The second observation is that the protection in advance of these civil rights and liberties is not going to come from the United States Supreme Court for the foreseeable future. Twenty-five years ago, I wrote the first edition of a constitutional law case book. Last month, I finished the seventh edition. I have never done an edition where so much changed in such a short period of time. I can't think of an edition where so much has changed from the first edition. Think about just the last two years from the Supreme Court. The Court has overruled *Roe v. Wade*,¹² the Court has dramatically expanded gun rights,¹³ the Court for the first time has said that a public school teacher has a First Amendment right to pray at public school events.¹⁴ The Court has held that when the government gives aid to secular private schools, then it is constitutionally required to give it to religious schools.¹⁵ The Court has imposed significant new limits on administrative agencies¹⁶ and the Supreme Court has effectively overruled forty-five years of precedent that allowed colleges and universities to engage in affirmative action.¹⁷ The Supreme Court, for the first time, has said that a business establishment has the right to discriminate through violations of state law when it's engaged in expressive activity.¹⁸ The reality is that this is the Court we're going to have for some time to come.

Think of the age of the conservative justices. Clarence Thomas: seventy-five years old. Samuel Alito is seventy-three. John Roberts is sixty-eight. The three Trump appointees: Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett are still in their fifties. I've long

¹² *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

¹³ *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022).

¹⁴ *Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407 (2022).

¹⁵ *Carson as next friend of O. C. v. Makin*, 596 U.S. 767 (2022).

¹⁶ *West Virginia v. Environmental Protection Agency*, 142 S.Ct. 2587 (2022).

¹⁷ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023).

¹⁸ *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

thought that the best predictor of a long lifespan is somebody who can be confirmed to the United States Supreme Court. John Paul Stevens didn't retire until he was ninety. Ruther Bader Ginsburg was still on the Court when she died at age eighty-seven. I can put it in very stark terms. Amy Coney Barrett was forty-eight years old when she was confirmed for the Court. If she remains on the court until she's eighty-seven, she'll be a justice to the year 2059. The reality is we're not going to be able to look to this Supreme Court to advance equality and freedom in the areas that I quickly went through a moment ago.

My third comment is, then we have to look to other paths to advance equality and freedom. Occasionally, there will be victories in the United States Supreme Court. There was some last year with regard to voting rights.¹⁹ But in all of the areas that I mentioned, it was a six-to-three decision. Rulings against advancing equality, to roll back civil rights. But there are other forums to look to, to advance civil rights and civil liberties: state courts and state constitutions. States, under their constitutions, provide more protection of rights than the US Constitution. It was in 1977, that William Brennan wrote an article in the *Harvard Law Review*,²⁰ urging states to use state constitutions to advance individual liberties. He saw how much more conservative the Court had become in light of the Nixon appointees. And of course, the Court today is so much more conservative than it was in 1977. There are areas where the Supreme Court's decisions don't allow state courts to do more. Where the Supreme Court finds a Second Amendment right, states can't provide less protection than that. Where the Supreme Court eliminates affirmative action, states can't do more than that. But the Supreme Court is leaving a great deal to the political process. It's obvious with regard to reproductive freedom. And there have been decisions, including in some conservative

¹⁹ *Allen v. Milligan*, 599 U.S. 1 (2023) (holding that Alabama's congressional redistricting plan which only gave one out of seven districts a Black majority violated the equal protections clause and §2 of the Voting Rights Act); *Moore v. Harper*, 600 U.S. 1 (2023) (rejecting independent state legislature theory).

²⁰ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

states, like North Dakota,²¹ South Carolina,²² where courts have provided protection for reproductive freedom more than the United States Constitution. There can be protection of rights through state legislatures. We've seen this happen in states with regard to limits on policing. Though the United States Supreme Court has refused to change the doctrines of qualified immunity, the Colorado legislature adopted a law limiting qualified immunity for suits against police officers.²³ The Nevada Supreme Court eliminated qualified immunity under Nevada law for suits against police officers in state court.²⁴

We've seen in some states, including red states like Kansas, voters adopting initiatives to protect reproductive freedom.²⁵ We saw recently in Ohio the rejection of a change in the procedure, which would have endangered the ability to get reproductive freedom at the ballot box.²⁶ There can even be changes at the local level. Some cities, after the tragic death of George Floyd, finally outlawed the chokehold for use by their police forces, something that should have been done a long time ago.²⁷ I think what's crucial

²¹ Wrigley v. Romanick, 988 N.W.2d 231 (N.D. 2023).

²² Planned Parenthood S. Atl. v. State, 882 S.E.2d 770 (S.C. 2023) (finding that the state constitution's recognition of a right to privacy did extend to a woman's decision to have an abortion and declaring the six-week abortion ban unconstitutional); Planned Parenthood S. Atl. v. State, 892 S.E.2d 121 (S.C. 2023) (finding that the revised six-week abortion ban could stand despite the state constitution's right to privacy and that *stare decisis* did not require the court to agree with its previous decision).

²³ S.B. 20-217, 74th Gen. Assemb., Reg. Sess. (Colo. 2020).

²⁴ Mack v. Williams, 522 P.3d 434, 451 (2022).

²⁵ See Dylan Lysen et al., *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, NPR (Aug. 3, 2022, 2:18 AM), <https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment>.

²⁶ Julie Carr Smyth & Samantha Hendrickson, *Voters in Ohio Reject GOP-Backed Proposal That Would Have Made It Tougher to Protect Abortion Rights*, ASSOCIATED PRESS (Aug. 9, 2023, 9:26 AM), <https://apnews.com/article/ohio-abortion-rights-constitutional-amendment-special-election-227cde039f8d51723612878525164f1a>.

²⁷ See generally Katherine Fung, *These Are the Cities and States That Have Banned Police Chokeholds So Far in the Wake of Protests*, NEWSWEEK (June 9, 2020, 11:34 AM), <https://www.newsweek.com/these-are-cities-states-that-have->

for those, and I'm sure it is for all of us who want to see advances of freedom and equality, is to look for the paths that we can succeed in. Whether it's in state courts, under state constitutions, state legislatures, local governments, and we need to use those. It's harder, because it has to be fought state by state. It's not going to be won by just one decision by the United States Supreme Court. But it is possible. And that's what we need to do.

Fourth, and finally, there's the question that Susan posed for us: where do we get hope for the future? She gave us some questions to talk about, and that was one of them. And that's what I wanted to conclude with. I've thought a lot about this in talking to my students. I've been a law professor for forty-four years. And I've never seen some of my students as discouraged about the Constitution and the Supreme Court. What I tell them is, I think the hope has to come from the sweep of history. That when you think about equality and freedom, overall, there's been such advances over time. History has looked well on the arguments that progressives have made in the past in this area. With regard to race, through terrible racial inequalities in our society, there is a need for urgent action now as there's ever been since the country began. But think to what the Constitution did with regard to race in 1787. Or think of the apartheid that segregated Southern states and some border states. I was born in 1953. Every Southern state and many border states had Jim Crow laws that segregated every aspect of life. The Civil Rights Act, advances in state law, there's certainly been protections. I mean, think with regard to sex. Women didn't have the right to vote until 1920. Think about just the difference in the composition of law schools with sexual orientation. It wasn't until eight years ago, that finally gays and lesbians were accorded equal dignity and the right to marry.²⁸ I tell my students that Dr. Martin Luther King Jr. got it exactly right when he said, "The arc of the moral universe is long

banned-police-chokeholds-so-far-wake-protests-1509659 (noting that New York City, Minneapolis, Denver, Dallas, Houston, and Washington D.C. have banned the use of chokeholds in the wake of George Floyd's death); *see also* Harmeeet Kaur & Janine Mack, *The Cities, States and Countries Finally Putting an End to Police Neck Restraints*, CNN (June 16, 2020, 6:24 AM), <https://www.cnn.com/2020/06/10/world/police-policies-neck-restraints-trnd/index.html>.

²⁸ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

and bends towards history.”²⁹ My message to them is that will only happen if they fight for it. And so, when Susan asked us “What is it that gives us hope for the future?” Some of it is looking to the past, and some of it is my students. I see how idealistic they are. I see how committed they are to using the law to advance freedom and equality. It really does give me hope for the future. Thank you.

Ellis Cose:

I’m going to start off by doing what I think Susan told us not to do, which is to congratulate her on a very magnificent book. The great thing about her book is that it’s a relatively short book, about 150 pages. You can basically, in one sitting, get a really in-depth understanding of our trajectory on civil liberties and civil rights, and also a perspective that’s influenced obviously by her time at the ACLU. When I think of civil liberties, I also think of civil rights, as they sort of come in similar baskets. And my, sort of, not exactly precise, way of distinguishing between them is that I tend to think of civil liberties as those rules. Those things that protect us from the government. I tend to think of civil rights as those things that protect us from each other. But, however you categorize them, however you think of them, as Erwin has made clear, and as Susan sort of alluded to, they’re rather fragile. And we have a sense, we have a way of thinking that these things have been with us so long, you know, that nothing can sort of dislodge them. And that’s not quite true. I mean, what a lot of people tend to forget, and since Susan sort of invited me to play historian for a second, I’ll do that for a bit, but what people often forget, because they tend to think of the Bill of Rights as having been ratified basically two and a half years after the Constitution. So it’s been with us for a very long time. And it’s true, but it hasn’t been respected for most of that time. Now, and it’s interesting, you only have to go to 1798 with the Alien and Sedition Acts,³⁰ when Congress basically threw the Bill of Rights out the door. And for a long time, it sort of stayed there.

²⁹ Martin Luther King Jr., *Remaining Awake Through a Great Revolution*, OBERLIN COLL. (June 1965), <https://www2.oberlin.edu/external/EOG/BlackHistoryMonth/MLK/CommAddress.html> (Dr. King’s actual quote is “Yes, we shall overcome because the arc of the moral universe is long, but it bends toward justice.”).

³⁰ *Alien and Sedition Acts (1798)*, NAT’L. ARCHIVES (July 27, 2023), <https://www.archives.gov/milestone-documents/alien-and-sedition->

And one of many reasons that the ACLU is so important, is that it breathed new life into that document. We often forget that prior to the 1900s, actually, prior to 1925, the Bill of Rights didn't even apply to the states. We tend to think that it was something permanent and so let me just retrace a little bit of that history. Susan correctly pointed out that the ACLU was formed in 1920. But the ACLU did not begin as the ACLU. It began as something called the American Union Against Militarism.³¹ Basically, a peace group. And it was formed at a time when there was a huge movement, nationwide, to keep the United States out of World War I.³² Krystal Eastman and her progressive colleagues got together in 1915 and said, let's form something to fight this mood of militarism in this country, and to keep us from getting into that war.³³ By 1917, that became moot of course, because we did get into the war. And that was not yet the ACLU, but something called the National Civil Liberties Bureau.³⁴ And the National Civil Liberties Bureau, again, was not really a civil liberties organization in the way that we tend to think of the broad civil liberties organization. It was fundamentally an organization whose mission was to help young men who were conscientious objectors.³⁵ And it's spent a lot of energy and time doing that. Between 1917 and 1921, it was formed.³⁶ We had 1919. What happened in 1919? Well, pretty much everything. You know, you had this war against labor. You had violence going on all over the place. You had a war against African Americans. You had huge race riots going on all over the place, partly because this was right after World War I. Of course, partly because certain people in the country didn't want black folks to sort of get ahead. So they had rights and

acts#:~:text=Passed%20in%20preparation%20for%20an,brink%20of%20war%20with%20France.

³¹ Sam Walker, *Conscientious Objectors*, ACLU (June 28, 2019), <https://www.aclu.org/issues/free-speech/conscientious-objectors?redirect=issues/conscientious-objectors>.

³² *Id.*

³³ *Id.*

³⁴ *Id.* (“After some back and forth, the two sides reached a settlement. On July 1 [1917], the Civil Liberties Bureau would leave the AUAM and become an independent organization: the National Civil Liberties Bureau.”)

³⁵ *Id.*

³⁶ *Id.*

now some of them had participated in World War I. You had the Palmer Raids, because there was all this fear of socialism and communism taking place all over the country. Tens of thousands of people had been rounded up.

And the core folks who made up the ACLU were very much involved in sort of resisting this, protesting it, talking against it, getting involved with the IWW³⁷ and other organizations that were directly affected by this. And so, by the time 1920 rolled around, and the discussion became one of what they should do, it made perfect sense for the ACLU to form. But again, it evolved.

It was not an organization that began immediately filing lawsuits and going to the Supreme Court. It was an organization that popularized the idea with sort of community theater, and things of that nature, to try to spread awareness about free speech and about other civil liberties. And if you want to sort of pick a date when civil liberties in the modern sense began to be born, I think you might as well go to 1925 when you had the *Gitlow*³⁸ decision. Gitlow was basically a fellow who published some kind of socialist manifesto. And he was brought up on state charges in New York and ended up being actually convicted. The ACLU was very directly involved in that case. And there was a very powerful dissent. Well, it was really not a dissent; it was a concurrence. But it was a very powerful argument that was made by [Justice] Holmes and by [Justice] Brandeis basically, which did a couple of things. It articulated a rationale for protecting free speech. But it also incorporated the Bill of Rights in a way that made the Equal Protection Clause apply the Bill of Rights to states and that gave the ACLU a tool to go after criminal syndicate laws and various other things that had not really been that easy to contend with.

The point being that part of why I think these things are so fragile is not only because we get very nervous as a country when our sense of safety and security is threatened, and we decide maybe these things are not so important, but also because the tradition of

³⁷ The IWW (Industrial Workers of the World) is “a labor union representing nearly 9000 workers across North America. Established in 1905, the IWW is known for its high standards of democracy, transparency, multinationalism, and active use of the right to strike.” *About the IWW*, IWW, <https://www.iww.org/about/> (last visited Dec. 21, 2023).

³⁸ See *Gitlow v. New York*, 268 U.S. 652 (1925).

protection of civil liberties or protection of civil rights is not nearly as long lasting, as deep, or as broad as we often like to think that it is. And for that reason, we need to get reminders every now and again: what they mean, why they are important, and why they are essential to the society that we have today. And we're in a moment, as the previous speakers have already made clear, where again, you know, a number of rights are coming into question. We are in a moment where a number of people are feeling very insecure, and not just in the United States, but across the world. Of course, we have two big wars.³⁹

But we also have experienced Trumpism and part of why we experienced Trumpism is that there continues to be a tremendous appetite for promoting divisiveness and promoting nostalgia about an America that never existed. It is hardly coincidental, in my way of thinking, that Trumpism arose around the same time, not too long after, the Census Bureau projected that at some point in the future, they actually projected it was 2045, the United States is going to become a majority-minority nation.⁴⁰ I personally think that projection is nonsense for all kinds of reasons. I think part of the reason that this is nonsense is because we have a history in this country of redefining race. And that's based on an assumption that we're going to think about race the same way in 2045 than we do now and I don't think that's true. It's also based on a set of assumptions that the racial groups will act the same in 2045 as they do now. I don't think that's necessarily true either. But I think that the very idea was powerful enough to scare the "bejesus" out of a lot of people. And to make it possible for one political party to go absolutely nuts. As it tries to take us back to some imagined past, I guess, in the 1940s or somewhere back there. To a time where all of these bothersome people of color and other kinds of minorities were not much of a factor. And the bad news is, I don't think this period is going to end anytime soon. I think we're looking at something very generational.

³⁹ Referring to Russia's invasion of Ukraine in 2022 and Israel's invasion of Gaza in 2023.

⁴⁰ *Projecting Majority-Minority*, U.S. CENSUS BUREAU (2014), https://www.census.gov/content/dam/Census/newsroom/releases/2015/cb15-tps16_graphic.pdf (predicting that "non-Hispanic whites" would comprise less than 50% of the total population by 2044).

And as Erwin pointed out, I mean, the Supreme Court's not going to go away anytime soon. It's going to be around for a while. But the other thing that's not exactly generational, is that the founders never expected this Constitution to last as long as it has and it's really showing its age. When the Constitution was enacted, the largest state in the nation was Virginia. The smallest state was Delaware. What was the difference in their size? Eight to one. And if you included enslaved persons? Twelve to one. What's the largest state now? California. The smallest one is Wyoming. The difference is 67 times and yet they have the same power in the Senate, and the same number of votes in the Senate. We have a sort of minority bias, in that sense, built into the Constitution. And we have an Article V problem if we try to get rid of it. By the same token, obviously, the Electoral College is a relic. But it's not going to be something that we can easily get rid of. The last time we amended the Constitution meaningfully was close to fifty years ago, when we gave young people the right to vote.⁴¹ We also did it over thirty years ago to deal with congressional salaries.⁴² We have a constitution—despite the intention of making it easy to change—that is extremely difficult to change. At some point it is going to have to change. How that's going to happen? I don't know.

But just to end, I mean, I think what we're looking at is a war that's going to go on for a generation as we fight for the future of this country. And the one thing that gives me some hope about this is that the generation coming behind us has a very different way of looking at things than the current generation. How that's going to play out? I really don't know. But I think the way they have of looking at things does not bode well at all for the current crazy Republican Party. And I think I'll end it there.

Anthony Romero:

⁴¹ *Overview of Twenty-Sixth Amendment, Reduction of Voting Age*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt26-1/ALDE_00001015/ (last visited Dec. 11, 2023).

⁴² *Overview of the Twenty-Seventh Amendment, Congressional Compensation*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt27-1/ALDE_00013830/#:~:text=on%20Congressional%20Compensation-,Amdt27.,of%20Representatives%20shall%20have%20intervened (last visited, Dec. 11, 2023).

I want to maybe pick up where Ellis left off. But before I do, I want to make sure I break the rules and do thank Susan Herman for this book and for the invitation and for everything she's done in my career and my life. She was on the search committee that hired me, chaired by my other boss, Nadine Strossen, who invited me to this remarkable adventure of running this sometimes-unwieldy organization in some of the most challenging of times. It's been the thrill of a lifetime. And to be on a panel with Erwin, to have known Ellis for almost thirty years now. When I tried to convince him to come and be our first writer-in-residence, and say, you know, you need to write an accessible book about the history of the ACLU. We have many great books. Sam Walker's book is very thorough,⁴³ and I've read them all. But we needed something that I could hand to my nephew. It's a narrative. And Ellis Cose did precisely that. I disagree with some of your depictions of my leadership, but that's okay. It's really an exceptional piece. And so, it's just really humbling to be here among this group of individuals. And thank you, Susan, for this most recent contribution. It's wonderful. We're buying it for every new ACLU staff member. You have to read this before you show up. 150 pages. It's part of the orientation.

Let me, as a person who's not an academic, and I won't pretend to have the intellect of the individuals up here with me or our host. I want to reflect a little bit about the perspective of someone as a practitioner and how I see the work playing out from where I am. And I think about when they asked me, "What are the challenges to our democracy?" Partly just because of ease of reference, I try to bucket them into two buckets. One is to think about the challenges to our norms, rules and procedures, and the functioning of our institutions. And you can think about all the different ways in which democracy is challenged that way with the denial of an individual's right to vote. The cases in Georgia and elsewhere, efforts to circumvent or subvert elections.⁴⁴ These vote-denying Secretaries of State, the impeaching of officials with whom we disagree, like we

⁴³ SAMUEL WALKER, *THE AMERICAN CIVIL LIBERTIES UNION: AN ANNOTATED BIBLIOGRAPHY* (Routledge, 1st ed. 1992).

⁴⁴ Kate Brumback & Eric Tucker, *Trump and 18 Allies Charged in Georgia Election Meddling as Former President Faces 4th Criminal Case*, ASSOCIATED PRESS (Aug. 15, 2023), <https://apnews.com/article/trump-georgia-election-investigation-grand-jury-willis-d39562cedfc60d64948708de1b011ed3>.

see in Wisconsin.⁴⁵ An effort to really gut the workings, the machinery of democracy. Those occupy a great deal of our time, our thought, our concern.

And then the second bucket, which is the efforts to gut the rights and liberties that define a democracy and make a democracy worth living in. That's why you believe in democracy. The right to be who you are, and to associate freely and to speak your mind. And to love who you wish and worship any god or no god at all. And every way in which we decide what this gift of human life looks like, when you want to live with human dignity. Our struggle is ultimately about the right to live in dignity, the way you define it. It works for me because fourteen issue areas, I can't begin to wrap my mind my mind around. But two, I can do that pretty well.

When I think about the decline of American democracy, I see it on both fronts. I think the through-line has been, it's been a faint and often faint-hearted and incomplete commitment to those principles. But I think this through-line, the challenges to democratic norms, institutions, and to the rights that animate a democracy, took on a supercharged role with the War on Terror. And maybe that's because that's the time in which I began my work at the organization. But also, because it's a lot to do with the rights lost at that time, what seemed to be abstractions became real realities in terms of how we treated people. And whether that was the injustice and inhumane treatment of prisoners in our custody, who were waterboarded and tortured—the great work of Jameel Jaffer⁴⁶ uncovered that for this country—to the very same attacks we see now against trans people. The fight to dehumanize and deny them the care or the dignity they deserve. That's how I think about the challenges we confront. That was one of the questions that Susan put to us.

She also asked, “How do we respond in this new environment?” So from my perspective, I take another cue from one of the great minds I have surrounding me: the work of Ellis Cose and his book,

⁴⁵ Scott Bauer, *A Wisconsin Judge Orders the Former Chief Justice to Turn Over Records Related to Impeachment Advice*, ASSOCIATED PRESS (NOV. 10, 2023), <https://apnews.com/article/wisconsin-supreme-court-impeachment-9edaaf265a86df92844a0c5742cd232a>.

⁴⁶ *Jameel Jaffer*, COLUMBIA L. SCH., <https://www.law.columbia.edu/faculty/jameel-jaffer> (last visited Dec. 4, 2023).

Engines of Liberty,⁴⁷ and the importance of engaging around narratives and the public. Ultimately, it's about changing hearts and minds, and the impact of that on changing laws, institutions, legislatures. I think that work has never become more important in some of the issues that we've been trying to move the needle on for so many decades of our existence.

I think we need to double down and think about the Overton Window.⁴⁸ I think we are challenged in places like criminal justice reform. I think we missed the ball on some of the ways in which we were characterizing the struggle for criminal justice reform. I was one of the people who called for defunding the police. To be clear, you'll find it online, there's a TED talk.⁴⁹ I think that was a mistake. Not because I was wrong about the solution, because I think ultimately, the cops and the police had too much money, and very little accountability. And government officials, including state and local government officials, were not willing to exercise oversight on police. But I think I fundamentally missed the boat on the narrative around the defund frame. And it was too easy for our opponents then to capture the flag and say that you are not standing up for the safety and security of often the very same communities and people who are subjected to the over-policing and over-incarceration in the places where I grew up in the South Bronx. That was the issue that my mom and dad most worried about: the crime and the gangs and the drugs and the violence. I tried to think about it. Every once in a while, I remember, what would my mother say to a phrase like defunding the police. She would say Antonio's "loco," you're crazy, right? Because you miss the opportunity of talking about the importance

⁴⁷ DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW*, 1 (Basic Books, 1st ed. 2016).

⁴⁸ *The Overton Window*, MACKINAC CTR. FOR PUBLIC POLICY, <https://www.mackinac.org/OvertonWindow> (last visited, Dec. 11, 2023) ("The Overton Window is a model for understanding how ideas in society change over time and influence politics. The core concept is that politicians are limited in what policy ideas they can support—they generally only pursue policies that are widely accepted throughout society as legitimate policy options. These policies lie inside the Overton Window.").

⁴⁹ THE ACLU'S CALL TO DEFUND THE POLICE, https://www.ted.com/talks/anthony_d_romero_the_aclu_s_call_to_defund_the_police (last visited Dec. 04, 2023).

of safety and security to the very same communities that are subjected to that at the same time that you're talking about reforming institutions which are entrenched. And so, I think we need to change some of the ways we think about that narrative. I think about that in the conversation around immigrants. What's changed in this country, right?

I mean, I feel whipsawed often in this job. I started on 9/11. I saw the attack and the corralling of Muslims and Arabs and Asians. John Ashcroft counting the numbers of people on TV who were rounded up. Police going after taxicab drivers and people selling food. The security guard at my own institution being summarily deported to Pakistan. And everyone was kind of, you know, on that bandwagon—including NPR reporters I had arguments with. I was like, holy, this is crazy. You know, the idea that there's Islamophobia, anti-Muslim sentiment that gripped the country during the early days of 9/11. Fast forward to when Donald Trump becomes president. And the week after he signs the Executive Order, the Muslim ban, people are rushing to the airports, right? People are holding up signs saying "We are all Muslims. We are all immigrants." And then you fast forward to today, five years later, and you have this mayor of ours, talking about too many immigrants at the Roosevelt Hotel. And the whipsawing around how immigrants are venerated and protected and then demonized and then venerated and protected. And that's good. You trace it back to the Palmer Raids and you can see a through-line and we need to do a better job of keeping the narrative about what that contribution actually means and who they are and why we are engaged with them. And I think we lost a little bit of that sight. Otherwise, we wouldn't be struggling with liberals who are now faint-hearted about what's going on at the border. And I think it makes the point that we need to double down on that narrative.

Another example around transgender rights. I'm incredibly proud of the work my organization does to defend the rights of transgender people, individuals, and communities. Almost half the cases on transgender rights are carried by ACLU lawyers across this country. 500 some odd anti-trans bills have been dropped in state legislatures. And I think when we win the vast majority of them so far, it feels like running the gauntlet. I worry, though, that we haven't begun, but are now beginning to pay closer attention to—

and our wonderful colleagues like Chase Strangio, who does this work for us—he and I have been thinking through, “How do we get to the parts of the public that are not with us?” You know, how do we convince people that this is a human rights struggle that affects all of us, and not just a small minority of individuals that people don’t fully understand? And the importance of getting parents to speak out about the struggles of their transgender children, like we did on trial in Arkansas. Really important to lay the groundwork for that narrative change or to be able to tap the Republican family members of transgender people. And they exist, and they’re out there, and we are pulling them out. They need to speak out on behalf of the rights and liberties of their own family members. And a way to try and change the narrative around that, so that we can bring the public debate around it.

The freedom of speech issue Nadine will cover. It’s so important to engage in the narrative around it. Charlottesville was a very controversial flashpoint for my organization. There were many who were not sure we should have represented Steven Kessler and the Nazis in Charlottesville. Some of that, I think, has begun to change because people began to see that if you don’t commit to the freedom of expression for all people, there’ll be an effort to shut down the rights and liberties and the freedom of speech for individuals who don’t have power. The attacks I think on critical race theory, the attacks on Black history, on the “stop woke,” and the attacks on Palestinian activists make the point of why defending freedom of speech is so essential to the functioning of our democracy. As messy as it becomes, it undergirds the inner workings of our democratic institutions and our rights and liberties. So I think that the narrative work we’re engaged in or endeavoring to do more explicitly is probably the most important.

Second pivot, and I have three, so this will be quicker now. The pivot to political work. Now, the ACLU, as Ellis will tell you as one of our historians, was founded as an activist group. Then the National Civil Liberties Bureau was changed ultimately to the American Civil Liberties Union because they wanted to claim the union of the growing labor movement, right? It was, you know, the idea of card-carrying members to try to assemble themselves more alongside unions rather than bureaus. And for fifty years, all we had was a political arm. The largest line in our budget that was adopted

in 1921, I think was \$20,000. For propaganda, that was what they called it. And they saw their job as being a political movement. As deploying people. They were not lawyers; they were not tax-exempt organizations. The tax-exempt foundation, the ACLU Foundation, would come forty to fifty years later. But for all those years of our existence, our work was exclusively as a political 501(c)(4), a charitable organization with a political kind of agenda. And in some ways, I think, the great work that we did as lawyers, litigators. For all those years, people began to think it was only about litigation. It was only about being a law firm; it was only about being a legal group. And in many respects, I think the work we're doing today is bringing us back to our roots. When the courts don't provide us an opportunity to make the advances we want, then we will have to necessarily use the political arena. And we should be unapologetic about it and unafraid about it. We're not the American Bar Association. They pretend to be non-political. This agenda of ours, to defend the rights and liberties of all people, is an inherently political agenda. We can do it in a non-partisan way. We can criticize Republicans and we can criticize Democrats. We can work with them both. But I think to not engage in the political realm, it would be malpractice for a social justice practitioner like me. And I'd been thrilled to see that the work we've done in the political realm has been really highly effective. I mean, Erwin touched on this already. In the last several years since the *Dobbs*⁵⁰ decision, we've run five ballot referendums in states across this country to advance and defend abortion rights. We've won every single one of them. Even in states where you have to convince a majority of Republicans to join you. In Kansas, it was not a bunch of liberals, or latte-sipping liberals, who voted.⁵¹ It was all Republicans in Kansas that we were able to kind of bring along and say, "No, you got to vote down this anti-abortion initiative." In Ohio, we're working our asses off to make sure that we convince moderate Republicans and moderate Democrats, that this protection of abortion rights is critical. I think we run the gauntlet on this one. I think the Republican Party has so overreached on abortion rights that they've made our jobs a lot easier. And I think we ought to

⁵⁰ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

⁵¹ Lysen, *supra* note 25.

harvest that work without any fear of criticism. Ultimately, it's about, do we advance the protection for rights and liberties? And by any means necessary that's lawful? Let's do it. I think the political realm was one that's really a critical part of it.

Finally, the third pivot, I will say. As much as I love David Cole and his colleagues, and they play an awesome game of Supreme Court litigation and in the federal courts. They're super smart. Which theories do we bring? Which cases do we bring? Which clients do we pick? Where do you run the gauntlet? When do you settle? How do you split the circuits? What do you do now? What do you do in three or five or seven or ten years? It's wonderful. They play an awesome game of master chess. But let's do that also in state supreme courts. And let's think about how we play that game of chess as thoughtfully, as strategically, as aggressively, as long term in front of all the state supreme courts.

But I think, you know, they only take some 180 odd cases a year. There are hundreds and hundreds and hundreds of possibilities more to bring state supreme court litigation. The ACLU has this unique ability to do so because we have an office in every state, we have litigators in every state. And for a little bit more energy and a lot more work, we can really get a lot more juice out of that squeeze if we begin to think about state supreme court litigation with the same level of acumen and discipline and analysis that we've done to the federal and the Supreme Court litigation. And already in just a very short period of time, I think that work has really borne fruit in places like Massachusetts and Nevada on criminal justice issues. In Nebraska and Utah on abortion. And so, let's run through tables on state supreme courts and if we're able to do that work there, then maybe we can obviate the importance of the Supreme Court and Amy Coney Barrett can grow old and increasingly irrelevant at the federal and the Supreme Court level.

I'll close by finally saying, Susan says, "What gives you hope and optimism?" was one of her questions. And I think it's not something that gives you hope, or optimism. I mean, hope and optimism is a muscle you flex. And it kind of reinforces itself with you, as you see. I think the cynicism and the fatalism and the sadness that I sometimes see among young people, I'm just like, "Okay, we got to reboot that, just turn that off and turn it back on, and think in a more positive way." And then you will find that gives you more

hope and optimism. The successes we have won in these five states with abortion rights, give me hope. What we're doing in Ohio, gives me hope and optimism. And the more hope I channel, the more hope I feel. And so, I don't really work out in any other way, but that's the one muscle I do flex. And it's my hope and optimism muscle. And so far, so good. Thank you very much for listening.

Nadine Strossen:

Just to pick up on Anthony's last comment, when I saw David Cole in the audience, I was reminded of the fact that for many years I have had as the quote under my email signature, which nobody ever reads, including me, you don't get that far down. But it's something that David said, I believe in a *New York Times* interview and he in turn was quoting two other people: Cornel West and Roberto Unger. And it was exactly the idea that you conveyed, Anthony, which rings so true to me and the way David and the people he was quoting put it: "Hope is more the consequence of activism than its cause." And there's absolutely no doubt about it, but I also think of another saying which also refers back to points that have been made by I think, in particular by Erwin and by Ellis, and that is that "Whoever is not an optimist is not a realist." Because you don't even have to go back as far in time as Erwin and Ellis did. Well, to some young people in the audience, it might seem like ancient history, but in my lifetime, in my adult lifetime, indeed, dare I say, even in the last couple of decades, I would say if you look at the full scope of civil liberties, civil rights, human rights on the whole, yes, there have been very distressing setbacks.

But I think the net movement is definitely towards the positive. And I also am extremely hopeful because of the renewed activism on the part of young people. I will never take that for granted. Unfortunately, the activism springs from tragedy. In this case, I think we can trace the resurgence of campus activism to the killing of Michael Brown, in Missouri, which led to campus protests and demonstrations for racial justice that spread around the country. Obviously, the murder of George Floyd spurred unprecedented waves of activism. And, you know, that's the silver lining of the cloud of these tragedies. And it's not as if these catastrophes have not happened before. I think of when I became ACLU president in 1991, the videotaped beating of Rodney King in Los Angeles, and I know Erwin was living in LA and very involved in the police issues

there. And Daryl Gates, then the police chief boasting about chokeholds. It was about Black people and it was their fault, right? There was something wrong with their windpipe. That's why they died. And it was so unprecedented that young people here can't even relate to it. It was so unprecedented, to capture, visually in film, this beating when the ACLU had been crusading forever against police abuse and unjustified force, especially against young men of color. And it's one thing to say it in words, but it was another thing to have that captured on videotape. Sadly, we did not make the progress that we hoped to make through that image. But with the spread of viral social media, again, people love to focus on the adverse impact of social media. But let's look at the positive. These movements that had not gotten traction before, including Black Lives Matter, including #MeToo, including many non-traditional political candidacies are really taking advantage of the new.

And on the topic that I've mostly been dedicating myself to for the last half dozen or so years, freedom of speech, as Anthony alluded to, it's very common for people to bad-mouth young people and college students. Surveys are concerning that they don't show the same allegiance to some of the core free speech principles that Anthony alluded to. That if you want to have freedom for the speech that you love, you must defend freedom for the speech that you loathe. And yet the positive side of this is that, where is the skepticism about free speech coming from? I think Ellis alluded to this rather, somewhat cryptically and maybe I'm reading too much into what you said. But when you talked about the younger generation being different, I don't take for granted how profoundly committed they are to equality and to racial justice and to justice for gender identity and sexual orientation minorities in my lifetime. You know, when I started college, there was a lot of hostility to even to civil rights. I mean, if you look at public opinion polls of public attitudes toward Martin Luther King in the Civil Rights movement when he died, he was an incredibly divisive, controversial, unpopular person who was being banned from speaking on campuses in the South. So not only the fact that we have a generation of students who are so committed to diversity, equality, inclusion, belonging, dignity. I love your summary of human rights, Anthony: the right to live life with dignity. I think that's something that seems to be profoundly shared and being committed to by today's young

students. And, you know, we had decades between the campus activism when I was a student in the '60s and '70s. We had several decades when public opinion polls showed that students were so indifferent to public issues. They didn't even pay attention to the news, let alone become engaged themselves. We have a generation that is hungry for activism, committed to human rights, committed to dignity and equality. Exercising their free speech rights with great vigor. As we have all said, as a result of that activism, they will generate more optimism and it becomes a virtuous cycle, especially when they see the great results that Anthony was able to describe. So that was all a riff on what Anthony and my other distinguished co-panelists said.

I wanted to start by joining everybody and thanking especially the person whose book we are celebrating! We're not letting her censor us about it. I am so in awe of how much Susan is able to pack so effectively into such a short and readable book. There's an old saying among lawyers: "If I had more time, I would make it shorter." Susan, I don't know, did you spend a decade making it so short? It's, it's so readable. It's so interesting. And even though I know a fair amount about the subject myself, I learned so many new things. And I would like to give you a couple examples. I learned new facts that I'll admit, I had not known. Maybe I should have known. I also gained new insights that probably after decades of teaching constitutional law I should have had, but I'm really indebted to Susan. So, on the facts, I was thinking of one of them that was really startling to me. When Ellis talked about civil rights or civil liberties essentially coming into being in some meaningful way in 1925. And I certainly understand that the theory behind the importance of the *Gitlow* decision incorporating the Bill of Rights and making it enforceable against the states when the vast, vast, vast majority of violations of civil liberties were occurring at the state and local level. But Susan, I had not known about that 1923 decision that you talked about: *Moore v. Dempsey*.⁵² I had not known that. Susan is looking at me puzzled. How could I be so ignorant? Okay. I mean Ellis, you know, you've written so much about these topics. I honestly did not know about the Arkansas Race Massacre. And I think a lot. I think, you know, if I'm ignorant, there are probably a lot of other people

⁵² *Moore v. Dempsey*, 261 U.S. 86 (1923).

who will learn those really important facts, and that the Supreme Court did something about it, in an era when it was not doing anything to protect any human rights. Oliver Wendell Holmes I think of, as you know, excellent dissenter on free speech cases, but that he would be a pioneer and a trailblazer on racial justice and criminal justice. That was really interesting and inspiring, in terms of new insights.

Susan talks about two cases in the same breath that I hadn't really thought about together. One was an early case in which the Supreme Court upheld freedom to marriage for prisoners.⁵³ Well, first of all, factually, I had not known that a prisoner was marrying another prisoner. So that was kind of an interesting fact that I hadn't recognized before. And then Susan cobbles it with another decision,⁵⁴ in which the Supreme Court completely denied rights of prisoners to correspond with each other. So as she points out, a prisoner had a right to marry another prisoner, but not to correspond with her. And I found that, you know, just so interesting, especially in terms of the freedom of speech issues in which I've been focusing. I do want to say something about that, but I want to put the free speech issues in the larger context to some extent by talking about campus' skepticism about free speech coming from a positive mode.

Second, I think Ellis really educated me several books ago, he's so prolific. He's probably written about three since then. But the book that you wrote Ellis about the structural problems that you start talking about here, the gerrymandering and the electoral college, and basically the disenfranchisement of so many people. I was invited by Ron Collins, who's a First Amendment maven and publishes something called the *First Amendment News*. He invited me to conduct an interview of Ellis about that book for a free speech series. And the book doesn't expressly address free speech. At first, I was a little bit puzzled, but I became so grateful because it really underscored for me, and this is a theme that Susan asked us to address, the integral interconnection, among not only equality and racial justice and gender justice and free speech, as I've already alluded to, but the structural civil liberties and democracy issues as well. Because freedom of speech under the First Amendment is

⁵³ *Zablocki v. Redhail*, 434 U.S. 374 (1987).

⁵⁴ *Turner v. Safley*, 482 U.S. 78 (1987).

necessary, but not sufficient to have meaningful freedom of speech in the robust sense that Anthony talks about freedom, which is a concept of individual dignity, and, again, belonging inclusivity. One of my friends and colleagues, Sigal Ben-Porath,⁵⁵ who's a professor at the University of Pennsylvania, talked about the concept of inclusive freedom. And that's the way I relate very much to the structural issues that both Erwin, Ellis, Anthony, and Susan talked about. Yes, freedom of speech is essential if we are to have a meaningful democracy. But a meaningful democracy is really essential if we are going to have freedom of speech. That is not just "Congress shall make no law," as the First Amendment says, but is a meaningful exercise and enjoyment of participation in the democratic discourse by every member of our society. And that means taking many other affirmative steps, including educational steps, access to technology, even psychological resources and resilience to deal effectively with speech that is deeply traumatizing and problematic.

When people asked me, what is the state of free speech today and you know, why am I spending so much time on it? It is not at all because I think that it is the only embattled liberty or right, to the contrary we've seen a whole laundry list here. And it's certainly not at all because I think it is the most important. I think one can make a case in terms of the interrelatedness of all of these rights. And Susan's book quotes some famous Supreme Court statements about voting being the prerequisite for the exercise of all other liberties. I could say equality is the prerequisite because what is freedom if it's not equally available to everybody in this country? But I think the reason why I decided to focus on freedom of speech is because I think it is not nearly as, or had not been nearly as well understood or appreciated, especially by the younger generation of outspoken activists, as indicated by regular public opinion polls.⁵⁶

⁵⁵ Sigal Ben-Porath, UNIV. OF PENN. GRADUATE SCH. OF EDU., <https://www.gse.upenn.edu/academics/faculty-directory/ben-porath> (last visited Dec. 04, 2023).

⁵⁶ See generally, Colleen McClain, *More So Than Adults, U.S. Teens Value People Feeling Safe Online Over Being Able to Speak Freely*, PEW RSCH. CTR. (Aug. 30, 2022), <https://www.pewresearch.org/short-reads/2022/08/30/more-so-than-adults-u-s-teens-value-people-feeling-safe-online-over-being-able-to-speak-freely/>.

And I, again, you know, I'm the optimist. I always say the glass is half full. I think that part of the reason for not understanding what I believe to be the crucial importance of free speech for the struggles to which they are committed, is that they've had the luxury of taking it for granted. And exactly as Anthony says, when they start to see that suppression on various rationales, including speech that makes somebody uncomfortable or divisive speech. I mean, the Republicans and the conservatives have taken that exact language to outlaw or jeopardize the teaching of race and gender issues. And so this also relates to Susan's opening anecdote which I know I'd heard you tell before, but I'd forgotten. It was about being denied equal access. I mean, there you have it: equal access to the right to read. Equality and free speech rights in one fell swoop. That was your formative moment in becoming a civil libertarian. I had exactly a parallel experience. I was kept out of my public library because of age. I was relegated to two rooms for people under the age of eighteen, which I had read many times over long before the age of eighteen. So, you know, the silver lining to the cloud of the very visible attacks, including on the right to read, is we are seeing amazing activism. I hope you've all seen some of the examples of even middle school kids forming banned book clubs, testifying before school boards about the importance of these books. There was one situation that I read about with a local school board in a very conservative, rural area in Pennsylvania. It was a year or two ago, where the usual books were banned. You know most of the books that have been banned lately. Those that are either by or about LGBTQ+ authors or racial minorities. And it was a very deeply red area. At the school board hearing, a trans student stood up, and I saw a video of their testimony. Which was, you know, the narrative. Right, Anthony? It was so powerful. Literally talking about how these books had saved their life. You know, this was somebody who was on the verge of suicide, and had nobody in that community who was a role model or a confidant. The book was there as a lifeline. And it turned around that school board. And you see these kids also testifying before their state legislatures and becoming plaintiffs in and winning ACLU lawsuits, including at the United States Supreme Court. So, there's a great deal of cause for hope.

In terms of freedom of speech, I've already said why the First Amendment is necessary, but not sufficient, in terms of really making the right meaningful. But let me just add a couple other reasons for that conclusion. One is that we are seeing such, I think, unprecedented aggregation of private sector power to exercise censorial control that until now had only been exercised by governments. And I heard recently, I know we've got some experts here, Jameel Jaffer, among others, Jonathan Askin.⁵⁷ But I was speaking at the University of Chicago and one of the experts there said something that I had not been aware of. That the concentration that we're seeing at the social media level, the level at which content is disseminated or not disseminated at the behest of the platform. This person said that the degree of concentration is now going all the way down the pipeline to the deepest service-infrastructure elements of the Internet. Looking at Jon, I don't know whether that's true or not. And see, I've gotten to be very skeptical about everything I hear. Healthy skepticism in the age of disinformation. The other claim that was made was that these infrastructure providers which used to remove from the content level, used to not engage in content moderation, what I would call censorship. You know, deciding that some voices and speakers can be heard, but not others. The allegation was that this is now happening even at these deepest levels, which raises very serious questions, especially for those of us who believe that private sector entities should have their own free speech. I find these to be very, very difficult questions. I'm glad that such brilliant minds as Jameel and his colleagues at the Knight Institute and Jonny and his colleagues here are working on these questions. But they certainly, as a practical matter, are really going to make an enormous difference.

And the other, I think, elephant in the room, I'll just toss it out: is cancel culture. Which is a very difficult issue because what we're talking about are people exercising their own free speech rights, but in ways that are perhaps having an unduly speech suppressive impact on others. And speaking of which, Susan, thank you. I'm so sorry, I didn't see you. I'm just going to say one other thing, which is out of great respect for Brooklyn Law School, and my friend and

⁵⁷ *Jonathan Askin*, BROOKLYN L. SCH., <https://www.brooklaw.edu/Contact-Us/Askin-Jonathan> (last visited Dec. 04, 2023).

colleague Susan, I've worn your lovely school colors. Susan, thank you for having such nice colors.

Susan Herman:

And we appreciate it. Thank you. So, you can see why these are the people who I wanted to help me talk about the many, many issues there are to discuss. Unfortunately, there was already a lot of Q&A involved in what they were saying, because I had asked them a bunch of questions. So, I think we have time for maybe one, chosen question before we have to break and move to the reception.

Audience Question:

How can civil rights and liberties and American democracy more broadly survive racial resentment?

Ellis Cose:

I'll begin it. I mean, I think some things are going by the wayside. And we've already seen the beginning of that with affirmative action. But you can't, just because you have racial resentment, erase forty years of civil rights law. There are certain values like equal opportunity that are going to continue being values. And we're never going to go back to a society that is segregated by race. That's not something that we can do. But I do think that, as we saw with Reconstruction, and post-Reconstruction, there is an attempt to reverse Reconstruction. I think that we're now seeing a similar thing happening, where, you know, Reconstruction, of course, came about when you had a majority of the South, the majority of whites in the South who still fervently believe that Black people didn't deserve any rights. You're not going to have that now, there are too many people who believe differently. There are too many people who believe in a multiracial democracy. And that's why I said earlier that I think we're going to have a generational battle going on. Between those forces who want to, sort of, return things to the past and those who don't. There are going to be some battles that are won and some that aren't. And I think the things that are easy to pick apart are things that try to correct past discrimination by having current discrimination are going to have a harder time surviving. Those things that approach equality from a different perspective are going to have an easier time surviving. But in the end, it's going to be a question of what happens, as I've said before, to the next generation, and how they end up dealing with these issues.

Erwin Chemerinsky:

Thank you again for having me. I think our democracy is more in danger than it's been at any time in American history. I recently heard the United States Senator Peter Welch say, "Whether our democracy can survive is a jump ball." Imagine if Donald Trump is elected in 2024 and the Republicans win both houses of Congress. Do we believe democracy would survive? I think that if that were to happen, we'd see the first serious secession movements since the Civil War. And I think that Ellis pointed to many of the things that threaten our democracy. The electoral college that increasingly makes it likely that the candidate that loses the popular vote becomes president. The United States Senate has constituted the filibuster. Partisan gerrymandering for the House, the Supreme Court gutting voting rights. The Supreme Court empowering corporations through *Citizens United*.⁵⁸ The continuing racial inequalities that are mentioned. And I think the question is: how can our country overcome these now? Can democracy survive? And take it back to the Supreme Court. What will it mean at a time when a country is so politically polarized to have a Supreme Court that's come down on the far-right side of that divide? I think we all have to think through this question of how can we fight to save democracy. But I think we should all be very worried at this moment in time.

Anthony Romero:

I guess I want to pick up on the word "resentment" because that's the one that was kind of stuck in my head as I was hearing the sentence. And I guess, there's a part of me that thinks I am comfortable with the conflict that comes with the fight for equality. There are going to be resentments. I think if we're on a path to giving people greater opportunities and greater pathways for agency and self-actualization, I think the resentments are worth the price as we get through it. I remember the whole debate around affirmative action. I was definitely an affirmative action baby. When I went to college, I was the first one in my family to finish high school. I did not have the SAT scores of my roommates. Princeton very much picked me because I checked the Puerto Rican box. I was insecure about being an affirmative action baby at Princeton at that time. I am really glad I dealt with that insecurity. And so be it, the

⁵⁸ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

resentment that I took someone else's seat, because it gave me an opportunity to prove myself. I sat for my own exams; I earned my own grades. My grades were all blind on the blue book. They didn't know who I was and didn't know that I was the first generation in my family to be taking those exams. And so, I earned my place. The resentments that come into giving people like me an opportunity to compete, an opportunity to compete to succeed, I think are worth the kind of transaction costs initially, because ultimately, you make change by being there.

Ellis Cose:

A lot of the resentment we see now is not because somebody got affirmative action. It's this whole replacement theory nonsense. There's this sense that the country is changing in ways they don't like. And maybe too many Black people were voting, maybe too many immigrants are voting. That's a little bit different than those around them and the resentment that you're talking about. I'm just wondering how you process that kind of resentment and its consequences.

Anthony Romero:

I think there are some who are definitely going to feel that sense of being besieged or being replaced. I also think that part of what happens is that people grow and change and they get to be wrong and then get to be in the right. There was massive resentment when we moved out of the projects into this working-class white community in Passaic County, New Jersey. My parents had to bribe the superintendent to move in. There was major resentment that we were Puerto Ricans moving into that neighborhood. We were called all sorts of words and my sister stopped speaking Spanish at that time. My dark-skinned cousins who were across the street got the worse side of the hate. Yet over time, as we lived alongside some very, kind of, racist, white, ethnic Italian/Irish folk, we became part of the community. We changed their points of view. Rubbing up against each other, they got to know what it was like to be Puerto Rican. The Irish family that didn't want us moving in next door, that young Irish girl now speaks very good Spanish because she learned it from my mother and my father. I believe that part of what happens is that you work through these resentments. Look at the way that gay people are now accepted. I mean, it's just like, I've seen that in my lifetime. I'm fifty years old. I think part of how we change hearts

and minds is through forcing proximity. When Bryan Stevenson talks about being proximate. People are not going to get close. Sometimes you have to force the closeness, so they get the perspective and the knowledge. I don't know Ellis. That's where I think that in some ways, we'll see them on the other side. I think we'll bring a lot of them along with us. Maybe that's overly optimistic. But I'm flexing that muscle for you right now.

Nadine Strossen:

I can tell you that is backed up by a famous sociological study that's been confirmed by many, many hundreds of subsequent studies, called the contact theory. It was formulated by Gordon Allport, social psychologist at Harvard, right after the Holocaust. He was looking into, "How can we prevent what caused the genocide, or the support for it? How can we prevent it?" And it's such common sense, but I love it when these sophisticated social science studies, you know, prove that common sense really works. And that is the way you get over your resentment, your prejudice, your stereotyping, your demonization of the other is to make them not the "other" and to have actual contact with people. To appreciate them with all of the complexity that all of us individuals have. What's even more encouraging and relevant in an era where unfortunately, we are physically and geographically living in such segregated communities in various ways. There have been hundreds and hundreds of studies that have shown that para-social contact is virtually as effective. That if you see the images of the "other" on TV shows, or in books, or in movies, that that has virtually the same impact as actually interacting in person. Which is another reason for wanting to make our literature and our cultural depictions more inclusive.

Susan Herman:

So, there's the optimistic thread for tonight that we can change and a lot of the way that we change is person to person. But one of the most striking comments to me tonight was Ellis's claim that we're actually not going to get anywhere unless we can change the Constitution. I recently read a description of the Constitution as an 18th century legal corset. So here we are, with this corset, right? You know, the problem of the electoral college that we can't get rid of, and we can't actually change the Constitution because of the difficulty of the amendment process. You look at the red and blue

states, and it's not going to happen. I think that leaves us in kind of a difficult place that we can talk about more during the reception, because there's still a great deal to talk about.