DWIGHT D. OPPERMAN LECTURE
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REMARKS OF THE HONORABLE STEPHEN G. BREYER, ASSOCIATE JUSTICE, SUPREME COURT OF THE UNITED STATES

REFLECTIONS OF A JUNIOR JUSTICE

Thank you, Dean Walker, for that kind and thoroughly-researched introduction. Although you managed to look up everything else, I am glad to say you missed the review of my book on regulatory reform that appeared in the *Los Angeles Times*. It said: "Alice in *Alice in Wonderland* emerges from the pool of tears with the dormouse. The dormouse begins to read Hume's *History of England*. 'Why are you reading that?,' said Alice. 'Well,' said the dormouse, 'we are wet and that is the driest thing I know.' That was before Breyer wrote this book."

I am very glad to be here at Drake. I have enjoyed seeing your campus, and the impressive new Law School building. I think you have struck upon an excellent idea—one that I have not seen elsewhere—to host an actual trial once a year and have the students prepare for it, to put what they are learning into context. Thank you, Mr. President, for having me. And thank you, Congressman Smith and Mrs. Smith, for being here.

I am delighted that Dwight Opperman is both honored at this school and that he provided the opportunity for this talk. West Publishing, as you know, owes its success to Dwight Opperman, and West is not simply a successful publishing company. West is part of the legal system of the United States and indeed it has been for many years. Those headnotes do not write themselves and they are not just put together by some machine. Dwight has also contributed to the law through his philanthropy at Drake, the Supreme Court Historical Society, the American Judicature Society,

and other legal institutions in this country. Like Congressman Smith, Dwight is well known as a friend of the judiciary. I consider that a considerable compliment, although I am biased. I thank you both, and I know judges throughout the country feel that way because of your time and effort.

I am going to talk for awhile, not too long, about what it is like, and what I have learned from, being a Justice of the Supreme Court. And I said in the title "Junior Justice" because that is what I am and have been for eleven years. I remain so because the newest member of the Court, Chief Justice Roberts, is senior to me. Anyway, I get one vote, just like everybody else, and my only special job is opening the door in Conference when somebody knocks.

But also, over eleven years, I have had a chance to reflect on a number of things that I think are of special importance about the job that I am so privileged to have. I would like to mention three aspects of my job that I think are not only important to the law, but tell us something about the United States of America—certain assets, treasures, benefits that we have.

The first is about the rule of law, something we normally take for granted. We simply accept the fact that people in the United States do follow the law. But I can illustrate for you that that is not something that happens automatically. Consider an important case—one that is often forgotten in courses on constitutional law—from 1832 called *Worcester v. Georgia*.[1] There was a tribe of Indians, the Cherokees, who, under a treaty with the United States, had land in northern Georgia. Now, this tribe had given up hunting and fishing for better or for worse. They were farmers, they had an alphabet, they even had a constitution. Unfortunately for them they found gold. I say unfortunately because the Georgians then took the land. They simply marched in and took it over. They paid no attention to the treaty. They did pay attention to the gold.

Now as I said this particular tribe of Indians was pretty civilized. So what did they do? They did what any civilized American would do; they hired a lawyer. The lawyer was the best lawyer of his day, Willard Wirt, former Attorney General of the United States, and he said, "We are going to bring a lawsuit and we are going to fight it all the way to the Supreme Court." In fact, they brought two.

1. Worcester v. Georgia, 31 U.S. 515 (1832).

In the first, called *Cherokee Nation v. Georgia*,[2] they simply sued Georgia, and the Supreme Court eventually found a reason not to hear it. The Court said this is a matter beyond our capability. But then the Georgians passed a law making it a crime to go on the Indian Reservation without the permission of the Georgia legislature. Some missionaries did go on the reservation. A missionary called Worcester was arrested. He was in jail and he brought a lawsuit, in habeas corpus or the equivalent, and said, "I cannot be held here because this land belongs to the Indians, not the Georgians, so Georgia law does not apply." There was no way for the Supreme Court to avoid that. Here is a person, he is held in prison, he says I am not held correctly under the law because there is no law of Georgia that applies, and he asks the Court to order his release. After a lot of procedural detail, which I will spare you, he got to the Court and the Court decided the case. The Court held that he was right, the land belonged to the Indians. In fact, the Court said the Georgians had no basis at all for being there. That is the end of the matter. Release Worcester. Give the land back to the Indians.

The first thing the Georgia legislature did was pass a law that said anyone who comes to Georgia to enforce this ruling of the Supreme Court will be hanged. Andrew Jackson, President of the United States, supposedly said (and he said enough such things that it is probably true): "John Marshall, the Chief Justice, has made his decision. Now let him enforce it." Nobody did a thing.

But then North Carolina, thinking this rather a good idea, said, "We will not give the United States customs duties that we owe them because we prefer to keep them." Andrew Jackson woke up to the problem and he ended up saying to the governor of Georgia, "You must release Worcester." They had a negotiation and Worcester was let out of jail.

But what about the land—the land that the Supreme Court of the United States had said belongs to the Cherokees, not to the Georgians? The President sent troops to Georgia. But did he send them to enforce the ruling of the Supreme Court of the United States? No. He sent troops to evict the Indians. They walked along what is historically known as the Trail of Tears, to Oklahoma, where their descendants live to this day.

Let us roll the clock forward to 1958, to one of my favorite cases, *Cooper v. Aaron*.[3] That was the case, as some of you may know, in which the Supreme Court of the United States said "In *Brown v. Board of*

2. Cherokee Nation v. Georgia, 30 U.S. 1 (1831).
3. Cooper v. Aaron, 358 U.S. 1 (1958).

Education,[4] we said segregation of the public schools is unlawful, and we meant it." The governor of Arkansas, Orval Faubus, stood in the schoolhouse door in Little Rock and said this school will remain white. In *Cooper v. Aaron* the Supreme Court said "we meant it" and every one of the nine Justices signed the opinion. But you could have had nine justices, nine hundred, or nine thousand signing opinions. What mattered, Governor Faubus thought, was that "I have the state police and they are not going to let the black children in."

At that point, President Eisenhower said, "I will send troops to Arkansas—the paratroopers—but they will not go to thwart the law, they will go to enforce the law." And those paratroopers went to Arkansas, they took the black children by the hand, and they marched with those black children into the white school. That is progress.

Now, let us roll the clock forward again. What is the third case? Abortion? School prayer? *Bush v. Gore*?[5] Almost everyone in the United States has strong views on such matters. And when the Court decides cases involving those issues, half of the people think not just that it was wrong, but that it was terrible. And yet, what I think is the most remarkable fact about those cases is a fact that is rarely remarked. There are no paratroopers. There is no army. There are no people in the streets saying they will not follow the law, even those who think it is terrible. It is accepted that even in the most controversial matters the public will abide by the rule of law.

I think about that when I do my job. Sitting on one side of the bench, I look out into the room in which *Brown v. Board of Education* was argued. I see in front of me people of every race, every religion, every point of view. There they are, right in our courtroom, bringing forth controversial issues under law and expecting to carry that law out. The rule of law is a frame of mind, not words on paper. It is not writing the right kind of Constitution, though that is part of it. It is a force of habit. It is an understanding. It is something that has been won, if you like, because between 1832 and today we have had a Civil War. We have had eighty years of legal segregation. We have had ups and downs of all kinds and gradually, over time, Americans believe and teach their children to believe, through example as well as words, in the importance of the rule of law. I feel that emotionally, and I feel it every day, and it is not something you get bored of and used to. It is that frame of mind, that attitude that leads those

4. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
5. Bush v. Gore, 531 U.S. 98 (2000).

difficult matters into our courtroom to be decided, and causes the decision to be followed. That is a marvelous thing. That is the rule of law.

The second thing that impresses me is the vitality of our brand of democracy. If you believe what you read in the newspapers, nothing works. The city council does not work. The state does not work. The legislature does not work. Congress does not work. It is all terrible. We are not living in a democracy anymore. We are living in a dictatorship of X or Y, depending on your political point of view. That is not quite what I see.

Consider the problem of privacy rights. The law that protects people's privacy from interference is, in fact, a complex set of laws, such as trespass laws, privacy laws, tort laws—all with the objective of protecting the personal integrity of individuals. This objective is constantly being challenged by new technology. Surveillance cameras, cell phones, computers—these devices all challenge one of the traditional guardians of privacy: the fallibility of human memory. When you walk down the street and your neighbors see what you are doing, they will forget. Or when I say something silly I think one good thing is that everybody is going to forget about it pretty soon. But not with tape recorders. Not with computers. Not with surveillance cameras. Not with machines that remember everything.

The result is that the law of privacy is a little out of date in certain respects and it has to be changed. Everybody thinks it has to be changed, but not everyone agrees how. And the way we solve this problem is through public debate. All kinds of people participate. Lawyers, of course, people in business, people in labor unions. Academics—they love to debate. The Association of Police Chiefs. We have thousands, perhaps tens of thousands, perhaps hundreds of thousands of organizations, and they are all over the place, and there is nothing they like to do better than debate an issue that affects them.

Tocqueville said in 1834 when he came to America what he heard was the clamor of political debate. Has that clamor diminished? I do not think so. People run things up the flagpole. Somebody says try this. Somebody responds that that is the worst idea I have ever heard. And out of this debate what happens? What happens is maybe someone passes a state or local law, or issues an administrative ruling. Eventually we will end up with maybe statutes, maybe administrative rulings, a whole complex set of laws which deal with new circumstances and which we are prepared to modify over time in light of this public debate.

Now if I am right about that, we are not in quite the terrible shape in

respect to democracy that some think. Think of the Patriot Act. Think of privacy statutes. Think of many, many efforts to change the law in important ways and I think you will see that ordinarily the process resembles the "messy" public debate that I have described. And when I say "messy" I mean to put it in quotes because I do not really think it is a mess. It is a democratic conversation in action, the very kind of system that our Constitution foresees.

Courts have a role to play, of course, but in most cases it comes late in the day. When this great public debate has crystallized into a statute, say, regarding the use of personal information on the Internet, its application may be challenged in court. And what the court is going to do is not to say whether this is a good solution or a bad solution in respect to privacy. The court is going to say whether this solution reached by others, administrators, legislators, after debate, comports with a basic set of ground rules. The Constitution provides the ultimate ground rules. The Supreme Court polices those boundaries. And when we decide constitutional questions in this posture, we often say that a particular decision falls within those boundaries, and the merits of the particular issue are up to others.

That brings me to my third and last point. What kind of a document is this document, the Constitution? One of the privileges of my job is to work with this document every day. Doing that for eleven years tends to give one a view of the document as a whole. So over the course of time a Supreme Court Justice inevitably tends to develop a general approach of respecting what the document is like as a whole.

Justice Kennedy, Justice O'Connor, and I were speaking at a meeting on the topic of educating high school seniors about the Constitution. The Annenberg and Carnegie foundations have done some surveys of lawyers and others, and they ask what is the most important part of the Constitution to transmit in the high school class? They got a variety of answers. The First Amendment, a lot of people thought, equality, privacy. Not very many had our reaction. We said, those things are in the Constitution and of course they are important, but there are not what it is basically. It is basically a set of detailed provisions designed to create democratic political institutions that will last. At least that is what Articles I through VII are about. They describe institutions, not individual rights. Of course, those institutions are designed in such a way, separating power vertically (states and federal government) and horizontally (legislative, executive, judicial), so that no one will become too powerful. And the Bill of Rights further protects the individual from government overreaching. A participatory democracy that has those attributes is really what the

Constitution is trying to create.

If that is so, it becomes clear that the Court is not there to make decisions for other people. We are there to keep the system on the rails. That is it. The democratic rails, the boundaries, the creation of the democratic space within which people are to make their own decisions. That is what Tocqueville said in 1830. How is it possible, he asks, that in this society where the basic idea is everyone has something to offer and (unlike Europe) there is not some social class that is "us and not them"—why does this country not go off the rails? Why does vacillating public opinion not throw it into a nightmare of civic turmoil? Why does it work? And he answered the question by saying, "because people practice democracy." They learn how. They learn how in town meetings, or they learn how in school, to work with others. They learn that you have to cooperate. They learn that you better listen to what somebody else says if you want your way. They learn that we are part of something bigger than us and that when we make decisions we are deciding as a group. Does that still exist? I certainly hope so.

And now you see why I feel so strongly about it. When I read that more high school students know the names of the Three Stooges than three members of the Supreme Court that does not bother me. It honestly does not. But when I read that more know the names of the Three Stooges than know that there are three branches of government, that is cause for concern. When I read that they are not teaching civics in high school I think, my goodness, how is this all going to work? The document I work with every day does not just *permit* the people to decide matters of public policy, matters of how they will live in their communities, matters of how they will live in the state and the nation, through a democratic process of participation. It foresees that they *will do it*. And so if they do not, well, I just do not see how it works.

This is not a new idea. Go back twenty-five hundred years to the Funeral Oration of Pericles, where he is describing Athens. What is it we say in Athens of a man who does not participate in public affairs? We do not say he is a man who minds his own business. We say he is a man who has no business here. That is strong, but I think the Founding Fathers had something like that in mind. The Constitution foresees participation in the democratic process. That is what I have carried away. I carry away the importance of the rule of law, the notion that our democracy functions sometimes in complicated ways but often better than we think, and I carry away the impression of a Constitution that makes room for democracy.

Thank you.