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Dean Reuter: Hello, and welcome to the podcast hosted by The Federalist Society's Practice Groups. I'm Dean Reuter, Senior Vice President and General Counsel of The Federalist Society.

We're joined today by Judge Amul Thapar, who serves on the Sixth Circuit Court of Appeals, having been elevated to that court from the district court after having served as the U.S. Attorney in the Eastern District of Kentucky and having done a stint in private practice. His degrees are from Boston College and the Berkeley Law School.

His book, available today, is an Amazon number one new release. Now, this book, published by Regnery Gateway, is titled *The People's Justice: Clarence Thomas and the Constitutional Stories that Define Him*. Judge Thapar is a great friend of the Federalist Society, appearing at national and local events, teaching classes, and more.

So the book, *The People's Justice*, is unique in that it tells stories case by case to discuss the jurisprudence of U.S. Supreme Court Justice Clarence Thomas. Judge Thapar, can you give us some idea of what inspired you to write this book?

Hon. Amul R. Thapar: Yes. So thank you for having me. It's an honor to be here with my good friend Dean. And I wrote the book because Justice Scalia, before he sadly passed, said, "We have an obligation to fly the flag."

And what he meant by that, and what I took from that is Justice Scalia was always such a great advocate for originalism. In fact, when he started, he said, if he said he was an originalist, everyone would run from the room like he was a bear. He changed that—somewhat single handedly—amongst the judiciary by just a force of will and talking about it and being open about it. And what he did is he took it to lawyers, judges, and academia, where it now exists and is debated in academia even.

But what I wanted to do is take the next step and take originalism to the American people because I believe it is consistent with our oath and consistent with what the Founding Generation intended and what is natural for all documents to interpret them consistent with their terms.

Dean Reuter: Yeah, I've never understood why that's so controversial, that we, as lawyers, should interpret documents consistent with their meaning. To me, that seems like the definition of lawyering.

You provided a good segue to my second question, and that is The Federalist Society, of course, is a bunch of lawyers, conservatives, and libertarian lawyers. But we all have family members. We all have friends. This book, it seems to me, having leafed through it, is written so that it's much more accessible.

I think it's a valuable thing for lawyers and Federalist Society members to read. But I think it's accessible to friends, children, teenage children—probably—and family members. Did you write it that way on purpose?

Hon. Amul R. Thapar: I did.

Dean Reuter: You mentioned trying to reach a wider audience.

Hon. Amul R. Thapar: Yes, I definitely did. I wanted to, of course -- I think lawyers will find it fascinating and interesting because I include so many facts that aren't out there that really help you understand Justice Thomas's opinion and the original meaning.

But I also think it's the stories of real people, and I guess it's the trial judge and AUSA former prosecutor, trial attorney in me that wants to tell the stories of the cases and recognize the real people in front of the Court. Justice Thomas captures that so well. Of course, he's now the leading originalist. I think that few would debate that, and I maintain that in the book.

But he's also someone who cares passionately about people—hence the title, *The People's Justice*. Whether it's personally anyone that knows him knows he loves and cares about people, and everyone he meets, he treats them like they're the only person in the room, or it's his jurisprudence that reflects that understanding. And while it talks about the original meaning, it also honors in doing so the will of the people because he knows that he shouldn't replace his views for those of the American people.

Dean Reuter: I have seen Justice Thomas stand in a line for three hours—well, stand in a place for three hours while a line works through. And it's exactly right. That's a great description of him. He speaks to each person as if they're the only one in the room. He's not looking over their shoulders at the next person. He's not checking his watch. He's fully engaged talking to those people, and they love it, obviously.

Hon. Amul R. Thapar: Yeah. I was at Yale Law School for—this isn't in the book, but there are some personal stories in the book. But I was at Yale Law School for an event honoring him, believe it or not. And I think it was 25 years on the bench, and they put together an event honoring him.

And afterwards, we went to a reception together. And at the reception were all these professors—including many who criticize him—all these students who were dying to spend time with him, and who did he spend 20 to 30 minutes with? The support staff.

Dean Reuter: Right.

Hon. Amul R. Thapar: And then afterwards there was a private dinner for him, and everyone left for the dinner. Who was behind taking pictures with and thanking every one of the support staff? Clarence Thomas.

Dean Reuter: Right.

Hon. Amul R. Thapar: And those stories aren't told. They aren't captured because his critics, they don't want you to know that. They don't want you to know the stories in this book. I think that's why it's important not only for lawyers, but lay people to read it, because I think you'll get a true understanding of how his jurisprudence benefits the American people.

Dean Reuter: Yeah. So let's dive into the book a little bit, *The People's Justice*. First of all, let me ask you because you brought up originalism. And this is a book about the stories behind 12 different cases. It's interesting to me how you selected -- I'm curious as to how you selected the 12 different cases.

There are nine dissents and three other opinions—concurring opinions, I guess, but a majority opinion or two. Does it say anything about the justices' early years, the era of the Court, that he's defined by dissents—maybe the way Scalia was, maybe the way Rehnquist was—when he was in the minority on the Court?

Hon. Amul R. Thapar: I think it does. But as in *McDonald*, which is in the book, *McDonald v. City of Chicago*, it's a concurrence. In *Zelman*, it's a concurrence. And the one—and I think your numbers are accurate—I would point out is if you want to understand someone's jurisprudence, I learned this as a judge.

Their separate writings are the most important thing to look at because when you're trying to get two votes, five votes, whatever it is, you're writing for a majority. And so that doesn't reflect their true jurisprudence. It does reflect their jurisprudence but not in a way the separate writings do.

And that's why I think the best place to look is his separate writings. And that's where I started and finished was looking at his separate writings. Trust me, there's a lot more. I'm not going to tell you where because if I want to write a second book about Justice Thomas, I may do it. But at this point, I found these 12 stories to be gripping. It was really fun to do.

As I say in the beginning, there's a lot of heroes in this book, and as we dive into the book, I'll talk about some of them. And I think what you find is there's so many people that bring cases, like Otis McDonald, whose lives are suspended during the litigation, who need the result of the litigation just to defend themselves, in Otis McDonald's case.

And I think as lawyers and judges, we should appreciate that justice delayed is justice denied. And we need to recognize there's real people every step of the way. And I think at the district court, you see it because they're in front of you. But at the court of appeals and Supreme Court, sometimes, we lose sight of that, and we shouldn't.

Dean Reuter: Yeah. I take it for the lay audience in the district court, the litigants, the parties are before you. You're interacting with them during a trial—or even sometimes during motions practice. But once you get to the appellate level, that's less the case.

Hon. Amul R. Thapar: Yes, that's definitely less the case. I think at the appellate level, we interact almost exclusively with lawyers, unless they're arguing the case themselves, which happens from time to time, but not very often.

Dean Reuter: Yeah. So I'm going to go back to originalism just briefly and see if there's a tension between originalism and these people's stories because originalism means adhering to the text of a statute for textualism or of the Constitution. Do you see any tension between the

stories of the litigants, which maybe create a different focus not on the text of the Constitution or the text of the statute before you?

Hon. Amul R. Thapar: I don't because you need to tell the stories to understand the decision. And I think that the document itself -- so what the critics will accuse originalism of is protecting the rich over the poor, the corporation over the consumer, the strong over the weak.

What the book shows is originalism actually does the opposite. Why? Because what was the Constitution? It was a contract between the American people and their government. And when the American people gave up certain God -- or allowed restrictions on certain God-given rights, they did so as a part of a bargain. And that bargain is reflected in the words of the document.

And so if you think about the document, it limits the federal government's power, and it limits the rights that the federal government can intrude on. The first chapter demonstrates this firsthand, where the Founders had one vision and put certain words in the Fifth Amendment. And the Court has changed those words, as Justice Thomas so eloquently pointed out.

And so when we adhere to the original meaning, it actually does the exact opposite of what the critics say. Now, let me qualify that with, as you pointed out, an originalist job—and I say this in the introduction—is to get the result right. And people say, “Oh, my gosh. In certain cases, that results in our rights not being protected.” Well, if the document doesn't protect your rights, there's an easy way to do it. It's go talk to your neighbor and pass a law.

Title VII protects rights. That was passed by the legislature and signed into the law by the president. That's a perfectly fine way to protect your rights. What is not perfectly fine is to turn me from a judge into a monarch.

Dean Reuter: Well, back to the book, *The People's Justice*, I want to -- it has 12 chapters, 12 different stories, 12 different cases. And of all those, do you have a special -- a favorite case, a favorite chapter? Not that we're going to direct the reader to one, but let's get specific and make this a little bit more real for our podcast audience. Pick a chapter, pick a story, pick a case, and tell us about it.

Hon. Amul R. Thapar: Okay. So I want to say—and you know this, Dean, firsthand, after writing a book—every -- after you write a book, they're like your -- every chapter is like a child to me in some sense. You can't have a favorite.

But I have a special place in my heart for the second chapter for a lot of reasons. It's a case called *Zelman*. It's out of Cleveland, Ohio. Of course, as a native—born in Detroit but raised in Ohio—I love the great state of Ohio almost as much as I love my home state of Kentucky. And *Zelman* was fascinating because of all the people I came across and all I learned in researching it.

So *Zelman* is a case about vouchers—so vouchers for school-aged children and especially poor school-aged children. It was directed based on your income level. So let me talk about what was going on in Cleveland at the time where the voucher program was based. So George Voinovich was the mayor of Cleveland. And it was called “The Mistake by the Lake” at the time. The Cuyahoga River caught on fire.

Dean Reuter: So what decade is this? The 1970s?

Hon. Amul R. Thapar: Yeah, this is the late 70s, early 80s.

Dean Reuter: Okay.

Hon. Amul R. Thapar: And George Voinovich becomes mayor—and I recount that—and he turns the city around. And then he runs for governor. But one thing always nagged at him, and that was that the schools—the public schools in Cleveland—he could never change, so much so that 25 buildings in the school system were condemned—14 to 25.

And a federal court, when the city did not fix the buildings, had to turn over supervision to the state of Ohio of the schools—the public schools in Cleveland. Students didn't have toilet paper. They didn't have soap in their bathrooms. They complained about all sorts of basic necessities not being there. Nine percent of students passed the ninth grade proficiency test. Very few graduates.

Dean Reuter: Nine percent?

Hon. Amul R. Thapar: Nine percent.

Dean Reuter: Wow.

Hon. Amul R. Thapar: And so Voinovich was looking for a solution—any solution. And he went to the leader of the Senate—the Republican leader, Bill Batchelder—and he said, “Bill, we have a problem. We need a solution, and I need it to be constitutional. But I need to get these kids out of these failing schools. Figure it out.”

Bill Batchelder went to Cleveland to study the problem. He met two amazing city council people. One was Bill Patmon, who himself was from Detroit and then moved to Cleveland and eventually ran for city council. The other was Fannie Lewis. And Fannie Lewis may be one of my favorite people in the book.

Fanny Lewis was from the highest crime ward in Cleveland—the poorest ward in Cleveland. They said she was the safest person in Cleveland because if you jumped her, she'd call your mom. She knew everyone. And Fannie was a champion of the public schools, but she wasn't going to leave the kids behind. She wasn't going to allow that to happen.

And I recount her personal story in the book. But what she ultimately does is teams up with Bill Batchelder, Bill Patman, and the ranking Democrat in the Senate, who was also from Cleveland and had some choice words for those who opposed vouchers. He said, “They have a voucher in their pocket, yet they'll oppose vouchers because they don't want these kids in their schools.”

Dean Reuter: That's an allusion to wealth, I assume, that if you have enough money, you can put your kids in private school. So you have a voucher in your pocket.

Hon. Amul R. Thapar: Yes. That's exactly what he's saying.

Dean Reuter: Right.

Hon. Amul R. Thapar: And they team up and they pass a voucher program, and the kids are incredibly happy. In fact, there's a Twitter page for the book. If you put in *The People's Justice* in Twitter, I don't know how to tell you the handle or whatever people talk about. But you'll come up with the page.

Dean Reuter: Don't let your publicist know that.

Hon. Amul R. Thapar: Yeah, I know. Let's keep that secret. And on it, I insisted the background picture be the Cleveland parents. So what happens? The case ends up in the court system, and the book recounts the fight.

And during the fight, it makes its way, obviously, to the Supreme Court in an emergency basis, and they uphold the program 5-4. But then it goes back for the ultimate fight. And there's another great story. Gosh, I could talk about this chapter all day, see?

Judi French is going to argue one of the most important cases. It would be her second argument ever in front of the Supreme Court. And everyone knows how important this is, and they're saying, "She can't argue it. She can't argue it."

They call Ken Starr, "Will you please take it over?"—Ken Starr, former famed D.C. Circuit judge, solicitor general, one of the great advocates in the history of the country. And Ken Starr says, "Let me meet with her." He takes her to moots. He tells people, "There's no way I'm taking this over."

We posted on the Twitter page the link to her argument. Every young person should go listen to that argument. Everyone's intimidated going into the Supreme Court. I'm sure she was intimidated. She was masterful. She argued that case with Ken Starr at her side. And afterwards, Ken Starr said, "There is no chance I would have done better than Judi French."

Dean Reuter: Wow.

Hon. Amul R. Thapar: And there's some great stories about how she prepared in the book. I'll leave that for your readers to read about, but it's really fascinating. So it gets to the Court, and the Court rules in favor of the voucher program. And the voucher program was the first of its kind. Why? Fannie Lewis said, to make this succeed, her and Bill Batchelder and Bill Patmon, they needed to get the bishop involved.

And they needed the Catholic schools to commit because the suburban schools would not participate in the voucher program. The magnet schools would. The community schools would, and they got the Catholic schools to participate. It was the first voucher program that tested the boundaries.

And Justice Thomas, he concurred in full with the majority, but then he wrote separately. And he talked about what he calls the cognoscenti, and this runs consistent—the cognoscenti, meaning to him, the elitist. And he talks about how Frederick Douglas talked about “education means emancipation.”

Those words were so true for a young Clarence Thomas, where his grandfather would say those words—his grandfather, who was so poor but saved his money to send Clarence Thomas and his brother to Catholic schools. And those years, if you talk to Justice Thomas, were so influential on him.

And we know that we talk about higher education, but we forget—and Justice Thomas points this out constantly, and he talks about it in the book—that the most important, formative years are kindergarten through twelfth grade. And so, interestingly, in *Zelman*, he references affirmative action, and he says, “There's two ways to fix the problem.” One's a Band Aid, and one's a solution. One's constitutional. And in his mind, one is not.

Dean Reuter: Interesting.

Hon. Amul R. Thapar: Sorry to go on so long.

Dean Reuter: That's okay.

Hon. Amul R. Thapar: You asked me for one I would like.

Dean Reuter: I did. I did. I want to go back to what you said about majority opinions and concurrences or dissents. In that concurrence—the way I understand what you said—Justice Thomas is liberated from the process of having to write for the majority and persuade his colleagues. So you're more apt to hear his true voice because he's writing for one person himself.

Hon. Amul R. Thapar: Right.

Dean Reuter: Say more about that if you could.

Hon. Amul R. Thapar: Yeah. So when he writes for himself, you will find a pretty consistent pattern in his opinions, in that he spends a lot of time on the original meaning, because that is what he is first and foremost. But afterwards, he doesn't hesitate to respond to those who say the original meaning isn't best for the country or the original meaning isn't best for the schools or the original meaning isn't best for the people.

And what I found fascinating is he often quotes people like Frederick Douglas and has some just amazing and thoughtful quotes that are -- that I include in the book. And to me, the chapter is called “Education Means Emancipation” because those words just seemed so important to him.

But he has other words about -- he talks about *Brown v. Board* and the promise of *Brown v. Board* and how it's ironic that the very thing the children were trying to get then, now people ignore that we've left them in failing schools. And to him, you can see.

It's not only does he believe the original meaning supports -- and he talks about how ironic it would be if a document and a Constitution that was supposed to promote liberty restricted kids from getting a good education.

Dean Reuter: Yeah. It is stunning how often a government decision or policy leads to an opposite result. Interesting. So I'll talk to you author to author now. When I was writing books, I often have someone in mind—an audience of one person that I'm writing to. When you are putting this together and putting pen to paper, did you have that same experience? Was there somebody? Was it your wife? One of your children? A colleague? A clerk?

Hon. Amul R. Thapar: So it was a neighbor of mine who thinks very differently as a dear friend—probably one of my best friends in the world. And he sadly has moved away just the other day. And I give him grief about it all the time. But he thinks differently. And when I talk to him, he's a different thinker.

And he said, “You're one of those” -- when I was nominated to the Sixth Circuit, there was some media about it. And he said, “I didn't know you were one of those originalists,” right? Because you hang out with these people. They're parents of your kids' friends, and you spend a lot of time with them. But I don't talk law, right? We talk sports; we talk all kinds of things. But no one wants to talk to me about law, nor do I want to talk about it.

And so he said, “I didn't know you're one of those originalists”—kind of like Justice Scalia must have got it. For the first time, I knew what Justice Scalia was talking about. And I said, “What do you mean?” And he said, “Well, how can you be one of those originalists? You're crazy,” right? And I said, “Let me explain to you what originalism is.” And I explained it to him.

And I said, “Look, here's how it works. If you signed a contract -- this is the example I used because he's a business guy.” I said, “If you sign a contract with someone, should I try and figure out the meaning of the terms as you and the person you signed it with understood it, or should I just tell you what's best for you and ignore the contents of the document?” He said, “Well, of course you should look -- that's why I spent so much time on these contracts.”

And I said, “That's all originalism is.” And I explained it to him, and he said, “Oh.” He said, “No one's explained it like that. Oh, I'm an originalist, too.”

Dean Reuter: Fascinating.

Hon. Amul R. Thapar: As I wrote this book, I thought about him at every page, every time. And I said, “Okay. When he reads it, is he going to walk away and say, ‘Yes?’?” In other words, I want -- there's a lot of people. We think at The Federalist Society and we think in the legal profession that everyone's thinking about what we're thinking about. That's just not the reality.

I'd say most Americans are living their daily life trying to provide for their children and raise their children in the best way possible. And I hope this book entertains, and I hope this book explains, and I hope this book changes minds because I think it will.

Dean Reuter: Good. The book, again, *The People's Justice*, is available on Amazon today, right?

Hon. Amul R. Thapar: Today.

Dean Reuter: I mean, it's debuting today as a number one new release. And presumably in bookstores and everywhere you can buy a book, you can get this.

Hon. Amul R. Thapar: I would hope so, yeah. I think it's everywhere.

Dean Reuter: Good. And I don't know if I mentioned it's Regnery Gateway is the publisher, I think, right?

Hon. Amul R. Thapar: That's right.

Dean Reuter: Yeah, good. So I don't want to ask you how long it took you to put the book together, but I do want to ask you if you had -- if there were any big surprises along the way. Is there anything that caught you off guard either about one of the cases in the book or about Justice Thomas or any other aspect? Maybe the writing process? Is there anything that surprised you?

Hon. Amul R. Thapar: Yeah, there's a few things. I'd say there's a lot that surprised me -- how hard it is for those of you out there thinking, "Oh, I'm going to write a book." It's a much more difficult process than I thought it would be, especially about something I thought I knew so much about.

And the other thing that surprised me is how strong -- it didn't surprise me how strong an originalist he is. That is what he is. That's what he's known for. We all know he's an originalist. No one denies he's an originalist. And I think he's true to his originalism in a way not everyone that claims to be an originalist is.

What surprised me is how strong a black voice he has, and I think that resonates in the book. And, in fact, at one point, I thought -- and I talked to friends and my clerks and others. And I said, "I got to break up some of these chapters."

Dean Reuter: Does that mean intersperse something else so they're not running --

Hon. Amul R. Thapar: Yeah.

Dean Reuter: Yeah, yeah. Okay.

Hon. Amul R. Thapar: So that part of it surprised me. The other thing that surprised me is just how many compelling stories there are when you dig in. And the *Zelman* chapter, which I just went over, it was one thing after another. And every time I thought I was done, I came across another story. I'm like, "I got to include that in the book." And the interviews were a lot of fun.

Maybe the thing that surprised me most—I told you there's a lot—is that these cases live with the litigants forever. And you talk about them now—even 20, 30 years later—they're still really passionate about it.

Dean Reuter: For most litigants as parties, it's got to be their most public moment, certainly, and perhaps one of the most profound moments of their lives. It's their big interaction with government. For the rest of us, the big interaction with government is either filing your taxes or going to the post office, I suppose.

Hon. Amul R. Thapar: Yeah, that's right. Yeah, it really is. And if I can quickly just mention another chapter, Otis McDonald -- everyone knows about *McDonald* probably listening to this *v. City of Chicago*, but what the book tells you is about Otis McDonald's life and the lead up to Justice Thomas' separate writing in that case on the privileges or immunities clause and the black codes that were passed.

And Otis McDonald was somewhat of a reluctant gun owner. Six crimes. People can read the book. But he moved himself to where he thought was a better -- himself and his family to a better community so his children could grow up safe.

Dean Reuter: It's in Chicago?

Hon. Amul R. Thapar: In the south side of Chicago. And he's the champion of gun rights. A grandson of slaves is the champion of gun rights for -- because he believes -- he believed after putting bars on his windows, putting in an alarm system, and still having people break in, that the only way --

Dean Reuter: Into his home?

Hon. Amul R. Thapar: Into his home. That the only way he could protect his family, it would be to -- he trusted the police. He was the head. He became the head of a community group that worked with the police. He did everything in his power to keep his community safe before finally saying, "I need a gun at my bedside because if I have to call the police and someone's in my house, it'll be too late."

And yet, the city of Chicago -- he was a vet. He was someone who had no crimes on his record. And the city of Chicago denied him what he believed were his gun rights. And he took that case all the way to the Supreme Court.

Dean Reuter: So this is the -- *McDonald* case, comes after *Heller*?

Hon. Amul R. Thapar: Yes, they filed it. The book recounts they filed it 15 minutes after the *Heller* decision came down, because Otis -- when Alan Gura told Otis, "No, I can't file your case yet" --

Dean Reuter: So let's rewind a little bit. Alan Gura argued the *Heller* case?

Hon. Amul R. Thapar: Right.

Dean Reuter: Okay, so go ahead.

Hon. Amul R. Thapar: And Otis McDonald has friends who recommend Alan Gura as his lawyer. I think it's called the Second Amendment Foundation who he reached out to, and they put him in touch with Alan Gura. And Alan counsels patience, and Otis isn't patient, right?

Dean Reuter: Well, he's trying to protect his family.

Hon. Amul R. Thapar: He's trying to protect his family. And Alan is like, "If we file your case before *Heller* comes down, it's going to get dismissed right away, out of hand." And so what does Otis do? He goes to his nephew, Fred Jones. His nephew is a lawyer, and he says, "I got this lawyer, and he's telling me I can't file."

And Fred says, "Whoa. Patience, Otis." And he sends him the decisions. He sends him all the decisions, and Otis studies them. He reads everything. And he finally sees that he has to wait, thanks to his nephew.

So 15 minutes—because Alan knew he couldn't wait more than 15 minutes—*Heller* was out, and he called his counsel in Chicago and said, "File." And Otis McDonald—the grandson of slaves at the Supreme Court—and once he won that case, Fred told me he read Justice Thomas's opinion multiple times because Justice Thomas recounted after the Civil War how the southern states were passing what were known as "black codes" to deprive blacks of guns.

And Frederick Douglas again shows up and talks about how, without guns, they can't have equality. And in that, what occurs is Otis reads this. And, I mean, what a feeling he had. And Fred said, "He read it multiple times with a smile on his face."

Dean Reuter: Yeah, interesting. That's interesting. You mentioned the black code. You mentioned some other -- in parts of these stories some historical facts. Do you want to say a few words—this is not really part of your book necessarily, but maybe it goes to originalism—about history and tradition?

This is this notion that has emerged in some of the recent jurisprudence of the Supreme Court. It feels to me, and I'm wondering whether Clarence Thomas's reference to the black codes was sort of a step in that direction to looking to history and tradition to try and get to the right answer.

Hon. Amul R. Thapar: Yeah. Clarence Thomas was trying to figure out what the privileges or immunities of citizenship were, which was included in the Fourteenth Amendment. And to understand that, he had to understand what was going on at the time.

There's some fascinating books on -- and Keith Whittington has written on old originalism versus new originalism. And I think part of new originalism is much more expansive in what we can look at. There's now the corpus database. There is other things.

And history and tradition, as you referenced and *Bruen* gets to, is something that courts are looking to more and more to try. We're looking at almost anything to try and figure out the original meaning.

And so anything that parties can bring to us to help us figure out the original meaning, figure out how to set up the tests, how the Founders would have envisioned the test set up because no matter what we do, there's going to be challenges. And the Court has to do as much as possible to give us guidance. And history and tradition helps them do so.

Dean Reuter: Interesting. I'm going to turn back to another specific case, if we could—the *Raich* case, the marijuana case. And at least for maybe the first couple of decades on the Court, critics or skeptics—I don't know how to describe them—but critics of Justice Thomas wanted to liken him to a clone of Justice Scalia, I suppose, or in the shadow of -- I don't know how they described him. But they were reluctant to give him his own brand, I suppose. Do you want to talk about the *Raich* case and maybe through that lens a little bit?

Hon. Amul R. Thapar: Yeah. And I think there's a number of cases. I'll go back just for a second to Jan Crawford Greenburg, who wrote a book about Justice Thomas's initial years on the Court. And what came out was that Justice Scalia and others changed.

Initially, Justice Thomas, I think his first year on the Court had three solo dissents initially that then were joined by others. And Justice Scalia corrected this notion and said, “No, no, no. He wasn't following me. At times, I was following him.” And the *Raich* case, though, is one place where they diverged.

And so Angel Raich is a fascinating woman. I spent many an hour talking to her. And this is a case where she was suffering from just excruciating pain. And all the traditional methods of treating her pain didn't work. And she lived in California. And so Angel talked to people who said medical marijuana was the solution.

She ultimately was growing, and she used a co-op. Then the co-op was ruled that you couldn't have a co-op in a case that went to the Supreme Court. Ultimately, she is growing her own marijuana.

And the question becomes -- and the book recounts this fascinating standoff between the DEA who want to confiscate her -- the marijuana of Diane, her co-plaintiff, and the local sheriff who says, “No, no. They have a prescription. They're allowed to use the marijuana according to California law.” And the question is whether there's a substantial effect on interstate commerce.

Dean Reuter: Because we're talking about the assertion of federal power, for our lay audience?

Hon. Amul R. Thapar: Yes. And the question then becomes -- first of all, if I can just -- Randy Barnett takes on the case—a famed professor, Georgetown Law School. I always say, “He makes originalism fun.” And Randy takes on the case.

And the book recounts his moots and his prep for and the tough questions he's going to get. And he gets to the Supreme Court, and he ultimately loses 6-3. And the dissent is Rehnquist, O'Connor, and Justice Thomas. And Justice Thomas writes separately to point out that the substantial effects on interstate commerce is basically made up in his mind. And he talks about historically what commerce was.

And at the end -- so all of it's the original meaning. At the end of his dissent, he includes a note, basically, to Diane and Angel. And it's really moving, talking about their pain and the hopes that they can get relief.

Dean Reuter: Fascinating. And with regard to Justice Scalia in particular, Justice Scalia is in the majority?

Hon. Amul R. Thapar: He is, but he writes a concurrence separately to talk about the necessary and proper clause. So I'm not going to go into this, but the book does. There's a case called *Wickard* that is in the background of this case.

And *Wickard* was the case that Randy needed to get -- basically, he tried to distinguish it, but he really needed to take a frontal assault. And he knew it. He just didn't think he could count to five. And he was right in trying to get rid of *Wickard*. And *Wickard* was about a wheat farmer who was growing his own wheat for personal consumption.

And the Supreme Court in *Wickard* said that's where substantial effect on interstate commerce. That had a substantial effect and that it was necessary and proper for Congress to do it to protect their, basically, interstate commerce. And *Wickard* explains it and the prices of wheat nationally.

And so Justice Scalia latches on to the necessary and proper clause—I don't want to say latches on—believed that the necessary and proper clause justified Congress's regulating wholly interstate—intrastate, I'm sorry—growth of marijuana.

Dean Reuter: Yeah. And for our lay audience, this has always -- this puzzled me as a law school student. I couldn't understand this. I thought I was not dumb enough to -- that I was too dumb to understand it. But basically at the bottom, it's because he's taken himself out of the market. Because he's grown his own wheat, he doesn't have to buy interstate wheat, and that's the interstate effect.

Hon. Amul R. Thapar: Yeah, and the book explains that. And so when he takes himself out of the market, he's not a consumer. And if everyone did that, they said it would change the price of wheat, and then Congress couldn't regulate things in interstate commerce if no one was buying, etc.

Dean Reuter: Right, right. So I think in the opening, you mentioned some of the process in writing this book, or we've talked about it a little bit. I'm curious, was there a thirteenth case that you really wanted to include but you couldn't manage to squeeze in?

Hon. Amul R. Thapar: There were a lot of “thirteenth cases” that we came across. And one was fascinating was the nominal damage case. I thought that was really interesting. But there were a lot of cases. *McIntyre* is an old case about anonymous speech. But the background of the *NAACP* and all that was really interesting in the debate between him and Justice Scalia about subsequent history.

So what I mean by that is what Justice Thomas said in *McIntyre* was that, “Well, we had tons of anonymous speech at the Founding. The Federalists and Antifederalists were anonymous, so we should protect anonymous speech.” And what Justice Scalia pointed to is after the Founding, all the way up to the Reconstruction Amendments and past them, we had states regulating whether you could have anonymous speech.

And so that indicates their understanding at the time that anonymous speech was not protected. And you have this back and forth between the two of them. I'd love to dive into that some more someday.

Dean Reuter: Well, anonymous speech and donor anonymity, I mean, it has a lot of currency in today's legal market, I suppose, or policy market.

Hon. Amul R. Thapar: Right. And there's the *NAACP* case about donors to the NAACP. And so it's just really, really interesting.

Dean Reuter: So I've only got a couple more questions and one of them, really, I think I'm asking on behalf of our audience because I got asked this question a lot, and that is, "How do you find the time? How do you come about with a -- how do you come up with an idea for a book?" And then, "How do you find the time?" And say a little bit about your process. I imagine it's different than writing an opinion. How do you squeeze that into a full-time life?

Hon. Amul R. Thapar: Yeah, it's much different and much harder than writing an opinion because opinions are what I do for a living, for lack of a better way of explaining it. Your family, as you know, has to be very, very understanding.

I spent a lot of time—7:00 to 11:00 at night and 3:00 to 7:00 in the morning writing. I actually found the window from 3:00 to about 5:30 to be an amazingly productive time. I lost a lot.

Dean Reuter: Was that new information for you, or was that historically the case? Or you just carved it out?

Hon. Amul R. Thapar: No, that was new information. I used to get up about 5:30, and I started setting my alarm for 3:00. The problem is that changes your sleep patterns, right? So then I started naturally getting up at 3:00, and I've been working really hard to sleep until about 5:00 every morning now. But I usually toss and turn in bed between 3:00 and 5:00.

But I spent those hours, weekends. And then when I went to sporting events with my kids, I would go find -- I wouldn't watch. And I would go and find a library or a coffee shop and spend time. So I'd take them, so I could eat meals with them and be with them. But I would go and write. And that's what I did.

I remember distinctly spending time moving from coffee shop to library to coffee shop and just working on the book. And, in fact, we were in one hotel in Pinehurst, and I literally got to know the people who cleaned the bar in the hotel because as they were finishing up cleaning, I was coming in to start writing.

And they let me sit in there, and I got to know the staff. And they treated me like gold and would get me coffee because they were getting coffee. I often had coffee with them before I even started writing, and it was really inspiring.

Dean Reuter: Yeah, that's funny. You mentioned interviews. Talk about that. I mean, how did you find people? How many interviews do you suppose you did? What was the nature of them? Do you have a process for that, for identifying people, finding them?

Hon. Amul R. Thapar: I'd read about them, and I'd read everything I could: the record, everything. I'd find the record. I'd do anything possible. The Constitution Center at Notre Dame, I had a research assistant because I teach there.

We did everything we could to find everything we could about the cases, talk to the lawyers. And the lawyers would turn me on to the clients and other things. The *Zelman* chapter, Bill Batchelder—who is known as “the Godfather of Vouchers”—his wife is one of my incredible colleagues on the court.

Sadly, Bill has passed away, but his wife continues, and she is a remarkable and brilliant woman who really helped me find people because she knew all these people because Bill lived through it. If you're a spouse, you live through it by their side. And she knew these people and put me in touch with them and told me how remarkable they were. And they were more than willing to talk. And that part of it was a ton of fun. That part, I will say, I really enjoyed the interviews.

Dean Reuter: Did you interview many on the opposing side of the stories, the litigants, or attorneys?

Hon. Amul R. Thapar: I did. I tried to find and interview some of them. Some I didn't get in touch with or wouldn't. But I don't want to say who, but there were some very willing and thoughtful people, including on the *Grutter* case, that I found the lawyers to really have thought it through and really be trying to do it for the right reasons on both sides of the issue and really have thought about it.

Dean Reuter: And I would suppose—or I'd guess—that the people whose stories you're telling, they're eager to participate. They like to be interviewed about this. This is, as you suggested early on, almost this is a hugely important part of their life. Almost everyone?

Hon. Amul R. Thapar: Almost everyone. I remember some reluctant plaintiffs who had put it behind them and didn't want to think about it anymore.

Dean Reuter: Well, did those tend to be people who were disappointed with the outcome?

Hon. Amul R. Thapar: Very private to begin with—brought the lawsuit because they felt their rights were violated and then wanted to go back to that anonymity, right? I mean, the problem is when you bring a case, like *Otis McDonald* or *Barbara Grutter*, a lot of times, you're vilified. You're asserting your rights, but you're vilified, whereas other plaintiffs are heroes. And they just want to assert their rights without being a public figure. Not everyone's asking to be a public figure.

Dean Reuter: Yeah. There's a cost, I suppose—an out-of-pocket cost. But then there's another cost that's intangible.

Hon. Amul R. Thapar: Right.

Dean Reuter: Do you think litigants enter into litigation with any sense of that?

Hon. Amul R. Thapar: No. I think they enter with very little sense of that, and then it blows up.

Dean Reuter: Do their lawyers try to inform them of that?

Hon. Amul R. Thapar: I think they warn them. I think the good lawyers are really good about warning them. I am sure, for example, that Otis was counseled. I mean, he had his nephew, who I know warned him. I'm confident Alan warned him. So I think people were warned, and Otis wasn't afraid.

Dean Reuter: So can we talk about *Grutter* for a minute?

Hon. Amul R. Thapar: Yeah.

Dean Reuter: Good. I think we've got a little bit of time left. I'm trying to monitor the time here. Walk us through that. I mean, it's not quite 25 years from that -- since that case. But these were interesting cases: two cases that came out of University of Michigan and University of Michigan Law School. And they basically concerned affirmative action in an era when in the wake of the *Bakke* case, I suppose, there were a lot of questions about the contours—what's permissible and what's not.

Hon. Amul R. Thapar: Yeah. I mean, *Bakke* was over 20 years before that.

Dean Reuter: Right.

Hon. Amul R. Thapar: But *Gratz* was the undergrad case, and then *Grutter* was the law school case. And in the chapter, I traced the law school case because that's where Justice Thomas has his separate and fulsome writing.

And it's interesting because I researched the history of the University of Michigan Law School and found some fascinating facts that are recounted in the book. And I won't go through them now. You can read the book to find out about them. And then the whole process and how the process worked and how it was discovered, what they were doing. And it ultimately, obviously, gets to the Supreme Court, and Barbara Grutter loses.

And she's got a test that the University of Michigan and the Sixth Circuit conceded in questioning by Danny Boggs that had she been a different race, she would have gotten in. She was a mother. She was in her 40s.

Dean Reuter: Can I ask you? Yeah, sorry to interrupt you. Is that is that part of the record? Is that accepted as a fact that had she been a different race, she would have been accepted?

Hon. Amul R. Thapar: I think it's hard to say it's a fact because the district judge didn't find it. But the lawyer conceded it at argument.

Dean Reuter: Okay, interesting.

Hon. Amul R. Thapar: And they said something like “most likely.” I quote it in the book, so you can see it. I can't recall the exact terminology. But Judge Boggs then points it out in his dissent in the Sixth Circuit. It goes up to the Supreme Court. And again, there's the Bush administration who's grappling with what to do, and the book recounts that and which side to take and where President Bush had come out on all this.

And Justice Thomas, again, in dissent, joined, I believe, if I recall correctly, by Justice Scalia, it was a 5-4 case or maybe 6-3. I can't remember the exact numbers right now. But Justice Thomas, in dissent, again, references the cognoscenti, which is interesting.

The issue he takes is Justice O'Connor says, “Well, it's fine now. But in 25 years, we won't need it anymore.” You can see Justice Thomas' struggle in saying, “How can the Constitution allow for it now but not in 25 years?” And he basically says that.

He also talks again, and he references Frederick Douglas. He goes through all that about -- and the interesting thing that he does is he talks about historically black colleges. And the chapter traces a case filed by a black student at historically black Alabama State where a scholarship was taken away from him based on his race to give to a white student.

The district court in that case—and I talk about it in the book, and I talk about the Eleventh Circuit and everything in that book—points out -- references a statement by Justice Thomas where he's saying the district court upholds this program of what the litigants called “whites-only scholarships” to diversify historically black colleges.

And Justice Thomas says in a separate and unrelated case—although this quote makes its way into this district court case—“It's amazing to me that anything that -- the courts assume anything that is predominantly black is inferior.” And he points out the elite nature of Morehouse College and the other historically black colleges and how it would be a real shame if, in the name of affirmative action and diversity, they destroy these unique institutions that have provided an education to some of our greatest Americans, including people like Thurgood Marshall.

Dean Reuter: Yeah. Well, we're just about out of time, but this book is about stories. I want to ask you if there are any stories from any cases that you've handled that you wanted to share. And if none come to mind immediately, I'll ask you a different question, and that is, can you trace the development of Justice Thomas' thinking? Has it changed -- which is not to say mature. But from some of the earlier cases to the later cases, do you see differences in his writing style or his thinking?

Hon. Amul R. Thapar: I do. And with all of us, this is true. I hope and think we get better. Who am I to judge Justice Thomas? But I would say I think his writing has progressed to where he talks about it. Why use a \$20 word when a \$2 word will do?

Justice Thomas—like me, I think—wants our writing to be accessible to non-lawyers because we both know that if we explain ourselves and explain the original meaning, we can convert people. You may pick up and read my decision. You may not agree with it, but I promise I'm doing my best to make sure you understand it and make sure the litigants

understand it—not the lawyers—because they're the ones we both recognize with the case in front of us.

And so I think in writing this book, I've remembered to remember the real people in front of the court. I think in the district court, you saw it all the time. I remember distinct litigants. I remember cases that kept me up at night just looking into their eyes. I think there's something about that that gets lost in the higher courts that we should remember and Justice Thomas never forgets.

Dean Reuter: Yeah, that's a terrific way to end. Judge Thapar, congratulations on *The People's Justice*—now available on Amazon and everywhere else you can buy books. I want to thank you for joining us today. I think this has been terrific. As I thank you for joining us, let me ask you if you have a final thought you want to express?

Hon. Amul R. Thapar: No. I hope when people read it—I know I get around and talk a lot—they'll share their thoughts with me. I would welcome any feedback. If you order it on Amazon, I will read the reviews. So if you post a review, I will take it seriously. I appreciate people taking the time to read the book. I think they will enjoy it. But if they don't, I want to know that as well.

Dean Reuter: I think they will enjoy it as well. And as I said at the outset, I think this is written with attorneys in mind, but with lay people in mind, and I think it hits the mark. So thank you so much, Judge Thapar.

Hon. Amul R. Thapar: Thank you very much for having me.

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