

12-15-2009

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Recommended Citation

Samuel A. Alito Jr, Michael W. McConnell, Kenneth W. Starr, Walter E. Dellinger III, and Douglas W. Kmiec
The Second Conversation with Justice Samuel A. Alito, Jr.: Lawyering and the Craft of Judicial Opinion Writing, 37 Pepp. L. Rev. Iss. 5 (2009)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol37/iss5/4>

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The Second Conversation with Justice Samuel A. Alito, Jr.: Lawyering and the Craft of Judicial Opinion Writing

Panelists: The Honorable Samuel A. Alito, Jr.,*
The Honorable Michael W. McConnell,** Dean Kenneth W. Starr,***
Professor Walter E. Dellinger III,**** Professor Douglas W. Kmiec.*****

PROFESSOR KMIEC: Ladies and gentlemen, welcome to Pepperdine University. My name is Douglas Kmiec. I am the Caruso Family Chair and Professor of Constitutional Law and with me in conversation this afternoon is the 110th Justice of the United States Supreme Court, Associate Justice Samuel A. Alito Jr.

Justice Alito was appointed to the bench in January 2006 after over fifteen years of service on the United States Court of Appeals for the Third Circuit. Prior to his judicial service, he served as deputy assistant attorney general for the Office of Legal Counsel, as assistant to the Solicitor General, and as U.S. attorney for the State of New Jersey.

Next to Justice Alito is Judge Michael W. McConnell, a member of the Federal appellate bench since November 2002. Judge McConnell is well-known to the legal academy by virtue of his scholarship and extended tenure at the Universities of Chicago and Utah. Judge McConnell, it's good to have you with us.

Walter Dellinger is the chairman of the appellate group of O'Melveny & Myers. He is also the Douglas B. Maggs Professor of Law at the Duke Law School. Walter Dellinger served as Solicitor General in the Clinton administration and also headed the Office of Legal Counsel. Good to have you with us, Walter.

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And the Duane and Kelley Roberts Dean of the Pepperdine University School of Law, himself a former judge with the United States Court of Appeals with the District of Columbia Circuit, Solicitor General for the first President Bush, and the independent counsel—who continues to maintain a relationship with Kirkland & Ellis—Dean Kenneth Starr. Welcome, gentlemen, one and all.

The conversation tonight: the craft of judicial opinion writing—is a subject that is remarkably understudied. While there are some important seminal works written on this topic by Judge Ruger Aldisert of the Third Circuit, and there is a recent separate book by Judge Richard Posner of the Seventh Circuit, it is not a topic that has greatly occupied the time of law professors in terms of the regular curriculum, and it has not been a topic featured by professional societies in terms of bar associations either. And that’s rather remarkable, given the significance of judicial opinions not only to the parties in litigation, but also to the profession in the guidance opinions are relied upon to inform the ongoing development of law. So we’re very pleased to have the opportunity to explore the various aspects of this craft more closely. In the course of the discussion, we will be asking questions about the role of the judge, the purposes served by the writing of judicial opinions, what gives an opinion legitimacy, the role of dissenting and concurring opinions, and if time permits, considerations of interpretative method.

We begin, Justice Alito, with a characterization of the judicial role by one of your colleagues, the Chief Justice. In assuming his responsibilities John Roberts indicated that he was going to be an umpire that few would notice because no one—after all—goes to a ball game to see the umpire.¹ Like the Chief Justice, you are a big fan of baseball, but this characterization of judges as umpires is one that is highly disputed in the law schools and even on the bench as overly simplistic and misleading. Justice Brennan, for example, once wrote that judges were not umpires, but rather they, in their own sphere were “lawmakers—a coordinate branch of government.”² Justice Frankfurter also refused to understand judges as umpires. They were instead the conscience of the law.³ What’s your take on the characterization

1. *Hearing on the Nomination Of John Roberts to Be Chief Justice of the Supreme Court: Hearing Before the S. Judiciary Comm.*, 2005 WL 2204109 (statement of then-Judge Roberts, Circuit Judge on the United States Court of Appeals for the District of Columbia Circuit) (“The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire.”).

2. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 595 (Brennan, J., concurring in the judgment) (“Under our system, judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of government.”).

3. *Chrysler Corp. v. United States*, 316 U.S. 556, 570 (Frankfurter, J., dissenting) (“A court of equity is not just an umpire between two litigants. In a very special sense, the public interest is in its keeping as the conscience of the law.”).

of the judicial role? And does the way you see your own role affect the way in which you draft an opinion?

JUSTICE ALITO: You know, I have actually given an entire speech on the issue of judges and umpires. I am not going to give it in its entirety today. But in defense of umpires, I have to say that their role is not as mechanical as a lot of people think. They really exercise a lot of discretion, in fact, more discretion in some areas than judges should exercise, but I think what the Chief Justice was getting at was simply an analogy and not anything that he intended to be exact. Obviously, there are important differences between umpires and judges, but I think what he was getting at is a very valid point, which is that umpires have rules to apply, and judges have rules to apply. It is our job, just as it is the job of the umpire, to apply those rules, not to make up new rules, and not to assume a role that is broader than or different from the one that people expect us to perform, the role that our Constitution and our society expect us to perform.

PROFESSOR KMIEC: Okay, then, let's assume the Chief Justice's analogy to umpires does state an important limit on judicial decision-making, as you affirm, how does that limitation manifested itself on a day-to-day basis in your opinion drafting?

JUSTICE ALITO: Well, let's take the issue of interpreting a statute. It was not that long ago when perhaps the most famous Court of Appeals judge in the history of the United States, Learned Hand—I am not going to get this quotation exactly correct—but the thrust of it was that the best way to misinterpret a statute is to read it literally.⁴ I think he said you shouldn't make a fortress of the dictionary.⁵ That was the dominant school of statutory interpretation not that long ago in our history. Now, I don't think that we do that in that way any longer on the Supreme Court or on the courts of appeals.

4. See Learned Hand, Circuit Judge, United States Court of Appeals for the Second Circuit, *The Contribution of an Independent Judiciary to Civilization*, reprinted in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 155, 157 (Irving Dilliard ed., 3d ed., 1960) (“The duty of ascertaining its meaning is difficult enough at best, and one certain way of missing it is by reading it literally, for words are such temperamental beings that the surest way to lose their essence is to take them at their face.”).

5. *Cabel v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (“[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”).

We start with the language of the statute. That's the rule that we are applying, and we pay close attention to that.

PROFESSOR KMIEC: Judge McConnell, your insight on the role of the judge and the umpire characterization?

JUDGE McCONNELL: Well, I don't know about that particular analogy, but I do think that, in our system, the judiciary plays an important role. But when people begin to see the courts as the primary decision makers with respect to controversial matters not addressed, say, by the Constitution or by the statutes, but it's in a case where perhaps the courts are overstepping their roles, the Constitution has a number of very important principles in it, but it does not answer all questions. And when we see major areas of American political life dominated by Court decisions, rather than by decisions of the representatives of the people, I think something has gone awry.

PROFESSOR KMIEC: Is justification of result the essential purpose of opinion writing? Is that how you see your task as you write an opinion?

JUDGE McCONNELL: Well, I think the important thing about an opinion is that it can at least properly be a form of discipline for the Court. The courts are the only institution of our government that are required to state the reasons for what they do. Now, of course other actors—the President—might make a speech explaining something, congressmen might do the same, but the judges give opinions as part of the formal process, and the opinions, I think, expose whether the judges have a proper grounding in text or history or precedent or whatever happens to be the mode of analysis. When you read the opinion, anyone reading the opinion can make a judgment for themselves as to whether that decision was actually a conscientious application of those authorities. I think that's a major form of discipline. I know it happens to me at our lowly level sometimes—I'm what the Constitution charmingly calls an inferior court.

And at that level, I know that it regularly happens that I think a case can and should be decided in a particular way, but when I sit down to actually write the reasons why, I find out that it won't work. Now, that does not make me—at least I flatter myself that that doesn't make me—write it in a sort of sneaky or more Machiavellian fashion to make it come out that way anyway. It makes me say, "Well, we ought to reconsider this," and come out with the way it's going to write in a straightforward, authoritative fashion.

PROFESSOR KMIEC: Now, in both the Supreme Court and the inferior courts, writing is a collaborative process. Appellate judges are mostly sitting in panels of three. You [Justice Alito], of course, are sitting in a panel of nine. As we understand the Supreme Court's deliberations, following the oral argument—and we have two great oral advocates here—following the oral argument, the Justices or the panel assemble to deliberate and vote. Then the assignment for the writing is given for the Supreme Court by the Chief Justice, if he's in the majority, and by the Senior Associate Justice, if Chief's view lacks a majority. Is it a little unusual to vote first and write second?

Judge Posner in his book, *How Judges Think*, argues that there's a real risk in writing after voting because there's a tendency simply to want to confirm the way you voted. Is that a serious problem?

JUDGE McCONNELL: Well, I think as a practical matter this is not really as true as all of that. Maybe our court, the Tenth Circuit, is more collegial than some, but yes, we vote, but that is not fixed in stone. We vote. Somebody goes off and attempts to write an opinion. If one of the members of the panel disagrees and says, "I'm going to write a dissent," the other members always wait. They consider the dissent. We think about it. It is not unusual—it doesn't happen every day—but it is not unusual for the case to come out differently than the initial vote. It sometimes comes out unanimously different than the initial vote because of the crucible of opinion writing and commenting upon the opinions so that our conferences were very frequently quite substantive. It depends in part on the personalities of the judges, how much they like to engage in back and forth, but they're often quite substantive. But that's just the beginning of the deliberative process. It's not the end. It's not as if you vote and then everything else just follows from that.

PROFESSOR KMIEC: Professor Dellinger, what was the nature of the deliberation that took place as you saw it as a law clerk for Justice Black?

PROFESSOR DELLINGER: I was surprised in 1968–1969 at how little the Justices discussed cases collegially outside of the conference. They tended to operate like non-separate law offices.

The other thing I learned that's pertinent to the question Judge McConnell was answering is that I spent a lot of time looking through files about prior years of the Court. And, it is a disproved, cynical notion that judges are not influenced by a law in the arguments. To look at the number

of times—not large, but significant—that the result changes between the time the case is argued and a tentative vote is taken, and the end of the process where people have considered all the opinions because, when you cast your first vote, you know everything that would bias you. You know what the politics of the case are. You know if it is a corporation or criminal defendant. Who is on what side. It is only when you look at the opinions that you are influenced by the doctrinal consideration of the fact that people changed their votes, and the result changes because they are influenced. Sometimes the draft of the opinion has the better, more convincing argument—an existence proof that that law goes on, and it's not just politics in another name.

PROFESSOR KMIEC: Dean Starr, you've just returned from our London program. Welcome home.

DEAN STARR: Thank you.

PROFESSOR KMIEC: And among other things, the English had a tradition of what they called “orality,” which in appellate practice meant that there were no briefs, the judges knew little or nothing of the case until it was presented to them. The oral argument in an appeal could last a week or more, with the judges sitting on the bench reading the statutes of case authorities for the first time. Some of us have witnessed this English tradition and seen materials being handed up, and of course, the long delays as people studied. The English idea of this practice was driven by a desire for full transparency and public accountability. Both of the members of the bench have indicated that there's a fair amount of deliberation going on in American courts that is not seen. Would it be a good idea if the internal deliberations were made public after a case was decided?

DEAN STARR: It would be a horrible idea.

PROFESSOR KMIEC: Why so?

DEAN STARR: We need confidentiality. The law and any number of relationships say that confidence is going to be protected, the lawyer-client privilege, the spousal privilege, and the priest-penitent privilege—all these developed and have become law to do what? To protect relationships. And the Supreme Court of the United States has recognized with respect to public officers, most famously in the case involving Richard Nixon—*United States v. Nixon*⁶—that confidentiality is a vital part of our governmental system,

6. 418 U.S. 683 (1974).

that they were relying not on some abstract lawsuit, but on a comity of experience which is a pragmatic reflection on the way institutions operate and people operate. So to encourage a confidential, robust exchange of views, you've got to know that it's not going to appear in a professor's website two years later or in the pages of the *The New York Times*. Confidentiality encourages this kind of deliberative exchange that is very important for the healthy operation of the institution.

PROFESSOR DELLINGER: Just one added comment that the Court is said often to be the most secretive of our institutions. I think that may be kind of backwards because what matters about the Court's work are the opinions that are publicly announced, whatever a judge or Justice's secret agenda may be. The influence that controls the law is what is said in the fully public opinion. In some sense what matters is, first, the arguments—the inputs are all public, and what matters is the justification for the decision. That is what guides the future, not any express reservation. So I have never felt a need to know what led up to the public opinion.

PROFESSOR KMIEC: I take it you concur in this matter of keeping these things confidential?

JUSTICE ALITO: I have to say that I do. I think it was last year that we had a visit from the Chief Justice of the Supreme Court of Brazil, who is a very impressive person, and she astonished us by saying that in Brazil the conference of the Supreme Court is televised. And I said, "Well, that can't be the real conference. There must be the conference that's on television and then the real conference." But she said that's the way they do things. But I entirely agree with what Dean Starr said. I think it would undermine the decision-making process.

PROFESSOR KMIEC: Can you tell us a little bit about the manner in which deliberations in the modern Court take place. Is it by e-mail? Is it by telephone? Is it by memoranda? Or do you speak through law clerks? By what means do you interact with your brethren?

JUSTICE ALITO: Well, on my old court, on the Third Circuit, a lot of it was by e-mail because we were located in different places. On the Supreme Court, we are not yet into the e-mail era. Almost nothing is done by e-mail. It is mostly done in conference. We talk about the cases in

conference, and then we talk about the cases through the medium of the opinions that we circulate and comments on the opinions that are circulated.

PROFESSOR KMIEC: Have you had occasion to be assigned the writing of an opinion and it didn't write, such that you then sent a memo around to your colleagues saying, "Guess what? I'm now in the dissent"?

JUSTICE ALITO: Yes. Certainly. During my time on the Court of Appeals it happened a number of times, and on all of those occasions, the rest of the panel actually ended up agreeing with me. But what Judge McConnell says is entirely correct. There are opinions that just will not write. There's a great discipline in having to write out an argument. No matter how thoroughly you thought it through before you put it on paper, you inevitably see things when you sit down and write the opinion, and sometimes it causes you to change your mind.

PROFESSOR KMIEC: Now, there are a great many audiences waiting on the words of an opinion as you are drafting it. There are, of course, the other Justices who are waiting to see what you are going to circulate. There are the parties who are waiting to see the outcome of the case. There are the lower courts, the political branches, the administrative agencies all desiring of guidance. There are the states, and yes, there's *The New York Times*, and as you're writing—

JUDGE McCONNELL: Don't forget all the blogs.

PROFESSOR KMIEC: All right, as you're writing, are you thinking about the blogs or the other audiences?

JUSTICE ALITO: I'm actually not thinking about any particular audience when I'm writing. I have an idea in my head about how an opinion should look, and basically that's what I'm doing. But if I stop to break down the process, I think I am first writing for myself in the sense that Judge McConnell said and setting out an argument that I find convincing. Then I am definitely writing for—if I am attempting to write a majority opinion—I am writing for the other Justices or judges whom I hope will be part of the majority. I have to write the opinion in a way that embodies something that we can agree on, something that I think we will agree on, based on our discussions at conference. Then I am certainly writing for—with the hope that this will be an Opinion of the Court—I am writing for those who will have to apply the opinion in future cases: trial judges and lawyers who need to work with the opinion. There is an unusual aspect of opinion writing that is something I do not think authors in most other genres deal with, and that

is we are writing for an audience that includes some people who will not try to understand what we really mean, but will try to use our words to support whatever position they, in a professional way, feel they need to take on behalf of their clients. So it requires a special degree of precision, and I think you have to keep that in mind.

PROFESSOR KMIEC: Judge McConnell, any thoughts about these various audiences that read your work?

JUDGE McCONNELL: Well, at our level, we do not get the same kind of scrutiny. There are not that many law review articles that are coming out and parsing our opinions and so forth. I am one that thinks that commentary and critique is actually a useful thing for the Court. I wish often that it were more professional rather than just in the nature of “Well, we don’t like the results in a case.” I mean, particularly at the Supreme Court level, I think an enormous amount of the commentary on the Court’s work is as if the vote had been taken in Congress, and the question is, “Did you like how they came out or not?”

And, by the way, we are here in a law school, and I am a former—even to some extent a current—law professor. I think that the academy is letting us down in a sense and not performing as useful a function as a commentator as it might because too many law professors are political or ideological first and legal and professional only second. The question should be whether, as a legal matter, what the Supreme Court or any other court is doing is well-grounded, and it should not be whether we happen to like the result. When academics—who ought to be our best friends and our harshest critics at times—act more like politicians or advocates, then it makes their commentary essentially useless as part of the disciplining function. Now, I was going to say at my level we don’t get as much scrutiny. I wish we had more.

PROFESSOR KMIEC: Should the academy be spending more time analyzing the Tenth Circuit’s work?

JUDGE McCONNELL: I think so.

PROFESSOR DELLINGER: You never get seen here.

JUDGE McCONNELL: But I made a joking reference to blogs earlier. Actually, I think blogs in the legal area are beginning to provide this kind of

commentary, not in the Tenth Circuit, but on particular subject matter areas. There are very useful blogs maintained mostly by academics and, in some cases, by practicing attorneys on specific areas of the law where they look and they comment upon the decisions from district courts and courts of appeal, not just the Supreme Court, but the inferior courts as well. And in many cases, this is the best, most intelligent, most professional commentary and critique that we get, and I'm quite grateful for that. I think that has been an excellent development in the last several years.

PROFESSOR KMIEC: Vincent Blasi, a law professor, has observed that one of the most important audiences the Supreme Court has is the lower courts, the courts that have to apply the rulings which you've articulated. There have been several major cases decided in recent years—I think of the past term's decision dealing with the writ of habeas corpus and its applicability to noncitizens being detained in Guantanamo, for example. In those cases, the Supreme Court's direction to the lower courts has basically been, "Have at it." Should the Court give greater direction to the lower courts? Or if you give great latitude as in *Boumediene*, how does the Supreme Court monitor, if at all, what the lower courts then do in response to your ruling?

JUSTICE ALITO: I wasn't in the majority in the writing. I'm not going to try to defend that opinion. I was the recipient of the Supreme Court decisions in the sense that I was the applier of them for fifteen years on the Third Circuit, and what I was looking for was some clear expression—some clear guidance—as to what I should do. I was always happy when I received that and not so happy when the guidance was not so clear. But there are tradeoffs in writing opinions as there are in everything else. I went to a dinner during the course of the year for new judges. Whenever there's a body of new judges, there's a school, what they call "baby judges school." I went to this school in Washington after I was appointed to the Third Circuit. Last year, as is usual, there was a dinner at the end of it. A new district judge and a new circuit judge spoke. The district judge I think had been a state trial judge for many years. He was not an inhibited guy in any way. He commented about an opinion that we had just issued, and I won't get into the specifics, but he said, "This involved an issue that we apply all the time in the trial court, and we were waiting for guidance on this issue because we just wanted to know what we should do in future cases because it comes up with some frequency. We got the opinion, and we saw it was a unanimous opinion, and we read the opinion, and we found out that it really didn't tell us what we were supposed to do in future cases." Well, there are tradeoffs. If you want to have a unanimous opinion, it may not be possible to be as specific as you could be but for that unanimity.

PROFESSOR KMIEC: In fact, that is one of the things the academy has noticed, and there seems to be growth in the distinction between facial and as-applied challenges that, to some degree, explains the greater consensus. For example, consider the consensus built upon this in the Indiana voter ID case.⁷ Justice Stevens, I believe, wrote the majority opinion, indicating that he was willing to defer to the legislative choice in Indiana. They could have their ID card in order to suppress fraud even though that was not really shown to exist in Indiana. It was enough that it may have existed in other states. That was sufficient since it would be possible later to evaluate—in application—whether this ID requirement was unduly burdensome for the disabled or for elderly or for the poor or others who couldn't get to the DMV. This facial/as-applied distinction resolved several key cases.

Dean, is this development of upholding statutes only on their face a good development?

DEAN STARR: I think so because it does say to litigants and to judges, “Be very careful. Be very cautious. Let's give this legislation a chance. Let's look at whether this legislation passed by the people's representatives, signed by a governor or Congress, signed by the President, whether it could have a constitutional application in any set of the circumstances.” That is a pretty stiff standard to try to meet. That's asking a lot. So the Court has been saying that we do ask a lot, so give us your best argument. And even there, in a case that was very politically charged, Judge Posner writing the majority opinion in the voter ID case for the lower court said, “Hey, this is a Republican-Democratic kind of issue. People are just going to line up based on their party.”⁸ Well, I think it was wonderful to see Justice John Paul Stevens, whatever his party affiliation was once upon a time, whether it was D or an R, here he was saying, “No, no. We're judges, and we're going to say bring us specific examples of what you called an unduly burdensome application, but we're going to set the standard very high in order to actually tear down, tear asunder, a statute that the legislature and the governor of the state thought was good legislation to encourage a lot of integrity in the process.” So that whole case has been so politicized, and here were these

7. *Crawford v. Marion County Election Bd.*, 533 U.S. ___, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008).

8. *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 533 U.S. ___, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008).

voices from the Supreme Court saying, “Let’s depoliticize this and look at it,” as Judge McConnell was saying, “in a much less passionate way.” So one of the, to use the jargon, most liberal members of the Court said, “I am not going to cast my vote to strike this law down. Let’s see how it operates.” It was a very practical and, I think, very respectful decision in terms of the democratic process.

PROFESSOR KMIEC: So it respects the legislative outcome and the democratic process, but do you see a downside?

PROFESSOR DELLINGER: I do in two senses: One, when you decide cases on an as-applied basis, you’re really not deciding lots of other applications, which is good; but when you deal with a larger level of generality, you’re answering a lot more questions. And it’s not just lower court judges that need guidance, it’s state legislatures in a search and seizure area. It may be a county deputy sheriff. Now, there will be a court somewhere in the process for that county sheriff, but the doctrine has to be one that can be written in terms that it can be actually followed. I have seen law professors and law clerks write about probable cause as if it were an essay on epistemology—“how do we know what we know,” but you actually need rules if you’re going to be a police officer and apply it. I respectfully disagree that—it’s also bound up with merit, not just technique—if you think that the ID requirement is an unnecessary burden on the process and it shouldn’t be burdened at all, that’s your view of voting rights, as it is mine, then you don’t need to go to the as-applied because your substantive view resolves the issue for you. Therefore, the as-applied assumption is secondary to what you think of the merits of the case.

PROFESSOR KMIEC: Judge McConnell, are you getting sufficient guidance in these cases that are being resolved in this fashion?

JUDGE McCONNELL: It’s nice to get clear guidance, but in a way that’s not my highest priority. I’d rather have them get it right, and to my mind, it’s much more frustrating for me as, a lower court judge, to apply decisions that I think are incoherent or counterproductive than it is to deal with vague decisions. There are even some times when I think vagueness is the right thing to do. When the courts are venturing into new areas, very frequently it’s so difficult for mere mortals to guess what the range of problems and issues that will come up. Sometimes it really is better for the Court just to say, “Go at it.” And then all the various complications of human life that will throw themselves up in lots of different cases and the lower courts can sort through them, and it may become much clearer how we should deal with this than it is for the Supreme Court, the first time they

confront a problem, to try to think that they have the ability of writing a set of rules for it. I think the Court sometimes does us a disservice by jumping the gun and trying to issue a bunch of clear rules when we don't yet know enough and there hasn't been enough experience. So whatever one thinks about the interpretation of the writ of habeas corpus and the Guantanamo detainee cases and whatever—as a matter of history and precedent and so forth—I think it may have been the best thing about the decision that they did not attempt to say, “And by the way, here are all the possible or ramifications and rights and applications.” We don't know, so I think a bit of modesty there was a good thing.

PROFESSOR DELLINGER: A bookend to the opinion that is written for the person who's got to apply it on the lower court or in the operative field is an opinion, particularly of the Supreme Court in great cases, is really written for the long-term future, that clearly some opinions Justices are thinking about people long after they have passed from the scene. I'm struck, for example, that when John Marshall wrote *McCulloch v. Maryland*⁹ articulating a view of the national supremacy and the importance of the nation, that opinion was read by a young lawyer starting out in practice in Springfield, Illinois, who was deeply impressed by it, and one can't help but think that that had some influence on what Abraham Lincoln thought needed to be done to preserve the Union, that he had read John Marshall's opinions. So sometimes opinions are reaching very far into the future to shape views of the politic.

JUDGE McCONNELL: We're talking about the perception of the Supreme Court opinions among the lower courts and the lower court judges talk about Supreme Court opinions all the time—they're helpful, not helpful, confusing, not confusing—whatever. I'd be curious to hear Justice Alito's reaction: Do the Supreme Court Justices appreciate lower court opinions pointing out problems with their opinions?

JUSTICE ALITO: Very much if they point out problems with other people's opinions.

JUDGE McCONNELL: That goes without saying.

9. 17 U.S. 316 (1819).

JUSTICE ALITO: They are helpful in pointing out problems in applying opinions, pointing out problems that might not be apparent to someone other than, let's say, a trial judge applying an opinion or a Court of Appeals judge who has to deal with a great many opinions raising factual variations under a particular legal standard, and to point out the problems that arise in those contexts in particular—I think that is quite helpful.

PROFESSOR DELLINGER: How influential are lower court opinions in particular in persuading the Justices to take a case or—

JUSTICE ALITO: Oh, I think they're very influential. If there's a dissent, it may highlight a problem with the majority opinion or the importance of the issues—so it's a very important factor.

PROFESSOR KMIEC: Do you do the same in reverse? Do you put people on notice about particular problems in your opinions? I remember Justice Rehnquist in the *VM*¹⁰ case noted how the Commonwealth of Virginia should have known that gender discrimination in the context of public education would be understood to be impermissible from the *Hogan*¹¹ case, for example.

Is the Court in the business of sending signals out to political actors or to others?

JUSTICE ALITO: There are some contexts where that comes up. I don't know that it has happened much in my own experience.

PROFESSOR KMIEC: I seem to recall you wrote the *Hein*¹² decision, and that presented you with a number of separate opinions from the Seventh Circuit. I take it this is an example of the kind of lower court identification of an issue that the Court finds helpful?

JUSTICE ALITO: Yes. Exactly.

PROFESSOR KMIEC: We have a question from the audience which takes us off course a bit—a question about Justice Thomas and whether or not Justice Thomas' rare engagement in oral questioning affects opinion writing?

10. *United States v. Virginia et. al*, 518 U.S. 515 (1996).

11. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

12. *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007).

JUSTICE ALITO: He's explained his view of oral argument, and he doesn't find it too helpful to him to ask questions. I think each of us approaches our work in a different way. He certainly analyzes every case very thoroughly and could ask questions if he chose to do so. He's a forceful and active participant in conference. Oral argument in the Supreme Court has changed quite a bit. It has not always been the way it is now. I noticed a big change from when I was arguing cases when Judge McConnell and I were in the Solicitor General's office in the 1980s. There are many, many more questions now. In those days there were quite a few Justices who rarely asked questions—Justices who were held in extremely high regard. If you go further back in the beginning, the Justices didn't ask questions at all. The questioning has accelerated through the 20th century, and I don't know that we will always keep the form of oral argument that we have now.

PROFESSOR KMIEC: Do you think that some of the oral questioning now telescopes its way into the oral argument discussion in the sense that questions being asked signal what your commentary is likely to be in the conference?

JUSTICE ALITO: Not really. I know that's one theory of oral argument, that it's the way in which the Justices or the judges talk to each other. I have generally not used it that way.

PROFESSOR KMIEC: Just in terms of this question about Justice Thomas, I mean, obviously he's a great contributor by virtue of what you just described in the internal conference, but to the extent that the oral argument itself is a prelude to that conference, if his voice is silent, don't you lose something by not having it available?

JUSTICE ALITO: As I said, I don't think that we should generally use oral argument as a way of talking to each other through the attorneys. I think I personally don't find that to be a useful approach to oral argument. I know there are people who have said that that's something that they do and that's something that is one of the uses of oral argument. I personally don't think that that's the purpose of it. I think its purpose is to ask the advocates to respond to real concerns that we have about the case individually. I find it useful to do that. Justice Thomas does not, and I can't say that my way of making up my own mind as to how to vote is better than his way.

PROFESSOR DELLINGER: As the Court moves to more and more questions, it has occurred to me that—obviously a good advocate knows to abandon the planned argument and respond to what the concerns are. It has occurred to me as someone who’s argued cases before the Court there is a point where it might make sense to stand up and say, “May it please the Court, we have submitted our argument in the brief. I would like to respond to whatever questions you have or if you would like any further elaboration,” and just shut up because you may have three or four issues, but it could be that you all know that two of them are going nowhere. It’s just a waste of time for me to be arguing, but there’s actually an issue that you’d like me to explore and may have some possibility. Does that make sense? Maybe not literally in that form, but to me that opens it up to the Court to lead the argument.

JUSTICE ALITO: When I was arguing cases, I was always happy when I got questions. Sometimes I wasn’t happy with the individual questions that I got, but I was happy to get questions because it told me what the judges, or the Justices, presumably were really interested in, and they may not have been interested in my Point One or my Point Two, but they may have been interested in Point Three or something that I had not planned to talk about or something that was a minor point in the brief that I wrote.

JUDGE McCONNELL: I often find, especially in multi-issue cases and in the courts of appeal, typically there are more questions presented than at the Supreme Court level, that the lawyers don’t necessarily know which of their arguments are the ones that really would reward discussion. I think it’s a help to them to say, “Well, Counsel, let’s talk about your issue number three. Here’s my concern about that.” I think that enables the lawyer to get right to the point to address something that matters. I don’t view it as a problem for counsel. I think it’s a benefit to counsel.

PROFESSOR KMIEC: There’s a member of your Court who’s written a book recently, giving advice to appellate advocates, and in that book and in some other sources there is much criticism of unreflective citations to precedent—that is, trying to win with a string cite with snippets of quotations that are out of context. I assume we would all agree that approach would be unpersuasive. Thinking about the materials now from the advocates from the standpoint of opinion preparation, what is the most helpful means of presentation?

JUSTICE ALITO: The most helpful argument is one that sets out the arguments that are in the brief in a way that is different from what is set out in the brief, one that summarizes them, boils them down to their essentials so

that the argument contributes something that the Justice or the judge did not get from reading the brief and does not get into detail like quotations and things of that nature.

PROFESSOR KMIEC: So the briefing tells a compelling narrative?

JUSTICE ALITO: Yes, a compelling legal narrative.

PROFESSOR KMIEC: One that is anchored in the statute or the cases and one that allows you to get a head start on the way in which you might write the opinion if you take the assignment?

JUSTICE ALITO: The one that boils the argument down to its essentials and presents it in a compelling way and in an understandable way and makes sense of the positions that the advocate is advancing is most helpful.

PROFESSOR DELLINGER: Ken [Starr] argued cases before and after, being a judge of the Court of Appeals.

Did the way you argue cases change after you had had experience?

DEAN STARR: I would hope that I had a fuller, richer understanding of the judicial process and could be more empathetic and aware of the way the judge is likely thinking about the case. I think that made—at least the potential, I may have looked up to it—the argument a little more mature, more rich, and, frankly, more helpful to the Court and helpful to the client or the cause. I think all too frequently—and I’ve seen this very recently: I argued a case earlier this month in a Court of Appeals, and I was really stunned with fact that very fine lawyers from excellent law firms were bound and determined to say what they wanted to say even though they didn’t seem to be reading the body language. It’s very important for the advocate to be reading body language. Is the Justice or judge or the judges really—am I connecting with them? Is this really a conversation, or am I doing a little bit more of a set piece? Set pieces are, I think, very dangerous because you’re no longer engaged in a conversation. I think just being very—as best you can—exquisitely sensitive and reading the language of the Court and really being very responsive. I recall in this very argument, it looked to me as if one of the judges wanted to ask a question. So I did what I thought was polite. I just stopped for a just a split second. It seemed like an eternity, and it turned out the judge did not want to ask a question. So the

judge was just really eager, but he looked like he wanted to ask a question, but I saw it. I noticed that it was a very long argument, multiple counsel, and I just conclude by saying this: Some of the finest advocates in the country will talk over the judge or the Justice, which is truly viewed in appellate advocacy circle as the unpardonable sin. You dare not interrupt the judge or Justice.

JUDGE McCONNELL: There is a difference depending on how large the panel is; the dynamics of an oral argument when there are only three judges are very different from nine. With three, it's really much more of a conversation. I think that counsel ought to take much more of a cue. With nine very frequently—I've been on that side of the podium—very frequently it's a bit miscellaneous, and it sometimes happens that one of the Justices wants to go off on a tangent that is just not particularly helpful, and if all you do as counsel is respond specifically to the questions that are put to and you never get around to telling the Court why you should win, you have not been a very good advocate. I think sometimes it's important to get away from the specific respectful, fully responsive answer and get on to the point that you really need to make. And the larger the body, I think the more likely it is that you as counsel need to be directive. The smaller the body, the more coherent and conversational it's likely to be.

PROFESSOR KMIEC: I want to move on to the considerations of legitimacy. What in your mind are the factors that make an opinion legitimate—that is, that are essential to having the opinion accepted by the people reading it?

JUSTICE ALITO: Is it a case that's properly before us—in every sense? Does it fall within our jurisdiction under Article III and under the statute? Are we applying a rule of law? And what's the origin and the basis and the legitimacy of the rule of law that we're applying? Are we applying the rule of law with the full understanding of the facts and the appreciation of the arguments that were made by the parties? I think those are the factors.

PROFESSOR KMIEC: Well, looking at those factors, whether the case is properly before you, whether you have a party who's got standing, whether the case is justiciable and not a political question—those factors sound like factors that are on the front end of the Court's consideration of whether or not to take a case. Are those factors really the salient ones in your mind as you're writing as well?

JUSTICE ALITO: Well, sure. Sometimes we will not take a case because we have doubts about jurisdiction, but sometimes there are other

reasons for taking a case where questions can come up after the case has been taken. If it's an appeal, then we may note jurisdiction and consider it fully after we've taken it.

PROFESSOR KMIEC: There's a whole theory out there by Professor Rosen at George Washington that your Court is the most democratic branch, that, in fact, even though you're not elected to your office, that the Court, in the old line of Peter Finley Dunne, follows the election returns. Does the Court as it writes have an eye toward democratic acceptability? I mean, we saw this raised in the context of the school desegregation case, and the issue was raised dramatically in the teeth of violence there. To what degree does the Court pay attention to the people in issuing its opinions? How large of a role is democratic acceptability as you write?

JUSTICE ALITO: I think it depends on what you mean by the term "following the election returns." If you mean issuing opinions that are going to be popular, then that's something we should pay no attention to. If you mean acceptability in the sense of adhering to our proper role—because if we depart from the proper role then our work will not be accepted—that's a very important factor. We have a role to perform, and we should perform that role. We were given life tenure precisely so that we don't pay attention to the election returns or polls or our sense of the pulse of the country.

PROFESSOR KMIEC: So if a case is justiciable, considerations of the subject's potential cultural divisiveness are not, as you see it, proper for the Court to take account of? Would that be a correct statement?

JUSTICE ALITO: If it's properly before the Court, then I think we have to decide it. We have to decide it as best we can. I don't think we can alter our opinion because we think this is going to be an unpopular decision.

PROFESSOR KMIEC: Yet, you do notice—this term, for example, a notable absence of the controversial—for example, there were no affirmative action cases, there were no religion cases, there were no cases of bong hitting anyone in particular—these culturally troubling cases just accidentally missed the Court's docket. Is that accidental? Or was the Court saying, "We'll give the nation a rest on those questions?"

JUSTICE ALITO: Well, I think we did have many controversial issues before us. We choose our cases, but we don't choose the menu of cases

from which we'll make the choice. There's a tendency at the end of each term for the people who write stories in the press to try to summarize the term. I think that they don't take into account the fact that the particular combination of cases that we have during any particular year has a lot to do with accident. It has to do with the cases that are coming up through the courts of appeals and the state judicial systems, and so it can be an accident. You could have a term with a lot of very controversial issues. You could have a term with not so many. I don't think it's a choice on the part of the Court.

PROFESSOR KMIEC: Dean Starr, another English question. Until recently, in England, it was described as willful misbehavior for a judge not to follow a precedent except with extraordinary justification. Our rules of following precedent, our formulation of *stare decisis*, is much looser than that. Is the former English practice to be recommended?

DEAN STARR: At the heart of this is the fact that we have a written Constitution, and our English cousins do not, and so in the development and evolution of the law of England and Wales, the body precedent is terribly, terribly important. Imagine, though, in interpreting the Constitution of the United States, *stare decisis* is viewed—and everyone, I think, embraces the Brandeisian formulation—you see it in the cases that *stare decisis* is not an inexorable command. So it rejects the British view. Why is that? Because of the obvious fact that a constitutional interpretation by the Supreme Court of the United States cannot readily be changed. We all know a constitutional amendment is extraordinarily difficult and rightly so. So the Court needs to remain open to thoughtful argument that it erred. We know from history that it has been grievously and profoundly so when it's very destructive for the country: *Dred Scott* and *Plessy v. Ferguson*. Those are two examples that are rightly held up to those who lift up the idea that the judicial supremacy of the Supreme Court has spoken and, therefore, we must all be obedient. Well, the Supreme Court should, therefore, it seems to me, be all the more receptive to the idea in the Constitution that we may have gotten it wrong. With the respect to the interpretation of statutes, the case for *stare decisis* or following precedent is extremely powerful because Congress very quickly and frequently does, or at least not infrequently does, step in and overrule the Supreme Court decision. It's no disrespect. It's just that's not what we either intended or what we want even if the earlier Congress did intend that result, we do not want that now. So I think that critical difference between a written constitution and the power of judicial review in the United States versus the unwritten constitution and the lesser power of the judiciary in the mother country have much to do to explain the difference.

PROFESSOR KMIEC: We were talking before the event, Professor Dellinger, about precedent and the Court's handling of precedent in terms of distinguishing earlier cases, and you wanted to pose a question publicly?

PROFESSOR DELLINGER: Well, I am interested in the question of when the Court announces that it is overruling a prior decision, and when it cuts the heart out of a prior decision, critics will say that it distinguishes it away. You know, there's something to be said for not overturning a decision that resolved a very precise and particular issue and that issue can remain resolved the way it was earlier, but not expanding it. But it also causes problems, and I know that there was a bit of debate on the Court in recent terms that some of the Justices who concurred, not dissented but concurred the decision, that "I agree with the result, but the Court should have overruled the case and not distinguished the case that was in the way."

One of the problems of not overruling a case that you've cut the heart out of is another doctrine of the Supreme Court that lower courts are not allowed to anticipate the overruling of one of the Court's holdings so that even if you think that associated cases have undercut the very rationale of the decision, lower courts judges are still bound by it which puts them in a very awkward position if the Court has all but overruled an earlier case like the standing of religion cases or the campaign finance laws, and yet they have to act as if it hasn't been overruled as a result of this doctrine. I think that's tough. I think the question for the judge that's more for Supreme Court, that doesn't want to overrule what the courts of the appeal do, but one of the considerations that go into deciding whether there is a plausible distinction of the earlier case, you leave it standing on the basis of that distinction or overrule it. That's really something of a discretionary choice inexorably, isn't it?

JUSTICE ALITO: I guess it is to a degree. We need to be honest in distinguishing a case if the case really can be distinguished. I don't think there's anything wrong with taking that approach. Now, there are those who expect a degree of doctrinal consistency that courts that are doing practical work and not writing academic pieces really cannot be expected to produce at all times. So we may say that a certain precedent goes this far and no further, even though you can make the argument that the logic of the decision ought to extend much further. But to say it goes this far and no further isn't overruling that decision. It's not being disingenuous in

distinguishing that case. It's just saying that it has its limits. We're drawing a limit.

PROFESSOR DELLINGER: You know, it would be one thing if the first case were one which the Court agreed they wouldn't decide it the same way were it before them today and it can thus be distinguished. But I think the category of cases are those where it appears that a majority of the Court would not have reached the same conclusion had the issue in the earlier case been before them even though the distinction was on another judge. That's the category, but you're still on the hook as a decision with which a majority of the course doesn't agree.

JUSTICE ALITO: There's a considerable element, I think, of judgment under our legal system in determining the exact holding of a case. We don't view the holdings of cases to be limited to the very narrowly specific, factual situations before the Court. We consider the holdings to be broader, but at a certain point the discussion may go beyond the holding. It simply becomes dictum. I don't think there's anything wrong, in the later case, with declining to follow the broadest language that's perhaps unnecessarily and unwisely used in the earlier opinion.

JUDGE McCONNELL: I think that that's right, but I also think the Court should not be as hesitant as it seems to be in actually admitting that an earlier decision was wrong and overruling it. It doesn't happen very often. The number of overrulings is very small, and yet the number of cases where it has become evident that it was a mistake is, shall we say, somewhat larger. So there are two things that the Court does when it confronts an earlier mistake. One thing that it does is it distinguishes often on grounds that are questionable—that case was decided on a Wednesday. The other thing that they sometimes do is that they go to a second-best doctrinal approach. So take as an example that's much on the minds of inferior court judges, the sentencing after the Sentencing Reform Act was passed in 1986. There was an extremely plausible separation of powers argument against the act which the Court rejected. Everybody thought the Sentencing Reform Act was wonderful, was a bipartisan sort of thing, but by not quite twenty years later, the judiciary became disaffected with the consequences of this act. Instead of going back and reconsidering a quite logical, doctrinally coherent argument, the Court then adopted a Sixth Amendment theory—which I know you and I would agree on this since I agreed with your dissenting opinion in the *Gall* case—which really didn't make a lot of sense. There are problems with this when the Court distinguishes on illogical grounds or shifts doctrinally to the wrong basis. You get the real consequences in the lower courts for getting cases wrong because we're forced to maneuver

within these categories. I think it would be much more helpful if, when the Supreme Court realizes that it did something wrong, it just went back and corrected itself instead of adopting these rather torturous ways of getting to where they now want to get, but without actually overruling things.

PROFESSOR KMIEC: I take it you don't disagree?

JUSTICE ALITO: Well, I don't disagree with that in particular. I don't think, in fairness to my colleagues, that they took the Sixth Amendment theory that they adopted as a second-best alternative to the separation of powers theory that they did not adopt in *Mistretta*.¹³ I think they thought that their analysis of the Sixth Amendment is the correct one, not the one with which I agree, as I said in my opinion in the case that Judge McConnell was mentioning. I agree with him that if the Court has gone down a wrong path and the wrong path is creating bad consequences, then what the Court should do is say, "Well, we made a mistake. We turn took a wrong turn. We're going to go back and correct the mistake."

PROFESSOR KMIEC: There are a number of questions from the audience about dissents and concurrences and the practice of writing them, and the general thrust of the questions seems to be "What's their point?"

JUSTICE ALITO: They actually serve an important purpose. I do think it is quite important on any multi-member court for all of the Justices or judges to strive to produce an Opinion of the Court. It is very undesirable for there to be fractured opinions and for there to be no Opinion of the Court. As a Court of Appeals judge, I always found that frustrating.

PROFESSOR KMIEC: So should dissents perhaps be written and circulated only internally—that is, for purposes of provoking thought among each other in terms of the weakness of the argument, but not published?

JUSTICE ALITO: No. Not in general. Once the Opinion of the Court is achieved, then I personally don't think that there is generally much value in suppressing the expression of individual views. We could have a system if we wanted one in which there are no concurrences and no dissents. That's what they have in most of continental Europe. A decision is issued that is an unsigned institutional decision. The vote is not revealed. That's not our

13. *Mistretta v. United States*, 488 U.S. 361 (1989).

tradition. I don't think it's consistent with the spirit of our country. We're a very individualistic, independent, plain-speaking country, and when we're at our best, I think we speak our minds, sometimes loudly, but at the end, we shake hands, and we don't go away with bitterness. I think our appellate opinion writing has taken that form. I don't see a reason not to do that. I think the separate opinions do serve a function. Concurrences can affect the way the Opinion of the Court is interpreted later. A dissent, I think, disciplines the Opinion of the Court. I've heard it said, and I actually agree, that unanimous opinions are often not as analytically rigorous as divided opinions because they have not been subjected to the criticism of a dissent. The dissent can change the law later on. It also is a discipline for the individual Justice or the individual judge who must take a public stand unlike a judge in continental Europe does who votes, and then when the opinion is issued, no one knows whether that particular judge was in favor of the result or not. Nobody knows what the vote is.

Here everybody knows what the vote is. Everybody knows what everyone's position is. Having to make a decision, whether to sign on to what the Court has said, and say, "I agree with that," not just the result but with the essential reasoning or write separately and say, "No. This is the way I think about this question," is an important discipline.

PROFESSOR DELLINGER: Some concurring opinions and some dissenting opinions have become the law because they were better. They look at things, I think, like Justice Jackson's concurring opinion in *Youngstown*¹⁴ had a better reason why President Truman couldn't seize the steel mills and shaped the law in that area because the profession came to regard that as the more salient opinion. I think Justice Harlan's opinion as to why he would strike down a law forbidding the use of birth control by married couples ultimately proved more influential than Justice Douglas's majority opinion in *Griswold*¹⁵ and became the source of the law in those areas, so that sometimes there's where a Justice just has a better approach and that the profession comes to view it in some way as the better expression of the view.

PROFESSOR KMIIEC: Although there clearly is a change in practice over time on the Court, some of the statistics indicate that the rate of non-unanimous opinions was under twenty percent in 1900 and is over seventy percent today. The number of dissents, concurrences, and separate opinions has greatly expanded.

14. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

15. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

JUDGE McCONNELL: That has a lot to do with the type of cases. If you look at what they were deciding in 1900, there were a very large number of diversity cases and commercial cases where the outcome is important for the parties, but where they are not raising major precedent-setting issues for the nation. It's understandable that they would divide more over really hard questions like gun control and Guantanamo detainees and things of that sort.

JUSTICE ALITO: We should be disciplined about writing separately; we shouldn't do it unless we've got a pretty good reason for doing it. Maybe I, on occasion have written separately when I shouldn't, but, as I said, I think it can serve an important function at times.

JUDGE McCONNELL: At the Court of Appeals level, by the way, I think that there's another consideration, which is that there are twelve regional courts of appeals and yet we're dealing largely with federal law.

I think that a dissent or concurrence can alert judges in other courts and lawyers in other courts to the existence of a real issue or problem because we have far more cases to decide than the Supreme Court has. If I see that the Eighth and the Third Circuits have both gone the same way on something, I will by and large assume that that's probably right and may not give full attention to the question; but if there's a judge on the Third Circuit who wrote a dissent, then I'm going to pay very much attention to that instead of just following the caravan. I'm going to give it some real thought. So I think if at the lower level, which is where a lot more law goes on than the Supreme Court, dissents have a very practical and important function.

PROFESSOR KMIEC: May I ask both Dean Starr and Professor Dellinger about judicial method and approaches to deciding cases? Do you as advocates see the Court coalescing around particular methods of judicial reasoning, and if so, what methods?

DEAN STARR: Well, I think the courts—the Supreme Court of the United States, and thus virtually all the courts—are much more textualist in approach, and the Justice talked about that earlier. The Learned Hand approach toward statutes. Also with respect to the interpretation of the Constitution, I think all of the Justices tend these days to be pretty strongly textualist, and it doesn't always yield up the answer. And then structure—how the particular text fits into the structure of the Constitution and the history of that particular part of the Constitution, the particular terms of the

Constitution. So I think there is widespread agreement—I don't want to overstate it—but I think widespread agreement among the Justices and the judges as to how one goes about the process of interpreting the Constitution as law. That's not simply philosophy. So it's freedom of speech. The freedom of speech—what do they think that means? Then we also look at text and the structure and the history, but we also will then pay very close attention, even in the constitutional arena, to precedent. But in some of the areas of constitutional law, interestingly enough, as in *Youngstown*, the steel seizure case, and in this iconic concurring opinion—it is surprising how few materials we had on something as fundamental as separation of powers, the powers of the Presidency, and so forth. So at times you have to go to a number, a range of considerations, including what has been the practical construction of the Constitution and the wide range of interpretive approaches under that, but I think those are the starting points.

PROFESSOR KMIEC: Let me just target you a little bit longer, though perhaps the word “target” is ill-chosen. Professor Dellinger, you argued the *Heller* case.¹⁶ That was a case that seems by its opinion to be a debate over history.

In this gun control case, much of the oral argument was concentrated and focused upon various historical accounts of the meaning of “to keep and bear arms,” for example, although we did learn you could take a gun lock off in a hurry if you needed to.

PROFESSOR DELLINGER: That's the first time I've had personal testimony about my own ability to unlock a gun. I didn't raise that. I was asked specifically by one of the Justices how long it took to undo a trigger lock.

PROFESSOR KMIEC: Because you were asked by one of the Justices, it helpfully frames my question: should cases be decided in terms of their anticipated consequences—the question about trigger locks obviously being a consequential question from the bench? How do you see the philosophy or methodologies on the bench in light of your recent argument experience in *Heller*?

PROFESSOR DELLINGER: Different judges have a different sense of taking pragmatic consideration into account. That's particularly true of the open-ended provisions of the Constitution. I've noticed, I think—and *Heller* is an exception to a more general rule—that pragmatic consequences are more likely to be the subject of oral argument than they are of briefings.

16. *Dist. of Columbia v. Heller*, 544 U.S. ___, 128 S. Ct. 2783, 171 L. Ed. 2d. 637 (2008).

Partly that's because I think the Justices are so well-prepared that they will absorb each side's doctrinal argument. And the way the oral argument seems to differ sharply from briefing is that the Justices are pressing you on, you know, "I've got these two competing doctrines here. What are the consequences of ruling?"—and some of you know covering your brief—"What is the worst consequence of adopting the principle that you advocate? What is its most unacceptable extreme application?" You tend to get that kind of pragmatic question. "If I rule your way, where is that going to lead me that might be unfortunate?" Obviously, you tend not to brief that. Because that's where it comes up. It's often surprising how little discussion there is of case law. People who haven't argued in the Supreme Court before, citing a lot of lower court decisions is not at that point very influential. But you know what happens—and I don't think it's an illegitimate consideration—pragmatism. Take, for example, in the voting rights area—when is the consideration of race in districting too great? And one of the arguments I made in one of the cases where the Court did indeed uphold the districting was that state legislatures cannot operate if you invalidate every districting plan that has any consideration of race. It's too great a trip wire that would be caught in between. You have to shake the doctrine in a way that would give some breathing room to the state legislature, and that's the kind of pragmatic consideration I think that often—it seems to be more often the focus at oral argument. Perhaps because the Court was writing on what it thought was a blank slate on the Second Amendment, the argument in that case was different in that it was much more about first principles than would be the case with a more mature area of the law where there had been a number of decisions into the issues of application of a principle.

PROFESSOR KMIEC: Judge McConnell, have you seen one form of judicial method predominating over another in your court?

JUDGE McCONNELL: I think courts of appeal are different partly because there's a whole lot more precedent. Precedent dominates at the Court of Appeals level. It isn't the only thing, but it dominates, and the large part of what the courts of appeal are doing is more interstitial, that is, taking various Supreme Court decisions and then looking at cases that come in between them and sort of sorting things out rather than the bigger picture on decision making. I do strongly agree with Dean Starr that over the past thirty years, say, from thinking back to when I was a law clerk at the end of the 1970s, I think constitutional law looks much different and that there has

been a noticeable shift toward considerations of text and history and away from a kind of somewhat more freewheeling approach, and I think that's a good thing. I worry when you ask this question about pragmatic consequences because of course we have to consider consequences. That's not the question. The question is, in what light? In light of what values are they evaluating the consequences? If they're evaluating the consequences in light of the actual authentic principles embodied in the constitutional doctrine, take if it's a freedom of speech case and you want to know, "Well, is this particular regulation really a serious restriction on speech? Or is this just really kind of a distraction?" That's the kind of consequences they ought to be looking at. Or, in a Second Amendment case, how fast does a trigger lock come off might tell you whether there's a serious burden on the right to keep and bear arms. Those are consequence that they have to look at. What I think is problematic is when the Justices think they are better evaluators of value than either the legislature or the framers of the Constitution. So if they say, "We recognize that the Congress thinks this and we recognize that there's no real support for the contrary, but nonetheless we believe that our notions of justice are progressive," you know, whatever, and go the other way, and that's when I think the Court becomes the usurper.

PROFESSOR KMIEC: Justice Alito, this is, of course, a vital debate in the academy and a debate among your own colleagues. If I understand Judge McConnell's answer and the responses of Dean Starr and Professor Dellinger consequences are best considered within the frame of the law as given by the law giver. Now the response that, say, Judge Posner would give to that is that the law invariably has gray areas and a tremendous amount of gap-filling needs to be done—in fact, he references Judge McConnell for the proposition that relying upon history, tradition, and custom is seldom enough. In any event, Posner argues the boundary is really not plain in history. There is plenty of latitude in the interpretation of tradition and in the interpretation of history. Is the *Heller* case an example of that? Here we have two good faith presentations—one by Justice Stevens and one by Justice Scalia—both finding the history to support directly opposite meanings. Has original understanding, the historical, textual approach run out of steam? Or is it just that originalism never really was sufficient by itself and something else was always needed?

JUSTICE ALITO: It's unrealistic to expect that, if you program the judicial system correctly, it will mechanically turn out results that everybody will agree are consistent with the program. So the fact that there were two originalist opinions reaching conflicting results in the *Heller* case shouldn't be terribly surprising or, I think, terribly disturbing.

PROFESSOR DELLINGER: Sometimes the constitutional rule is, or the language is, sufficiently open-ended that it doesn't lend itself to a textualist study in the way that the Second Amendment does. There was plenty of material in the Second Amendment case for each side to argue that there was a historically ascertainable meaning of a well-regulated militia or the right to bear arms. But you turn to the Fourteenth Amendment, and it says no state should deprive a person of the equal protection of the law. You can say it as often as you want to that the judges should just follow the law as it's written, but that really doesn't answer very many questions for you. So in that kind of context, of an amendment adopted, we should remember that, after half a century of judicial review and expansive judicial review, the framers knew that they were delegating to the judges a determination of the privileges and meaning of citizenship and what is equal protection, and if that becomes an escape point. There are some scholars like Judge Bork, who would say it is so open-ended that judges should basically decline to make those kinds of substantive judgments, but that's not an originalist or textualist argument. That's an institutional policy argument that you should decline the role.

PROFESSOR KMIEC: So we may have come back to various styles of umpiring.

PROFESSOR DELLINGER: Judges are like umpires, but sometimes rules like the Fourteenth Amendment are like, each side should be given a reasonable opportunity to score runs. But that requires a lot more judgment of the strike zone.

DEAN STARR: But doctrine does get—I'll be very brief—developed so that the judges don't begin running the world. So in equal protection the baseline is as long as the legislature has not exceeded the bounds of reason, no matter what its wisdom, we're going to sustain it against the equal protection challenge. Legislation means someone wins, someone loses. It's only when there's an extra special something, a suspect category, or what have you, that then we will put on a much more different kind of analysis that we call it scrutiny. So there are still these democratic values very much at stake and in play when the umpire is using a more open-ended or interpreting a more open-ended part of the Constitution.

PROFESSOR KMIEC: Well, there are many more questions from our audience, but our time has expired. Even umpires need to rest. Our most sincere gratitude to Justice Alito, Judge McConnell, and former Solicitors General Dellinger and Starr for an enlightening and lively discussion. That's my opinion, at least, and I doubt there is a dissent in the house. Thank you, ladies and gentlemen, we are adjourned.