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## Roundtable Discussion

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## Roundtable Discussion

### Authors

Vikram Amar, Joan Biskupic, Douglas W. Kmiec, Jeffrey Rosen, Kenneth W. Starr, and Kathleen M. Sullivan

## Roundtable Discussion

PROFESSOR KMIEC: I would like to begin by pursuing some of the insight Professor Sullivan brought to light in the area of free speech. Professor Sullivan, you drew our attention to the distinction between people who are speaking on their own dime and people who are relying upon the public dime. These government speech decisions, including *United States v. American Library Ass'n*<sup>1</sup> and *Rust v. Sullivan*,<sup>2</sup> were cases that the late Chief Justice Rehnquist seemed to advance.

I think I also heard you say that in *Morse v. Frederick* you gave some advice to the Dean about maybe relying on a version of this government speech theory.<sup>3</sup> I, too, thought that a very wise way to pursue the *Morse* record without getting into content distinctions. In essence, the argument would say, “Well, this really is the school’s program, and a school platform, and the student is wrongfully commandeering that.” That approach did not seem to have complete resonance in the *Morse* case, at least not at the level I would have thought. Perhaps it was because the Dean argued the case differently. He argued it on the basis of the illegal message.

Nevertheless, do you think that one of the signals in *Morse* is that Justice Alito does not share the same supposition that speech can be limited when it is on the government’s dime?

PROFESSOR SULLIVAN: That is a very good question. Again, I think Justice Alito might find that speech is protected even in certain circumstances where it is a student speaking in a public school, where it is a government employee speaking out against an employer, or a recipient of government funds, but I think it is the *content* of the speech that will matter more to Justice Alito.

Some speech will be more protected than other speech in those settings, and in his view, there was no reason to protect the “bong hits” fellow against suppression by a totalitarian state, whereas there might be if the student speaking in school was trying to express a minority point of view within that school system. I think content may matter.

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1. 539 U.S. 194 (2003).

2. 500 U.S. 173 (1991).

3. *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

Similarly, with respect to the campaign finance case, the fact that it was core political speech mattered a lot to the majority.<sup>4</sup> Chief Justice Roberts echoed Justices Kennedy's, Thomas's, and Scalia's prior opinions on campaign finance.<sup>5</sup> If this is the core of political speech, and if we are going to protect plastic bag burning, topless dancing, and smut on cable television—if we are going to protect all these things that are really ancillary to the First Amendment—we should certainly protect core things.

Justice Stevens in his *Morse* dissent said you should protect the speaker's right to decide whether the speech is protected.<sup>6</sup> It should be up to the speaker. He also said it was an uncommonly silly speech, and that we had all been snookered into thinking that Mr. Frederick was saying anything intelligible at all when he said "Bong Hits 4 Jesus."<sup>7</sup> However, I can faithfully report that the Sullivan/Kmiec position got zero votes.

My specific advice was to treat it like it was an outdoor assembly or a pageant. I was nervous about saying drug speech is categorically unprotected, because you would want a student to be able to say in civics class, "Well, I think medicinal marijuana should be an exception to the drug laws." You wouldn't want to plant the seed that this type of speech would be considered unprotected drug speech.

But it is a different thing to wear "Go Medical Marijuana" on your jersey in a football game, because that is the school speaking, and the student has become a billboard for the school. I thought the situation in *Morse* was more like wearing a T-shirt to a football game than speaking about medicinal marijuana in civics class. I thought that was the distinction to draw, but the Court went more with the pro-drug message.

I do not mean to go on too long. I just think that there is strong support for freedom of speech, especially if it is political and especially if it is perceived as a dissent against a majority.

MS. BISKUPIC: I actually have the dissent with me, parts of it, because I wanted to look into distinctions by which they separate themselves from the other more conservative jurists. I know most of us do not like the term "conservative," but as journalists, we lapse into it frequently.

Justice Alito said that he wanted to make sure that he was joining the opinion in *Morse* with the understanding that "it goes no further than to hold that speech . . . that a reasonable observer would interpret as advocating illegal drug

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4. *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007).

5. *Id.*

6. *Morse*, 127 S. Ct. at 2643-49 (Stephens, J., dissenting) ("The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible. That the Court believes such a silly message can be proscribed as advocacy underscores the novelty of its position, and suggests that the principle it articulates has no stopping point.").

7. *Id.*

use” is not protected.<sup>8</sup> He wanted to ensure that he was saying nothing about speech on political, social issues, such as the broader wisdom of the war on drugs. If you had gone further with your anti-drug thread in the needle, as Professor Sullivan said, it probably would not have gotten Justice Alito.

DEAN STARR: It is a very pro-free-speech Court. Free speech does not always win, but the advocate is well advised in fashioning her or his positions with the mindset that the baseline for this Court is free speech is good—more protective than our past Courts.

PROFESSOR KMIEC: Although with respect, I think, *Garcetti* cuts a bit against that thought.<sup>9</sup> In terms of seeing free speech as good, *Garcetti* is a case that seems to make little sense in terms of the kinds of incentives one might think the Court would want to encourage—namely, having an employee freely bring out concerns about public mistake within, rather than outside, a public organization.

PROFESSOR AMAR: Chief Justice Roberts went out of his way at the beginning of *Rumsfeld v. FAIR* to say that the Court was not going to decide that case with respect to whether the funding condition gave them more power or not; the Court was not going to ask whether the federal government could require universities that do not receive federal funding to open their doors to a military recruiter.<sup>10</sup> But, the answer to that is yes.

I am not sure the *Morse* Court would have allowed punishing the same message on a student’s laptop computer at home that happened to find its way back to campus the next day through a few friends who were snickering about it.

PROFESSOR ROSEN: I am just curious, Dean Starr, were you concerned that the Court might interpret the message, as Justice Stevens *did*, to actually be protesting the war on drugs? He cited his Vietnam experience and prohibition in the 1920s.<sup>11</sup>

DEAN STARR: It is very hard to say this may not have had political resonance, especially in Alaska where there is an active political debate about

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8. *Id.* at 2636 (Alito, J., concurring).

9. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1955 (2006).

10. *See generally* *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006).

11. *Morse*, 127 S. Ct. at 2644-51 (Stevens, J., dissenting).

legalization.<sup>12</sup> On behalf of the Juneau School Board, we were very concerned about exactly how to treat the speech happily. We plumbed the record and found statements by the young man himself, but they really did not help his case. He simply said he was just trying to get attention,<sup>13</sup> and there was no real substance to his message. Was it a religious message? No. It emphatically was not a religious message. Was it a political message? No, it wasn't. That was what seemed to be our safe point, but that did not convince four Justices.<sup>14</sup>

PROFESSOR KMIEC: Here are a couple of questions from our audience, both here and at the National Constitution Center in Philadelphia. They relate to the freedom of association—in particular, that of the Boy Scouts.<sup>15</sup> How can they have a right of association, it is asked, but then be penalized for exercising that right, when they are told in several places that they cannot have the preferred pier or the preferred public camping space because of their associational choice? Where is the limit on conditioning a constitutional right, whether it be the right of free speech or, in the Scout's case, the right of association?

PROFESSOR SULLIVAN: I think the conditions are more suspect the more coercive they are, and I think the Solomon Amendment is as coercive as the condition could possibly be.<sup>16</sup> “We will take away all of your biomedical research funding. We will take all of your English as a second language funding. We will take away all of your sports funding. We will take away all of your funding if your renegade law school will not let the JAG Corps on campus.” Well, that is a very coercive condition. Everybody has to capitulate to that. There is no question.

The condition is less coercive where the Boy Scouts have many other opportunities to go elsewhere in the community. I think the result really depends on whether there are private substitutes. It depends on the potential spectrum of alternative opportunities.

Let me just reference Chief Justice Rehnquist in the *Webster* case, where the Court upheld a Missouri law prohibiting public financing of hospitals that perform abortions. He said the Court this to be an interference with the right of privacy, because it is not coercive where you have private alternatives to the

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12. See, e.g., *Frederick v. Morse*, 439 F.3d 1114, 1119 (9th Cir. 2006) (noting that, in Alaska, “referenda regarding marijuana legalization repeatedly occur and a controversial state court decision on the topic had recently issued.”).

13. *Morse*, 127 S. Ct. at 2638 (Breyer, J., concurring in the judgment in part and dissenting in part) (noting the banner was “designed to attract attention from television cameras.”).

14. *Id.*; see also *id.* at 2651 (Stevens, J., dissenting, joined by Souter & Ginsburg, JJ.) (“[A] full and frank discussion of the costs and benefits of the attempt to prohibit the use of marijuana is far wiser than suppression of speech because it is unpopular.”).

15. See generally *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

16. 10 U.S.C. §983 (1996).

state hospital.<sup>17</sup> If we had a national health service, on the other hand, he said that the result might be different.<sup>18</sup>

I think denial of public funding could be the equivalent of a regulation, but I tend to think it depends on the alternatives. Pamphlets seem to be the vehicle of the small voice, the poorly financed class of people. The poorer and less well funded you are, and the more of a chokehold the state has on speech, then the more reason there is to worry about the conditions I think.

I do not know the facts of the case you referred to well enough to say, but the Boy Scouts have many alternatives. Similarly, if the woman seeking abortion has lots of alternatives, then the denial of public opportunities has not become urgent.

PROFESSOR KMIEC: To what degree are the new members—Chief Justice Roberts and Justice Alito—signing on to the idea of substantive due process, out of which the punitive damage limitation was created?

DEAN STARR: Both Chief Justice Roberts and Justice Alito have signed on to the use of substantive due process. Although, Justice Breyer was skillfully elusive in *Philip Morris v. Williams*, suggesting that this action was entirely a procedural mechanism—namely, that the jury could consider harm to others when determining reprehensibility.<sup>19</sup> This is one of the factors that goes into determining whether punitive damages will lie, and if so, the amount of punitive damages. One can use this factor in the reprehensibility analysis, but one cannot consider that harm to others in actually calculating the amount.

Now, this is where we could have lots of fun with the procedural versus substantive distinction. There is a little bit of cover, but there is no reason to believe, based upon their other jurisprudence, that they are concerned with the use of substantive due process. They are concerned with your restrained issues, but less so with the idea that the Due Process Clause is going to have substantive content.

PROFESSOR KMIEC: Restrained substantive due process?

DEAN STARR: Yes.

PROFESSOR KMIEC: Is Justice Alito going to be concerned?

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17. *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

18. *Id.*

19. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063-64 (2007).

DEAN STARR: The right to play tennis may not come in, but when you look at the history and traditions of the people, there is a more restrained push of substantive due process, as opposed to a wide-open, robust vision of individual autonomy.

PROFESSOR SULLIVAN: Has living in Malibu changed your view on the right to play tennis?

DEAN STARR: I am not sure the Constitution speaks that implicitly to it.

PROFESSOR KMIEC: Won't some people say that the line drawing under so-called substantive due process is only a political one?

DEAN STARR: One might say that. In fairness, if you read Justice Breyer's opinion, he is looking to the great traditions of the common law, specifically, control of what he calls the arbitrary exercise of power.<sup>20</sup> Punishment should be proportional. This is a Breyer principle drawn from the common law.

PROFESSOR AMAR: Where are Justices Scalia and Thomas on this substantive due process question?

DEAN STARR: They will have none of it. Now, *Exxon Valdez* is on its way up to the Court.<sup>21</sup> We will see whether the Justices take the case.<sup>22</sup> There, it is no longer the federal Constitution controlling state juries, it is federal maritime law. And so as Walter Dellinger of O'Melveny & Myers puts it, it is time for Justices Scalia and Thomas to come play.<sup>23</sup>

MS. BISKUPIC: You know, your question of how to break down the usual alliances on punitive damages reminds me also of how much this Court has changed on the question since the early 1990s.

Remember the *Pacific Mutual Life Insurance Co. v. Haslip* case?<sup>24</sup> That was actually the very first time that Justice O'Connor dissented from the bench. She had never done it in her almost ten years on the Court at that point. Interestingly, that first oral dissent came on a punitive damages case. Having her business interest from Arizona, she was looking for the Court to take that

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20. *Id.*

21. Petition for Writ of Certiorari, *Exxon Shipping Co. v. Baker* (No. 07-219), 2007 WL 2383784.

22. Subsequent to this presentation, the Court did, in fact, grant certiorari. See *Exxon Shipping Co. v. Baker*, 128 S. Ct. 492 (Oct. 29, 2007) (No. 07-219) (granting petition for certiorari).

23. Walter Dellinger led the appeal and made the oral argument on behalf of Exxon Shipping Company on February 27, 2008. Transcript of Oral Argument, *Exxon Shipping Co. v. Baker* (No. 07-219), 2008 WL 534746.

24. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).



turn away from jury latitude on punitive damages. Of course, the Court did take a greater turn in that area after she left.

DEAN STARR: Let us turn to the next brief topic we would like to take up with you. It is one that our friend Jeffrey Rosen has explored at some length. At the beginning of his service, the Chief Justice indicated that he wanted the Court to speak with one voice.<sup>25</sup> He wanted the Court to speak as an institution.<sup>26</sup> He wanted it to be more than just a series of academics in a room propagating theories. The question is whether he can achieve that in some manner, given the practices of the modern Court.

It seems to me there are a number of things that influence the possibility of unanimity: collegiality and temperament; opinion assignment practices and the strategy of opinion assignment, in terms of when you give an opinion to Justice Kennedy and when you do not; and the ability to talk things out in conference before you set your ideas down and write them.

One of the things we know about Chief Justice Rehnquist was that he kept those trains running on time. But one of the consequences of trains running on time is that things went down into writing quickly. The conversations and the conference were short, and people's positions got locked in by virtue of that.

So those are some thoughts about the meager abilities that the Chief has in his disposition. He has his smile, and he has his charm, which is great. He has a little bit of opinion assignment authority. What else?

PROFESSOR ROSEN: Well, that is it. I mean, when I talked to him, he said, "The assignment power is not my greatest power, it is my only power." He talked about how most of his predecessors have been failures. He was about to spend the summer reading biographies of Chief Justices. He said he wanted to resurrect Marshall's vision for the Court, not because he was comparing himself to Marshall, he said, but because Marshall was his greatest predecessor.

The questions I would love to resolve on this panel, because they are of great interest to me are: why did he say that, why did he fail, and what do you see in the future? I will briefly set forth my tentative thoughts on these issues.

First, will he succeed? Systems do not run well. His colleagues have been polled on this question, and each of them has been discouraged. When asked what Roberts would see in the future, Justice Scalia smiled sweetly and said, "Goodbye." He was not very encouraging. I asked Justice Breyer this question four different ways this summer in an interview, and he dodged it very eloquently. He said the other Justices could join his opinions. Justice Kennedy

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25. Jeffrey Rosen, *Roberts's Rules*, THE ATLANTIC MONTHLY (Jan./Feb. 2007), available at <http://www.theatlantic.com/doc/200701/john-roberts>.

26. *Id.*

said they could assign him more opinions. Finally, when Justice Stevens was recently asked if Chief Justice Roberts would succeed, he said, “I don’t think so. We were all being nice to him during the first Term. It was the honeymoon.” Justice Alito was had just taken the bench, so he did not want to do anything too controversial, but it takes nine votes around here to do this. The idea that you can charm people is overstated. Chief Justice Rehnquist was supposed to be charming, but he was not. He was a nice guy, but he won because he had five votes. It was silly to think that he could do much more than that.

My question then becomes why would Chief Justice Roberts have said this and set himself up for failure? He must have known his colleagues disagreed. In fact, when I asked him about his greatest opposition, he signaled—without saying explicitly—Justice Kennedy. This is because Kennedy prefers it to be the “Kennedy Court.”

Frankly, maybe the Chief Justice was a little bit overconfident. It was the beginning, and his first Term had gone really well. He had achieved a string of unanimous opinions. He never had a big failure, and he was fairly successful in actually bringing people over to his side while on the D.C. Circuit.

The crucial thing he did not say in the interview, and which I did not anticipate, is that when he talked about narrowing everyone’s opinions, he was not talking about compromise. He did not mean he was going to split the difference. He was confident enough to think he could convince the others to come over to his side. In that sense, he was overconfident. He was wrong.

DEAN STARR: Now, there is a sense, though, in which we can say he achieved some level of success, not just in that first Term where he had the benefit of the honeymoon, but last Term where Justice Kennedy was largely on the side of Chief Justice Roberts in all of these five-to-four opinions.<sup>27</sup>

PROFESSOR KMIEC: There was an interesting academic study that found Justice Kennedy to have stayed remarkably consistent—at least up to the early 1990s.<sup>28</sup> He has changed and evolved less than almost any other Justice. And

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27. Of the twenty-four five-to-four decisions in OT 2006, Justice Kennedy voted with the majority every time, and Chief Justice Roberts was in the majority sixteen times. See Ben Winograd, *Visual Representation of 5-4 Decisions*, (June 28, 2007) available at <http://www.scotusblog.com/movabletype/archives/Final5-4visual.pdf>.

28. Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1505-06 (2007).

Turning from the recent past to the immediate present, the article also shines valuable light on Justice Anthony M. Kennedy. He is commonly depicted as having stepped into Justice Sandra Day O'Connor's role as the "swing" Justice. But Epstein and her co-authors demonstrate that in fact, Kennedy has changed very little since 1990 in any doctrinal area, and that on the subject of affirmative action, still a volatile issue for the Court, he has never shown evidence of shifting from his view that government policy should simply not take race into account for any reason. The article thus offers a valuable corrective to sloppy thinking and writing about the current Court.

Linda Greenhouse, *Justices Who Change: A Response to Epstein Et Al.*, 101 NW. U. L. REV. 1885, 1885-86 (2007), referencing Lee Epstein et al., *supra*.

the views he expressed last Term were consistent with the ones he has been expressing all along.

Perhaps, the case for Chief Justice Roberts winning over Justice Kennedy is evident in the business cases. There were eighteen business cases; fourteen were unanimous, and the other three of them did not divide along the usual five-to-four division.

MS. BISKUPIC: I do not think you can count the times when Justice Kennedy was with the Chief Justice as a victory for Chief Justice Roberts. I do think he set up a false expectation for everybody, especially himself. But I think what it also did was to push the left closer together.

During this recent Term, the four Justices on the left banded together in a way that they had not done in several years. I think the Chief Justice caused a more polarized situation. If you look at the *Hein* case, you might have seen a little bit more consensus or cohesion among the Justices' opinion, but it was at the end of the Term.<sup>29</sup> At that point, I think both camps had started to dig in, and I do not think anyone was looking for consensus at that point.

I think this might be a blip on the whole screen, frankly, because it came right after this unusual first Term where there was some unanimity. Chief Justice Roberts drew a bit of a line in the sand that caused the liberals to back away, but I think this might still be short-lived. Everybody might calm down a bit more after this Term. But again, I would not count what Justice Kennedy did to be something that was the result of Chief Justice Roberts.

PROFESSOR KMIEC: Chief Justice Roberts said he was going to try to achieve unanimity in the less contentious, statutory cases, and that if he succeeded there, the Justices might be predisposed to look for common ground in the larger constitutional matters. Does anyone wish to comment?

PROFESSOR SULLIVAN: There has always been unanimity in many areas of statutory law that only a lawyer could love. In fact, you underestimate how many cases every Term come down unanimously. But I think the idea of using this as a springboard to unanimity could not have been more wrong. Last Term, the Court was as polarized as it has ever been, not only with respect to the number of five-to-four decisions, but also with respect to the depth of the division and the passion with which dissents were announced from the bench.

MS. BISKUPIC: The question is: why did the liberals get so angry? Because they knew what he was like. Well there was something that happened early on that I think got their backs up a bit. It might have been some of the

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29. *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553 (2007).

early votes in conference. We do not hear these votes when they occur. We only see the rulings in the spring. The Justices have voted on them in the fall, so they would have already known the divisions and anger behind the scenes. I wonder if some of that was revealing itself in ways we did not know at the time.

PROFESSOR KMIEC: Part of it might also be the treatment of precedent. Is it better to overturn openly, better to be candid?

PROFESSOR AMAR: The honeymoon Term was also a relatively unimportant Term where there were not many contentious cases. There certainly was not a case that was nearly as big as *Gonzalez v. Carhart*.<sup>30</sup> There was no case dealing with resident-based affirmative action. This is a very smart Court, and these are nine very competent people. I think it is particularly hard to win people over when they have not just thought things through, but they are also pretty confident in their own abilities. I am not actually sure whether unanimity or consensus—an opinion of five—is always better.

DEAN STARR: There is one reason for dissenters to feel so strongly, and that is precisely because they are dissenters. The current dissenters were not losing a lot of cases two Terms ago, Chief Justice Rehnquist's last Term. Justice Stevens was triumphant. This Term, other than a bad penalty in *Massachusetts v. EPA*,<sup>31</sup> Chief Justice Roberts won on case after case after case.

So wouldn't he love unanimity? Of course he would. But he is a litigator. He wants to win, and he has done an extremely successful job thus far.

On another note, how can there be unanimity when Justice Thomas keeps disagreeing with the Chief Justice and Justice Alito? They vote the same way, but they have a profoundly different jurisprudential provision.

PROFESSOR SULLIVAN: I have to agree with that. I think one of the most interesting things about last Term was the fragmentations within the so-called "conservative five." Justice Scalia was often more critical of Chief Justice Roberts' opinion than even the dissenters, because he thinks to overrule without saying you are overruling may have many explanations. It may be a political ploy; it deafens the Court, creating an issue for the left to use politics.

This type of ruling is certainly not going to win friends and influence among people who are idealists, like Scalia and Thomas, who would never want to sign on to an opinion that not true to their principles.

PROFESSOR KMIEC: Jeffrey Rosen wrote in an article that someone who is highly ideological tends to be marginalized on the Court.<sup>32</sup> Isn't John Roberts

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30. 127 S. Ct. 1610 (2007).

31. 127 S. Ct. 1438 (2007).

32. Rosen, *supra* note 25 ("The ideological purists are marginalized on the Court, while those who understand when not to take each principle to its logical extreme are vindicated by history.").

less of an ideological person in the sense that he has these inclinations to build this consensus? He has not, by and large, undertaken to do what Chief Justice Rehnquist did, say, in *Dickerson*<sup>33</sup>—namely, swallowing his longstanding opposition to *Miranda*,<sup>34</sup> and basically taking that opinion up on his own.

PROFESSOR ROSEN: Exactly. So my question is whether he is more likely to do this in the future? Is he more likely to compromise because he does not want to preside with the most conflicted Court in history?

I will put it this way—am I just the victim of foolish optimism if I say that having committed himself to this vision, and obviously having the impulses, he would be embarrassed to fail? This man has never failed at anything he has done. He is incredibly successful. He would not want to fail by the standards he set up for himself, and therefore might we tentatively hope that he will be compromising in the future?

MS. BISKUPIC: The Court is about to change, though. We have the election coming up in 2009. Now, of course, Chief Justice Roberts is working with the people that he has. But this is going to change. In 2009, one way or another, the Court is probably going to change. And if a Democrat wins the presidential election, we predict that Justices Stevens and Souter would possibly leave. Maybe more liberal people would come on, and Roberts would start losing more of the votes.

PROFESSOR ROSEN: It would still be five-to-four liberal.

MS. BISKUPIC: But the dynamics of the Court are nonetheless going to change.

PROFESSOR ROSEN: If a Democrat wins, and there are some younger liberals on the Court, would Roberts then compromise because he would not want to preside over the five-to-four Court? Does anyone think he will?

PROFESSOR SULLIVAN: He has never really made one liberal vote except deciding you should get remedies if the Post Office misdelivers your mail.<sup>35</sup>

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33. *Dickerson v. United States*, 530 U.S. 428 (2000).

34. *Arizona v. Miranda*, 384 U.S. 436 (1966).

35. See *Dolan v. United States Postal Service*, 546 U.S. 481 (2006) (holding that a claim for negligent placement of mail under the Federal Tort Claims Act was not barred by statute).

PROFESSOR AMAR: Exactly. Two good cases to consider in that respect are *Morse v. Frederick*<sup>36</sup> and *Parents Involved*.<sup>37</sup> Justices Kennedy and Alito, writing separately in *Morse*, are eminently defensible. It is hard for me to believe that anyone really wants to count this kind of punishment against students for pure political speech, even involving drugs. So why didn't the Chief Justice adopt that position if he wanted to get more consensus? He also could have written a very narrow opinion in *Parents Involved* that would have kept Kennedy on board simply saying that the plan fell on the *Gratz* side of the *Grutter* line. He chose not to do those two things.

PROFESSOR KMIEC: This may seem trivial in comparison to these insights, but research has shown that one of the things responsible for fractured opinions is the happenstance of typography. At one point some years ago, people started to put roman numerals in opinions and divided them because they were getting too long to read, and they took up outlining as a practice. But once they were outlined, they invited people to say, "Well, I agree with Part I.C, but not I.A or I.B." Is there something that the Chief Justice should do as administrator of the Court that says, "I hereby abolish roman numerals"?

PROFESSOR ROSEN: Good luck.

PROFESSOR KMIEC: John Marshall was able to do it.

DEAN STARR: Gimmicks are not going to work. There is a clash of visions and a clash of moral views at work. Welcome to judicial democracy. Not everyone is going to line up and say, "Let's all sign this wonderful opinion on abortion. Oh, what does it hold?"

PROFESSOR AMAR: You draw extensions in footnotes instead—all one section with a few more footnotes.

PROFESSOR SULLIVAN: Three cheers for division. Let me just contest the premise. Normatively, you might say that seriatim, the British method, is bad because it makes every judge or justice into his own person. But there is nothing wrong with pointed division. We have an odd number of Justices. That is our tradition, and as part of that tradition, unequal votes can be preserved. There is nothing terribly damaging for a robust constitutional democracy to have pointed division on the Court. We had it in the period of the Espionage Act. We had it in the period of the New Deal cases.

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36. *Morse*, 127 S. Ct. 2618.

37. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

PROFESSOR KMIEC: Let's focus then on the effect of lack of consensus on public acceptance of the law. When an opinion is five-to-four does it have the same level of respect and dignity that a nine-to-zero opinion or seven-to-two opinion has?

MS. BISKUPIC: I think the public is bitterly divided on some of these issues.

PROFESSOR ROSEN: The questions on which the Justices are divided are generally the same ones on which the public is divided.

Affirmative action certainly has an amount of razor edge, and there are backlashes in both directions as responses in Texas and California show. There are also backlashes with abortion, but probably less so. The Court has its finger on the pulses in the center by protecting early choice, but also by allowing restrictions on later-term choice.

In situations where the Roberts Court comes down heavily on one side of a contentious question, such as *Seattle Schools*, history suggests there might be backlashes. In the case for unanimity—at least the liberal strategic case for unanimity—it would have been better for the Court to have done what Professor Amar suggested, simply saying that *Gratz* rather than *Grutter* strict scrutiny applied, instead of going for broke and trying to strike down all race consciousness.

I also could have imagined a way of threading a needle on the partial birth case. In each of those cases, there was a narrower alternative available, although maybe not unanimous—I suppose Justice Stevens would have dissented in any event.

Turning back to the broader picture, I think that Chief Justice Roberts' stemmed in large part from desire to establish stronger precedent. He said to me, "I have to convince the other Justices that rather than flipping a coin and maybe winning 50 percent of the time in five-to-four decision, it is more interesting to win 100 percent of the time on a more narrow issue, because it is harder to overturn that decision."

PROFESSOR KMIEC: If unanimity or consensus is elusive on particularly sensitive or difficult issues, I am going to transition now by asking if there still might be some consensus achieved, even with very different judicial personalities, by focusing on method of interpretation.

In terms of resolving *Parents Involved*, for example, we have illustrated here that original understanding was not the consensus, unless original understanding included precedent. Let me set this up by making a few remarks about the competing methods of interpretation, and then you can each tell me where a particular Justice fits, if at all, in this scheme of things.

First, interpretation always relates to a text. Out of that text comes another text, the linguistic rephrasing of the first text. There is the text of the Constitution and out of that is derived the opinion-based interpretation of it. What connects the first text to the second is a method of interpretation. As a result, it can be argued that method ultimately is what determines whether meaning is accurately discerned or not. If that's the case, what are the competing methods? I am assuming, by the way, that we have judges of good faith, so that we might think of the formula for the rule of law as: legal text, plus the method of interpretation, plus good faith judicial work, equals legal meaning.

Now, on one side of the ledger is textualism and originalism. On the other side of the ledger is nontextualism and nonoriginalism. What are some of the competing things that are said about these methods of interpretation?

First, textualism stands for the proposition that words can be used with such precision and clarity that the meaning leaps from the page. Take, for example, the word "year" in Article II, Section 1, of the Constitution.<sup>38</sup> The President shall serve for a term of four years. I think most people in this room would say, in terms of textualism, that has a definite meaning. It jumps off the page. We know what "year" means. In point of fact, however, we could introduce ambiguity even to that word.

PROFESSOR SULLIVAN: Leap year.

PROFESSOR KMIEC: Exactly. Even with textualism you can, in fact, introduce ambiguities, and because that is so, it belies its own premise.

PROFESSOR AMAR: Well, what does equal protection mean, especially when the Fifteenth Amendment uses the word "race"?

PROFESSOR KMIEC: Yes, that is the textualism problem. So the focus then turns to originalism. One originalist conception finds meaning in the intent of the drafters. Frankly, finding that specific intent is said to be either too hard to find or illegitimate, because it prefers the drafter over the enacting assembly. Original *understanding* is an alternative version of originalism that looks to the literary usage at the time a provision was enacted.

PROFESSOR ROSEN: Isn't that the ratifying meaning?

PROFESSOR KMIEC: It could be the ratifying meaning, but it might mean more than just the understanding of the ratifiers. Justice Scalia broadens it beyond the drafters and the ratifiers, to encompass the understanding in existence at large in the community at the time the measure becomes law.

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38. U.S. CONST. Art. 22 § 1.



PROFESSOR ROSEN: I do not mean to press it, but you are requiring us to focus on the concept of originalism in the *Brown* case.<sup>39</sup> This is the central testing for any theory of interpretation. And the fact that there is not a word of this type of reasoning in Chief Justice Roberts's majority opinion in *Parents Involved*, makes it hard for people who want to believe in their good faith and think that they are really a conscientious originalist.<sup>40</sup>

PROFESSOR KMIEC: So originalism, too, runs into rough ground. But what is the opposing side? The opposing side is the negative critique that basically says you really cannot even know the conventional meaning of words at the time of enactment, or even if you can know it, you ought not be limited to it, and hence, one gets some version of the "living constitution."

PROFESSOR AMAR: It is interesting. The "living constitution" is one of those law professor conceits that, as flawed as originalism in the Scalia fashion may be, many Justices on the Court say "I do not care about text structure and original intent of drafters or ratifiers. I am going to go my own way." They play games at a level of generality, and conservatives sometimes avoid the question in the race cases, but there is not this kind of liberal rejectionism, in part, because it has a broad appeal. If you told the American public, "We're not going to be bound by the text or original understanding of the generation that created those words," I think that would be a tough sell.

PROFESSOR KMIEC: Indeed, even original understanding might well be a tough sell over original intent to the public at large. The search for specific intent is so deep in our culture that it goes back to Aristotle's *Ethics*.<sup>41</sup> Aristotle basically says if you have an ambiguity in a statute, you should put yourself in the place of the original drafter and ask what he would have done at the time of the drafting. So it has a long legacy, but as noted above, it is not followed.

The question becomes: is there a competing theory with original understanding that has any legitimacy? The versions of the "living constitution" are all over the place, and certainly, there is no general public consensus supporting any particular one as far as I can discern.

Originalists will say any version of non-originalism merely transfers to the judges that which otherwise should be in the democratic process. That is the standard counterpoint. The "living constitution" alternative is always some introduction of someone's value-set. Both conservatives and liberals do this.

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39. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

40. See *Parents Involved*, 127 S. Ct. at 2746-68.

41. Aristotle, *Nichomachean Ethics* in THE COMPLETE WORKS OF ARISTOTLE 1729, 1796 (Jonathan Barnes ed., 1984).

On the liberal side, for example, Justice Stephen Breyer's doctrine of active liberty<sup>42</sup> is a value-based theory of participatory democracy. On the conservative side, some would say the whole Eleventh Amendment jurisprudence is built on the value of our Federalism standing behind—and significantly changing—the text of that Amendment. Richard Posner's "law and economics" is another nominally conservative value, though one not often seen at the Supreme Court level, which measures outcomes in terms of the results they produce. Of course, this is met by the objection that the idea of measuring utility subverts law insofar as the idea of legal rights is that they are enforced, notwithstanding the consequences that they may produce.

So do any of these scholarly theories find their way into the jurisprudence of individual Justices?

DEAN STARR: Yes, especially originalism. This is the reason I wanted to talk about Justice Thomas, but first I will say just a couple of words about this very interesting overview. It seems to me that what you actually see in practice is a hybrid drawing from these different traditions you have articulated. There is not, however, a monolithic devotion to one and an exclusion of the others, except perhaps by Justice Thomas.

Drawing from history and tradition, Earl Warren was a great historian and traditionalist. Read *Powell v. McCormack*.<sup>43</sup> It seems to me that this Court does not have the unifying moral vision that the Warren Court had. This was a moral vision which, at this very high level of generality, embodied the better society, the more equal society, and the Supreme Court idea of progress.

The Rehnquist Court fell in love with federalism and some structural principles and the like, but then seemed to sort of fall out of love. The one person who I had described as the most original Justice I would now say is the most iconoclastic Justice.<sup>44</sup> I wanted to use a very specific example in this last Term, and that is Justice Thomas.

An arena that should warm the cockles of all those who believe that we live in a country and not a confederation is the dormant Commerce Clause—judicial power being brought to bear with respect to state actions that discriminate against interstate commerce. It is as old as the republic itself. It is called protectionism or parochialism.

In 1994, Justice Thomas said in *United Haulers* that he had joined an opinion that gave life to the dormant Commerce Clause, but he foreswore that he was wrong—that the entire enterprise since 1824 has been wrong.<sup>45</sup> Justice Thomas is so dedicated to the proposition that we must get it right, no matter

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42. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

43. 395 U.S. 486 (1969).

44. See KENNETH W. STARR, *FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE* (2003).

45. *United Haulers Ass'n v. Oneida Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1799 (2007) (Thomas, J., concurring in the judgment).

how much china in the judicial shop gets broken, that he is even willing with regard to statutory interpretation, to say, “I don’t care that it’s been a settled interpretation of federal law for over a generation. I don’t care. I have a duty to get it right.”

Now, what is it that is driving him? I think it is his vision of originalism. But what happens when you come to the Fourth Amendment and the issue of what is a reasonable search or seizure? Doesn’t that call for a judgment? And surely one wouldn’t say, “Well, what did James Madison think about car searches?”

PROFESSOR KMIEC: As Jefferson Powell argues, the Framers’ “originalism” may itself have anticipated that contemporary considerations would be assessed. In other words, the “living constitution” was what was originally intended.

MS. BISKUPIC: That is why Justice Thomas’s view is going nowhere. Even Justice Scalia’s view, which is close, but not as narrow, has not found fans within the Court. Justice Alito and Chief Justice Roberts will vote more with Justice Scalia than their two predecessors did. In fact, that was the case last year. But this does not mean they are buying into his view of originalism—they are not. I think when you get to the core of your question about consensus and what the Justices agree with, these judicial philosophies divide the Justices much more. But they do not actually play out that much in the bottom-line rulings.

PROFESSOR KMIEC: Dean Starr, Justice Alito even divided from Chief Justice Roberts in *United Haulers*, as I remember.<sup>46</sup>

DEAN STARR: Yes, Justice Alito is much more Hamiltonian than Chief Justice Roberts, who is still somewhat Rehnquist-like in having a warm spot in his heart for the states.

PROFESSOR ROSEN: On the current Court, each Justice has a coherent approach as rooted in temperament, as in any sort of abstract technology. The differences among them are much more relevant than similarities. The Justices are doing something quite different than academics.

PROFESSOR KMIEC: If the Justices are being guided not by any theory of interpretation, but by, as you say, “temperament,” isn’t that merely what Ronald Dworkin would call the external factors of judging—namely, psychology,

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46. *See id.* at 1803-12 (Alito, J., dissenting).

personal experience, and background?<sup>47</sup> Professor Rosen, you nicely assess the temperament and psychology in your splendid biographical sketches of the Justices, but how does one build that into a rule of law?

PROFESSOR ROSEN: Each is coherent in its own way. Justice Kennedy is a good example of someone who completely resists all of the methodological categories that you set out. You could not put him in any of those processes. But he has a coherent vision, which some will find attractive, and others less so.

He is not an originalist in any way. He said he is quite interested in drafting or ratifying history, not in being a pragmatist. Unlike Justice O'Connor, who cared about consequences, who could split every difference, and who was acutely sensitive to the impact of the decisions on society, Justice Kennedy is a romantic idealist who prefers enforcing broad principles regardless of the disruptive consequences.

How does he operate? Using his own words, he suggested that he tends to make snap decisions; he has intuition about a particular case, and then he tries to express it as a broad and sweeping ideal. He has a fondness for literary images and archetypes, as well as judicial ones. He believes that the role of a judge, like that of great authors, is to impose order on a disordered society, and then to compare the law in question with his abstraction about how the world should be. I have no doubt of his good faith and the fact that he is struggling earnestly to get the right answers that he pleases. You can construct a vision about how that approach is consistent with the judge's role to enforce the Constitution, the same way that you can construct a democratic classification for Justice Breyer's approach.

DEAN STARR: Don't you think that the root of this is a very robust vision of liberty, including, but not limited to, freedom of conscience?

PROFESSOR ROSEN: Absolutely. Liberty is at the center, as you know. Justice Breyer has a couple of strong ideals that he believes in: liberty, autonomy, and the idea that the state cannot be interfering in the visual conscience. These are principles, and they are philosophical events. He believes in them, and he is going to enforce them.

PROFESSOR KMIEC: But, if there is a disconnect between any consistent method of interpretation and what they are actually doing, isn't that the ultimate reason why Chief Justice Roberts' hope for consensus is going to be an impossibility? Yet, isn't one of the services that we do, if we do a service as legal scholars, to allow judicial decision-makers the opportunity to see their work in the reflective mirror of a coherent theory?

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47. For more information about Professor Dworkin and for links to many of his articles, see *New York University Department of Philosophy: Ronald Dworkin*, New York University, <http://philosophy.fas.nyu.edu/object/ronalddworkin>.

PROFESSOR AMAR: Well, I think Justice Breyer's book, *Active Liberty*, is a self-conscious attempt to try to organize some of that. It was a response to the idea that if the Justices are doing what Professor Rosen says we are doing, then there is a problem with that.<sup>48</sup> My critique of *Active Liberty* is that it does not account for some major areas of law, such as those presented in *Stenberg* and maybe *Philip Morris*.<sup>49</sup> Maybe for *Philip Morris*, you can say, well, the book had to have some sense of proportionality. But Michael McConnell wrote a review of *Active Liberty* saying that a book about deference and decision-making should not fail to discuss what they did in these cases.<sup>50</sup> There is a gaping hole.

PROFESSOR ROSEN: Scalia's book also had inconsistencies.<sup>51</sup> Regardless, Justices Breyer and Scalia needed to trade their principles, but at least they had principles to trade.

PROFESSOR AMAR: They are just a little less rooted in something we would call distinctively legal.

PROFESSOR KMIEC: To wrap up, let's take a brief look at this year's docket. Is there any case that strikes you as particularly important and that you want to make an observation about?

DEAN STARR: Because I am the business person on the panel, one case that comes to mind is the *Stoneridge* case, dealing with Rule 10(b)(5).<sup>52</sup> During the oral argument two weeks ago, Chief Justice Roberts, in talking about Rule 10b-5 and Section 10b, made a very interesting comment, and no one contradicted him. To the counsel who was urging an expansion of Rule 10(b)(5) liability going beyond the issuer to third parties who are doing business with the issuer, he said that Rule 10(b)(5) is a private cause of action that we made up. He then said that we do not do that anymore, which is consistent with different jurisprudential and constitutional approaches. This philosophy is certainly consistent with the idea of active liberty, which says, "Let's see what Congress has to say about this subject."

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48. See generally BREYER, *supra* note 38.

49. See *Stenberg v. Carhart*, 530 U.S. 914 (2000); see also *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).

50. Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism & Originalism?*, 119 HARV. L. REV. 2387 (2006).

51. ANTONIN SCALIA & STEVEN G. CALABRESI, *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* (2007).

52. See *Stoneridge Invest. Partners v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008).

MS. BISKUPIC: I just want to mention two cases that the Court might take which would make the docket for this Term even more exciting. In a few weeks we will know if they will take up the Second Amendment case from the D.C. Circuit, which will decide whether the Second Amendment is an individual right or a right for state militias.<sup>53</sup>

The other potential case has to do with what Cher and Nicole Richie and Bono said at various award ceremonies; the dispute is over the “fleeting expletives” policy of the FCC. The FCC is going to file a petition in that case by November, and we will probably know a couple months later whether they take up that case too.<sup>54</sup> So we have a very rich docket to test the John Roberts Court.

PROFESSOR AMAR: There is a lethal injection execution issue that is going to be huge.<sup>55</sup> It will attract a lot of attention. The other criminal procedure case to watch is *Virginia v. Moore*, where Virginia did not authorize the police to actually arrest people for certain infractions.<sup>56</sup> Nonetheless, the police arrested individuals and conducted searches incident to those arrests. The question is whether the evidence should be suppressed. Is it a violation of the Fourth Amendment to ban unreasonable searches and seizures when the state law would foreclose it?

PROFESSOR ROSEN: The partisan primary case from New York is very interesting.<sup>57</sup> New York elects its judges through conventions in which it is essentially impossible to get a nomination unless you are endorsed by a party process. One unsuccessful candidate argued that this froze her out of the electoral system and made it impossible for the voters to have a meaningful choice.

It is a case which may unite the great passion of our friends Justice Stevens and Justice Kennedy in a way that might produce a majority, although there may be others who can count these votes better. Nonetheless, Justice Stevens has had a life-long opposition to judicial elections. He does not like partisanship or ideas of capturing the political branches for non-neutral means, and he has been denouncing this for years. This is a chance to say what is wrong with partisan elections.

Justice Kennedy, as we know from the partisan primary cases, is very open to the idea that neutrality in political competition is a First Amendment value.

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53. *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), *cert. granted*, *District of Columbia v. Heller*, 128 S. Ct. 645 (2008) (No. 07-290).

54. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3255 (U.S. Nov. 1, 2007) (No. 07-582).

55. *Baze v. Rees*, 217 S.W.3d 207 (Ky. 2006), *cert. granted*, 128 S. Ct. 372 (2007) (No. 07-5439).

56. *Moore v. Virginia*, 636 S.E.2d 395 (Va. 2006), *cert. granted*, *Virginia v. Moore*, 128 S. Ct. 28 (2007) (No. 06-1082).

57. *N.Y. State Bd. of Elections v. Torres*, 128 S. Ct. 791 (2008).

In the partisan cases he resisted composing it because he could not find an intelligible workable principle, although he said, "Come back to me if anyone thinks of one." Well, here is the case where you can imagine striking down this system and replacing it with merit election or another method in a way that would be judicially acceptable.

PROFESSOR SULLIVAN: Voter I.D. is an issue that will intersect politics with the Court in this Term.<sup>58</sup> We have had a lot of change in the way we conduct federal elections since the Help America Vote Act.<sup>59</sup> These changes set up concerns about and butterfly ballots on one side, and a concern about fraud on the other. It is widely perceived that when you worry about voter fraud, that is a euphemism for going after Democrats. Identification requirements have been disproportionately harmful for Democrats, because they are used mostly against poor, minority, and elderly populations, which tend to vote in a more liberal direction.

The question in these cases is whether the Court can hold back and hope that gerrymandering will fragment from our voter I.D. It is otherwise a straightforward question: whether votes are diluted by restrictions that are too draconian. For elderly people, people who remarried, or people who have name changes, it is sometimes very difficult to get their I.D. You need to get to the polls. Is that dilution of your vote?

PROFESSOR KMIEC: The Court may hesitate on electoral politics, but the Court has thrown itself into the difficult area of military decision-making in a big way. The availability, or lack thereof, of the right to constitutional habeas corpus to the detainees in Cuba will be an issue very much fraught with history.

The debate between Judge Randolph and Judge Rogers in the D.C. Circuit was over the extent to which habeas corpus extended beyond the English Kingdom, and if it did as a matter of common law, does the writ as we know it today extend beyond our formal, territorial boundaries? At first, the Court was inclined not to take this difficult issue, but then reversed itself.<sup>60</sup> It was the supposition of popular accounts that it was taken later because Justice Stevens raised with Justice Kennedy the sufficiency of Combatant Status Review Tribunals.

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58. *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *cert. granted*, 128 S. Ct. 33 (2007) (No. 07-21).

59. Help America Vote Act, 42 U.S.C. §§ 15301-15545 (2002).

60. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. denied*, 127 S. Ct. 1725 (2007), *cert. granted*, 127 S. Ct. 3078 (2007) (No. 06-1195) (reversing the Court's own prior denial for a writ of certiorari).

There have been further developments since then, though. Suddenly the United States Court of Appeals for the District of Columbia Circuit has taken seriously its responsibilities under the Military Commission Act.<sup>61</sup> It has pushed the scope of its review of the Combatant Status Review Tribunal, and so there is this other parallel track. While the writ of habeas corpus is largely informed by history, it may also be informed by the extent to which the Court has confidence in its lower court in Washington to provide meaningful non-habeas review of those who are being detained.

There is also *Medellin v. Texas*, which is an unusual case that involves President Bush embracing an international judgment and requiring his home state court to apply it notwithstanding that state court's general rules that would preclude its application under Texas criminal procedure.<sup>62</sup> This was a case that fascinated the Justices in oral argument. They went way past time, and they basically had this question: "Why can the President of the United States say what a treaty means, and impose that meaning on Texas when we thought treaty interpretation was our job?" So one thing you can be sure of is that where the Justices perceive that their work is being infringed on, they will come to the forefront quite quickly.

With that prospective look at this Term's current docket, we conclude our conversation about the riddle that is the Roberts Court. Thank you.

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61. 10 U.S.C. §948(a) (2006).

62. *Ex parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006), *cert. granted*, *Medellin v. Texas*, 127 S. Ct. 2129 (2007) (No. 06-984).