

AMERICAN ENTERPRISE INSTITUTE

**STATES, CITIZENS, AND CORPORATIONS:
DO THE JUSTICES CARE?**

THE SUPREME COURT'S 2002-2003 TERM

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MR. MICHAEL GREVE: Welcome, ladies and gentlemen.

Thank you all for coming. My name is Michael Greve. I'm with the American Enterprise Institute's Federalism Project. Normally I moderate these events. This year, Alan Raul of Sidley & Austin has kindly agreed to moderate this illustrious panel and to keep us all in line so I can be my cranky and cantankerous self.

Alan.

MR. ALAN RAUL: Thank you, Michael.

My job, given the Supreme Court's work product this year, is much easier than that of my colleagues, who are going to have to explain the inexplicable. I can just sit here and look perplexed.

Each of the panelists will speak for about 15 minutes. Then we will have some interaction, hopefully not fisticuffs, on the panel where they will be able to ask each other questions. We will then open it up to the audience to seek yet further illumination on the meaning of the Supreme Court's interesting term.

Michael Greve received his Ph.D from Cornell University in 1987, and he is the John G. Searle scholar at the American Enterprise Institute. He serves as the director of the Federalism Project and of the Liability Project. His research and writing cover American federalism and its legal, political, and economic dimensions. He cofounded and from 1989 through February 2000 directed the Center for Individual Rights, a public interest law firm, and he currently serves on the board of directors of the Competitive Enterprise Institute. He writes on constitutional and administrative law, federalism, environmental policy, and civil rights.

Dan Schweitzer is a graduate of the University of Pennsylvania and Harvard Law School. He was appointed as Supreme Court counsel of the National Association of Attorneys General, NAAG, in February 1996. His principal responsibility is to assist state appellate litigators appearing before the U.S. Supreme Court. In that capacity he organizes and participates in moot courts and gets to edit 35 to 40 state briefs filed each year in the Court. He also edits the bi-weekly "Supreme Court Report" and provides strategic and technical assistance to state attorney general offices.

Adrian Vermeule graduated from Harvard College and Harvard Law School and joined the faculty of the University of Chicago Law School. He clerked for Judge David Sentell of the U.S. Court of Appeals for the D.C. Circuit and for Associate Justice Antonin Scalia. Professor Vermeule's interests include constitutional law, administrative law, and legislation.

John Yoo is a graduate of Harvard College and Yale Law School, and a visiting scholar at the American Enterprise Institute on leave from Bolt Hall School of Law. Professor

Yoo is a former deputy assistant attorney general at the Department of Justice in the Office of Legal Counsel and served as general counsel for the Senate Committee on the Judiciary. He clerked for Judge Silverman on the D.C. Circuit and Justice Clarence Thomas on the Supreme Court. His research areas include constitutional law, international law, war, and terrorism.

With that, we will start out with Dan, who will speak for 15 minutes, then turn it over to Adrian.

MR. DAN SCHWEITZER: Thank you, Alan. It is a real pleasure to be here and a real honor to be among such distinguished panelists.

As Alan mentioned, my job is to help state attorneys general in the United States Supreme Court. So I am happy to say at the outset that the states won thirteen cases and lost seven cases of those that attorney general offices argued this term, which I think is a pretty good year.

What is interesting about that record is that two of the seven state losses were in the only two constitutional federalism cases that the state AG offices argued, Nevada v. Hibbs¹ and Franchise Tax Board of California v. Hyatt.² Both cases seemed likely wins for the states at the outset. The states were petitioners in both cases and petitioners win about two-thirds of the cases the Court hears each term. The Hibbs case came out of the Ninth Circuit, which is always a good place to start for a petitioner. In the Hyatt case, under review was a Nevada Supreme Court decision that was unpublished and that didn't conflict with any other state supreme court decision in the country.

So what happened? I'll turn to Nevada v. Hibbs first and then take a stab at the California v. Hyatt case.

Nevada v. Hibbs addressed Congress's power to enforce the 14th Amendment through section 5 of the 14th Amendment. My view is that the decision in Hibbs represents the Court's effort, or at least Justice O'Connor's effort, to find an acceptable and doctrinally sound middle ground in this area of the law.

On the one hand, I think Boerne³ was absolutely correct and the Court had no choice but to reject the idea that Congress can construe the 14th Amendment on its own, as it pleases, and then impose that new construction on the states. If the Court had held otherwise, Congress's power vis-à-vis the states would be unlimited. A recent decision by the Court this term helps illuminate that.

In Overton v. Bazzetta,⁴ a case decided 11 days ago, the Court held that a Michigan Department of Corrections limitation on prisoner visitation does not violate the right to association or the cruel and unusual punishment clause as incorporated through the 14th

¹ Nevada Dep't of Human Res. v. Hibbs, No. 01-1368, 123 S. Ct. 1972 (2003).

² Franchise Tax Board of Cal. v. Hyatt, No. 02-42, 123 S. Ct. 1683 (2003).

³ City of Boerne v. Flores, 521 U.S. 507 (1997).

⁴ Overton v. Bazzetta, 123 S. Ct. 2162 (2003).

Amendment. Now if Boerne came out the other way, then Congress could turn around and first say that it disagreed with the Court's construction of the 14th Amendment. Second, Congress could remedy that by enacting a federal code of prison visitation rules and impose it on the states. By the same reasoning, Congress could impose a national code of state and local police rules to construe and enforce the Fourth and Fifth Amendments. If there is to be any limit on Congress's power over the states, then Congress's section 5 power has to be limited to remedying actual constitutional violations by the states.

Having said that, no one in the states questions the importance of Congress's section 5 enforcement power. The 14th Amendment gave Congress the power to make certain that the states live up to their obligation to treat their citizens equally and in keeping with most of the Bill of Rights. (Many of Congress's most noble efforts, like key portions of the Civil Rights Act of 1964, were exercises of Congress's section 5 power.) So our challenge, and the Court's challenge, is to find that middle ground, to give section 5 the power that it deserves while at the same time keeping Congress's power over the states limited.

The proportionality test that the Court created in City of Boerne was the Court's stab at finding that middle ground, but like all tests of that sort it really gets its meaning through its application in cases. In the first four cases that the Court decided after City of Boerne, in applying the proportionality test, the Court held that these pieces of federal legislation were not valid exercises of Congress's enforcement power.

The Court's decision in Nevada v. Hibbs broke the states' winning streak by a 6-3 vote. As you probably know by now, the Court held that the family care provision of the Family and Medical Leave Act is a valid exercise of Congress's 14th Amendment enforcement power. Let's take a closer look at how that happened.

The family care provision requires large employers to give all of their employees a 12 week leave entitlement, unpaid, to care for, among other things, a sick spouse or child or parent.

Now how, you may ask, does that remedy unconstitutional state conduct? The United States and Mr. Hibbs made what I think was a subtle argument that goes something as follows (and I take this from the summary of argument in the United States brief):

The family care provision enforces the equal protection clause's prohibition on gender discrimination. The nation as a whole, including the states, has a long regrettable history of gender discrimination, and even with Title VII on the books, discrimination on the grounds of gender in employment persists. For example, many states offer maternity leave but not paternity leave. The FMLA prevents and remedies that sort of discrimination by establishing a gender-neutral uniform family leave floor that erodes sex-based employer presumptions and transforms family leave from a woman's issue into a routine across-the-board employment benefit.

That's quite a mouthful, but that is their argument. I would say it has one thing working for it, and one thing working against it. Working for it is that the Court adopted that reasoning hook, line, and sinker. That's pretty much the best thing a legal argument can have going for it, at least from the perspective of an advocate.

Working against it is that this portrayal of what Congress was doing bears virtually no resemblance to reality. Simply put, the Congress that enacted the FMLA did not view itself as enacting antidiscrimination legislation. Here is what the 1993 Senate report said in the section addressing "need for legislation":

“The FMLA accommodates an important societal interest, assisting families by establishing a minimum labor standard for leave. The bill is based on the same principle as the child labor laws, the minimum wage, Social Security, safety and health laws, pension and welfare laws, and other labor laws that establish minimum standards for employment.”

The 1993 House report contained identical language. In short, the debate surrounding the FMLA was not about how to stop rampant discrimination. It was over how to treat employees fairly and how to ensure that employees can take care of their new children and take care of their sick family members without losing their jobs.

The 1993 Senate report contained one reference to discrimination, and it bears mention. There is one section of the report that is titled Equal Protection and Nondiscrimination, and here's what it says in its entirety:

“The FMLA addresses the basic leave needs of all employees. It covers not only women of childbearing age, but all employees, young and old, male and female, who suffer serious health conditions or who have a family member with such a condition. A law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. Senate Bill 5, by addressing the needs of all the workers, avoids any such risk. Thus, S. 5 is based not only on the Commerce Clause but also in the guarantees of equal protection and due process embodied in the 14th Amendment.”

Once again, the House report contains virtually identical language.

That is the only reference to discrimination in the Senate report and virtually the only reference to discrimination in the House report.

I am not suggesting that the issue of gender discrimination didn't arise at all during the 10-year legislative battle over this legislation. But to the extent gender discrimination was addressed, it was an exceedingly minor part of the debate. That shouldn't be surprising. The FMLA, after all, doesn't prohibit discrimination by its own terms. That is what Title VII does. Thus Title VII and the ADA and the ADEA are enforced by the EEOC and by the Civil Rights division of DOJ. The FMLA is enforced by the Department of Labor.

Adding to my confidence about what Congress was really focused on is the concurring opinion in Nevada v. Hibbs by Justice Stevens. Justice Stevens didn't buy the United States' argument about what Congress was trying to do in the FMLA. Stevens is "uncertain whether the congressional enactment before us was truly needed to secure the guarantees of the 14th Amendment." He concurred in the judgment only because he refuses to accept the Seminole Tribe⁵ decision, and if you don't accept that, then this whole issue becomes irrelevant.

Thus one doesn't have to be a heartless conservative to think that the FMLA was not about remedying gender discrimination. In spite of all of this, the Court by a 6-3 vote accepted the United States' *post hoc* justification for the FMLA and ruled that its family care provision really does remedy state violations of the equal protection clause.

Why is this? I see two reasons for it. First is the problem of motive. I have shown, I hope, that Congress wasn't really motivated in this act by concerns of gender discrimination. But it is very hard conceptually to base a decision on discerning Congress's motive. What if 2 percent or 5 percent of the hearings before Congress addressed gender discrimination? How are we to say therefore Congress was not at all concerned about gender discrimination? Is 20 percent enough?

If the Court were to rule that the FMLA were not valid 14th Amendment legislation strictly on grounds of Congress's motivation, that means that Congress could turn around tomorrow and enact identical legislation. It would be valid section 5 legislation, as long as Congress explicitly said, "We are doing this because of our concerns about gender discrimination." The Court would be uncomfortable with a jurisprudence that let that happen.

The second, more fundamental reason that the Court ruled as it did ties back to the concerns I mentioned earlier about trying to find that balance, a middle ground in this area of the law.

In Garrett⁶ and Kimel,⁷ the Court reviewed the ADA and the ADEA with what seemed like heightened scrutiny, and it received some criticism for this. But I do think it made sense since the laws dealt with issues as to which states are subject only to rational-basis review. Laws enacted by democratically elected state governments in those areas are presumptively valid. So Congress, like the Court, has some work to do to overcome that presumption that the states are acting properly. On the other hand, Congress's effort to remedy state discrimination that is presumptively unconstitutional such as gender discrimination is properly subject to far less scrutiny, just as the courts can more readily reject as illegal state activity in those areas.

So Hibbs can be seen as creating a deferential standard for review for section 5 legislation that seeks to remedy state discrimination subject to heightened review by the courts. That deference led the Court to accept the United States' *post hoc* justification for

⁵ Seminole Tribe v. Florida, 517 U.S. 44 (1996).

⁶ Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

⁷ Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

the legislation and to accept the remedy of family care leave, even though the Court identified no concrete examples of unconstitutional state conduct with respect to family care leave.

This seems a sensible approach to Congress's 14th Amendment power, one that accommodates the competing federalism and separation of powers concerns, although I do think there was a lot to be said for Justice Kennedy's dissent in terms of its analysis of what Congress was really aiming for.

I now turn to Hyatt. This interesting case arose out of California's assessment of Hyatt, a California resident who claimed to have moved to Nevada shortly after he earned \$20 million on a patent.

California conducted an audit and concluded that, lo and behold, he actually was a California resident at the time he earned his \$20 million, and so assessed him for that. He filed a challenge through the California administrative process to this tax assessment. Afterwards he filed a separate lawsuit in Nevada state court where he claimed that the California Franchise Tax Board through its assessors committed a slew of torts against him. The Nevada Supreme Court held that the action could proceed in Nevada state courts, but only with respect to the intentional torts that he alleged, not the negligent torts.

The United States Supreme Court unanimously affirmed the Nevada Supreme Court and, in an opinion by Justice O'Connor, held that Nevada did not have to give full faith and credit to a California statute which gave California tax assessors and the Franchise Tax Board absolute immunity from any tort suits that arose out of a tax assessment. I have a couple of observations about this decision.

First, California did not ask the Court to overrule Nevada v. Hall,⁸ a 1979 decision in which the Court held that a private citizen was not barred by the Constitution from suing a state in another state's courts.

Given the Court's more recent decisions in Seminole Tribe and Alden,⁹ it is a very open question whether Nevada v. Hall is still good law, but the Court decided not to reach the issue on the grounds that California didn't ask it to, even though 20 states had asked the Court to revisit and overrule Nevada v. Hall in an amicus brief. This shows that the Court is not going out of its way to break new ground in sovereign immunity law.

Second, the decision puts to rest any hope that the Court would reinvigorate the full faith and credit clause. The entire Court agreed that the clause imposes no barrier whatsoever on a forum state's use of skewed choice of law rules to benefit its own citizens. Not that the Nevada Supreme Court was playing games in this case, but the Court's rule was a pretty clear, across-the-board rule that it wasn't going to interfere with a forum court's choice of law decisions.

⁸ Nevada v. Hall, 440 U.S. 410 (1979).

⁹ Alden v. Maine, 527 U.S. 706 (1999).

The nature of this suit made it particularly striking that the Court permitted it to proceed in its entirety. Not only was it a suit against another state, but the core of Hyatt's claim was that the Franchise Tax Board of California essentially extorts settlements from former California residents who move to Nevada. The magistrate in this lawsuit has therefore allowed Hyatt to take discovery on California's entire tax collection process and pursuant to that Mr. Hyatt has taken 315 hours worth of depositions against California tax employees and has made 690 document requests.

Still the Supreme Court declined to limit the intentional tort action to, for example, torts that were physically committed in Nevada as opposed to in California. So forum states may continue to discriminate in their choice of law rulings in favor of their residents, even though, as Professor Douglas Laycock has written, this goes against the very purpose of the full faith and credit clause and the privileges and immunities clause, which are to ensure that states treat their sister states as equal in authority to themselves, and that states treat citizens of sister states equal to their own.¹⁰

I know Michael agrees with me that it's disappointing that this area of the law is pretty much going to remain static for the foreseeable future.

MR. RAUL: Thank you, Dan.

Adrian.

MR. ADRIAN VERMEULE: Thanks, Alan.

I want to thank Michael and Alan and Kim and others for organizing this event. It's a pleasure.

Today I want to offer an account of this Term's federalism decisions. The straw man for my view, or in this case the straw woman, will be Justice Ginsburg. She recently said at a public event that this Term would not be remembered for its federalism decisions, and that federalism was "the dog that didn't bark."¹¹ The implicit claim is that the federalist revolution has petered out; the Justices in the federalist majority have lost steam or have turned to other projects. It doesn't really matter whether this is what Ginsburg herself had in mind. But something like this view is widely shared, especially by supporters of vigorous judicially-enforced federalism who agree with Ginsburg's description – although the supporters of federalism think it is cause for regret, whereas Ginsburg sees it as cause for celebration.

I think both sides have the wrong picture of what the federalist majority is trying to do. This was, in fact, an important Term for enumerated powers and state immunities. It was the Term in which the Rehnquist Court attempted to consolidate the new constitutional

¹⁰ See Douglas Laycock, "Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law," 92 Colum. L. Rev. 249 (March, 1992).

¹¹ CNN, *Justice Ginsburg: Supreme Court Faces Stormy Times*, (June 12, 2003), available at <http://www.cnn.com/2003/LAW/06/12/ginsburg.aclu.ap/>.

law of federalism. The view that nothing of interest happened assumes a certain baseline of expectations: unless the Court continues to invalidate federal statutes on federalism grounds, with ever-more restrictive tests of congressional power, then the federalism revolution has lost momentum. I want to say, though, that successful revolutions, like the American one, are successful precisely because they eventually move into a more mature phase in which they consolidate their gains by placating the losers and encouraging them to acquiesce in the new regime. Unsuccessful revolutions, like that one in France you may have heard about, are unsuccessful precisely because revolutionary demands never stop expanding. That sort of overreaching tends to provoke a counterrevolution that undoes the revolution's previous gains.

The alternative picture I want to offer is that Rehnquist and his allies tried, this Term, to consolidate the federalism revolution. They did so by trying to emphasize and brighten some doctrinal lines that were already implicit in the previous cases, in order to make clear that the revolution will go only so far, but not farther. By promising that the federalism revolution will not take a meat-axe to the U.S. Code, the majority is encouraging the nationalist dissenters to acquiesce in the Court's recent decisions. Although the immediate result may have been to validate a few federal statutes of dubious constitutionality, the long-term result will be to entrench the new constitutional federalism more deeply as against future Court majorities with nationalist leanings.

I'll illustrate this thesis by reviewing a few major cases, starting with Nevada v. Hibbs. Many people were puzzled when the case came down; why would Rehnquist write the opinion that upheld the Family and Medical Leave Act (FMLA)? And, what's more, the opinion obviously strained to uphold the statute as an antidiscrimination provision. But the FMLA just provides a gender-neutral substantive entitlement akin to the minimum wage, so it isn't obviously a discrimination statute at all; the statutory preamble and the legislative history were ambiguous, and supported either characterization.

One explanation for these puzzles is micro-strategic: call it the Warren Burger gambit.¹² The idea is that Rehnquist may have joined the majority because Justice O'Connor had already voted to uphold the statute, and Rehnquist hoped that by assigning the opinion to himself he could limit the damage. But then the puzzle just becomes why O'Connor would vote to uphold the FMLA – aside from the possibility that she was persuaded by the excellent argument that her former law clerk Viet Dinh offered for the government. The story would have to be that O'Connor mentally coded this statute as an attempt to stamp out “gender discrimination,” rather than an affront to “federalism.” But this is pretty ad hoc; why didn't O'Connor see the Violence against Women Act (VAWA) as a gender discrimination statute¹³ – at least as plausible a characterization? Of course there are technical distinctions between the VAWA and the FMLA, but this isn't a technical story.

Another account comes from Jeff Rosen.¹⁴ Here the idea is that Nevada v. Hibbs isn't really about federalism at all: it's about the Supreme Court's power vis-à-vis Congress.

¹² Bob Woodward & Scott Armstrong, *The Brethren* 64 (Simon and Schuster 1979).

¹³ United States v. Morrison, 529 U.S. 598 (2000).

¹⁴ Jeffrey Rosen, “Sister Act,” *The New Republic*, June 16, 2003. p. 14.

By tying Congress' §5 power ever-more-closely to the heightened-scrutiny categories that the Court has developed under §1 – here, gender discrimination – the Court emphasizes the point made in Boerne v. Flores: the Constitution is what We the Judges say it is.

In my view Rosen starts out on the right tack, but then takes a bad wrong turn. The key to Hibbs is indeed that the case ties §5 more tightly to §1. Hibbs indicates that §5 and §1 vary inversely: just as state discrimination receives heightened scrutiny under §1, federal antidiscrimination statutes will receive reduced scrutiny under §5. But the point of this isn't to emphasize the Court's authority vis-à-vis Congress; it is to clarify the structure of the new federalism doctrine in ways that consolidate the Rehnquist majority's gains from prior terms. To clarify the location of the constitutional line, the federalist majority has to validate some statutes now; but this makes it easier to invalidate statutes on the wrong side of the line in future Terms. It also encourages nationalist Justices on future Courts to leave the new law in place, by making clear that the costs of acquiescence will be limited. The radical federalist alternative – invalidate as much as possible right now – would have been overreaching. Paradoxically enough, taking less than you can grab now may be the best way to keep what you've already gained. This was the lesson the French revolutionaries failed to learn.

Pierce County v. Guillen¹⁵ is in the same vein. The case involved an enumerated-powers challenge to a complex of federal statutes that provided federal funding for improvements of hazardous roads and required state and local governments, as a condition of funding, to undertake a thorough evaluation of the roads. States were concerned that the resulting documents would become a magnet for tort plaintiffs, so the statute also made the documents inadmissible into evidence in federal or state court. The Washington Supreme Court said that the statute exceeded Congress' enumerated powers.¹⁶ But the Supreme Court unanimously upheld it as a valid exercise of the commerce power, reasoning that the statute regulated the channels and instrumentalities of interstate commerce because it aimed to promote safety in the highway system.

The Court's unanimity was itself interesting, because the case was much harder than it looks. The statute's ultimate aim may have been to benefit the channels of interstate commerce. But it is hardly clear that the regulated activity itself – the admission of evidence in state court – has any interstate aspect. The VAWA case, United States v. Morrison, seemed to suggest that in those circumstances the statute could be upheld, if at all, only under the other prong of commerce clause analysis – for intrastate activities that substantially affect commerce. Even then, the federal government would have to show that the intrastate activity is itself intrinsically “economic,” and it is not clear that setting evidence rules to be used in state court on a state cause of action is any more intrinsically economic than is, say, growing wheat for home consumption. If the statute had to be upheld, surely it would have been much simpler to find the necessary authority in the Spending Clause, rather than a broad reading of the commerce power.

¹⁵ Pierce County, Wash. v. Guillen, 537 U.S. 129 (2003).

¹⁶ Guillen v. Pierce County, 31 P.3d 628 (Wash. 2001).

So we have another strained opinion that rejects a federalism challenge. Why would all of the Justices who usually support the new federalism abandon it here? Well, I don't think they did. In my view Pierce County is another effort to consolidate the federalism revolution by clarifying the doctrinal lines, even if the immediate price is a win for national power. The key to Pierce County is the simple idea that the channels-and-instrumentalities prong of commerce analysis is doing the same work that the §1 heightened-scrutiny categories did in Nevada v. Hibbs. The Court is clarifying that the Lopez/Morrison branch of the federalism revolution has some bite but not too much; many controversial federal statutes, such as the interstate child-support enforcement statute, can be upheld on similar channels-and-instrumentalities grounds. The message is that the nationalist dissenters should accept an implicit deal: if you acquiesce in the new federalism, you can be assured that the current scope of national regulation will not be drastically restricted – just trimmed around the edges. And, incidentally, this helps to explain why the Court didn't just uphold the statute on Spending Clause grounds. The route the Court chose emphasized the limits of the commerce clause revolution; on the view I'm offering, both sides had reason to prefer that to another routine spending decision.

Finally there is the striking unanimous opinion in Franchise Tax Board v. Hyatt. Hyatt seems to reaffirm the 1985 Garcia¹⁷ decision that attempted to kill off judicially-enforced federalism. This is especially curious because Justice O'Connor, the author of the Hyatt opinion, was one of the two Justices who issued a lightly veiled threat to overrule Garcia when the forces of federalism again gained the upper hand. The other, of course, was Rehnquist, who also joined the Hyatt opinion. What's going on here?

To understand this, we have to understand that Garcia had two very different rationales. The narrow rationale was that the previously prevailing legal test – one that gave states immunity from federal regulation of “traditional state functions”¹⁸ – was unworkable. The second, far broader rationale was that federalism should be enforced strictly through the political process, rather than through judicial review. Important work by academics like John Yoo has challenged the intellectual respectability of the broader rationale¹⁹, and the Court has obviously abandoned it as a general proposition. But the Court – including Rehnquist and O'Connor – has come to believe that the Garcia court was essentially right about the narrower rationale. The traditional state functions test doesn't work, so an effective, stable, and consolidated version of judicially-enforced federalism shouldn't try to resuscitate it. Confirming this view is that the Court has, in recent years, passed up several cert petitions that urged the Court to overrule Garcia itself.

Let me sum up. We have two hypotheses on the table. One is that this Term represented the collapse of the federalism revolution, and that the Rehnquist Court no longer cares about federalism. Another is that the new federalist majority is attempting to stabilize and entrench the revolution by convincing its opponents that the cost of acquiescence will not be total defeat; it will just be a new equilibrium, one somewhat more favorable to states, and one that nationalists can at least live with. If I'm right about the second view, it means that the federalist majority is accepting a few short-term defeats in order to

¹⁷ Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

¹⁸ National League of Cities v. Usery, 426 U.S. 833 (1976).

¹⁹ John Choon Yoo, *The Judicial Safeguards of Federalism*, 70 S. Cal. L. Rev. 1311 (1997).

ensure the long-term entrenchment of judicially-enforced federalism. Supporters of the federalism revolution should approve of this, rather than complaining that the Court didn't give them the other half of the loaf.

The much broader rationale is that federalism should be enforced strictly through the political process rather than the judicial process.

Now people like John Yoo have undercut the intellectual respectability of that broad rationale, and the Court has abandoned it as a general proposition. So I think congrats to John.

MR. JOHN YOO: There's no cause and effect.

[Laughter.]

MR. VERMEULE: I think that Rehnquist and O'Connor think that the Garcia court was actually right about the narrower rationale. They think that the traditional state functions test isn't workable.

If you want an effective, stable, consolidated judicial federalism, you should ditch the traditional state functions test. And I have a piece of data that confirms this, which is at least since the mid '90s the Court has passed up several opportunities to take cert petitions that urge the Court to overrule Garcia. They show no interest in revisiting the technical holding in the case.

Those three cases—Hibbs, Pierce County, and Hyatt—may illustrate or support one of two hypotheses. The first hypothesis is that this term represented the collapse of the federalism revolution. The Rehnquist court just isn't doing much with it anymore. That's not my view.

The other hypothesis, I think is more persuasive--namely, that the majority is trying to stabilize and entrench the revolution, to convince its opponents to give in. The cost of acquiescence will not be total defeat; it will just be a new equilibrium, one that's a little more favorable to states, and one that the nationalists can live with.

If I'm right about that, it means that supporters of the federalism revolution should like what happened this term rather than complaining that the Court didn't give them the other half of the loaf. The mistake in that is the mistake that the French revolutionaries made a while back. The idea is to try to swallow up the universe, but you end up often with nothing at all. My contrast is to the American Revolution, which realized that trying to buy off the dissenters, buy off losers, is a better way to achieve long-term goals than is the attempt to secure total victory.

So with that, I will go to Michael.

MR. GREVE: Among the questions raised by the Supreme Court's Term is this: is federalism dead? If you don't think the Court's decisions don't actually raise the

question, let's just say I raised it. Either way, the correct answer to the question is, we should be so lucky. Federalism has reached its outer limits in areas where it would do some good. Federalism—in the Supreme Court's primitive understanding—is flourishing in areas where it not only does no good but is in fact an absolute menace to the republic. I'll spend the remainder of my time on explaining, as best I can, these incendiary remarks.

Federalism presupposes some distinction between what's national and what's local—between stuff that spills across state borders and stuff that is “purely internal to each state.” Judicial federalism means that the Supreme Court has to police the boundary—*both ways*: it has to limit national overreach into internal state affairs, and it has to prevent states from infringing on each other's rights, or on inherently national concerns. If the Court fails to police the boundary either way, you're going to have two federalism problems: national overreach, which this Court occasionally recognizes as a federalism problem; and state overreach, to which this Court is almost entirely obtuse. In fact, the Court's so-called “federalism” posture affirmatively encourages states to exploit each other. If you have trouble envisioning what I mean, think liability crisis—the systematic expropriation of out-of-state manufacturers by state courts and juries. That, in a nutshell, is out federalism problem.

First, consider the judicial policing against national overreach. The issue has two dimensions: overreach by the Court, and overreach by the Congress. As for the former, the Court has shown zero restraint. In enumerated powers decisions (such as Lopez²⁰ or Morrison), the Court routinely describes criminal law and family law as the “traditional province” of the states. I don't much like the “traditional powers” language, but it corresponds roughly to federalism's logic: by and large, the exercise of those powers doesn't affect anyone outside a given state. At the same time, nothing is to be gained from yanking those issues on to the national level.

However: when the states exercise those powers in a way that offends Tony Kennedy's or Barbra Streisand's sensibilities, the Court will cast its federalism concerns aside. Of course, you might say that that comes with the Supreme Court's job of protecting fundamental rights. But the Court will regiment the states even when *no* fundamental rights are at stake; that is the explicit holding of yesterday's decision in Lawrence,²¹ the Texas sodomy case. We don't have a moral federalism; what we have is judicial imperialism.

Occasionally, the Court deploys that imperialist impulse against the Congress; whatever policing of national power we have is attributable to that inclination. This, of course, is the core field of “federalism,” as that term is commonly understood. But I think the Rehnquist Court's doctrines have played themselves out—not because of any constitutional impediment, but because they bump up against elementary political constraints. Two examples:

²⁰ United States v. Lopez, 514 U.S. 549 (1995).

²¹ Lawrence v. Texas, No. 02-102 (2003).

- On the Commerce Clause, the Court has settled on the formula that Congress may enact any and all “economic” statutes, meaning statutes that obviously regulate voluntary economic transactions (either in-state, or across state lines). With respect to non-economic statutes, the Court applies a “show-me” test: they will withstand constitutional scrutiny so long as Congress can demonstrate a plausible and reasonably direct effect on interstate commerce. The Court will not back away from this test. But it won’t significantly extend it, either. A few statutes—the Endangered Species Act, perhaps, or the Child Support Recovery Act—may present hard cases. But regardless of how those cases turn out, the Court will leave the regulatory state intact.
- In cases dealing with the protecting of states “as states” against federal impositions, the Court has drawn a similarly sharp line. (I include Eleventh Amendment cases, Section 5 cases, and statutory “clear statement” cases in this category.) The Court will protect states—in the name of federalism—against suits by purportedly disadvantaged but “non-suspect” groups, such as the elderly, the handicapped, and the religious. (That was clear even before this past Term.) The Court will permit such lawsuits, and set states’ rights concerns aside, when highly “suspect” classifications are involved.

We know, of course, that racial minorities are a “suspect” class. A harder question is, or was, whether women are comparably suspect. Personally, I’ve always thought that women are extremely suspect, especially when they show up on the Supreme Court. And sure enough: Nevada v. Hibbs held that states can be sued for money under the Family and Medical Leave Act, on the theory that the act is a Fourteenth Amendment statute to combat sexual “stereotypes.” Chief Justice Rehnquist in that case wrote a completely content-free opinion—which is what he always does when he wants an issue off the table. The true meaning of Hibbs is the articulation of a hard line: women and minorities into the Fourteenth Amendment lifeboat, everyone else out. (There is actually a third suspect class under the Fourteenth Amendment, which you’ll never guess. If you care to ask me during Q&A, I’ll give you the answer to this trivia question.) You can have a long discussion about the constitutional merits of this line. What I think is obvious is the political calculus: the Court has concluded that it shouldn’t burden its federalism with allegations that it might be bad for women, let alone blacks.

On balance, that is probably right. It does mean, though, that the Court’s states’ rights jurisprudence has run its course. With the possible exception of a few mop-up cases, the law is clear. Everyone knows what the rules are on both sides of the line.

In short: in terms of limiting national overreach, federalism has reached an equilibrium point. The next step over the line would embroil the Supreme Court in a big debate over the integrity of the regulatory state or the legacy of the civil rights era. There are no votes for any such enterprise, and there’s no constituency.

Now look at the second issue, protection against state overreach into national or sister state concerns: here, there’s no equilibrium point. Last year in this forum, I predicted that the preemption of state law—under federal statutes, or directly under the Constitution—

would become federalism's frontier and most fertile field. Lo and behold, that has come to pass. But there's no easily discernible pattern or theoretical coherence. For example, Hillside Dairy v. Lyons²² brought a somewhat surprising re-affirmation of the dormant Commerce Clause—which, interestingly, had not appeared in a Supreme Court case since 1997, and which at least two Justices (Scalia and Thomas) have denounced as a nationalist invention.

The Term also brought a rather remarkable preemption of state punitive damages verdicts. In State Farm v. Campbell,²³ the Court held that punis may not exceed compensatory damages when the latter are substantial; that the ratio between punis and compensatory damages may not exceed single digits in some other, unspecified set of cases; and that cases of personal injury or egregious corporate conduct may warrant a multiple digit ratio. In case you wonder where that corporate trimester solution came from, it's right there in the due process clause. The Term also brought a reaffirmation of the so-called "complete preemption" doctrine (Beneficial National Bank v. Anderson²⁴); and, in the Garamendi²⁵ case decided earlier this week, the preemption of a California insurance regulation by a mere executive agreement with foreign nations.

For every one of these nationalist, pro-business rulings, though, there's a pro-states, pro-trial lawyer preemption ruling. In Kentucky v. Miller,²⁶ the Court re-empowered states to regulate vast segments of the health insurance market. (It's an ERISA case, so nobody paid attention; but the practical impact is actually quite significant.) In Sprietsma v. Mercury Marine,²⁷ the Court allowed a state product liability lawsuit to go forward and rejected the corporate defendants' claim that administrative actions under the Federal Boat Safety Act preempted such lawsuits. The Norfolk & Western Railroad²⁸ case brought a startling expansion of asbestos liabilities under the Federal Employers Liability Act. And in Pharma v. Walsh,²⁹ the Court sustained a Maine statute under which the state threatens to exclude pharmaceutical products from the sizeable Medicaid market unless the manufacturers agree to make price concessions for drugs sold to *non*-Medicaid patients. The Court rejected both a dormant Commerce Clause challenge and what it thought of, albeit wrongly to my mind, as a statutory preemption challenge.

Now of course, you want to be careful in inferring all too much from the mere results—pro- or anti-business, pro- or anti-state—in these cases. Statutory preemption cases in particular hang on—well, the statutory language. One would want to examine that language, and the judicial reasoning, before jumping to the conclusion that the Court as a whole, or any individual justice, is being hopelessly inconsistent. My sense, though, is that there is an emerging pattern—not stable yet, but emerging, and perhaps cementing.

²² Hillside Dairy, Inc. v. Lyons, Nos. 01-950 and 01-1018 (2003).

²³ State Farm Mut. Auto. Ins. Co. v. Campbell, No. 01-1289, S. Ct. 1513 (2003).

²⁴ Ben. Nat'l Bank v. Anderson, No. 02-306, 123 S. Ct. 2058 (2003).

²⁵ Am. Ins. Ass'n v. Garamendi, No. 02-722 (2003).

²⁶ Ky. Ass'n of Health Plans, Inc. v. Miller, No. 00-1471, S. Ct. 1471 (2003).

²⁷ Sprietsma v. Mercury Marine, 537 U.S. 51 (2002).

²⁸ Norfolk & Western Ry. v. Ayers, No. 01-963, 123 S. Ct. 1210 (2003).

²⁹ Pharm. Research & Mfrs. of Am. v. Walsh, No. 01-188, 123 S. Ct. 1855 (2003).

Look at the 5-4 voting pattern in Garamendi, the case concerning the Holocaust Victim Relief Act: the four dissenters were Scalia, Thomas, Ginsburg, and Stevens. In other words, the hard right and the hard left. The center voted for preemption. You find almost the same coalition (plus Justices Breyer and Souter) in Pharma, the Medicaid preemption case. You also find it in the State Farm punitive damages cases and its precursor, BMW v. Gore³⁰—with the important proviso that Justice Stevens will consistently vote against statutory preemption but *for* judicial preemption under the due process or dormant Commerce Clause. In Norfolk & Western Railroad, the hard right/hard left quartet was joined by Justice Souter, thus eking out a narrow pro-liability majority over the four centrists. Again: it's not a consistent pattern, but it happens more and more frequently.

Why this hard left, hard right coalition? Justice Ginsburg and Justice Stevens have rarely met a trial lawyer they didn't like, and so they vote against federal preemption (at least when Congress has the gall). Justice Thomas and Justice Scalia, on the other hand, more and more often vote their constitutional and pro-federalist intuitions or principles—even if a vote against preemption turns the Constitution into a trial lawyers' bill of rights.

I predict that the center cannot hold—because part of the center is about to retire sooner or later, and because the center really has only one defense of its broad preemption position: we can't hand the trial lawyers the keys to the national economy. That's true. But it's not a credible constitutional argument, and it will crumble under the rhetorical force of the Court's own federalism rhetoric. Put differently: "federalism" will increasingly serve to expand the states' rights to exploit each others' citizens and businesses—through liability lawsuits that redistribute wealth from out-of-state defendants to in-state plaintiffs; through settlements among attorneys general that have the same logic and effect; and by taxing and regulating transactions in other states or, for that matter, foreign countries—all, again, to beggar neighbors.

Now why is it that Justice Thomas and Justice Scalia, of all people, are driving us into this unappetizing mess? They confront a problem not entirely of their own making. Of course, the modern doctrines that limit state exploitation—expansive doctrines of implied preemption, the creative due process theory in State Farm, and so on—are basically made up. But we have and need something like those doctrines because they serve as a functional substitute for the actual constitutional doctrines that used to restrain state aggression—but which were wiped out by the New Deal. Let me explain.

In 1842, the Supreme Court heard an unassuming little case, involving parties and transactions in different states, that eventually turned on the question of what constitutes a "negotiable instrument." There was uniform agreement on two points. First, cases involving parties from different states belong in federal court, because state courts would invariably be biased against out-of-state citizens. Second—and this was the holding in the case—federal courts can't simply follow state law (on "negotiable instruments" or anything else), because citizens need protection not only against the personal bias of state judges but also against the doctrinal bias of state law. So interstate disputes would have to be governed by what later came to be known as federal common law.

³⁰ BMW of N. Am. v. Gore, 517 U.S. 559 (1996).

The 1842 decision, of course, was Swift v. Tyson,³¹ and it bears emphasis that it was unanimous. It was written by Justice Story, a rabid nationalist; but it was signed by all others, including Justice Daniel—a cotton planter and nutcase Calhounist. Absolutely everyone understood that the protection of states and their citizens against sister-state aggression, bias, and exploitation was federalism’s irreducible baseline.

Over time, Swift v. Tyson sprouted constitutional doctrines to back up that basic intuition—a dormant Commerce Clause as a subject-matter limitation against state legislation; a Full Faith and Credit Clause that compelled states to recognize sister-state law; an equal protection clause that protected business against rank state discrimination; and so forth. The details of those doctrines need not concern us. What matters is this: under the old regime, the Holocaust Victims Relief Act would be dead, fifteen different ways, before the preemption question even arises. The State Farm punitive damages case or the Sprietsma case would never have been litigated under state law, let alone before a state court. Least of all would the Supreme Court look to state law in construing a federal liability statute, as this Court did in Norfolk & Western. Under those rules, business lobbies and lawyers wouldn’t have to dream up creative preemption doctrines. They wouldn’t have to.

Of course, Swift was overruled in 1938 in Erie Railroad³²—the heart and soul of the New Deal revolution, and the source of all rot in American law. There, Justice Brandeis staked out a states’ rights position that would have given John C. Calhoun an absolute fit. But it’s the unquestioned basis of modern public law. Federal courts are now bound by state law and state courts, which operate extraterritorially and with the rankest, uncontrolled bias. But not one of the sitting justices is willing to re-visit the New Deal revolution. I doubt that they even recognize the problem of state aggression as a constitutional problem. In fact, I’m positive that the Justices, one and all, are dead-set to deny the problem. They did so in the Hyatt case Dan Schweitzer mentioned earlier.

But of course, the rot in the foundation doesn’t go away simply because you choose to look the other way. And so, what the Supreme Court does when state courts go bad and state aggression rears its head in a particularly ugly way—when the Florida Supreme Court elects its very own president, when Utah threatens to lay waste to the insurance industry, when California starts regulating transactions between German insurers and German citizens, in Germany, in 1942—is to yank in some made-up doctrine.

So long as a return to the actual Constitution is foreclosed, or is thought to be foreclosed, the choice is this: preserve the doctrines that substitute for the real thing, even if they’re completely ad hoc; or else, denounce those doctrines as pure nationalist inventions—even at the risk of fomenting a state of mutual aggression that is the precise opposite of the Founders’ design. Justice Scalia and Justice Thomas have chosen the latter path. The result is the ultimate paradox: a federalism that turns the original federalism on its head.

³¹ Swift v. Tyson, 41 U.S. 1 (1842).

³² Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

To be fair, the alternative seems equally unattractive: enforce phony doctrines, just to protect favored constituencies (in this case, business)? On balance, though, that course seems preferable. It would enhance national welfare; if we can preempt Iraq, we ought to be able to preempt the trial lawyers. By virtue of being completely unprincipled, opportunistic, and constituency-oriented, it would bring the Court's preemption law in line with the rest of its so-called jurisprudence.

MR. RAUL: Thank you, Michael.

Does the audience need a break now or can we go on?

[Laughter.]

MR. RAUL: Okay. John.

MR. JOHN YOO: Thank you, Alan.

I would like to thank the American Enterprise Institute for having me appear. It's a great pleasure to be on a panel with such practitioners and thinkers about federalism.

I applaud all of you for coming because given what the Supreme Court did this Term, it's amazing you have all turned out to hear a *cri de coeur* for Swift v. Tyson.

[Laughter.]

MR. YOO: Which means that you really do care about federalism.

When we were having our conference call to split up the cases--again this shows you the seriousness of the panel, and what I'm learning AEI is like--everybody wanted to talk about all the preemption cases, and the California tax board case. At the very end of the call, they said, well, there are these cases from Michigan. Does anybody feel like talking about those?

[Laughter.]

MR. YOO: Then there's this thing from Texas, does anybody want to talk about that one? Since I came to the conference call 15 minutes late, I got stuck with those cases. Which I'm happy to talk about. I'm actually going to talk about the federalism implications, too.

Before turning to the affirmative action and the gay rights cases from this week, I was asked to talk about Garamendi as well, which I will do very briefly. Garamendi is a very interesting case with important implications for federalism in the future. Essentially the question here is whether or not our federalist system of government applies in the same way to domestic affairs as it does in foreign affairs. Here I think the Court pretty clearly said no, it does not.

The Court allowed a state law to be preempted by what is called a sole executive agreement, which had been reached by President Clinton and Germany, Austria, and France in terms of creating a voluntary settlement fund for the resolution of life insurance policies that had been held by Holocaust victims.

The Court gave a ringing defense of the President's powers in foreign affairs, not just to reach agreements with other countries, but also just to set foreign policy as the sole voice and organ of the federal government in foreign affairs.

Then--and this is the remarkable thing about the case--the Court suggested that it wasn't just the presence of a treaty that would preempt state law, but just a unilateral agreement between the President and another country could preempt state law, even if the agreement itself doesn't say it preempts state law. In fact, this agreement implied that it did *not* preempt state law, because it had a provision that said any time a state court or any court decision was brought to enforce one of these Holocaust victim life insurance policies, the United States would enter into the case with a letter saying how important it is that this case be moved over to the international settlement fund. This would seem to suggest that the people who made the agreement didn't think that they were preempting state law and state causes of action, but were using a more calibrated and less interventionist way of trying to get a court to dismiss a case or move it to an international body.

A second and more important thing to note is that the Court has periodically through the years upheld the ability of sole executive agreements between the President and another country to preempt inconsistent state law. There were several decisions when the United States recognized the Soviet Union, and then there was the case about the Iranian hostages in 1980 that also recognized the preemptive force of sole executive agreements.

Remarkably, however, Garamendi not only says that a sole executive agreement has a preemptive effect on state law, but it also hints that if a state law interfered with the President's foreign policy, even if the policy were not expressed in any kind of formal legal instrument, that law might be preempted. The Court actually goes through all the statements by administration members--Stuart Eisenstadt's letters, testimony by minor ambassadors before Congress, and so on to show that there was in fact an executive foreign policy, that policy being voluntary settlement of these Holocaust claims, suggesting that foreign policy in and of itself might be enough to preempt state law.

That's pretty incredible. I think that one of the problems that will be confronted, stemming from this opinion, is the question of what subject matter is immune from presidential foreign policy. How much executive pronouncement and thinking has to be present for that to coalesce into a preemptive foreign policy? The President wakes up in the middle of the night and thinks, "God, we have a really terrible tax system that interferes with our foreign relations." Is that enough to preempt state taxation of foreign corporations? Or do you have to have 10 ambassadorial statements? Are negotiations towards an executive agreement with another nation enough? It's not clear from this opinion how much government activity there needs to be to have preemptive effect.

Also, given how globalized our economy and society have become, what subject matter is immune from the President's foreign affairs power? Anything could be the source of international attention and perhaps the subject of presidential foreign policy. Think about all the areas we have in international agreements now: the environment, taxes, civil rights, political rights, crime. Are all of those areas that are now going to be subject to preemption because they interfere with the President's foreign policy?

Let me turn now to the affirmative action and the gay rights case. I am sure you are all quite familiar with the facts, but let me just run down what the Court's basic holding was and raise some questions about defects in the holdings or the approaches of both cases.

In the affirmative action cases from Michigan³³ the undergraduate campus had a strict point system that gave certain underrepresented minorities specific points in their admission system, whereas the law school had a what they call a whole person or holistic review of an applicant's file within which race could be taken into account as a plus factor.

The Court struck down the numerical point system, but upheld the law school's approach. The first major holding of these cases was that--and the Court is never clear exactly on what this is--the benefits of diversity in higher education is a compelling government interest. This is quite remarkable because outside the remedies context, there are now only two areas where race can be a compelling government interest. The first and only other one was Korematsu,³⁴ where the United States interned Japanese Americans during World War II. There the Court said the use of race in wartime can be a compelling government interest. Now we learn that diversity in higher education is a similarly compelling government interest. Keep in mind that Korematsu has been heavily criticized, with opponents arguing there was no compelling government interest to allow the use of race there.

One problem with the Court's decision is that it doesn't actually explain why race is important here. There is no explanation by the Court why the use of race in university admissions is as important as the use of race when you are defending the country from attack. It would seem to me that those are two very different kinds of government interests.

The Court says there are all kinds of good things that flow from the use of racial preferences in higher education. Cross-racial understanding would arise and a breaking down of racial stereotypes would arise from having a critical mass of minorities in higher education--although the Court did not define what a critical mass is or what even the diversity was. But how does a school know that it has enough diversity? The case gives you no guidance. In fact, it makes quite clear that one thing you can't look at is the percentage of the racial groups in society generally or in the applicant pool or even in the people who actually apply. So the opinion doesn't actually explain what diversity is and how much of it can you have. That's going to lead to a lot of uncertainty going forward.

³³ Grutter v. Bollinger, No. 02-241; Gratz v. Bollinger No. 02-516 (2003).

³⁴ Korematsu v. United States, 324 U.S. 885 (1945).

Also problematic is that the Court never explains why education is different. We know now that you can use race in creating a diverse student body in higher education. Why should higher education be the only institution in our society that can do this? It might be argued that higher education prepares people to be citizens and leaders. There are lots of institutions that are going to start claiming that now. You're going to see litigation for 10 years. I'm sure the military is going to claim this when it comes to making promotions, and not just in regards to admissions to the military academies. What about government employers, government civil service jobs. What about teachers who teach in this schools? What about policemen and firemen? What institutions can't try to make the same kind of claim that higher education did here? What really makes higher education any different than those other institutions?

On the other hand, here's, maybe, one small good thing about the opinion. You could say it is a pro-federalist decision. It did not say that affirmative action is a *required* remedy for previous racial discrimination, making it a required policy at every university. Instead, the Court said that diversity through affirmative action is a nice policy goal that can be compelling, but that it is a choice for each state to decide. This is preferable to the Court imposing a uniform rule upon every state to have the kind of affirmative action policy Michigan has. Coming from California this is odd because I never thought that Prop 209 would actually protect California from the Supreme Court, but it has that effect. Prop 209 means that California probably has the most race-neutral admissions policy of all the schools in the country. I'm sure many states will start changing their laws to look like California's. This decision allows states to make a decision on whether to have affirmative action or that. That is maybe a small good thing to come out of this opinion.

The last case I will talk about is Lawrence, the gay rights case. The way the opinion was written, this was a difficult case for me to understand. In these kinds of cases, the Court usually applies either one of two analyses. It might apply an equal protection analysis where you are a part of a protected class. Government burdens on you are then struck down in most circumstances. The Court declined to treat Lawrence as an equal protection clause case.

The other way it usually goes about this is through the due process clause, saying there's a fundamental right at issue here, linked to a liberty interest. With that understanding of a fundamental right at issue, the law is given some higher level of scrutiny. If it impinges on that fundamental right, it's struck down.

In this case the Court didn't really identify what the fundamental right was. The opinion is a very difficult one to understand. It doesn't really conduct a conventional legal analysis, and it is very typical of some of Justice Kennedy's other fine works in that regard. It is in the same vein as Casey³⁵ and Romer,³⁶ where Justice Kennedy writes with more of a stream of consciousness approach than a conventional legal analysis. In Lawrence he sort of said that there's this general right to privacy and, in fact, he raises not just the privacy cases but he quotes at length from Casey, which solidified the right to

³⁵ Planned Parenthood v. Casey, 505 U.S. 833 (1992).

³⁶ Romer v. Evans, 517 U.S. 620 (1996).

an abortion--language I never thought would be quoted. He said that the due process right to liberty is the right to define one's own existence in the universe free from government interference--whatever that means. I just thought that was rhetoric in Casey. Now it's clear that it's actually a core part of the Court's approach to due process clause.

According to Kennedy, what two adults do in private in their own home is no longer subject to government scrutiny. In fact, the government, by criminalizing that kind of activity, demeans the people who choose to engage in that kind of activity. In this case sexual relations between two homosexuals takes place in a home, it's perfectly consensual, doesn't harm anybody else. The Court says that kind of activity and relationship cannot be criminalized by the government.

As in Grutter, there are a lot of open-ended questions here. First of all, this is a very anti-federalism case. It seems to me one thing the states have done historically in our country is engage in social/moral legislation, taking positions on some things that are good or bad and preventing its citizens from doing them. The law here is such an instance. Think of all the other laws that are like this: are they still going to be upheld? Laws against adultery or polygamy or incest all try to regulate what two adults can consent to in their own homes. Are those now, because of the due process clause, outside the government's ability to regulate? That's not limited to gays; it's just general social and moral legislation.

In the area of gay rights, this decision is going to lead to a lot of litigation as the contours of this doctrine, whatever they are, are pushed. For example, on gay marriage, the Court is careful to say it doesn't take a position. But it's hard to see how the logic of the opinion does not say that prohibitions on gay marriage are unconstitutional. Once one state chooses to become like Nevada of divorces, recognizing gay marriage, then everyone who wants to get married that way will go to that state and get married. Can states pass laws now prohibiting the recognition of those marriages in their own borders? It seems to me unlikely that the Court is going to allow states to do that.

What about gays in the military? Gays can say, look, what we're doing that makes us gay takes place in our homes between consenting adults. It has nothing to do with our work in the military. How can the federal government regulate that? Isn't that also protected by the liberty interest in the due process clause?

Let me conclude with a few observations about what these cases showed about the term.

First, I think, people who complain that this is a conservative court are smoking things that may soon be legal under the due process clause.

[Laughter.]

Think about the three great social issues of our time that divide people: abortion, affirmative action, and gay rights. I think it would be fair to say that these are the three great social/moral issues of the day. If you look those three issues, all have been decided

by the Supreme Court in a nonconservative way, in fact, in a way that even the Warren and Burger Courts never tried. Brennan and Marshall never tried to go this far.

Second, if you were to take a poll on those three issues, where the Court came out would kind of match up with public opinion. The polls on affirmative action, showed that people don't want preferences but they would like to use race a little bit to help out minorities in higher education.

As for gay rights, even Justices Scalia and Thomas in their opinion said we would never have voted for this law if we had a choice as legislators. Public opinion is probably around where the Court was in Lawrence. Also a lot of people have written about how the Court's opinion in Casey struck the balance, a sort of compromise that people had wanted generally on the abortion issue.

Is this really the function that we want the Court to play? Is the Court really the only institution in our system we want to play that role? Do we want the Court to sit there and make these kinds of decisions about what we as a people really think the best compromises are?

It is not apparent to me that that is the case. Courts operate by logic, or they're supposed to operate by logic, whereas legislators can make compromises and make arbitrary choices. The courts aren't supposed to do that, which might mean that in a case like Lawrence that they will have to carry it out logically to all these other areas, too.

MR. RAUL: Thank you, gentlemen, for a collective tour de force. That was terrific. I have never seen so many people on one panel in desperate search of a silver lining. I think a couple of you thought you found it, though, Michael certainly didn't--well, maybe by dredging up Swift v. Tyson.

Before I turn it back over to the panel for some interaction with each other, does anyone know what the third suspect class is? We'll have a little quiz here.

Otherwise, would you tell us, Michael?

MR. GREVE: Railroads. There's a federal statute that says that states must tax railroad property at rates equal to the tax rate on all other property in the state. You need the statute because otherwise the states would overexploit these resources that can't be moved. Now, of course states constantly try to find a way around it and nonetheless overtax railroad properties. The difficulty, then, is this: if you say the Railroad Revitalization Act was passed pursuant to the Commerce Clause, you can get an injunction, but you can't get your tax money back. Therefore, the railroads argue that it was actually passed pursuant to the 14th Amendment. So there you have it, the discrete and insular railroad.

MR. RAUL: Well, in addition to the silver linings, there did seem to be one consistent theme that everyone picked up on in the Court's decisions this term, and that is the absence of any conventional legal analysis.

[Laughter.]

MR. RAUL: That seemed very much to be a prevailing characterization of the Court's work this term.

One exception I would take is with what John said about the Court trying to ferret out where public opinion is and acting in accordance with it. I think as Justice Scalia said in the Lawrence decision, the gay rights case, the Court seemed to be oblivious to the fact that it was in accord only with the mainstream of the law profession which had argued that was where the popular view of homosexual rights stood as well.

In fact, a recent Gallup poll will show--one is almost surprised that you don't see polling data in the Lawrence decision--that 52 percent of the public takes the position that homosexuality is morally wrong. Where the mainstream stands is, of course, an issue that will come up in terms of the acceptability of the next Supreme Court nominee, or indeed even appellate and district court judges facing potential filibusters in the Senate. So it's really important to know where the mainstream is so you can figure out whether nominees are in it or not.

According to an ABC poll that was announced just last week, only 34 percent of the public strongly desires a Supreme Court nominee who thinks abortion should be legal in all or most cases. In contrast, 35 percent of the surveyed public strongly wants the next Justice to find abortion illegal in all or most cases. And another 9 percent of the public is at least somewhat inclined to the same antiabortion position.

Obviously the Court is not reading polls, or maybe it is, just which polls it's reading are not the same ones that are publicly available.

On the abortion front and the Lawrence case I would throw out, to start the panel's discussion, Adrian's thought that the Court was seeking to entrench the federalism jurisprudence that has evolved over the years. Michael says that it has perhaps run its course. But going with the entrenchment theme, do you think that the Lawrence decision will entrench Roe v. Wade or rather will unsettle it by galvanizing the political reaction to it? Further, does Lawrence threaten the doctrine of *stare decisis* since the Court overruled Bowers v. Hardwick, which it had decided exactly the other way, only 17 years ago? Entrenchment on these issues or not? Any comments?

MR. SCHWEITZER: Well, it is hard to imagine the abortion debate getting any more intense on both sides, so I'm not sure that Lawrence would have that much of an effect on the abortion debate, although I think it will just intensify even more the debate over who the next justice is going to be. Lawrence, as well as the affirmative action cases, just highlight what the stakes are.

MR. VERMEULE: Alan, I thought you were exactly right in your point about what sectors of opinion the Court responds to. This is a court that responds to elite professionals. Justice Kennedy wants to be well thought of on the New York Times editorial page. He wants to go to Vienna in the summer and hobnob with justices from the European Court of Human Rights and he wants them to approve of him.

The problem is that, appoint who you will, that incentive becomes extremely powerful once they are on the Court. You can't commit them, no matter what they say in front of the Senators. Once they are on the bench those social forces operate with great power. It seems to me that for the foreseeable future that is the sort of court we will have. That sort of court will never permit the overruling of Roe v. Wade.

MR. GREVE: I don't disagree with anything that anyone said, but there is a theory that has been propounded for a while in various versions by Alex Bickel, Martin Shapiro, and a number of other scholars. The theory is that the Court tries to anticipate a social consensus and nudge the country in that direction.

Once you look at the Supreme Court's enterprise in that fashion, certain things actually begin to make sense. The big example of the Court successfully anticipating the social consensus was, of course, Brown v. Board. In that sense, as in many other senses, Brown v. Board really was the beginning.

To the Supreme Court, Roe was the same thing. What the Supreme Court thought it was doing was anticipating a social consensus. The difficulty for the Court is always that the game won't play itself out the way they want it to. What you have to do to anticipate some things successfully is not only get the country to say, "we all agree." You actually have to delegitimize the constituencies that oppose you. The calculation was that all these right-to-life people would do what the racists did--crawl under a rock and go away. They have failed to do so in 30 years. That is why you get cases like Planned Parenthood where the Court said we *ordered* you to do this and you *will* follow our lead.

That the Supreme Court, having watched this sort of debate over abortion--where people didn't just slink off and hide under a rock--still has the nerve to play that game is, to me, somewhat astonishing.

MR. YOO: I very much agree with Adrian's view of the reaction of Justices to social pressures. One of the judges I clerked for, Judge Silverman, called it the "Greenhouse Effect", after the New York Times correspondent for the Supreme Court. Bumpkin judges from out in the sticks come to Washington and they get seduced by all the glamour or their power and being in the New York Times and the Washington Post all the time. They gradually move their views to where the consensus of elite opinion is.

Given that, I think the question that still remains is whether we want the Supreme Court to even decide things this way. Are these actually the people you want to promote some sort of social consensus and stability? Justices are nine very isolated, somewhat strange people. For several of them, it's not that they didn't grow up without cable TV, they grew up with no TV. They're just very different from the kind of people that they are seeking

to regulate. Yet they are trying to intervene and make decisions on some of the most pressing sort of social questions of the day.

Justice Powell, when he decided Bowers v. Hardwick, said he thought he had never met a gay person in his whole life. It turned out he had had clerks who were gay, but he just didn't know it.

These kind of people are isolated and distant from general society. If it really were their function to mirror or to push us to a social consensus, are they even the right people to do it? Shouldn't the President and Congress be the ones to play that function?

MR. VERMEULE: Just one more word, just following up briefly on John. This is a cry from the heart. The next time there are vacancies on the Supreme Court, the temptation for conservatives will be to say, "If we can just get the right person, if we can just get the White House to put the right person in there, we can stop this." That is an illusion. The Supreme Court decisionmaking is a mug's game for conservatives. You can't win it because the forces are too powerful.

Republicans have had the last 11 out of 13 Supreme Court appointments and this is what you get. You can't win the game, so what you have to do is downsize the Court's power. That's the only answer. Trying to put the right people in there will not help.

MR. YOO: The only point I would disagree on that is that there are three Justices, Rehnquist, Scalia, and Thomas, who you would probably say generally do the right thing in these cases. The one defining characteristic they have is that they all served in Washington in some way before they were Justices, and were used to getting the crap beaten out of them by the New York Times and don't care about it anymore.

And so if you were going to appoint somebody, you have to--I think Adrian might just say let's just leave the seats vacant. [Laughter.]

MR. VERMEULE: Not appoint anybody until we get to zero.

[Laughter.]

MR. YOO: But we have to make an appointment and the best we could do is to appoint Republicans who have been in Washington for a while and are used to getting criticized by the culture and press.

MR. SCHWEITZER: I guess I should say I'm in the minority on the panel in that I actually support the result of the Lawrence v. Texas decision. But I guess under Monday's decision in Grutter my being on the panel is improving the quality of everyone's experience on the panel.

[Laughter.]

MR. SCHWEITZER: Just a couple of thoughts on Lawrence. One thing that is interesting in terms of the Court's timing of the decision is that they waited until a time where the states that engaged in the practice that they struck down was a rather small number. It's not a question of whether 50 percent of the people may think that homosexuality is right or wrong, but how many states--how many people think that it should actually be a crime to engage in that, and how many states actually have it on the books that homosexual sodomy is a crime, whereas heterosexual sodomy is not. I think it was a handful, four or five.

And so I think the justices, Justice Kennedy and Justice O'Connor in particular, who might be thinking most about this, are thinking about what they should do. They are thinking they are really not upsetting societal expectations. Do most people in society really think we should be going into houses and say that this group of people, homosexuals, are criminals?

In terms of the opinion itself, I think substantive due process is always a dicey proposition, starting with Griswold. You could defend the substantive due process holding as a logical extension of some of the prior substantive due process opinions, with the exception obviously of Bowers.

So it really gets down to the question of do you believe in substantive due process, do you believe in Griswold, in the first place or not. If you do, then you could say this is a sensible opinion--although it wasn't written with as much clarity, even within substantive due process jurisprudence, as it possibly could have been.

I do think personally that there is a very compelling argument that the Texas sodomy statute is unconstitutional as a matter of equal protection. I guess I would say that it takes an interesting reading of the equal protection clause to say that the equal protection clause is so strict that it bars a benevolent effort to benefit minorities through affirmative action, but it's so weak that it permits a statute to stay on the books that has the express purpose of discriminating against and demeaning a discrete group of people who have historically been discriminated against.

I feel stronger that Lawrence v. Texas was correct for that reason than I do that the affirmative action cases were correct. I find affirmative action very difficult as a policy matter and as a constitutional matter. I'm very comfortable, again as a personal matter, on Lawrence v. Texas for the reasons I said.

MR. GREVE: Just one brief remark. I really wonder why the Justices yanked Lawrence up. With the fact that fewer and fewer states have these statutes, you can say, "Look, there's no reason for us to wade into this really messy area because by and large things are going the right way, anyhow. We have a Federal statute, the Defense of Marriage Act, which compartmentalizes these difficult moral issues regarding homosexuality along state lines, and that has worked reasonably well."

On the other hand, if we now wade into this feet first, we're going to have a brutal debate over, of all things, sodomy. We don't want to have a national debate over sodomy. I mean that's the absolute last thing we want--I assure you, I don't want that debate.

MR. YOO: You should spend more time in Berkeley.

[Laughter.]

MR. GREVE: Okay. Let me rephrase that: outside Berkeley, nobody really wants a national debate about sodomy. The only reason, I think, for taking this case was there were four liberal votes to yank this trumped-up case out of the state court in Texas with no need to do so, and they thought maybe we have a fifth vote now. Even if we don't have a fifth vote for overruling Bowers, there's no way in the world that this will play well for Republicans and conservatives in some possible future nomination fight. Therefore, let's yank this case in here and make life difficult for the administration. That's what I think happened here.

MR. RAUL: Any other irresistible impulses on the panel? Otherwise, maybe we will open it to the floor. Yes, sir.

AUDIENCE MEMBER: Most people thought there would be a retirement yesterday of the Chief Justice. Would you have any commentary on why we saw no retirements? The next real window of opening for retirement is after next year. I think the members of the Court would be reluctant to retire in an election year, especially after Bush v. Gore. Would you have any comment on why no retirements and about the next real window for retirement without a political fracas?

MR. YOO: I agree with your analysis that if no one retired this summer, we probably won't have one for two more years. Actually, I worked up some numbers, just showing why it is surprising there were no retirements.

In this century the retirement age for Justices on average is 70 years old, after they have served on the Court for 15 years. I wrote a law article about it. I didn't really do that for this panel, but I wrote a law article about this a few years ago.

If you go down the three most senior Justices, Chief Justice Rehnquist is going to be 79 this year; he's been on the Court 31 years. Justice Stevens is going to be 83 this year; he's been on the Court 28 years. Justice O'Connor is 73 this year; she's been on the Court 22 years. So all three of them are well beyond the averages for Justices at the time they retire, both in age and years of service on the Court.

I would have thought that also would have been another reason why someone might retire.

The third thing is, Justices generally like to retire while the party of the President who appointed them is in power. Justice White retired under President Clinton, even though Justice White had voted with the conservatives on a whole bunch of issues. Justice

Powell was a Democrat, but still waited to retire under a Republican President, because he had been appointed by President Nixon.

So I actually am quite surprised there isn't a retirement. There's always next week, though. I mean they don't have to retire today or yesterday.

MR. RAUL: Does anybody think that the campaign finance litigation being heard this summer made a retirement now more problematic than it might otherwise have been?

MR. VERMEULE: That seems plausible. Also, on Rehnquist and O'Connor, who are the two likely retirees, according to public speculation, I don't see why they should retire. They're having a grand time, right? O'Connor is setting fundamental national policy on every issue, right? How about this for a new form of government? We'll pick an 80-year-old former state legislator and let them set fundamental national policy on all the burning issues of the day. That's our form of government. Why should she retire?

[Laughter.]

MR. GREVE: It's actually interesting to speculate whether the fact that these people have worked together for such a long time is an independent influence on the way they rule and the way voting coalitions on the Court work, because they all know each other so well and they are very predictable to each other. It might be that a younger or less experienced court might behave very differently. I don't know which way that cuts, though.

JUDGE LOREN SMITH: This perspective comes from a trial judge. One of the things about the judicial process I find in a trial capacity is you are shaped in the quality of your decisions by the concreteness of the case. Judges are generally pretty good at evaluating single decisions. The Supreme Court's institutional role has become defective, it seems to me, because it no longer is seen as dealing with individual cases, and the cases have relatively little content. The two we have been discussing that are most controversial dealing with gay rights and affirmative action really are seen as policy issues, and when judges are deciding policy issues, they are generally very bad at it. They have no context. As has been pointed out, they are not part of a democratic consensus, but they are part of an elite consensus. They are doing a job and that has particularly become important in the last 20 years as more and more status and prestige is focused on the Court and more media is focused on the Court, and it is really not surprising that we should see this being done badly.

Maybe we need to rethink the whole mechanism of viewing the Court, and the public would generally view it as a legislative type body, which is what explains why everyone is so concerned, legitimately so, over who are we going to appoint.

In a healthy system we wouldn't really care. All we should care about is that they are good honest judges. In fact, no one has that attitude anymore, and that may be some grounds for rethinking the whole institution. I would be very interested in the panel's comments.

MR. RAUL: Well, do we think that if Harvard had a course, the way they do for freshman members of Congress, for judges, sort of policymaking for judges, would that be helpful?

[Laughter.]

MR. RAUL: Maybe we should have the justices and judges all go up to Cambridge. Maybe that would combine some things that they would be interested in with assisting in the judicial formulation of public policy for the nation. Maybe we should think about that. If we can't prevail through conventional legal analysis we can at least have seminars and attractive places with desirable elites.

[Laughter.]

MR. VERMEULE: I will take that as a Swiftian proposal. [Laughter.]

MR. RAUL: Any other responses?

MR. SCHWEITZER: No, I just think it's not clear where a solution is on that. It's sort of like states' rights in that sometimes it's a question of whose ox is being gored. So are you unhappy with the affirmative action case because they let the public policy debate continue, or because it was a bad opinion. Are you unhappy with the gay rights case because you're unhappy with the decision or because they didn't let a public policy debate continue? I don't think there is anyone on the Court who is a complete purist who says the Court should read every provision so narrowly that we should get out of every single policy debate. I think the Justices try to do their best in terms of figuring out where they think the right answer is on these policy debates that have become legal issues.

Tocqueville said everything eventually becomes a legal issue. I'm sure he didn't envision today where it really, really is true. Which doesn't mean that some legal approaches aren't better or worse and come out to different answers to this. But I'm not sure there is anyone on the Court now who seriously is thinking of a way to truly get the Court out of policy issues.

I'm just trying to stir things up

[Laughter.]

MR. YOO: I was going to suggest there were two things you could do in response. Why not think about radical institutional changes of the way the Supreme Court works. If you look at the Constitution it only requires there to be a Chief Justice, right? You could just have one Chief Justice and you could rotate all the other justices from the Circuit Courts. You could have one Circuit Court judge, the chief judge of a circuit, be on the Supreme Court, and have it more like legislative hearings. Let's just be open about what they do. Also, there's a lot of studies on how elected judges at the state level perform and whether that system actually produces better results than the federal system.

MR. GREVE: Just this one quick remark. Whenever there is a term like this, there are periodic calls from Bob Bork and others for institutional reform. I think that's actually very, very unlikely. It has historically always been quite unlikely.

What you hope for, what you have to hope for, is that eventually people who observe this institution and might one day serve on it, or are already serving on it, might eventually learn.

I don't think the problem with the opinions in this term is that they are that results-oriented. Judges have preferences and that's natural. But what is astonishing is the vacuousness, the sheer sense of powerlessness you get when you read these opinions. You recognize reason does not matter. This is now postmodern law.

What, of course, comes along with sort of postmodern law is that nothing matters, it's all sentiment, it's Nietzschean politics. Sandra Day O'Connor--this is the ultimate irony--wants desperately to be middle-of-the-roadish; she desperately wants to have consensus. But I think what she has just done will guarantee precisely the opposite. She's the one who gave us abortion on demand. Now she gave us quotas on demand and homosexual rights on demand. What's next? "Get her. No more O'Connors." That will be the battle cry. And, of course, as Dan already pointed out, on the other side the incentives are there's much, much more at stake now than there was previously, and I think O'Connor should have seen this. You read these kinds of decisions and see that they have absolutely no reason, they are just sentiment. What are these people thinking?

I think if any good comes out of that, it will be some sort of learning process.

MR. TODD GAZIANO (Heritage): I thank AEI and all of you for such an intellectually stimulating discussion. After reading the opinions, it's nice to hear people who do understand the law.

[Laughter.]

Since Michael agrees with everyone, I want to direct this primarily to John. In your description of the Michigan preference cases, you were absolutely correct in everything you said. The Court made no sense in its discussion of taking race into account. They did great harm to the concept of compelling government interests. They didn't say why diversity in education wasn't as significant as national security or why it was more significant than all the other things that they rejected. I was in a panel for AEI two days ago criticizing some of those things, but what I didn't address, and I was hoping you would, about that case, is how astonishing the deference was under the 14th Amendment, which is the exception, as we know, to most federalism doctrines. Under the logic of this case, we are back to validating the Topeka School Board's theory, or the theory that separate but equal is really best for all races. It's in the spirit of Orville Faubus or George Wallace. Now, of course, I believe this is just *sui generis* to this case and actually makes it more splendid because it makes it so much less defensible and easy to overturn.

But is there any staying power or any further effect of that kind of a judgment in other areas of racial preferences, in areas outside racial preference and the equal protection clause?

MR. YOO: That's a really good point. There's a lot of other stuff to comment on, but in the opinion itself the Court said we will give deference to not just state officials but to academic administrators about the educational benefits of diversity.

You know he is chuckling because it's academics. The last people you want to trust –

[Laughter.]

MR. YOO: An academic administrator can't even Xerox articles for you with two weeks lead time. That they are also going to be managing the racial composition of society is a scary idea.

Actually the interesting thing is just a few years ago the Court rejected deference to academic administrators in Virginia, in the VMI case. If you remember in VMI, the Court struck down the idea of single-sex education public universities. In that case the administrators actually had said give us deference about the way we teach in military academies, which is very confrontational, and we don't think that women are going to adapt to it well. The Court utterly dismissed and rejected it.

So I think it's a very good point. Even within the little doctrine of deference to school administrators, they aren't being consistent.

The other thing I would point out goes to your *sui generis* point. Do you think that the Court would have come out the same way if academic administrators had said they need to have segregation because keeping the races apart will actually lead to greater racial harmony over time? That was the argument in Plessy v. Ferguson.

I don't think they would defer to academic administrators there. But, if Justice O'Connor had been on the Supreme Court in 1898 I bet she would have voted in the majority in Plessy v. Ferguson because that was the conventional social wisdom at that time. It's Justice Harlan who's the real judge, it seems to me. He didn't care what public opinion was about segregation.

In terms of where it exists outside, I can see the courts display the same level of deference to the military. If the military wanted to use race in promoting people from say lieutenant to captain in promotion boards, I could see the Court similarly deferring to their use of race.

It's interesting, actually here the military was on the side of the universities in wanting to use race in making decisions.

MR. _____: No, the military was not.

MR. YOO: Not formally. The former military officials, right. The military itself actually was I guess represented by the Solicitor General, one hopes.

MR. MICHAEL ROSMAN (CIR): I really have to ask about Rehnquist's decision in Hibbs. John says that Rehnquist normally does the right thing. In Hibbs he wrote an opinion, the section 5 analysis of which seems utterly inconsistent with his analysis in Morrison.

Dan Schweitzer said that Hibbs was O'Connor's search for a middle ground, which is odd, since O'Connor didn't actually write an opinion in the case, and Professor Vermeule says Rehnquist switched to preempt O'Connor. So the theory is Rehnquist is here trying to control what's going on in the majority opinion, and yet if Rehnquist doesn't vote with the majority, there's not a majority under section 5. There's only four votes under the section 5 analysis.

I understand the idea that he was trying to consolidate. Is consolidation to be bought at the price of coherence, though?

MR. VERMEULE: Yes.

MR. ROSMAN: Really.

[Laughter.]

MR. ROSMAN: Okay. Well, then, maybe that really answers my question. The next question is, of course, to Michael. You said that Rehnquist wants to put the women and the minorities on a federalism lifeboat. How do we explain Morrison? He didn't put them there then.

MR. GREVE: That's a fair question. Mr. Morrison had an excellent lawyer, Mr. Rosman.

[Laughter.]

MR. GREVE: Actually, in that case, arguments actually mattered. In a lot of other cases now, including Nevada v. Hibbs, they don't. It is, as Adrian said, in some part a matter of what mental box do people put these things in.

Look, Morrison is the one big exception to a fairly consistent pattern. There are Title IX cases that you really cannot explain--where Kennedy writes in dissent--saying if our federalism jurisprudence is right and has any bite at all, this cannot possibly be right (see, for instance, Davis v. Monroe County, where the majority pro-women opinion was written by O'Connor.³⁷)

³⁷

Davis v. Monroe County Bd. of Education, 526 U.S. 629 (1999).

The open question in the 14th Amendment context was how much further would this jurisprudence go beyond the classes that it had already hit. You could, under the pre-Nevada v. Hibbs law, make a colorable argument that disparate impact regulations under Title VII might be dubious. By the same token you could make that same claim about statutes enacted for the protection of women. Rehnquist just wanted that issue settled, and I think the Vermeule consolidation theory captures that quite well.

AUDIENCE MEMBER: This is mainly for John Yoo. First I am struck by your suggestion that we have to limit the power of the Court because the Justices want to be well regarded by the intellectual elite and writers for the New York Times. Surely the better answer is that we keep making arguments, better arguments that move the cultural center so that ultimately these justices will agree with the positions that you are putting forth.

Certainly a lot of work has been done on affirmative action. We fell short this time, but I would not assume that that argument is lost. As a matter of fact, if you are correct enough in your view of society this position has to ultimately prevail.

But my question goes to the homosexual decision. Since I think many results have to do with the quality of argument, and arguments do matter in terms of which way the Court comes down, what sort of arguments are they getting for state restrictions on homosexuality? If they are just getting arguments, this is our right to rule this way, and historically this behavior has been immoral, it seems to me that ultimately you are not going to win that argument in a democracy.

Are they getting some sort of argument that tries to tie it into the stability of the family, something real, that drives to a compelling state interest beyond what looks like an outmoded prejudice?

MR. YOO: Your last question first. My sense was that the quality of argument in the case was very poor. I'm not trying to insult him, but I think the case was argued by the local county prosecutor, who had prosecuted the actual criminal case. This isn't the usual arrangement. There's a solicitor general in Texas and he didn't argue the case. The attorney general didn't argue the case. They didn't try to find someone else.

That gives you some sign of the level of quality of argumentation. I don't think the arguments you are talking about were made to the Court. They certainly don't even appear really in the dissents to the majority opinion. There's no discussion of sort of the larger values you talk about.

Your first point is really, "Why should we care about what the Court, the individual Justices or the Court itself, cares about in terms of reacting to public opinion. The real way to win on these issues is just to change public opinion."

That's probably right. I think it is unfortunately right. My point is more if that's all the Court really was doing, which is reflecting public opinion, and to change law you have to change public opinion, what's the point of having a Supreme Court at all then? Just have

a plebiscite and just do whatever the plebiscite says. Under our system there should be a function to the Court. It's just that this current Court isn't performing it properly.

But I quite agree with you, given these decisions now. The best thing to do is just try to change public opinion at the state level first or through the media. That seems to be the best way to change policy on these issues, not using the courts.

MR. FRED SMITH (CEI): I would like to follow up on that, because I think she's really onto something, opinions change. Compared to 30 years ago when Hayek wrote "The Road to Serfdom," it looked like any concept of rule-based systems was doomed. We would go to Montpelier and on the Hill, we would keep alive the flame of freedom and maybe in a thousand years it might have a chance again. That was way too pessimistic. We're not winning yet, but those ideas are now in currency.

In a sense there is something that maybe needs to be made much more clear, that in effect the kind of consensus we are trying to realize is that there was a purpose of having three branches of government, and it wasn't intended that they all blur into one another. There's elements of that in some of the people on the Court now. There has been a lot of criticism of O'Connor from the left as well as the right about the incoherence of her rulings, and maybe sharpening that and giving respectability to rule-based law again is the only hope in these areas. Otherwise, we do become nihilists or Nietzschean.

At least it seems to me we shouldn't give up yet. We haven't really lost yet. America still is better than most parts of the world.

[Laughter.]

MR. RAUL: Talk about a silver lining.

[Laughter.]

MS. KIM HENDRICKSON (AEI): There has been a lot of talk today, and I agree with most of it, about the policymaking of this Court and the abstract postmodernist tendencies of recent decisions, and it's all justified criticism. But it is also a Court that takes statutory interpretation incredibly seriously. You haven't talked much about the Pharma case. But I think the congressional deference and the Court's deference to Tommy Thompson in Pharma is very interesting and I wonder if anybody could talk about this interest in statutory language from a Court that doesn't seem to take language in other areas very seriously at all.

MR. SCHWEITZER: Well, I'll give one take on it, about their deference to Tommy Thompson and what the United States had to say about it.

One point I found in the preemption cases recently is that they defer a great deal to what the Solicitor General says is the preemptive scope of statutes, which in some of their recent cases, like the Sprietsma case was helpful to the state antipreemption side, but I doubt in the long run it's going to be very helpful to the states when the courts have to

listen to the views of the federal government about the power of the federal government, because we all know how that ultimately works.

It's a Court that has generally been, apart from the affirmative action case, fairly deferential to this particular Solicitor General of the past couple years. I'll let someone else discuss their broad view about statutory construction.

MR. VERMEULE: From the standpoint of Supreme Court adjudication, rather than interpretative theory, I think the view has to be that they are postmodern on issues as to which elite opinion has a strong normative valiance, but not otherwise. In the "not otherwise" category, sure, they will just draw on their professional training and use lawyers' tools and the opinions look a little better. But, is that category growing or shrinking? In my opinion, it is certainly shrinking over time.

AUDIENCE MEMBER: I'm not a legal scholar, I'm a sophomore in college, but I had a question regarding the split decision In Gratz and Grutter. I'm a little bit confused, because I feel as though saying that they can't use the point system because it resembles quotas is fine, but what is Michigan going to do in response to that? They could adjust it so that they say they are not going to use a point system anymore, this is not the public policy in admissions, but they have to do something because they have 50,000 applications.

The whole abstract interpretation of race as a factor is fine if you had 200 applicants and every file is really being interpreted for the quality of the applicant beyond the numbers, but we know that a lot of universities have so many thousands of applicants that even if they don't use a strict point system, they are really just going to use a more subtle point system. Has the decision just reaffirmed the status quo and made it something where they say, "Use affirmative action, just don't make it so blatant so that we have to come down on you."

MR. GREVE: He is a legal scholar.

[Laughter.]

MR. YOO: The idea that this was a split decision is just because journalists read the opinions too fast when they first came out. This is really an overwhelming victory for people in favor of racial preferences. Think about it from more of a corporate lawyer's perspective. What the Supreme Court did is it created a safe harbor for every university in the country. If you do exactly what the Michigan Law School did, you know what you are doing is constitutional, and the Court doesn't care about whether in the process of conducting your whole person review you actually come out to the same percentages every year. In fact, Chief Justice Rehnquist's dissent has a chart in it which I recommend to you. It shows that the admitted percentages of minority students is almost exactly the same as the minority proportion in the applicant pool every year. When the applications go up and down, the amount in the admitted student column goes up and down almost exactly the same way.

But this Court doesn't care about that. The Court says, "Just as long as you follow this process, regardless of the output, you are going to be constitutional." In fact, they suggest there is no way to judge whether the output you arrive at is diverse enough.

So I quite agree, I think. The only good thing is that this is going to mean universities are going to have to spend a lot of money hiring more administrators to do college admissions. That's what happened in California after Prop 209. The legislature actually appropriated extra millions of dollars just to hire people to read application files. That's probably what will happen at a lot of other schools, too.

MR. GREVE: There's actually a little policy paradox there. I never thought I would say this in any case, but in this particular case, it struck me that Justice Souter actually wrote a very plausible opinion. His point is this: By saying, "no open point systems, but discretionary ones," all you do is drive this underground. If anything, Souter said, I should be tempted, if this weren't a clear case for me already, to give Michigan some extra points of its own for its candor and openness. That is actually a halfway serious point. If we absolutely have to have these preferences, by all means let us know what they are. Advertise it. Because everything else is just false advertising, and it's deeply misleading, and many waste their time and money on applications that in an open, candid and transparent world they would never send in.

Now Michigan has to go through the motions and, you know, hire 50,000 pretend administrators who then pretend to read these files. Everybody knows in advance the entire enterprise is stupid. Have it be open.

AUDIENCE MEMBER: You talked about how the O'Connor opinion incorporated the idea that racial diversity on campus is a compelling governmental interest, and even Chief Justice Rehnquist echoed that in his Gratz opinion without really discussing why it is so.

That comes from Justice Powell's opinion in Bakke which was only one opinion in a 5-4 case, but the four that went against said that remedying past discrimination was the reason for racial preferences.

Is there much precedent for using the one opinion as binding precedent for future decisions?

MR. YOO: Actually it's a good point because after Bakke, Justice Powell's decision was very uncertain. The circuits had split on whether Powell's ruling was the Court's opinion, which is why we actually got this case.

But in the opinion itself, the Court says in Grutter it's not important whether Bakke is the law or not, we're just going to adopt the reasoning of it as a matter of choice. So they didn't reject it.

You're quite right, though, that over the years the justification for affirmative action has really changed from remedies for past racial injustice to this free-floating, undefined

diversity goal. There is no real explanation in the opinion about how that happened, why that is the case, and what benefits it really produces. I don't think there are any real studies that show that diversity actually produces a better education. That's what the Court argues it does, but there's no real social science one way or the other about that.

MR. SCHWEITZER: John, do you think it's safe to say that what the Court really did in Grutter was accept Justice Ginsberg's dissent in Gratz? I mean in Gratz her dissent just came out and said I still think we should apply a different standard of review when reviewing invidious, mean-spirited, racial discrimination versus better-intended affirmative action type discrimination.

[Laughter.]

That could be wrong or not, but it seems to be that's the only way you could justify the type of so-called strict scrutiny review they were giving. Kennedy was clearly right.

MR. YOO: The only reason I don't say not is because I also don't see this Court reversing Adarand or the voting rights cases. They have a distinct set. It doesn't matter whether it's benign or malicious racial discrimination, which is why they have to go to this diversity rationale.

MR. SCHWEITZER: We have four Justices who would do it, and Justice O'Connor who won't, I guess, just say it, but will –

MR. YOO: Actually Justice Kennedy also agreed with the Bakke framework. He just thought it wasn't properly applied. So actually if you count it up, it's actually 6-3 in favor of the Bakke approach, not 5-4, which is even more remarkable, considering Kennedy's writings.

MR. RAUL: Any closing comments by any panel member?

MR. VERMEULE: Well, just very briefly. The test case for your idea would be a case where the diversity justification cut in favor of a plus factor for white applicants, for example, at a historically black state college (Thomas gave the example of Mississippi Valley State College) or at a college like one in the UC system, where there's a very large number of nonwhite, specifically Asian, applicants with excellent scores. If one of those colleges tried to apply a plus factor for whites on diversity grounds, you'd have the test case for this. My prediction is that it would be struck down.

MR. RAUL: Well, as the only private practitioner on the group, it is somewhat demoralizing that there was nothing said about the Nike decision where the Court exercised what might be considered uncharacteristic judicial restraint in declining to delve into the interesting realm of First Amendment rights for corporations and commercial speech. We'll revisit that case in a few years.

But there, if we are looking, Adrian, for some judicial restraint and some withholding of power, there perhaps is an example of it.

But that is the only point about which I have been demoralized in this exchange of views, which I am sure the audience agrees has been extremely interesting and not mealy-mouthed as some decisions of the Court may be. They tell it like it is, and in a very stimulating, intellectually expanding and challenging way.

Thank you very much.