

**AMERICAN CONSTITUTION SOCIETY SUPREME COURT ROUNDUP**  
**Tuesday, July 1, 2003**  
**National Press Club**  
**Washington, D.C.**

**LISA BROWN:** Good morning. My name is Lisa Brown. I'm the Executive Director of the American Constitution Society and on behalf of ACS I want to welcome all of you to today's Supreme Court Round-Up, which has been organized by our terrific Washington D.C., chapter. And particular thanks go to Goodwin Liu, Chris Sprigman and Dan Bromberg, who are here somewhere for putting together this fabulous panel.

And an especially warm welcome to our fabulous group of panelists. We are very much looking forward to hearing your thoughts on the recently considered term.

The term certainly ended on a high note with the decision in the University of Michigan Law School, Affirmative Action Case and The Texas Sodomy Case. Although I have to say the decisions like these and particularly the breadth of these decisions are only too rare. I mean, you read the newspaper and hear these decisions described as surprising and rare, which shows exactly why The American Constitution Society is so needed today.

Need I remind you that President Bush promised that Justices Thomas and Scalia, who wrote scathing dissents in the two cases, would be his model for Supreme Court Justices. For those of you who don't know ACS and want a little quick description, The American Constitution Society is a national organization made up of lawyers, law students, academics, judges, policy makers whose goal is to restore to their rightful and traditionally central place in American law, the values of respect for human dignity, protection of individual rights and liberties, genuine equality, and access to justice.

Over the past 20 years, these values, while they have animated our Constitution and other sources of American law, [have consciously been pushed to from center stage by various strands of conservative legal thought that fail to take into account the impact of law on peoples' lives. Over and over, I hear a frustration today at the dominance of the conservative law agenda.

There's a hunger for an organization and a vision that demonstrates that fundamental human values can be taken into account on rigorous legal analysis, that rigorous legal analysis can consider the impact of law on peoples' lives. And The American Constitution Society is dedicated to promoting a more progressive and positive vision of the law on every issue of civil rights and civil justice, from free speech to the environment.

The American Constitution Society is holding its first annual convention here in Washington, D.C., this summer, August 1<sup>st</sup> to 3<sup>rd</sup>, and we have an absolutely spectacular array of speakers. Justice Ruth Bader Ginsburg is going to deliver our keynote address on Saturday evening; Senator Hillary Rodham Clinton is speaking at our Friday lunch; we will hear from John Payton, who along with Maureen Mahoney on today's panel, is representing the University of Michigan in the Affirmative Action cases, and from Paul Smith, who is also here today, who represented the individual challenge in the Texas sodomy law.

Judge Tatel and Judge Luttig will discuss whether the liberals or the conservatives are more guilty of judicial activism. NARAL'S Kate Michelman will discuss with James Bopp of the National Right To Life Committee, reproductive rights and Nadine Strossen of the ACLU will debate Dan Collins Deputy Associate Attorney General Justice over civil rights and civil liberties following September 11.

We'll also hear from Janet Reno, Walter Dellinger, Wade Henderson, Antonia Hernandez, over 15 sitting federal judges and many other leading activists, lawyers, judges who will discuss virtually every critical issue of our time.

There are convention brochures here. Please take one on your way out of if you didn't get one on the way in and most of all I hope you enjoy today and come join us at the convention, which I am absolutely confident will prove to be a fascinating series of three days.

And now let me turn things over to Peter Rubin, ACS founding President, who will moderate today's panel.

**PETER RUBIN:** Thank you so much Lisa. Let me make a tiny pitch for the convention. Come to the convention. You can sign up on our webpage, [www.acslaw.org](http://www.acslaw.org). There are discounted registrations available for students and public interest in government lawyers. It's going to be spectacular, August 1<sup>st</sup> through 3<sup>rd</sup>, here in Washington, at the Capitol Hilton.

This past Sunday was the 11<sup>th</sup> anniversary of *Planned Parenthood of Southeastern Pennsylvania vs. Casey*. At the time that that case was decided, there was a lot of talk that there might be an emerging moderate center on the Supreme Court, particularly since it was decided the same term as *Lee vs. Weisman*, the middle school graduation prayer case.

Of course, that centrist coalition did not emerge. And instead, over the past decade, what we've seen of the Supreme Court of the United States, is probably the most conservative Supreme Court in almost a century.

In area after area of law, we've seen this conservatism, most dramatically in the Federalism cases, limiting Congress's power, particularly to restrict and prevent discrimination by the states. But we've seen it in all areas of law, criminal law, civil law, even when, and, of course, most dramatically, this same 5 to 4 conservative majority of Chief Justice Rehnquist and Justices O'Connor, Kennedy, Scalia and Thomas, voted together as a block in the *Bush vs. Gore* decision in late 2000, the Florida election cases.

Even when this Court has done something that could be considered progressive or liberal, by and large, over the last decade, they've done so, in either a kind of crabbed way, like in *Evans vs. Romer*, where it's very hard to tell what the principal that's being announced is. That was the Colorado amendment to gay rights case.

Or more frequently, they simply haven't done the progressive thing. And this trend continued even after *Bush vs. Gore*, where for example, in the *Zelman* case recently, Justice O'Connor, who had really been on the fence about religious freedom, approved of the use of vouchers in public school education without so much as a caveat in concurring opinion.

Against this backdrop, this past term of the Supreme Court has been extraordinary. And particularly extraordinary was the two to three decisions this past week, the two involving affirmative action and the gay rights decision.

What we have here in the affirmative action case (the University of Michigan Law School case), and in *Lawrence v. Texas*, the case that I think will be ultimately understood to announce a privacy of rights in adult consensual sexual relations is a full-throated constitutional vision of the likes of which we haven't seen really since *Casey*, since 11 years ago.

We are very fortunate today to have an extraordinary panel here. And I'm going to start with two of our panelists. We're fortunate to have two former Solicitors General of the United States here. To my immediate left, is Walter Dellinger and to my immediate right, Drew Days. Walter is the Douglas Mags Professor of Law at Duke University and a Partner at O'Melveny & Meyers here in D.C. Drew is the Albert Rankin Professor of Law at Yale Law School and is of counsel to Morrison and Forrester here. And we're also honored that each of them serves on the National Advisory Board of the American Constitution Society. So I'll start with the two of you. Let's say, first Walter and then Drew, what do we make of this term? How do we account for these decisions, in light of this past decade's history with this Court? Walter:

**WALTER DELLINGER:** I think we'd have gotten the same decisions virtually any time in the past decade. I don't think the Court has moved, this is just the particular configuration of cases that happen to come before the Court, with the possible exception that the further into his Chief

Justiceship that William H. Rehnquist goes, the more pragmatic a turn I believe he is taking. But with that, that is fairly subtle change.

I think that the major cases this term were not a sign of liberal activism. If you look at four of the cases with progressive results, what you see is the Court deferring in large measure to other agencies of the government. When they upheld the legal services funding against the property rights challenge, they deferred to 50 states. When they upheld the family medical leave act, they left in place what Congress had done. In *Grutter v. Bollinger*, they left the state universities out there in the states decide what their policies would be. The only exception, of course, is *Lawrence v. Texas*. But even there, where Justice Scalia said that this Court has brought about a major disruption in the social order, in fact it was the judgment of 13 states that was overturned. About the same number that had Jim Crow laws and it was fairly, sort of, central part of the 14<sup>th</sup> Amendment to bring national standards to bear on a few states that were repressing a minority. That doesn't, I don't mean to, in any way, lessen these extraordinary impacts of the reasoning of the Court's opinion in *Lawrence* and its national and international implications for the dignity and respect with which it treated relationships, same sex relationships. But I don't think that these are examples of the Court being interventionists as with respect to its 25 or more decisions invalidating acts of Congress over the last half dozen years.

I think non-deference remains the Court's central theme. I avoid the term "activism," because it's non-deference. This is a court that generally doesn't defer to other agencies of the government, state or Federal, and that's as true of the moderates on the Court as is true of anyone else.

But it is a court whose central theme is a juro-centric view of the Constitution. This is a court that decides everything for itself; whether it's the rules of golf, instead of the PGA or a presidential election instead of Congress. It doesn't defer much to lower Federal courts anymore, or the state courts. And I think the effect of the Court's very great willingness to decide cases is somewhat underrated by the fact that the center of the Court is politically somewhat moderate in their approach to law and life. I think if you had a Court that moved sharply to the left or the right in terms of sort of the basic previous position of the Justices, you would find the stage set, and the approach of this Court, for a fairly aggressive judicial activism--because this Court believes in deciding issues for itself. It's just that I think what it chooses to decide at this stage is not very extreme in one direction or another.

But the seeds are there for the Court to be a much more influential agency of our government.

**DREW DAYS:** I agree with much of what Walter said about the Court, one of the things that strikes me about this term is that the Court seems to want to clear out the underbrush with respect to some issues that have been around for quite a while. Of course, we know about *Grutter* and *Gratz* in terms of affirmative action. I think the case law had developed to the point where the Court was really forced to look very seriously at this position and try to sort it out. It's a decision, of course, that kind of clears out the underbrush and moves the discussion of affirmative action to another level.

But there are other cases, *Lawrence*, which Walter mentioned. I think that a lot of these decisions reflect the continuing breaking authority of Justices O'Connor and Kennedy, their ability to slow down what, I agree with Walter, has been action by a non-deferential Court -- a Court that is very much committed to notions of state autonomy, of restricting the Federal government in exercise of its powers under the 14<sup>th</sup> Amendment, particularly Section 5.

But there were some surprises in terms of not deferring. We'll talk about the *Eldred* case later on, having to do with copyright extension, but there, the criticism of the dissenters was that the majority had deferred almost totally to Congress with respect to what was required under Article 1 of the Constitution on the issue of limited terms for copyright protection.

And, of course, I think the greatest surprise, at least for me, was the Court's decision in the *Hibbs* case, having to do with family and medical leave, because it was written by Chief Justice Rehnquist, who has been the architect of the notion that Congress has very limited authority to abrogate state sovereign immunity under the 11<sup>th</sup> Amendment, relying upon its Section 5 powers under the 14<sup>th</sup>. This was a case where Chief Justice Rehnquist said that Congress, in fact, had gotten it right in using some of the terminology that had been the death knell with respect to many other statutes having to do with age discrimination, discrimination based upon disability, said that what Congress had done here was indeed congruent and proportionate to the powers given Congress under Section 5 of the 14<sup>th</sup> Amendment.

I think the key in that case is that the Court said that it still is [unclear – 14:35] what the power of Congress was under Section 5 of the 14<sup>th</sup> Amendment, what Section 1 of that Amendment authorized Congress to do. And it therefore, while upholding what Congress had done, nevertheless safeguarded the fundamental principals of the Court that has been operating upon in looking at Congressional legislation.

*Lawrence v. Texas* also is a reflection of a movement by Justice Kennedy that we saw in *Romer v. Evans*, this notion that there are certain types of classifications that simply are unacceptable in our society. But I think we also see in *Lawrence v. Texas* a basic disagreement about the question presented. Justice Kennedy focuses on questions of privacy, but the dissenters really are focused on sodomy and -- homosexual sodomy -- under the degree to which upholding the right that was alleged in that case would in fact undermine the moral bases of our society. Where society can, in fact, criminalize certain conduct that it believes is antagonistic to these fundamental values.

So I think that we have a Court that is pretty much the same Court that was known. But because of these contingent factors because Justices O'Connor and Kennedy continue, as I said earlier, to play a breaking role with respect to the Court, we've come up with a term that I think has achieved some very surprising outcomes.

**PETER RUBIN:** One of those outcomes is one by a national civil rights hero. I have two people to my left here. Maureen Mahoney is a partner to Washington office of Latham & Watkins. She argued and won *Grutter vs. Bollinger*, the Michigan Law School case, and indeed, entered thereby the pantheon of civil rights heroes in America. Maureen, were you surprised by the breadth of the Court's decision in *Grutter*? Not only did you win Justice O'Connor's essential fifth vote for upholding the law school plan, but this was neither a narrow nor an unexplained decision. There was no requirement of exploring all race neutral alternatives, even in the *Gratz* decisions the Court didn't say that. The decision is forthright in asserting the importance of diversity in the selective educational institution. And it doesn't even rely on *stare decisis*, the doctrine that precedent has to be followed, instead adopting as its own, Justice Powell's position *Bakke* as the correct one as an original matter of equal protection of the laws. Were you surprised by its breadth? Its tone? Its rhetoric?

**MAUREEN MAHONEY:** I was actually surprised by something that I don't think many people have noticed or mentioned. And that is that the key issue in the case, always, was the threshold question of whether you could take race into account in admissions et al., in any manner. That was always the main issue. *Hopwood* of course, had decided that you could not. That was the rule in Texas.

And the *Hopwood* analysis actually only got two votes. It was a crushing defeat for that. It wasn't close at all. Not only did we get the five votes that formed the majority to uphold the program, but Justice Kennedy's dissent also specifically embraces the rule that had been adopted in *Bakke* that says, yes, of course you could take race into account if you had a properly designed program. So that's six solid votes on that issue.

And I think most surprising to a lot of people is that the Chief Justice didn't take a position on the issue. He pointedly did not join the dissenting opinion of Justices Thomas and Scalia, so it's certainly possible that on a different set of facts, he too would have said that it is

appropriate to take race into account in a different kind of program. That's really what I found most surprising, was that we got six or seven potentially votes to endorse that view of the Constitution.

I don't think it's as surprising though, in some respects. And that is that you could characterize this as liberal and progressive. But I don't actually think that's fair. I think really, at this point in our history, what the Court really did was said, "We're going to preserve higher education as we know it." For the past 25 years, this is the way that higher education had been running its admissions programs. In fact, it's the way all selective schools from K through 12, that were subject to Title 6 had been running their programs. It had produced terrific outcomes educationally and I think it would have been very, very radical for the Court to say that all of that must stop now and you all must go ahead and run your programs like they do in Texas or California.

So I think in some sense, it was actually quite consistent with a conservative tradition and the other thing I would emphasize, as Justice O'Connor noted is that it left the issue to the democratic process still, too. If a state wants to have a different way of running their educational system, they're still free to experiment. So, the Court did not take this issue and mandate a set of rules. They simply, they did defer. They gave deference to the states to decide how to run their educational programs.

**PETER RUBIN:** Let's stick with the question of Justice O'Connor, because I guess I agree with you about the outcome here, but to me it's a big surprise because of Justice O'Connor. Let me turn to Beth Brinkman who is at the far end of the panel here.

You argued 20 cases before the U. S. Supreme Court. You're now counsel in the Washington office of Morrison & Forester. Last term you argued *Gonzaga vs. Doe* in which the conservative Court majority reached out to limit the scope of 42 USC, Section 1983, our fundamental civil rights law.

What do you make about the fact that in *Grutter*, Drew talked a little bit about underbrush being cleared away. But the underbrush that Justice O'Connor was clearing away in *Grutter* was largely of her own making. She was sweeping away language in her own opinions in cases like *Adarand* and *Metro Broadcasting* that had drawn *Bakke* into question in the first place. What do you make of that?

**BETH BRINKMAN:** I think in some respects it's the approach Justice O'Connor had demonstrated in her case by case adjudication in a very traditional common law fashion to take the case that comes before her and make that, and then to incrementally move forward with decisions that she has left unresolved. And I think its commentators and obviously lower courts that perhaps make more out of what is left unresolved than she intends to do.

I actually agree with Maureen. I think that in the *Grutter* case, it actually was more consistent and more conservative to uphold the program at that point in light of the history and what's been going on. And I think the differentiation between the two cases also confirms that. To draw a line between the undergraduate program and the graduate program.

I also think that that's why to me it's different from the *Lawrence* case, which I think is more the landmark decision than this case. Because I think the breadth of that opinion is really much more of a break with past precedent and past atmospherics of opinions in the Court. Whereas I think *Grutter* is very consistent with the Supreme Court's consistent commitment to anti-discrimination.

**PETER RUBIN:** Okay. I want to turn to *Lawrence* in a minute. But let's stick with *Grutter* and *Gratz* for a minute. Ted Shaw, you are the Associate Director Counsel of the NAACP Legal Defense Fund. [Exchange b/w Rubin and Shaw] You are a former professor at the University of Michigan Law School and indeed, one of the principal architects of the beautifully crafted Affirmative Action policy upheld by the Court in *Grutter*.

I guess my question for you is this: what ultimately is the significance of the decision in *Grutter* and what does it mean for race in America and racial issues before the Supreme Court

given that later last week, almost unremarked, the five to four traditional conservative majority basically completed its work of eliminating the teeth in Section 5 of the Voting Rights Act, which requires states -- certain covered states -- and jurisdictions to receive pre-clearance for changes in voting that might lead to what's described as a retrogression in the voting power of historically disadvantaged minority groups.

Despite the decision of *Grutter*, at the end of the week, in the same week that *Lawrence* was handed down, in a case called *Georgia vs. Ashcroft*, this five to four conservative majority with Justice O'Connor again as she typically has in race cases through the last decade, with Justice O'Connor voting with the Chief Justice and Justices Scalia, Thomas and Kennedy, the Court articulated a vision that is not particularly protective. Indeed, it seems to be totally unprotective of the civil rights of racial minority groups.

So my question is just that: what is the significance of *Grutter* given that kind of underlay? What is its significance for racial issues in America?

**THEODORE SHAW:** Well, I think first, this is still a very conservative Court. And in spite of *Lawrence*, which I think, along with *Beth*, is the landmark decision of the Court this term, the Court remains very conservative. We have to put *Grutter* in context.

*Grutter* is a decision which basically adopts *Bakke* or leaves Justice Powell's reasoning in *Bakke*. And *Bakke* was a loss for African Americans, for the civil rights community 25 years ago. So the fact that we've been defending *Bakke* is a reflection of how far to the right we have moved in our jurisprudence and as a country.

Having said that in the context of these conservative times, *Grutter* is significant victory and it preserves opportunities in higher education at selective institutions for people of color. The opposite result would have been nothing short of a disaster, I believe, and so we take those wins where we can get them and we're very happy for them.

At the same time, while we were on our way to *Grutter*, we were also struggling with the redistricting issues for more than a decade now and ever since the Supreme Court's decision in *Shaw v. Reno*, we've been on the past that has taken us to *Georgia vs. Ashcroft*.

Section 5 was a relatively untouched, although being nibbled away at by lower courts up until now. I think the Court's opinion in *Georgia vs. Ashcroft*, which has gone largely unnoticed, is a very troubling development because it portends a significant diminishing in the protections of Section 5.

What the Court did was really focus on issues in which some black elected incumbents may feel comfortable because one of the things that we now know is that incumbency can trump race, but at the same time, has left the retrogression principal in Section 5 on very shaky ground. So I have to think that over the next few years, we're going to see how that plays out.

There's an article in The New York Times today about how the redistricting game has completely changed. The practice of waiting for the decennial redistricting process apparently is out the window. And so we may be constantly in court with more of these cases headed to the Supreme Court.

But we've always known that redistricting -- or hope that redistricting -- was not the same as education or higher education and so I think that the opinion in *Grutter*, in some respects, was not a surprise. Linda Greenhouse has a very comprehensive summary of the term in today's *New York Times* and one of the things that she talks about is both the breadth of *Lawrence* and *Grutter* as being the surprise but the results not being a surprise. And I think that's absolutely right.

**PETER RUBIN:** Let's talk a little bit more about the both legal underpinnings of the *Grutter* decision and its rhetoric. I'm going to turn to you, Larry Gold.

You are former General Counsel of the AFLCIO and you are now Counsel to Bredhoff & Kaiser, here in Washington. You filed briefs or worked on a large number of the cases before the Court this term, not including the affirmative action cases, but I'm going to ask you question about them anyway.

In these cases and in particular in *Grutter*, for the first time, the Supreme Court has adopted a forward-looking rationale for race-conscious government action, rather than a remedial justification. They've accepted the positive, forward-looking value of having an integrated school environment and there's a lot of rhetoric about the civil life of the nation requiring that all people be and be seen to be within the group of people in this case, who have higher education, higher quality education open to them.

Does that decision have implications beyond schools? Of course, there's a lot of focus on education and deference to education. But on the other hand, the same argument it seems to me, could be made in particular, in employment, which [Mary], I know, you are focused on and concerned with. Or, for that matter, in the military.

The Supreme Court and Justice O'Connor in particular, focused a great deal on the importance of diversity in the military. The brief filed by Carter Phillips on behalf of retired military officers seems to have played a profoundly important role in the Court's thinking. At least in Justice O'Connor's thinking.

Does this decision have implications beyond schools or employment or the military?  
**LAURENCE GOLD:** To begin, it was a brief filed by my former colleague Virginia Sikes who is the Counsel of Record and (LAUGHTER) I would be unfair and churlish if I didn't correct you on that despite the fact that the brief was referred to as the Carter Phillips brief by at least one Justice. (OVERLAPPING REMARKS [that's what Justice Stevens said – the Carter Phillips brief])

Two things; one we talked about the Court proceeding on the basis that it is proper to take race into account, at least in the way that the Michigan School admission program worked. But it seems to me that the basis that the Court did so was defined that there was an overriding governmental interest which was the educational diversity interest. And I don't think that the Court in any way committed itself to finding that an overriding justification for other kinds of race-conscious decision making. And indeed while the opinion is not in strict terms one that follows (*stare decisis*, it is an opinion that I would suggest is unimaginable without Justice Powell's opinion in *Bakke* and Justice Powell's approach. And the Michigan, the *Grutter* opinion, echoes this -- is one which sees the selection process as part of the educational process and of academic freedom and defers to academic decision making and an area of autonomy in academic decision making as a high value.

I can't see any of that in the employment context and there is also a good deal of specific history. There is the Michigan case, I think it was *Wygant* on role model retention of teachers and the Court wasn't having that. So I don't think that the *Grutter* presage is something different in the employment context.

Where one God and weather is where it's going to stay. Affirmative action in the face of gross imbalances, without admitting prior discrimination, is going to survive, but I don't see it being expanded on an operational-needs kind of basis.

I think the military, one way or another, will be an exception, to whatever extent raised in the effective officer corps is necessary -- but that's going to be on national security grounds or something that has nothing to do with anything else. If it ever becomes an issue.

**PETER RUBIN:** Okay. And I want to turn, eventually, to some other national security related matters. Let's turn first to *Lawrence vs. Texas* which two of our panelists have described as the landmark decision of the term. We have in our audience, but not on our panel, Paul Smith, who argued and won that case. If you want to hear him speak, you'll have to come to our national convention. And you can sign up at [www.acslaw.org](http://www.acslaw.org).

*Lawrence v. Texas* is an extraordinary decision. It is such a sweeping constitutional vision and says, among other things, the state cannot demean the petitioner's existence or control their destiny by making their private sexual conduct a crime. And it says, that deciding a case on substantive due process grounds as it did, would actually advance the interest in both protecting this liberty and the interest in equal protection for gay men and lesbians.

I'm going to turn to you Preeta Bansal, you're the former Solicitor General of New York and a Professor of Law, as well. My question for you is this: would it have been better if this case had been decided on equal protection grounds or maybe there's another way to put it, which is: could anything have been better than our incredible and spectacular decision?

**PREETA BANSAL:** Would it have been better in what respect?

**PETER RUBIN:** Better for the rights of gay men and lesbians.

**PREETA BANSAL:** I don't think so at all. I mean, I think deciding this case on substantive Due Process grounds made this an incredibly landmark decision. The Court kind of asserting itself in a sweeping way over state morality decisions that it hasn't done in maybe decades. So, I mean, from the perspective of gay men and lesbians, I think the fact that it Substantive Due Process opens up the possibility of the kinds of legislative moves that a lot of the gay and lesbian community are pushing for at the state level.

**PETER RUBIN:** With respect to the Substantive Due Process grounds, in dissent, Justice Scalia said, or charged, that the Court had failed to find a fundamental right here. There's language in the opinion that says that it adopts some of the reasoning which it quotes, of, in Justice Stevens' dissent in *Bowers vs. Hardwick*, which, and the language they quote, seems to reflect recognition of a fundamental right in private adult consensual sexual relations. There's some other discussion throughout the text that suggests this.

On the other hand, the decision may also be read as a rational basis test case. The Court says, "There's no legitimate purpose, at least no legitimate purpose strong enough, to infringe on this right." So there's some unclarity, which Justice Scalia exploits, this in his dissent about the precise ground of decision here.

I guess the first question I have about this is does it even matter? Walter?

**WALTER DELLINGER:** I think it matters. It's an overdetermined result in the sense that there are many ways to get to the proposition. The state does not have a sufficiently legitimate interest here to engage in the regulation it does.

One, which was offered I believe by the Institute for Justice which is a conservative group, was a very libertarian premise that legislatures never had the power to intervene in this way for mere sake of morality. You don't even have to look for an amendment that forbids this; it's the actual absence of coming within the legislative power.

I think what is striking here is that the Court has really embraced the notion that there is an area of intimate relationships that is free from government control. The 14<sup>th</sup> Amendment invites Congress and the states to do just that. There's a constant refrain that there is no textural basis for the Court's decision.

Well, the framers for the 14<sup>th</sup> Amendment were aware of judicial review. They were aware of *Marbury*; they were aware of *Dredd Scott*, they were aware of *McCullough v. Maryland* and yet they put forth an amendment that says, "No state shall deprive any person of the equal protection of the laws, or the privileges and immunities of citizenship." These are very broad phrases and you look for the appendix about what exactly are covered within that, and there's no appendix to the 14<sup>th</sup> amendment. They left that to the courts. So there's, I think, some sense in which Justice Scalia and others who agree with him, disagree with the 14<sup>th</sup> Amendment.

It's very important to keep in mind how many narrow grounds there were for deciding this case. You could have decided this case on a matter of locational privacy. I think that would have been the least significant win. You could have emphasized that this is actually occurring in the bedroom. There's a reference to that at the beginning, but the Court moves well beyond that.

You could have decided it on purely libertarian basis. But as someone pointed out to me, it's not really a libertarian decision. Libertarian decision says this may be reprehensible, but the government should stay out of it. And indeed says much more warmly than that these are very significant relationships which are entitled to be treated with dignity, not to be trivialized or

criminalized. And that's a much more inclusive opinion than anything I think one might have anticipated.

**PETER RUBIN:** Let's talk about the question of relationships here. We should take a moment to just celebrate the extraordinary victory in *Lawrence*. And for that matter in *Grutter*, it's remarkable Bowers was overruled, there's not more fight about whether Section 5 of Justice Powell's opinion *Bakke* for the Court represents the narrowest, or broadest, or a different vision of equal protection. So something really quite extraordinary has happened in both of these cases. And on their own terms without requiring broader implications for them to be extraordinary and landmark decisions.

Having said that, of course, the Court has already held that the right to make decisions about whom to marry is a fundamental right. And here, the basis for the decision in *Lawrence* seems to be that, and this is the Court's language, "when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." That's what the Court says.

Indeed, the Court argued in essence that the relationships at issue in *Lawrence* were important for the same reason marriages are important. Does *Lawrence* mean that the right to marry the person you choose must extend to the circumstance when that is a person of the same sex? Drew?

**DREW DAYS:** I'm not certain, I certainly wouldn't assert that at this point. What we see in this country is a great resistance to the notion of same sex marriages and we have the Defense of Marriage Act, which is a Federal act which has yet to be fully construed, and I think the Court has gone into, the lower courts are going to be very careful before they move into this area with alacrity.

We know about the Vermont situation where the civil unions were upheld, but I think that to which there's a resistance to this notion in many quarters will cause the extension of *Lawrence* to be deliberate, if not with all deliberate speed, but I think the courts will look very carefully before they move to that next step.

Of course, the developments in Canada, although most of the Justices pretend that they don't know anything about anything that happens outside of the United States, will have to have some bearing on the gradual thinking about homosexual unions as having the same sanctity, and same degree of seriousness, as a heterosexual union.

**PETER RUBIN:** What about the current policy of, don't ask, don't tell, don't pursue, -- that really is a discriminatory policy -- in the United States military. Is that fatally undermined by the decision in *Lawrence*? Maureen?

**MAUREEN MAHONEY:** I doubt it. I mean we'll have to see what happens but I think this Court would probably tend to be quite deferential to the military if they offer justification for their policies, just as, that was part of what was going on in *Grutter*.

**PETER RUBIN:** I guess the question is what justification can they put forward that survives. I understand that deference may say, oh well, their judgment of morality is entitled to more deference than --

**MAUREEN MAHONEY:** My guess is that they are not going to do it. Their justification, if fully developed, would not be based on morality. It would be based on issues related to training needs and esprit de corps or however they articulate it. I think that the Court could well be deferential to those kinds of justifications.

**PETER RUBIN:** Do you have some thoughts on that, Walter?

**WALTER DELLINGER:** I do. I think the basis for defending the ban on acknowledged homosexuality in the military is deeply undermined by *Lawrence*. Deeply undermined. I don't disagree with Maureen, but there is also a tradition of very substantial deference to the political branches of the government and military matters. Those two things seem on collision course. I thought before *Lawrence*, that the Court would defer to the military. Now, I think it's very questionable.

One remark on the marriage issue, it is hard to articulate what the principal would be after *Lawrence*, although there is a very big difference between the Court striking down the laws of 13 states and striking down the laws of 50, just as a purely predictive matter.

I do think that it is an extremely bad idea to advance an amendment to the Constitution of the United States on the basis of a problem, if it were to be a problem, that has not yet manifested itself anywhere. And that is, a constitutional amendment has been proposed that would prohibit the extension of marriage. Which, of course, if nothing in this would effect the sacrament of marriage in any state -- states can continue to have their own definition of what is marriage-- but a Constitutional amendment seems very ill considered at this time.

**PETER RUBIN:** That brings up an interesting point. Senate majority leader Bill Frist on television a few days ago articulated his support for this Constitutional amendment. It would require something that I think is probably unlikely, but I don't think dead certainly impossible, which is a vote of two-thirds of both Houses of Congress and then approval by the legislatures of three-quarters of the states.

One of the criticisms of *Roe v. Wade* from the progressive side has been the extent to which that decision stimulated conservative backlash in the United States that has been politically organized, influential, powerful in policy matters, and also in shaping the courts of the country for the future.

This goes back to my initial question, so ironically, we get in sort of a quick fashion these two extraordinary decisions by an utterly conservative Supreme Court and they get the most attention and there is already this kind of "let's amend the Constitution" backlash. Will the effect of these decisions in the political process be more to energize the right than to garner support from the left? Ted?

**THEODORE SHAW:** I think one of the significant things about both of these decisions is that they reflect how even a conservative Supreme Court has drawn a line beyond which it is not willing to go backwards and I think that people on the right may be energized by these decisions. On the other hand, I think clearly people on the left (these terms are always troublesome) they are certainly energized by the decisions. But I think the significant aspect of both decisions is that the Court, in spite of struggling with these issues, has heard in some respects, if not the election returns, some expression of where the vast majority -- or at least a majority of the American people -- stand right now.

Americans may be struggling with the issues of same sex marriages, but I think people feel like discrimination against people who are gay and lesbian, I think there's a majority now that says that that is not acceptable.

Justice Kennedy's opinion is the opinion of a Justice who is not known as a "liberal activist." So I think that's the important thing. As to the political fallout, I just think we have to see. I think both sides are probably energized by the results, but in different ways.

I heard people on the right talking about being in meltdown after *Grutter* and I figured after *Lawrence* came down at the end of the week, they were a puddle (LAUGHTER).

**PETER RUBIN:** Let's pull the camera back a little bit. The Court in the *Lawrence* decision does something remarkable. It relies on decisions of the European Court of Human Rights as indicating where Western values on this question of adult consensual sexual relations between people of the same sex, where Western values on this question lie.

And in *Grutter*, in her separate opinion, Justice Ginsburg wrote, looking at the question of what you described as the "international understanding of affirmative action." What started as really a trickle in, primarily, Justice Breyer's opinion, a comparative look at the law of other Western industrialized democracies, or international norms, generally, seems to be becoming kind of a flood here. It's quite extraordinary.

What do we make of the sudden interest in, and engagement with, human rights law of other jurisdictions and international human rights law?

**LAURENCE GOLD:** I think the Court's engagement is strong. This is one piece in an opinion which has many pieces, which are not joined through any group logic of one premise following after another and leading to an irrefutable conclusion -- the way you would work through a math problem.

Beyond that, and particularly a look by Justice Ginsburg in the dissent, or Justice Breyer from time to time, in opinions at foreign laws seems to me to be very limited evidence of where the Court is going.

Also, on *Lawrence*, a view of the case is that it completes a work begun in *Griswold* and deals with the extent to which the state gets a role in regulating private, intimate consensual sexual matters between consenting adults. Some of these sodomy laws dealt with heterosexual as well as homosexual sodomy. And that the particular discussion of the gay rights aspects of things is necessary to correct the deviation from *Griswold* in the prior sodomy decision.

How far the Court is going, and the extent to which the secondary indicia are going to be important in moving the Court on a variety of gay rights issues seems to me to be very questionable, and to excite the issue either in terms of expectations or alarms, as Justice Scalia did in his dissent, seems to me quite premature.

**WALTER DELLINGER:** The movement to look toward the European court and other international sources seems to me to be a perfectly natural movement on the part of Justices who, out of necessity, have to look outside of themselves to give content to these broad phrases like, liberty, quality and privacy.

Either you treat it as a null set, an equal, as Judge Bork once said because there's no list, or you try to decide what liberties of fundamental importance. The first place outside themselves the Justices look was to the Bill of Rights was applied by the founders to the national government. That indicates in one's view that freedom of speech is fundamentally important as against the state is not some idiosyncratic view of your own, like running naked in the streets, and then they look to, in sense of state, case like *Lawrence*, the fact that 38 states have chosen not to intervene in this kind of relationship. They look in the cases involving the execution of the mentally retarded to other states, and it just gives, when you look to the international court and how it views same sex relationships, it gives a Justice some sense that their view that this is an important liberty is not just in personal idiosyncratic view, but there's some support for it in the international community as they look in history to see support in our history and traditions.

**DREW DAYS:** I just want to add a few words about this as well. There's a real schism on the Court with respect to reference to international standards. Most particularly, we have Justices Breyer and Ginsburg who see evidence of what happens in other countries and other courts as helpful in thinking about the human condition and how law might apply to it.

On the other side, or I guess most notably Justices Scalia and Thomas, who see no relevance of these international norms, say it's the United States Constitution we're talking about. It's the United States that we're talking about. What are these particular rules have to do with our decision making process?

But there's no denying very, very powerful persuasive decisions are being rendered by international courts -- the German Constitutional Court, constitutional courts around the world, the Canadian Supreme Court. The movement from what's happening in the United States to what's happening there is not a great leap. There are a lot of parallels and I think just the intellectual power of some of these decisions has had an impact on at least some of the Justices. Mental retardation, the *Atkins* case, the great dispute between Justice Breyer and Justice Thomas over something called the Death Row Syndrome, where there was denial and cert. and the issue really came down the relevance of international standards.

I think what some of the Justices are understanding is the United States used to be the leader with respect to resolving a number of these issues. In many parts of the world, it's no

longer viewed as the leader. The leadership has been taken over by other courts with intellectual power and very persuasive decision making.

**THEODORE SHAW:** Some years ago I was over at the Salisbury Seminars in Austria and Justice Kennedy visited, dropped by. He was teaching somewhere and spending some time in Italy and the point is that some of the Justices do spend time, in the summers, in Europe and other places and they are people who have formed relationships with other Justices from other Supreme Courts, and I think we're seeing some influence. Some of them realize this is not just fortress America. We live in the world.

There is a movement within the United States, nascent, but still a movement, to bring human rights here to the United States, as opposed to just civil rights. We sign human rights treaties and with reservations in many instances, but we sign them. And the question is whether they have any meaning here.

So I think that this is going to be a growing trend, at least the issue is going to be there. I don't suspect that the Supreme Court, any time soon, is going to make decisions on this basis, but I think we're going to see, more and more, some of the Justices at least looking to international law.

Drew is absolutely right about other nations taking a lead. It used to be that they looked to the United States as having the best, the strongest, the most vibrant Constitution and protection of individual rights. South African Constitution is much more progressive than the United States Constitution in many ways. And there are many countries about which we could say the same thing.

**PREETA BANSAL:** I think the Court, and in at least a few opinions, there's kind of explicit talk about international standards is reflective of some of the things I found striking about some of the decisions this term.

The Court seems much, at least some members of the Court, seem much more willing to explicitly embrace the concept that context can matter. And I think the reference to international standards, especially in *Eldred*, where Justice Ginsburg relied a lot on the EU Directives with regard to the copyright term; I think that's one illustration of that.

I think another really striking illustration was the kind of Court's reliance on amicus briefs. And it's explicit talk and reference in its decisions. Of course, the amicus briefs always mattered and they've always been a source of great context for the Court. But in important decisions this term, the Court talked about the military brief, obviously in the *Grutter* case.

The only caveat at that I would there is as of course it's been focused on Federalism. One of the things I always found ironic was that the amicus briefs that the Court seemed least interested in were the states views on Federalism issues. In the (VAWA case, the *Morrison* case, a few years ago, 40 some states filed an amicus brief saying, we really want Federal protection here. And there were a range of states, not just the progressive states.

But, of course, in that case, the Court knew better. And then the context did seem to matter. In addition to the amicus briefs and the kind of international context, I think the few references to this term to the kind of personal context of some of the Justices was also interesting. Obviously Justice Thomas in the cross-burning case, and *Grutter* as well.

I think in the *Hibbs* case, the Family and Medical Leave Act, I wonder how much the personal context of Justice O'Connor – and some said possibly – the Chief Justice put his daughter in a high profile position, maybe had some impact on the way the Justices view these cases.

**PETER RUBIN:** Let's take a little detour and talk about some of the upcoming questions that are likely to reach the Court sometime relating to detention and national security. And I'll ask you about this, Beth.

In a little noted paragraph in his *Grutter* dissent that was remarkable for some of the reasons that Preeta discussed, Justice Thomas wrote, "the lesson of *Korematsu* is that national

security constitutes a pressing public necessity for the government's use of race to advance that objective must be narrowly tailored." This is a post September 11 rendition of *Korematsu*.

By contrast, Justice Scalia wrote just three years ago in his dissent in *Stenberg vs. Carhart*, the so-called partial birth abortion case, that he thought that that decision should take a place beside *Korematsu* and *Dredd Scott*, implying that these are dead decisions.

When combined with the decision in *Demore vs. Kim* this term, where the five person conservative majority that I've described held even a legal permanent resident alien can be detained without any individualized showing of need pending a deportation hearing, essentially on the government's say so, is this a significant tea leaf – this language about *Korematsu*?

**BETH BRINKMAN:** I do think that, whether it's conscious or subconscious, a direct impact on the Court's decisions by the war on terrorism and there are a couple of criminal cases that reflect that. Obviously *Kim v. Demore* that alien detention case is the most obvious and a couple of comments on that.

First of all, it's not that the government can detain someone; it's actually that they must. That was a mandatory detention statute that was upheld in *Kim v. Demore* where there is no determination whether or not the individual alien poses a danger.

Now these are people who are also lawful permanent residents. The Court obviously focused on the fact that's of limited duration because it's this pending removal for seating. But, by contrast, just a few years ago before September 11, shortly before it, the Court invalidated prolonged detention of aliens who had been ordered removed and could not be returned to their countries and that the *Zadvydas* case.

Now, there, it was one of these old cases. The *Mizai* case, that the government relied on and I was in the Solicitor General's office at that point in time and under that case we surely should have won, and the Court really reconsidered that and gave a nod to the terrorism issues that we raised in our brief, but really looked at it as a determination of liberty and freedom without really giving the consideration to those government interests, the weight that they might have been accorded.

Particularly because in that situation, it was where the government was giving individualized hearings about dangerousness. So I think there is real dramatic difference between those two cases. It plays into the trend we've been talking about this term in deference also to the government and to the INS's expertise in that area.

Two other criminal cases I would mention in this terrorism-related vein. One's a conspiracy case. The RICO case. Drug conspiracy. You might think, what does that have to do with the war on terrorism, but that was the case in which the Court held that conspiracy charges can continue even after the government has defeated the object of the conspiracy. There the government has seized the drugs. Certainly that has broad implications, I think, for conspiracies in the terrorism area, even where the government defeats that purpose as they need to, and yet also need the ability to continue to prosecute people who participated in that.

Also there's the interrogation case by police. Interrogation of someone who was on a hospital gurney being treated for a bullet wound. That's kind of a mixed result. Because that was actually was a 1983 case. And the Court held that there is no 1983 action there. But if you count the votes, it suggested the Court might still suppress that statement. I think that will be interesting.

I would say there was a defeat along these lines for the government also. Somewhat surprising in that respect, the *Stogner* case. Where the Court struck down a California statute that was reviving actions against sex offenders where the statute of limitations had already run, really reviving those kinds of claims. And that had negative implications of the government's view for the USA Patriot, which is likely.

But on the other hand, there's the Holocaust case where there is great deference to the political branches on issues of foreign affairs. And I think perhaps *Stogner* can be explained by

a case a couple terms ago, the *Carmel* case, in which the Court also had upheld the ex post facto challenge to an evidentiary rule in Texas.

But other than that, I think that's the one exception, I think that these cases are being influenced by this heightened awareness of the need to deference to political branches in national security and taking that into account in all types of criminal cases.

**DREW DAYS:** I just want to second some things that Beth said. First of all there is this tradition of deference to Congress and to the immigration service in dealing with the implementation of various laws. And I think that's apparent in this case. Even apart from 9/11. The other is the Court's unwillingness to expand procedural due process where the government has created categories. The argument is not that the categories are wrong, but "I don't belong in that category."

And one sees in the sexual offender registry cases that same reaction. It's one thing if you don't think the category is right. That's another lawsuit. But if you think that you should be given an individualized hearing to show that you really don't fit into that category, we're not going to be supportive of that. So I think that's very much reflected in both *Kim* and *Connecticut vs. Doe*.

**BETH BRINKMAN:** One other thing that I would say about the *Kim vs. Demore* case, is this trend against rehabilitation. It's remarkable that several cases probably some cases we'll talk about later, but both the Three Strikes case and the sex offender case are really giving great deference to the total abandonment of rehabilitation of any kind of interest in a criminal justice system.

**THEODORE SHAW:** I'm struck by the revival in some respects of *Korematsu*. It was a very much discredited case for quite some time now, but I think about Justice Kennedy in *Lawrence* who wrote that the *Bowers* case was wrong the day it was decided. I doubt there's a similar view now of *Korematsu* and the aftermath of September 11. I think people are still troubled about the use of race, even if there's a national security issue, but I don't think that *Korematsu* was discredited in the way it was ten years ago.

**PREETA BANSAL:** I was struck by the discussion of *Korematsu*. And I have a hard time believing it was incidental. Just given how *Korematsu* was discredited several years ago. The kind of revival of it now. I mean, at least for some members of the Court, I think probably it is trying to lay a bit of a groundwork.

**MAUREEN MAHONEY:** I actually that the discussions of *Korematsu* have been perhaps saying that the scrutiny wasn't strict enough as to whether or not the consideration of race was sufficiently relevant and necessary in that context. But I certainly think that both *Adarand* and *Grutter* leave the door wide open for race to be considered in a particular context in a narrow way when you have some sort of security interest at stake. I think that's what the Court means when it says it's not fatal. Strict scrutiny isn't fatal in fact. But it needs to be searching. We need to see whether or not the government has gone too far. And that's what I think they'll do.

**PETER RUBIN:** Let's turn to the case that Drew said was most surprising to him this term. This is the Hibbs' case and I'm going to start with you on this Preeta because you are the former Solicitor General of the State of New York.

After a series of decisions refusing to recognize Congress's power to subject the state suit, the Court, finally, upheld the Family and Medical Leave Act as a valid exercise of Congress's power under Section 5 of the 14<sup>th</sup> Amendment.

There's a lot of powerful language about the evil of discrimination against women in Chief Justice Rehnquist's opinion. I guess my question is that helpful in the fight for women's equality? Or does it actually play a more important role narrowing the decision by distinguishing gender discrimination from other evils that Congress has tried to redress, like disability discrimination and age discrimination?

**PREETA BANSAL:** I guess I would go for the latter view. I think the Chief Justice went out of his way to say that this particular remedial scheme of FMLA was limited, it's allowed only for

certain type of, it limited damages, it limited scope, it didn't require the kind of change in the work place that, for example, the Americans with Disabilities Act required. So I think he was quite clear in saying, looking at this particular remedial scheme, the requirements of that, plus the fact that we're dealing here with a heightened class. Women, obviously they're subject to heightened scrutiny.

I do think that one of the striking thing about *Hibbs* is it kind of illustrates the extent to which a lot of the sovereign immunity and Federalism decisions as many have already written about were more about the Court's assertion of it's own power vis a vis Congress rather than some great deference or concern for states as sovereign entities.

At one point in the *Hibbs* decision, the Chief Justice has a line in there that says, "Congress was justified in enacting the FMLA." I mean that's kind of an extraordinary statement of how much the Court is going to make its own second guessing judgments of whether or not particular legislation is needed.

So I think it's, again, a statement of, more, the Court having a power over Congress in assessing the need for further remedial legislation. I also think there's an aspect to which I wonder -- *Hibbs* reflects a growing pragmatism on the part of the Court in the sense that you have very feverished and pitched judicial confirmation battles going on in the Appellate courts. You have kind of a post *Bush v. Gore* atmosphere and I think, at least, some members of the Court fashion themselves that this is the judiciary that's above politics. We are the grand referees for society. We get it right. And I wonder if there's a sense that giving with one hand and taking with the other. Kind of trying to continue to play a little bit both ways, and continuing to have the legitimacy of society and things like that.

So I think the combination of the fact that you're dealing here with women, classification subject to heightened scrutiny, a limited remedial scheme in comparison at least to the ADA and ADEA which require kind of affirmative accommodations and changes in work place requirements on the part of employers, and may be some of the personal context of the Justices. I think that this case, I guess to me it wasn't that surprising, although Beth already did it and maybe she found it surprising.

**PETER RUBIN:** Sticking with some of what Preeta said, you're agreeing with Walter's initial view here that despite this decision, the Federalism decision, there's nothing here that undermines the rap on the Rehnquist Court, which is that it arrogates to itself the sole power to judge Constitutional obligations -- and that even in give a thing, it's take a thing away -- that this question of Congressional power in this case.

Does anyone see any broader implications of this decision for the Federalism area of law beyond this civil case?

**BETH BRINKMAN:** I think it's really a breather. I don't think it's a reversal in the trend whatsoever. I agree with Preeta that it's really about the heightened scrutiny -- that comment following on the heels of the VMI where that was really established. I think that that is really the purpose of all the emphasis of the role of women in the opinion. I think that's right.

I'd mention another case that I think is very interesting about the Federalism trend of the Court which I found remarkable. It's the per curiam opinion about whether or not a loan restructuring agreement is a contract under the Federal Arbitration Act. Not something that would make the headlines of the newspaper. It's a per curiam reversal of a state's court ruling saying that under *Lopez*, the beginning of the Federalism, this did not adequately effect commerce to come under the Federal Arbitration Act.

Per curiam opinion, not even briefing on the merits; the Court is telling the states' Supreme Courts, "No, you were reading *Lopez* too broadly." That, I thought, was very interesting opinion, and actually is more significant probably about a kind of place that they are now stopping on the interpretation of the commerce clause and Congressional power in that area. I think that's going to be an oft-cited per curiam opinion.

**THEODORE SHAW:** Yeah, but it's tough to know what it needs. The question that you put to us about *Hibbs* reminded me of the redistricting battles. The *Shaw v. Reno* cases where we went back to the Court again and again and again during the 1990s in a series of cases and finally we had *Cromartie*. And *Cromartie* was the first time since *Shaw* the Court really upheld one of these challenged districts, although it didn't speak in broad sweeping principals. It was very factually intensive.

But the point here is that, just as we thought that there was no apparent stopping point with respect to striking down various state measures or statutes, there was one: *Hibbs*. And I can't quite say why it was in *Hibbs* and I agree with both Preeta and Beth to the extent that they've articulated the reason.

But in *Cromartie*, the Court just stopped. And saw a line and drew the line. Why, we're not entirely sure. And it doesn't mean that the next case up before the Supreme Court involving the same issues is going to follow the same trend. They have these momentary departures, but they can pick right back up, start striking down these various statutes drafted by various states or by Congress. And they can start the redistricting battles all over again.

**PETER RUBIN:** And, of course, when we say the Court in that circumstance of *Cromartie* we're speaking really, as we are so often with the Court, about Justice O'Connor who, after having given the majority in all the other, being the only person in majority in both the cases that strike down race conscious districts and then switches to uphold them with the dissenters in this case as well.

**THEODORE SHAW:** We still have to count to five.

**WALTER DELLINGER:** Having argued *Cromartie* along with the Council for the Legal Defense Fund, with whom we share the argument and argued the Washington Legal Foundation, I think there's a small opening for the fact that the Court may be giving some deference to the states when the states are descending so called progressive positions.

I've noted the Court talks about integrity and sovereignty of the states when the states are doing something like resisting application of a Disability Act or the Age Discrimination Act or these other Acts of Congress, but the states never seem to get deference when they are sort of on the progressive side and I mentioned to Maureen and John Payton that one of my imagined openings in the Michigan argument would be, "May it please the Court, I would like to ask you to take judicial notice of the fact that Michigan, like Alabama, is a state. And this is its educational policy." And when I argued the Washington Legal Foundation case, you know that the Chief Justice of the State of Washington came to the argument and I tried to say the Justices of the Supreme Court of the State of Washington have adopted this policy as many times as possible. So that there's a little bit and in *Hunt v. Cromartie*, now *Easley vs. Cromartie*, one of the points was, you're moving to a hair trigger.

If even this modest use of race invalidates a plan, you're moving to a hair trigger that's going to make it very difficult for state legislatures to come up with any plan that works. There's a little bit of state's rights theme.

But still, basically, the Court doesn't defer, and in *Cromartie* didn't defer to the three judge lower court on the findings of fact. That it was predominantly racial. Because I think this Court decides things for itself.

*Hibbs*, like *Dickerson*, can be seen as about the Court's own role and where Congress has acted consistent with the Court as in *Hibbs*, it's approved -- where it's inconsistent with the Court as in *Dickerson* (the Miranda case), it's not.

**LAURENCE GOLD:** One thing on *Hibbs*, I apologize for suggesting that there's anything rational or principal that goes on in the 14<sup>th</sup> Amendment, Section 5 jurisprudence or the 11<sup>th</sup> Amendment jurisprudence, but it does seem to me that what *Hibbs* says and what it turns on is, that Congress was legislating in the area of strict scrutiny discrimination race, sex and so on. And that in that area, the Court does not, it is not of the view that's it's going to limit or second

guess the Court. And that such legislation is different in the Court's view than legislation in the area of rational scrutiny discrimination.

And that's that difference. There was more than a suggestion that the next candidate for state sovereign immunity litigation was Title VII in so far as it deals with discriminatory effects wrongs. And it seems to me that what the Court was doing here was drawing a line. A line between Congressional action in these areas of strong, persistent and acknowledged discriminatory wrongdoing by the states as well as by private parties, and other areas which the Court regards as different in kind and not so characterized.

And in those terms, I don't think that *Nevada vs. Hibbs* tells you a thing about what's going to happen to Section II of the ADA but I think it tells very important things about Congress's 14<sup>th</sup> Amendment, Section V power to deal with all manner of race and sex discrimination issues and to do so in the broadest and most far-reaching and prophylactic terms.

In those areas, I think, go back to where we were in the voting rights cases and while that may not be the full measure it certainly extremely significant.

**DREW DAYS:** I was just going to refer to the same issue that Larry just mentioned, namely the fact that the Supreme Court has been taking cases that raise the question of Congress's power to legislate under Section V, particularly under the ADA, and there was a case this term that presented the issue that was different from the one decided in *Garrett* which had to do with employment. And to the ADA, this was government services. That case was voluntarily dismissed by the State of California so the Court didn't get to that, but I think we'll see the same alignment of Justices in dealing with that particular issue.

I'm not going to predict the outcome, but this is by way of saying that there's still a long list of issues that the Supreme Court is going to be dealing with over the next several terms that will tell us more about where the Supreme Court in fact is prepared to draw the line. I don't think we're there yet.

**PREETA BANSAL:** On the federalism front, I think that some of the decisions this term and last term on preemption are kind of an interesting way to also view the Federalism issue. Because at the same time that the Court has been deferential to states, one could argue in the sovereign immunity context, it's been quite willing to find state laws preempted so it hasn't necessarily been all that interested in state regulatory authority.

It seems to me that if you view the preemptive decisions along with the sovereign immunity decisions, one could come to a conclusion that the Court is concerned about regulation. Whether it's Federal or state and they're willing to strike down regulatory schemes which they consider to be excessive.

This Court's preemptive decisions, interestingly, the case in which they found state regulation not to be preempted was a boating, it was boating claims by boat victims. And they found that a state common law claim was not preempted by a Federal regulation that did not require certain boating safety equipment to be included.

But in that case, the Justice Department acquiesced, in essence, in its interpretation of the regulation. So, it seems to be that the Court is kind of quite deferential to the Federal government in terms of finding state regulations and common law actions preempted.

**PETER RUBIN:** We are just about out of time, but what I can see that you can't is that Walter has prepared an extremely complex and erudite chart, and as a consequence, I'm going to call on Walter and give him the last word. Walter?

**WALTER DELLINGER:** It seems to me that one of the most interesting developments of the term is the growing split among Justices thought of as conservative. This may be like the natives of the north slopes of Alaska that have 197 different words for snow. You look at it long enough, you begin to see distinction. But this was quite dramatic.

Particularly if you think ahead to the kind of person that President Bush might nominate to the Court. I think it's perfectly appropriate for a President to look to his basic constituency in making a nomination.

But there is really a divided constituency that's reflected in some of the attitudes on the Court. There were half a dozen cases, and this is an underinclusive list, half a dozen cases of major importance to business before the Court this term. I didn't even think to add in the preemption cases, Preeti. These half dozen cases reflected a very fundamental split. In every single instance, the side favored by business was supported by Justices O'Connor and Kennedy. In every single instance, the side that was the nightmare for corporate America was adopted by Justices Scalia and Thomas. It's a very dramatic split.

The *State Farm* punitive damages cases. In fact, Justices Scalia and Thomas, it's probably their view of state's rights that account for this, in upholding state regulation, but when the President said he would nominate persons in the mold of Justices Scalia and Thomas, if he had had one or two more Justices like that, it would have been a disaster for corporate America this term. As one more Justice like that would have come out a different way in *BMW vs. (INAUDIBLE)* two more would have changed *State Farm*. California's regulation of business, the Holocaust case, the *American Insurance Association* case, *Norfolk and Western vs. Ayers* on fear of cancer being compensable, the pharmaceutical manufacturers' case involving Maine's restriction fund on the marketing of pharmaceuticals. And all of those cases, Justices O'Connor and Kennedy and each of those who are joined by the Chief Justice came out on the side supported by business and every one of those cases Justices Scalia and Thomas were on the other side. It's true of the dismissal of the *Nike* case.

And *Grutter vs. Bollinger*, we had this enormous outpouring of support from corporate America on the sides supported by Justices Kennedy and O'Connor with Justices Scalia and Thomas in dissent.

So it's really a very major split between the nature of the Court. You see it in a party that has both a sort of corporate constituency, somewhat of a libertarian constituency on the one hand and a moral majority constituency on the other. You've seen that split that is emerging in the Court. It's very, very striking in this term if you look back through the cases of the term.

**PETER RUBIN:** We are deeply indebted to the D.C. Chapter of the American Constitution Society for having us and particularly to the outstanding and extraordinary panelists that we've had here today. I'd like to thank you all for coming. I'd like to encourage you to come to the ACS National Convention, August 1<sup>st</sup> through 3<sup>rd</sup>, [www.acslaw.org](http://www.acslaw.org). And thank you for coming.

**END OF TRANSMISSION**