

Covering the Roberts Court: A Reporter's Reflection

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Thank you very much. It's a real pleasure to be here with you. I had a lovely day on the campus. I want to thank you all for turning out this afternoon after what was probably a full day of classes. I want to talk to you a little bit about the Supreme Court, and then I want to leave some time for your questions about the Court, or the *Times*, or anything else that is on your minds.

Needless to say, the Supreme Court is a very important institution. However, it can be a little dull. In preparing my talk today, I thought I would try to figure out a way to give you some glimpses into the Supreme Court's work that isn't dull, and I thought that the slice I would take is the Court's occasional interactions with popular culture, with popular music, with video games, with television. This coming term, they will have a case that I'm going to enjoy writing about involving what in the legal jargon is called "fleeting expletives"—which you would know as cursing. It also involves nudity on a show that was on in the early 2000s—maybe you guys were too young to have seen it—called *NYPD Blue*.

THE ROBERTS COURT AND BOB DYLAN

First, I thought I would talk about what is, to my mind, an under-examined phenomenon, which is the Roberts Court's revolution in its treatment of popular music, and in particular the citation of popular music in its judicial opinions.

John Roberts has been running the Supreme Court for six years now. He came on at age fifty, which is quite young for a Supreme Court justice. He is only fifty-six now, and as Supreme Court justices go, he is pretty hip. Let me make my case, and then you can quarrel with me or not. Certainly by contrast to the late Chief Justice William H. Rehnquist, who died in 2005 and spent thirty-three years on the Court, I don't think there is any question. And just to give you a sense of how the Supreme Court is a little bit of an insular culture, John Roberts had served as a law clerk to William Rehnquist years ago, when he was fresh out of Harvard Law School. So there is a kind of turnover, and you see that many of the justices now had served as law clerks to justices earlier on.

Chief Justice Rehnquist was old school. He liked light opera; he liked Gilbert and Sullivan. He liked Gilbert and Sullivan so much that he took the plain black robes that everybody wears and he put three gold stripes on it, because that was something he saw in a Gilbert and Sullivan opera. People thought that was a little weird. He would cite Gilbert and Sullivan once in a while in his opinions, which,

as you know, is not usually thought to be a source of law.

Chief Justice Roberts, by contrast, broke new ground a couple of years ago by citing Bob Dylan. Now, I think that maybe Bob Dylan is for you like Gilbert and Sullivan is for me, but I got a real kick out of it. He put a citation to a Bob Dylan song in a really achingly boring dispute between payphone companies and long distance carriers. Four pages into his dissent, the Chief Justice put a song lyric where the citation for a legal precedent usually goes.

First, let me read you the proposition that he wanted the supporting precedent for, and when I read it to you, try to put yourself in my shoes and think about how this is what this poor guy reads all day long, every day: “The absence of any right to the substantive recovery means that respondents cannot benefit from the judgment they seek and thus lack Article III standing.” I’m not kidding; that is what a lot of legal writing is like. Then the Chief Justice wrote this, “‘When you got nothing, you got nothing to lose.’ Bob Dylan, “Like A Rolling Stone,” on *Highway 61 Revisited* (Columbia Records 1965).”¹

So I consulted a law professor, Alex B. Long at the University of Tennessee, to try to put this into context for readers of the *New York Times*. Professor Long is perhaps the nation’s leading authority on the citation of popular music in judicial opinions. (You have to carve out a niche where you can find one, right?) He said this was almost certainly the first use of a rock lyric to buttress a legal proposition in a Supreme Court decision. “It’s a landmark opinion,” he said.

By the way, according to a study he did, Bob Dylan is by far the most cited songwriter in the lower courts; he has been quoted in twenty-six opinions. Paul Simon is next, with eight (but twelve if you count Simon and Garfunkel), and Bruce Springsteen has five.

Chief Justice Rehnquist cited his beloved Gilbert and Sullivan in a 1980 dissent from a decision on whether the press has a constitutional right of access to court proceedings, *Richmond Newspapers, Inc. v. Virginia* (1980). Before I was a reporter, I was a lawyer, so I cared about trying to get into closed court proceedings. To my mind, Justice Rehnquist was on the wrong side of this.

The point he was making is whether it’s a good idea or not to have access to court proceedings; it’s hard to find that right, he would say, in the First Amendment. He said that the majority had made up that right out of whole cloth, and so he cited Gilbert and Sullivan’s *Iolanthe* to rebuke the majority, in which the Lord Chancellor says,

The law is the true embodiment
of everything that’s excellent,
It has no kind of fault or flaw.
And I, my Lords, embody the Law.²

Now, that made Chief Justice Rehnquist’s point pretty well.

The Roberts citation of Bob Dylan is a little more problematic. On the one hand—I hope you agree with me—he showed excellent taste. “Like a Rolling Stone,” as music critic Greil Marcus has

written, is “the greatest record ever made, perhaps, or the greatest record that ever would be made.”³ On the other hand, Chief Justice Roberts got the citation wrong, proving that he is neither an originalist nor a strict constructionist. You may remember that he quoted Dylan as singing, “When you got nothing, you got nothing to lose.” Those of you who know “Like a Rolling Stone” know what Dylan actually sings is, “When you ain’t got nothing, you got nothing to lose.”⁴ It’s true that many websites, including Dylan’s official one, reproduce the lyrics as Chief Justice Roberts does, but a more careful Dylanologist might have consulted his iPod.

POPULAR CULTURE AND THE SUPREME COURT

So, we have a very fresh court these days. For the last eleven years of the Rehnquist Court there were no changes; it is the second longest period without changes in the Supreme Court history. Until Chief Justice Rehnquist died in 2005, they were together in a single block for eleven years straight; and then since then, in the last six years, we’ve had four changes. We had Chief Justice Roberts, and then Justice Samuel Alito for Justice Sandra Day O’Connor, and more recently Justice Sonia Sotomayor for Justice David Souter, and Justice Elena Kagan just now for Justice John Paul Stevens. So, there has been a lot of turnover, and a lot of these people are younger.

Not long ago, Justice Alito, who came on board in 2006 and was the second appointee of President George W. Bush, went the Chief Justice one better. He cited a song in a case concerning a fringe religion named Summum. You probably don’t know anyone who practices Summum, but it’s a religion out in Utah, and they wanted to put up a monument to their Seven Aphorisms next to a Ten Commandments monument in the city park.

It raises a pretty interesting question: If the government is going to allow a Ten Commandments monument in the city park for one religion, why not have the Seven Aphorisms of Summum next to it? The question in the case was whether the Ten Commandments conveys a religious message. Justice Alito, who must have taken some French literary theory in college, tried to demonstrate that it did not. But he is a lawyer, so he used an analogy. He wrote, “What, for example, is ‘the message’ of the Greco-Roman mosaic of the word ‘Imagine’ that was donated to New York City’s Central Park in memory of John Lennon?” Some observers, and these are his quotation marks, “may ‘imagine’ the musical contributions that John Lennon would have made if he had not been killed. Others may think of the lyrics of the Lennon song that obviously inspired the mosaic and may ‘imagine’ a world without religion, countries, possessions, greed, or hunger.” Then Justice Alito dropped a footnote, and he quoted the complete lyrics of “Imagine.”⁵ Justice Alito may well be right that you can never really tell what a set or words means, but that is a curious position for a judge to take. After all, judges spend their days making pronouncements about what statues and the Constitution mean.

There was another notable Justice Alito trend last year; he seemed to develop a fixation with cable television programming. In an argument with a Supreme Court advocate—advocates typically gets asked all kinds of crazy hypothetical questions—about a law that made it a crime to sell videos of dogfights, Alito asked whether the government could ban a human sacrifice channel. “I mean, people here would probably love to see it. Live, pay per view, you know, on the Human Sacrifice Channel.”⁶ Three months later, in an argument over whether the government owns newly restored beaches that had been threatened by erosion, Justice Alito worried about what would happen to former beachfront property owners. He said, “You could have televised spring-break parties in front of somebody’s house.”⁷ So, you have the Human Sacrifice Channel, the Spring Break Channel: one million-dollar cable idea after another.

Now, coming up this term is the case I mentioned before, called *Federal Communications Commission v. Fox Television Stations*, about fleeting expletives and nudity. The case arose mostly from events at awards shows. It seems like celebrities can’t accept an award without dropping what some people might call the F-bomb. So, Bono from U2 accepts an award and says, “This is really, really, f***ing brilliant,” and Nicole Ritchie and Paris Hilton have some back and forth about getting cow dung out of a purse—but that’s not what they call it—and singer Cher, on receiving an award, says to her critics, “so f*** ‘em.”

It used to be thought that the Federal Communications Commission (FCC) could regulate indecency on television on the theory that a broadcast television is uniquely pervasive and that children could be assaulted by it—at least when it’s a long, sustained, ongoing kind of monologue, as in a famous case from 1978 involving comedian George Carlin, *Federal Communications Commission v. Pacifica Foundation*. Carlin had a very funny, very raunchy monologue about the seven words you can’t say on television. He turned out to be right. When the Court said the FCC could regulate and ban and fine the station that ran that monologue, it was a different world; and Carlin had specifically set out to test how far you could go. However, with fleeting expletives, which might get bleeped in time, it seems to be a slightly different question.

The second element in this case involves *NYPD Blue* and a woman’s rear end, and whether that crosses some kind of line. It’s really hard to know when that line is drawn, because there is nudity in *Schindler’s List*, there is profanity in *Saving Private Ryan*, and it’s a little hard to know whether you want the government deciding exactly where the line goes.

As is common with the Supreme Court, cases come up again and again in various permutations. A version of this FCC case has already been to the Court, and it was a really fun argument. In particular, I liked when a government lawyer warned the Court that “the world the networks are asking you to adopt here,” where the networks are free to use expletives, would include the extreme example of “Big Bird dropping the F-bomb on Sesame Street.”⁸

Here, I want to just give you a flavor of what the arguments are like. The justices are very able lawyers, very smart people, but sometimes a little goofy; sometimes they are trying out ideas that don't make it into the opinions, and you can see how their minds work. Justice Stevens, who just retired, said he might use a novel approach for judging indecency. He asked whether it's ever appropriate to consider whether the particular remark was "really hilarious" or "very, very funny." Should that enter the legal analysis? To which Justice Scalia said maybe that is the standard; "Bawdy jokes are okay if they are really good."⁹ The justices three years ago essentially kicked the can down the road, and this time it's going to be harder for them to avoid confronting the core First Amendment issue.

The basic idea you start with in the First Amendment is that we ought to be very skeptical about the government regulating speech. The First Amendment says, "Congress shall make no law abridging the freedom of speech." That may not be absolute, but the basic idea is that it's not up to the government to tell people what to say or to tell us what to hear. The theory behind the George Carlin case makes less sense today than it did back in 1978, because in 1978 (and I was there, I can tell you) there were three channels on TV. Broadcast TV was really broadcast—you put your rabbit ears up, and it came over the air, and it really was uniquely pervasive.

These days, the government still regulates the broadcast channels, which are just a handful of channels on your cable dial, and it does not regulate the other 200 or 800. So, as you flip through the dial, you are going in and out of government regulation zones in a way, and you don't even know why. That's to say nothing of the Internet, which is entirely unregulated. So you have to wonder whether the justification for the George Carlin case still makes sense when it regulates one little area and does not regulate all sorts of areas. The government's comeback, which is not terribly persuasive to me, is that there are people in the world who still only get broadcast TV—seventeen million households, maybe? Not a small number, but a relatively small number; and these people may actually seek it out in order to protect their children from profanity on TV. It would be a big step for the Court to say that this amendment prohibits regulation of broadcast television, but this is a Court that has been very, very strong on the First Amendment.

Say what you will about the Roberts Court—and I say lots of things about it—but it's a very tough pro-First Amendment court. It allowed hateful protests at military funerals in *Snyder v. Phelps* (2011), it struck down the federal law I mentioned about trafficking and depictions of animal cruelty in *United States v. Stevens* (2010), and of course, in *Citizens United v. Federal Election Committee* (2008) it struck down a federal law barring corporations from spending money in candidate elections. This last term they also struck down a California law that banned the sale of violent video games to minors in *Brown v. Entertainment Merchants Association* (2011). So you see this real strong march in the First Amendment area, and that would seem to suggest to me that the Court might strike down government

regulation of broadcast television.

But let's go back to music for a second. The last citation I want to talk about is in a case that reached the Court last year called *City of Ontario v. Quon* (2010) about a hot new technology: pagers and beepers. The Court is a little slow sometimes; things wind their way up through the legal system, so that tells you something about how fast technology is outrunning the law. The case involved a police SWAT team member who thought it was a good idea to send sexually explicit text messages to both his wife and girlfriend on his government-issued pager. The question in the case (a fairly hard question) was whether his employer, a government agency, was allowed to inspect those text messages and take disciplinary employment action against him for being a knucklehead.

The majority, and this tells you something about the Court, too, did not really decide what the answer was. (Remember, I said they kicked the FCC case down the road a couple years ago, too?) Justice Antonin Scalia—who is a very forceful, funny, self-confident man and a good writer on the Court—hates when the Court issues a decision and nobody really knows what it means, and the lower courts don't get guidance, and the lawyers don't get guidance, and future litigants don't get guidance. So he wrote, “The-times-they-are-a-changin’ is a feeble excuse for disregard of duty.”¹⁰ Now, there was no citation, but I say, let's chalk up one more for Bob Dylan.

I mentioned that this last term the justices turned their attention to video games in *Brown v. Entertainment Merchants Association* (2011). Here, too, you look at the Bench—they are not young; some of them are in their seventies and eighties—and you wonder whether they really understand what video games are or how they are played. Again, the question was, how does the First Amendment apply to this new medium? At the oral arguments, they tried to reason through analogies: Are they like books? Are they like films? Are they like cartoons? Are they like comic books? Are they like fairy tales? They argued about what the drafters of the Bill of Rights would have made of the video game *Postal 2*. They worried about whether it made sense to extend, for the first time, principles allowing government regulation of depictions of sex. The Court said the First Amendment does allow for the regulation of obscenity. However, the originalists on the Court—the judges who believe in trying to figure out what the Constitution meant when it was adopted—made the point (a pro-First Amendment point, assumedly) that the framers never thought that the government had the power to regulate depictions of violence and that they were wary about going further.

Plus, the California law was very vague. It defined violent video games as those, “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being.”¹¹ So there is a question in the argument, what about a Vulcan? Is a Vulcan a human being? The answer is no. They argue that in a way these games are patently offensive, appeal to minors' deviant or morbid interests, and lack serious literary, artistic, political, or scientific value. Justice

Scalia asks, “What’s a deviant video game? As opposed to what? A normal violent video game?”¹² He then made the point about how there have been depictions of violence in literature since forever. He said, “Some of the Grimm’s fairy tales are quite grim. Are you going to ban them, too?” At the same time, Justice Alito, also conservative, but not so much an originalist, made fun of Justice Scalia. He said, “What Justice Scalia wants to know is what James Madison thought about video games.” Scalia responded, “No, I want to know what James Madison thought about violence.”

Justice Elena Kagan, who just joined the Court and is its youngest member, seemed to be the only justice with even a passing familiarity with video games. She asked the lawyer for the state of California, “[do] you think *Mortal Kombat* is prohibited by this statute?” She said, “It’s an iconic game which I’m sure half the clerks who work for us spent considerable time in their adolescence playing.” Here again, the Court comes out on the pro-First Amendment side by a seven-to-two vote. They say that video games are protected like every other form of—I was about to say “art;” let’s say “communication.” They compare video games to “books, plays, and movies,” in that they “communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world),” as Justice Scalia wrote for the majority.¹³

There was an argument in the case that even the dissenters didn’t really buy. Video games are different from, say, reading a book because you are a participant in it; you alter it. Maybe that is a reason for allowing the government to regulate video games. Or, as Justice Clarence Thomas said in dissent, maybe the point is that the statute was aimed at children, and maybe the government should take a more active view of children. Here, again, the concern was with everybody under eighteen. It was very unclear what games were being discussed, but some of the games really were fairly gruesome. Justice Alito described one of them where players attempt to fire a rifle into the head of President Kennedy as his motorcade passes the Texas Schoolbook Depository. That is not pretty. This ruling demonstrates that the Court takes freedom of speech seriously. Maybe they also take seriously that just because it is allowed does not make it good, that parents have a role in monitoring this stuff, but that you want to be wary of the government telling people what they can and cannot see.

THE UPCOMING SUPREME COURT TERM

I thought I would now move out of the pop-culture stage of this stuff and give you a little bit of a sense of what is coming up this term in addition to that FCC case. It’s a decent term so far. They come back on the first Monday in October. They have so far accepted about forty cases for review. They will, by the end of the term in June, probably decide—if history is any guide—seventy-five to eighty cases. There is some hope in the press corps that they will take some really big cases, really good front-page

kind of cases, like health care or immigration or same-sex marriage or affirmative action in higher education. Some of those cases are percolating up and may be just on the cusp – just on the horizon – but not there yet. I’m going to tell you a little bit about the cases they have agreed to take.

One of them involves, again, how fast technology is moving, and how old legal concepts do not always marry well with the new technology. Thirty years ago, the Court had a case, *United States v. Knotts* (1982), that asked whether the police, while tracking a bad guy, could put a beeper into a canister that the bad guy then loaded onto a truck and allowed the police to track this guy for a hundred miles from Chicago to Wisconsin. The beeper basically sent out a signal and as you got closer, it got stronger; and as it got farther away, it got weaker. The Court said that did not violate the Fourth Amendment, which bans unreasonable searches and seizures and requires the police to get warrants.

The modern day version of this question is what happens if the police put a global positioning system (GPS) tracking device on your car; sit back at their computers for a month; and look at every single place you visit—every bar, church, drug sales point, mistress, etc.—and collect all the data on your car’s whereabouts. Do they need a warrant for that? Do they need a judge’s permission, or can they do that to every single citizen? That is a really interesting question. On the one hand, the old case kind of suggests that using a GPS unit is not very different from using the beeper; on the other hand, it’s a lot more information. The courts have really disagreed about whether this is just sort of enhancing the ability of police to track people, the way they always could anyway since you’re in public driving around, or is the amount of information being gathered different in kind. That is, is this a question of difference in kind rather than difference in degree? This interesting case is called *United States v. Jones*.

A second criminal justice case is *Florence v. County of Burlington* and asks the question of when is the government allowed to strip search, which is very humiliating. The Court has said, twenty or thirty years ago, that if you are already in jail or prison and you have a contact visit with somebody from the outside, then the warden can strip search if he considers it necessary. Now the question in the upcoming case is what about institutions that have the policy of strip searching everybody brought into the system, even if just overnight, who is arrested for anything? Should you be allowed to strip search them without any particular reason to think they have contraband or weapons? We are talking about people arrested for things like driving with a noisy muffler or walking their dog without a leash. Can every single one of those people be strip-searched?

One of the judges looking at the old case—judges always reason by referencing older cases—might say, “Well, if a strip search after a contact visit is ok, someone who was arrested just had a contact visit with the whole world.” I’m not sure how that comes out. For both the GPS and the strip search case, it’s important to note that the Roberts Court tends to give discretion to law enforcement; it tends not to want to interfere with these matters. However, you can see how some ideas about the Fourth Amendment

and the limits of the government's ability to keep track of you—search you, follow your movements—could be under stress.

There is a case to be argued in just a few weeks called *Maples v. Thomas* that involves a guy named Corey Maples who is on death row in Alabama. Maples has what at first looks like really good luck. He gets one of the biggest law firms in the world, Sullivan & Cromwell, to represent him. Sullivan & Cromwell assign two associates to his case, they put in some papers, the court takes a long time to rule, the court issues a ruling, the ruling gets sent up to Sullivan & Cromwell in New York, but the associates have left the firm and the mailroom says “return to sender.” It goes back to the courthouse in Alabama, the clerk puts it in a drawer, and then Maples's time to appeal expires. Though he has some decent arguments on appeal, the courts have thus far said, “tough luck,” your lawyers blew it, therefore you blew it, and therefore you die. That is a variation on a theme the Court gets all the time, and the Court's basic impulse is to say that the lawyer is the agent of the client and what the lawyer gets wrong gets imputed back to the client. So tough luck, even if it means execution. Now, I think this is a particularly harsh result. The Court probably decided to take the case to do something for Maples; at the same time, it's fairly hard to run a legal system where you can't figure that the lawyer's actions count. However, it does strike me that that's a very harsh result simply because a mailroom mixes something up.

Let me talk for a second about some cases on the horizon. The big case, the one everyone cares about, is what happens to the Patient Protection and Affordable Care Act. We have now had opinions out of three different courts of appeal; they have all gone in different directions. One of them, the Eleventh Circuit Court of Appeals in Atlanta, has struck down the core part of the health care law, the individual mandate; everyone thinks, probably correctly, that the Supreme Court will hear the case and decide whether Congress has the power under the Commerce Clause to require people to buy a product, in this case, health insurance. The question is in a way two questions: when and what is the result?

The Court generally agrees to hear cases for one of two reasons. The Court gets about 8,000 requests a year asking it to please hear a case, and it gets to decide which cases to take—and as I said before, they decide about eighty. So they take about one in one-hundred of the cases they receive, and their criteria for taking them tend to be whether it is really important and whether there is a difference of opinion in the lower federal courts of appeal. As for this one, obviously, it's very important, and yes, there is a difference in the lower federal courts of appeal. So I think that the Court is likely to take the case soon.

Also pending is a case out of the Federal Court of Appeals of the Sixth Circuit in Cincinnati; I don't think the flavor of that case is what the Court wants because it's a case that upheld the law. The case the Court wants is the Eleventh Circuit case, and the government may ask the full court to hear it. You have to wonder what exactly the Court wants to do regarding it. If they agree to hear the case soon, they

will almost certainly decide it around June of 2012 which, of course, is in the very heart of the presidential election campaign. It's not completely clear to me if the Court wants to be an active player in the political scene that way, or whether it would be likely to slow walk this a little bit. There are a lot of people who think it's important to get an answer right away. There is a lot of advance work being done getting ready to comply with the law, but the individual mandate does not kick in until 2014, so the Court would have some time to give us an answer that is still consequential if it didn't decide it this term.

As for how it comes out, it's one of those cases (one of many cases) where it would not be hard to write the opinion either way. If you look at the original text of the Commerce Clause, it's probably pretty clear that the framers of the Constitution did not envision Congress having this particular power. If you look at Supreme Court precedent in this opinion, much of it has been quite relaxed about how little activity it takes for Congress to regulate commerce. If you were to count up the votes of the justices based on the views they have expressed on this question in similar cases, much of the legal community thinks the odds are that the law is will be upheld five to four or six to three. Though as I said, it's such open territory that it would not be hard to write the decision in either direction.

The Arizona immigration law (often referred to as Arizona SB 1070) is another case that is questionable whether or not the Court wants to hear this term. Arizona has a law that is very aggressive in policing illegal immigrants. In the eyes of the federal government, it is too aggressive and goes too far in requiring police in all sorts of settings to identify whether someone is in the country illegally or not, so the Obama administration has sued Arizona. That case is likely to be taken by the Court.

You have probably been following same-sex marriage. There are two flavors of same-sex marriage cases. One of them in California is the famous case brought by the prominent lawyers Ken Olsen and David Bois, who have so far persuaded a federal district court judge to strike down a California ballot initiative that had banned same-sex marriage there. That case is kind of winding around through the courts and I think supporters of same-sex marriage should want that to take its time and should not want that to be the first case to reach the Court. Rather, supporters should want some intermediate question that is not as difficult or controversial to reach the Court first.

The Defense of Marriage Act (DOMA) cases are over a federal law that says the U.S. government won't even recognize same-sex marriages that are validly entered into in places like Massachusetts and New York where they are legal under state law. In the DOMA cases, the question is whether you should get federal benefits if you are married under state law. That seems to be a much easier question for someone like Justice Kennedy to say, "listen – marriage is basically a state law thing, why should somebody validly married be treated differently in a different state." An argument like this one is simpler to deal with than the California issue, where the voters have said we do not want same-sex marriage, but where depending on the ruling, the Court may have to make the controversial ruling that the Constitution

requires you to have it. However, with those cases it is not clear which one will make it to the Court first. Eventually, it will matter a lot which one gets taken by the Court first, but probably neither of them will get there in this term.

What might get there this term is affirmative action. About eight years ago in *Grutter v. Bollinger* (2003), the Court upheld the consideration of race in public university admissions decisions, so that public universities are allowed to take account of race—so long as it’s in a holistic sense. This means that there won’t be a quota by race, rather race is just part of the mix. What universities can basically say now is, “we like diversity and we’ll take account of all different factors, including race, but not so much so that you can tell exactly how much we put our thumb on the scale.” The now-retired Justice Sandra Day O’Connor said at the time that that was okay, but that we’ll need to revisit this case in about twenty-five years. I think we will probably revisit it a little bit sooner. Furthermore, Justice O’Connor was replaced by Justice Alito and he almost certainly has a different attitude about affirmative action than she did. A case out of Texas, *Fisher v. University of Texas*, presents this question again. Texas has largely a top-ten system, meaning if you are in the top ten percent of your high school class, you can get into the University of Texas System. However, that does not account for every spot, and for the remaining spots, they still pick applicants partly on the basis of race.

So, when I did my end-of-term wrap-up of the previous term in June, I quoted someone who predicted, somewhat optimistically, that this next term (which starts in a week or two) could be the “term of the century.”¹⁴ Well, it could be, but we need for one of these cases to land, otherwise we just have the cases I mentioned, which are okay cases –they are probably a little better than last year—but they are not monumental, term-of-the-century material.

COVERING THE SUPREME COURT

Let me say a little bit about what it’s like to cover the Court, and then I’ll turn to your questions. It’s a weird beat; it’s almost nothing like... I was about to say, “real journalism.” When I started at the *Times*, I had been a lawyer and did not really have the training to do the job I’m now doing. I was on the reporting staff and was covering the law for the national desk when I said to one of the reporters who had won a Pulitzer Prize and really knew what he was doing, “Sam, what am I doing?” He said, “It’s easy. You call people up on the phone and you write down what they say.” I thought, well, I can do that. All I have to do is find the right people and get them to talk to me. That is not really a bad description of what a lot of journalism is. It’s trying to get people to tell you stuff.

In the case of the Court, though, there is almost none of that. You are basically looking at the public acts of the Court and you are trying to make sense of them and translate them on tough deadlines for an educated readership, but not for legal wonks. You need to try to find the right level of

conversational generality that makes the Court—a very, very important institution—accessible for people. You have to get it right, but you can't be dull. And you write really fast about arguments, about decisions on whether or not to hear cases, and about the decisions themselves. People, you know, will often say, "Oh, that must be so hard when the decision comes down—it's long, it's technical." I respond, "Yeah, really hard." But I think they miss the point in a way, because by the time you write the article on the final decision, you will probably have already written once on their decision to hear the case, once after the argument, and once after reading all the legal briefs.

Very often in a big case you will do one or more set-up pieces, where you try to introduce people to the characters and legal issues in the case. Following this process makes it so that by the time the decision comes down, you really ought to be in very good shape to understand what is going on. You probably have a fairly good idea of how the Court is likely to decide, you may be able to suspect which justice will write the decision. This makes the job a lot easier, although at the end of June, when there are four major cases coming down simultaneously, that is not so great. Generally, though, the typical decision story is the easier story.

These days, we also have the justices out and about and making comments and writing books. And that is good, it seems to me. In part, it demonstrates that it's not the hardest job in the world that they have: deciding seventy-five cases between nine of them. It used to be, twenty years ago, that they decided 150 cases; now they have time to go out and make speeches and so on. I guess what I'm trying to say is that covering the Court is a sort of low-rent scholarship composed on a punishing deadline and compressed into 700 or 1100 words, and you are trying to write for two audiences, each of them demanding in their way. One is made up of specialists who rightly expect the *Times* to have accuracy, doctrinal context, and a sense of the consequences of a given decision. That is often the hardest one; you get a decision and the editor says, "Well, what does this mean for ...?" I don't know. The second readership is the one I mentioned: the educated readership that follows the Court only lightly, but cares deeply about it. This demographic includes a lot of practicing lawyers. Those readers want articles that are accessible and that don't get lost in the weeds. It would be hard work either way, but satisfying two constituencies simultaneously is a constant challenge.

I want to add a slightly heretical notion and one that probably cuts against my own self-interest. I think we pay too much attention to the Supreme Court. The Supreme Court is to the judiciary as the death penalty is to criminal justice. It's very important, but it's not the only important thing. We execute maybe fifty people a year, and yet we have two million people in prisons and jails—almost ten percent of them serving some form of life sentence. We have, in absolute numbers and as a percentage of our population, more people in our prisons and jails than any other country in the world. We are vastly more punitive than any place else, including places that you probably would not want to be arrested. The death penalty

consumes a lot of resources and attention—and I’m not saying it’s not important—but it’s fifty versus two million. Getting a life sentence is no picnic, and if you get a life sentence, no one is ever going to pay attention to you again. So it is not uncommon—and not common, though it happens with some regularity in the South—where someone is convicted of a capital crime and says to the jury, “I’m innocent. Please, please, please sentence me to death because that’s the only way people will continue to pay attention to me. If you sentence me to life in prison, that’s it—I’m done.” The numbers bear this out. Two-thirds of capital cases are overturned; ten percent of life sentences are overturned. Pro bono lawyers, journalists, the judiciary—they all focus on the death cases and not on what can also be very, very hard cases.

That is half the analogy, and the other half of the analogy is that the Supreme Court decides perhaps seventy or eighty cases a year, but only a handful of them are of any real consequence. Most Supreme Court cases are not very important and not very interesting. Most of them are about what a federal statute means, about some individual word in a federal statute. Take, for instance, the Armed Career Criminal Act of 1984. Is it a violent felony under the act for you to drive your car and have the police chase you? Okay, I guess we need an answer, and the lower courts have disagreed; but it’s not earthshaking. Compare this to some federal appeals court, say in the Ninth Circuit, which covers maybe 100 million people and can issue a really, really important decision that does not get the attention it deserves, because it’s not from the Supreme Court.

I also labor under the belief that it ought to be okay to have a little bit of fun on the job; the Court takes itself awfully seriously, and for good reason. The Court’s power flows almost entirely from its prestige. They don’t have an army, they don’t have much of a budget; it’s not entirely clear why we do what the Supreme Court tells us to, but everybody does. Anyway, you try to bring a little bit of life to the enterprise.

NOTES

1. *Sprint Communications Company v. APCC Services, Inc.*, 554 U.S. 269 (2008), at 301 (Roberts, dissenting).
2. *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), at 604 (Rehnquist, opinion of the Court).
3. Marcus Greil, “How Does It Feel?” *The Guardian*, May 13, 2005, Friday Review Section p. 4.
4. Bob Dylan, “Like A Rolling Stone,” on *Highway 61 Revisited* (Columbia Records 1965).
5. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009), at 474 (Alito, opinion of the Court).
6. Supreme Court oral arguments in *United States v. Robert J. Stevens* from Oct. 6, 2009, http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-769.pdf.
7. Supreme Court oral arguments in *Stop the Beach Renourishment v. Florida Department of Environmental Protection* from Dec. 2, 2009, http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1151.pdf.
8. Supreme Court oral arguments in *Federal Communications Commission v. Fox News Stations* from Nov. 4, 2008, http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-

- 582.pdf.
9. Ibid.
 10. *City of Ontario, California v. Jeff Quon*, 560 U.S. ____ (2010), (Scalia, concurring).
 11. California Civil Code § 1746 – 1746.5 (Violent Video Games).
 12. Supreme Court oral arguments in *Arnold Schwarzenegger, Governor of California v. Entertainment Merchants Association* from Nov. 2, 2010, http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1448.pdf. This case would later become titled, *Brown, Governor of California v. Entertainment Merchants Association* (2011).
 13. *Edmund G. Brown, Jr., Governor of California v. Entertainment Merchants Association*, 654 U.S. ____ (2011), (Scalia, opinion of the Court).
 14. Adam Liptak, “A Significant Term, with Bigger Cases Ahead,” *New York Times*, June 28, 2011, p. A12.