The Arlin M. Adams Center
FOR LAW AND SOCIETY
Susquehanna University

ARLIN M. ADAMS CENTER FOR LAW AND SOCIETY
CELEBRATE CONSTITUTION DAY

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THE MEMBERSHIP, ROLE, RESPONSIBILITY AND DECISIONS OF THE UNITED STATES SUPREME COURT

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Before: Sarah C. Thomas, RMR
Reporter-Notary Public

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MR. SOBEL: Good evening. I am Allan Sobel, the director of the Arlin M. Adams Center at Susquehanna University. Welcome to this program on the United States Supreme Court.

Next week on Wednesday, the 17th of September, we celebrate Constitution Day, the day when the signers of the constitution approved the document and brought to life the fundamental law of the United States that, to this day, has governed our activities as a nation and most particularly the actions of our government toward us as citizens. It is a great day in American life.

And during the week of September 17th, we are very proud to have Justice Samuel Alito visiting our campus on Monday evening at 7:30 to talk about Constitution Day and also to reflect on the contributions of two very important people in the life of Susquehanna University and really in the lives of all Americans, Arlin Adams and his wife, Neysa Adams. They have done great things for this University and have made possible the Center that I am the director of and are making possible the creation of a pro se assistance and mediation clinic that will be opening within the next few weeks.

Tonight we are very pleased to have two scholars on the United States Supreme Court that will give us a fundamental understanding of the role and responsibilities, the duties, the membership, and the recent decisions of the Court. This will enable those who are in attendance next week, when Justice Alito is here, to better put in context his responsibilities as a member of the United States Supreme Court.

A member of the United States Supreme Court, what does that mean? Well, for those of you who have not made a career choice -- thinking now of our students who are here -- it's a gig that you might want to consider. Think about the fact that when you are appointed, you are appointed for life. Some of our Justices, like Justice Thomas at age 43, were appointed and confirmed at relatively young ages. While 43 may to our students seem like somebody who is quite ancient, in reality he could well sit on the Supreme Court for 40 years.

The salary is certainly not that of a great athlete or a rock star, but it isn't bad. It's a little bit in excess of $200,000 a year. You have beautiful offices in the Supreme Court Building in Washington, D.C. You are escorted wherever you go by the United States Supreme Court Police, who ensure your safety.

Oh, and maybe the three best things about the job are July, August, and September, because you have those months off. The Court typically winds up its business in the month of June near the end and doesn't come back into session until the first Monday of October, so you are free to do just about anything you want during those three months off.

While the workload is fairly intense because the cases that you have to consider are some of the most important cases to the American public, unlike judges who toil in our state courts, you have five law clerks. Now, these are people who are graduates of law schools, typically the top tier law schools, who have proven themselves to be excellent scholars, excellent legal researchers, excellent legal writers, who will help you research the law and draft your opinions.

Well, how many opinions do you have to write? If you were a judge in a typical state court in an urban environment that handled traffic or petty criminal cases, say in Philadelphia, in one good day, and certainly in two, you would decide as many cases as the United States Supreme Court decides in an entire year. In recent years the United States Supreme Court has elected to decide only between 80 and

90 cases a year.

Now, when I say, "elected," what do I mean? What I mean is that, for the most part, the Court's decision whether to hear a case is discretionary. Petitions for review are filed with the United States Supreme Court and four Justices have to agree to grant what is known as certiorari for the case to be considered on the merits and decided by the Supreme Court.

So if you have a body of, let's say, 80 cases, you have nine Justices, on average each Justice is going to write about eight or nine majority opinions in the course of a year. Those opinions, again, are not going to be written initially by the Justice. They are going to be written by law clerks.

So, all in all, it ain't a bad gig. It's something to think about. It's something to consider.

The Supreme Court has nine members and those nine members have typically varying ideologies. Whether it's accurate or not, commentators like to put them in different boxes. They will tell you that today there are five liberal and four conservative Justices or four liberal and five conservative Justices, depending on how you categorize Justice Kennedy.

The interesting thing is that there is a division on the Court and one Justice can make a whale of a difference in the outcome of cases that are decided by the Court which impact every American citizen. We are talking now about constitutional decisions that define our rights as American citizens. That's why the Court gets such notoriety and such press, because when they decide a case, unlike the local court, a state court, they are making a decision that impacts every one of you in your daily lives, in your interactions with police, in your interactions with school administrators, in your interactions with municipal government, in your interactions of every nature, type, and description between you and the government.

Before I introduce our speakers and turn this program over to them, I just want to give you an example of how one Justice made a huge difference in the Court's decision making and the Justice I want to pick out is Sandra Day O'Connor. By the way, for those of you who don't know, it was the retirement of Sandra Day O'Connor which ultimately led to the nomination and confirmation of Justice Alito, who will be with us on Monday. Justice Alito took over Justice O'Connor's seat in January of 2006.

But whether you look at abortion, whether you look at affirmative action, whether you look at church and state relations, in every major area of American life Justice O'Connor, who, by the way, was the first and one of only two women to ever sit on the United States Supreme Court, was the key deciding factor in how the case came out.

I want to introduce you to our two speakers. As I mentioned before, we are very fortunate to have them.

To my immediate right is Professor Margaret Williams. Professor Williams has taught for some time at Goucher College. She left the college to conduct research at the Federal Judicial Center in Washington, D.C.

The Federal Judicial Center is the think tank for the federal judicial system. It is the group of scholars who gather together and look at key issues affecting our federal courts and decide what recommendations they will make to the Court to improve the administration of justice in our federal judiciary.

The project that she is working on today concerns how attorneys are appointed to represent defendants in capital cases, in cases where they are exposed to the death penalty. As any of you who read the papers or follow in the media the problems with death penalty cases would know, inadequate representation has proven to be a bugaboo which has led to numerous convictions in capital cases being overturned.

Prior to joining the Federal Judicial Center her scholarly interest had been primarily in federal judicial selection, selection of Supreme Court Justices, and procedures of the federal courts.

To her right is Professor Mark Rahdert. Professor Rahdert is the Klein Professor of Government and Law at the Beasley School of Law at Temple University. For those who follow Supreme Court decisions in the press, you would know that he is a nationally recognized authority on the decisions of the Supreme Court. He is one of the go-to people that the media likes to call upon to interpret why the Court decided a case a particular way and what the intended and unintended consequences of the decisions of the Court may involve.

It's a pleasure to have both of them here. I ask that you join me in welcoming them to our program.

I now call upon Professor Williams.

PROFESSOR WILLIAMS: Well, thank you for inviting me to speak with you tonight about the Supreme Court. I'm sure at least on a college campus on a Thursday night there is probably one or two other things for you to be doing.

I would like to spend a little time talking about the structure of the Supreme Court within the judicial hierarchy, as well as how the members of the federal judiciary are chosen, with specific emphasis on recent confirmations to the Supreme Court. As many of you know, but some may not, the Supreme Court is the highest court in the United States. And while it's like most other courts in a lot of aspects, in some it is quite different.

The Court not only functions with its system of power separated from the branches of government, but power is also separated within the judicial branch, so the Court acts within a system that includes the lower federal courts and state court systems, as well.

Unlike the coequal branches of government, at the federal level the power is not equal within the judiciary. The Supreme Court is clearly the most powerful institution in the U.S. political system, but the Court can't hear every case. As Allan mentioned earlier, they are only taking about 80 cases a year out of about 8,000 plus petitions they are getting from lower courts. So it would be difficult to say that they are the only important political actor, but they certainly have the most authority.

If the Supreme Court does not take the case up from the lower court, the decision of the lower court stands, making it essentially the final court to hear that case, as well.

So where do the 8,000 petitions come from? As the slide shows, the federal system includes the District Courts at the bottom and then the Courts of Appeals and finally the Supreme Court. There is between one and four District Courts in each state and these courts are called triers of fact. They determine things like guilt or innocence and liability, for example, in a civil case.

After the District Courts are the Courts of Appeals and there are 12. They are referred to as Circuit Courts on occasion. Each circuit is made up of three or more states with the exception of the

D.C. circuit. Pretty much everything I say with a sentence beginning with D.C. is the exception. It always works a little bit differently.

The Courts of Appeal are called triers of law. This means that they determine the fairness of the process, whether there has been some violation of due process or procedure. Most other cases will be heard then at the state court. The state courts may be the only court system where a case is actually heard.

It may sound simple, but federal courts hear cases involving federal law and state courts hear cases involving state law. They don't usually overlap, but there are exceptions. If a state case raises an issue of federal law it can be taken to federal court after going through the state process. If there is no issue of federal law, the federal courts do not have jurisdiction to hear it.

With the Supreme Court, for example, Article III of the Constitution, the Court has both original and appellate jurisdiction. The original jurisdiction is clearly defined within the Article. It basically says that the Court is the first and only court to hear disputes between states, disputes between states and the federal government, cases involving diplomats. It's all very clearly defined.

Article III also mentions that the appellate jurisdiction of the Court, where the Court is going to be the second or third court to hear the case, is determined by Congress. And since the early 20th Century Congress has essentially said that the Court can take whatever cases it wants to hear. There are a few noticeable exceptions that the Court still has to take the lower court case.

Because the Supreme Court has almost complete discretion over its cases, who makes these decisions has become all the more important. Before discussing the selection of the Justices it should be pointed out that a relatively small number of full opinions by the Supreme Court is issued in any given year, so they are hardly the only important actor in the American political system. There are thousands of cases each year on which the Supreme Court takes no action, making the lower federal courts and, of course, the state court judges equally important for their decision making, as well.

With this caveat aside, I would like to use my remaining time to talk about the selection process for the Supreme Court Justices and how it's changed somewhat over time.

The Supreme Court is unique as a political institution because, while it makes public policy, its members aren't actually elected. I actually love this picture because they are not looking at the camera. I think it was caught in a moment where they weren't quite so serious.

In some areas of law not being an elected official can actually be a good thing. When school segregation was stalling in Congress and in the state legislature because it was too politically contentious for an elected official to deal with, the Supreme Court had both the power and the attention to address the issue.

While at the time the decision wasn't necessarily very well received, now we view the decision as a high water mark by the Court. If the Justices of the Court had been elected, in all likelihood they would not have taken the case. We can say that with a high degree of confidence because of what was going on in the state courts at around the same time.

Chief Justice Earl Warren, who was the author of the opinion, had calls for his impeachment, but the calls were neither the first nor the last time that the members of the Supreme Court sparked any kind of controversy. In fact, not only are the decisions of the current Court

controversial, but the selection of the Justices themselves has become very controversial.

So how did we get this body of people that we have today? People who serve on the Supreme Court are appointed by the President and confirmed by a simple majority of the Senate. They serve for life, pending good behavior, which is becoming especially hard to define in the lower federal court level. They can only be removed through the impeachment process. Congress determines the number of Justices and their pay and ultimately who is qualified to serve on the federal bench.

Currently there are nine members, but it has varied between six and ten. The number set as nine has stayed relatively constant over the last 140 years, so it's not likely any will be added to the Supreme Court any time soon. So any vacancy on the Court today is likely to be a result of a retirement, a resignation or, sadly, the death of a Justice.

When a vacancy occurs, as we saw in 2005, Congress, as well as the media and the general public, pay a lot of attention to who the President is going to appoint. Perhaps the most important characteristic for a President in choosing his or her nominee is the way that they think that the Justice is actually going to behave on the Bench. What their jurisprudence will be, how they will make decisions is also a very important consideration for the President.

We saw this quite clearly in the nominations of Roberts, Alito, and Breyer. Part of the Presidential legacy is measured by the President's ability to have an impact on the judiciary, to shape it in a liberal or a conservative direction, so it's become increasingly an important concern for a President, although it's interesting that we haven't heard a lot of discussion in this presidential campaign so far about as to what they would plan to do with the Supreme Court given a chance.

For the reasons that the nominees to the Bench, they have a potential impact on it, the nominees are getting younger and younger, Thomas being probably the best example of a being a very young appointee to the Supreme Court. It gives the President an even longer time to have a potential impact on the nature of the law.

In addition to the jurisprudence of the nominees, there are other concerns the Presidents may make in their appointments. Some Presidents are concerned with creating a more diverse Bench, either because of racial diversity or gender diversity and really just diversity among the Justices, as well.

So while looking for a Justice of a particular ideological persuasion, they are also concerned with choosing Justices from a certain demographic background. When Justice Marshall retired there was a lot of concern about replacing him with another African-American. When Justice O'Connor retired, she, among others, was vocal in her concern to have the President appoint another woman to replace her as her successor.

Above all in choosing a nominee, the President must consider whether or not the person that they are going to select will actually be confirmed to the Bench. While only a simple majority of the Senate is needed to confirm a nominee, this is much more difficult than it actually sounds.

Looking at some of the recent confirmations of Supreme Court Justices shows just how difficult this would be. These are the confirmation votes for most of the recent Justices to the Supreme Court.

As you can see, the pattern is not absolutely unique. Obviously there are quite some very close votes quite a while ago, but there is an increasing trend towards more negative votes or more votes against a nominee than we had seen in the past.

Of course, as you know, the more negative votes that you have, the greater the likelihood of a failed confirmation. In fact, about one in six nominations to the Supreme Court fails, which is a higher failure rate than any other presidential appointee, so there is a real chance that the person the President chooses is not actually going to end up on the Supreme Court.

There are a number of factors that can influence this likelihood. The characteristics of the nominee, as well as the circumstances under which they are appointed to the Court or nominated to the Court all play into whether or not they are actually going to be confirmed. If a President is facing a Senate that is of the opposite party, the likelihood of a confirmation is much lower. Presidents who are in the middle of an election cycle and Presidents who are on their way out of office are also less likely to see their nominees confirmed. And, of course, popular Presidents typically get what they want from Congress and unpopular Presidents do not.

As for the nominees, those who are rated as well qualified by the American Bar Association are more likely to succeed than those who receive lower ratings. There is also limited evidence that the demographic characteristics of a nominee may influence the confirmation process, as well, with Senators from states with large African-American populations being slightly more likely to support Justice Thomas.

Likewise, the nominees to the Bench -- and this is especially true of our current Court -- are increasingly pulled from the lower federal courts. Not only do they have a judicial record on which we can judge them, but they are also more familiar with the federal judicial experience and they may appear to Senators to be more qualified for the Benchsimply because they already know the federal process.

Perhaps the best example we have of this is the Miers' nomination. It's become a very entrenched norm. If you don't have lower federal judicial experience, you are not considered to be as qualified to serve upon a Supreme Court.

Finally, influencing the decision to confirm a nominee to the Supreme Court is the potential effect that the Justice is going to have on the ideological balance of the Court. Justices who are appointed to more moderate positions who might tip the Court in either a liberal or conservative direction have a much tougher time in the confirmation process than people appointed on either end of the political spectrum.

One way to forecast whether or not a nominee is going to be confirmed is to consider the hearings that the nominees must undergo before the Senate Judiciary Committee. All Justices since John Marshall Harlan in 1955, have answered questions of the Senators at these hearings.

While the nominees have refused to speculate on how they would decide cases that will come before them once they are on the Bench -- so cases that they know are working their way up from the lower federal courts -- they do answer questions about their past decisions, as well as questions about constitutional law. The interesting thing about these confirmation hearings is that some nominees answer far more questions than others. Additionally, some of the nominees answer questions that are a lot harsher in tone than some of the other Justices have in the past. That custom has changed actually over time.

I didn't have a chance to add the Roberts and Alito nominations, but I would say they both got a fair number of questions from the Federal Judiciary Committee.

Not only does it seem that they are asked more questions over time in total, but they are also being asked questions that are much more negative in tone than they had been in the past. What do I mean by a positively toned question or a negatively toned question? These are kind of typical cases that we coded as positive, negative or neutral and they are directed at past nominees for the Supreme Court.

Positive questions, we also refer to these as softballs. Senate Hatt asked Judge Rehnquist if he was embarrassed to find himself in agreement with two-thirds of the Judiciary Committee on one of his past decisions. Not exactly a heated debate over constitution law. Especially when you compare it to Senator Metzenbaum's question of Judge Bork on one of his past decisions that dealt with lead-based batteries and the effect on fertility of women, where he said, "This is such a shocking decision and I can't understand how you, as a jurist, would put women to the choice of work or being sterilized." He is not exactly in favor of this decision, as you can tell from that question.

The negatively toned questions were often asked in a very hostile manner. The neutral questions were not really pointed in either direction, but just asking a judge a little more generally about past decisions, such as Senator Heflin's question to Judge Souter just asking him to explain his legal opinion in a past court decision.

Part of what has made the confirmation process much more hostile is the activity of interest groups in the selection of judges. Beginning in the 1980s, especially with the nomination of Robert Bork to the Court, interest groups became heavily involved with the confirmation of Supreme Court Justices. Not only do the groups influence the Senate and their Senate staffers, both through lobbying and through providing information and questions that are asked during the confirmation hearings, but the groups are increasingly involved in mobilizing grass roots.

The Bork nomination is perhaps the best example of the impact that these groups can have on the confirmation process. Judge Bork was a fairly conservative judge and his appointment and the influence he would have had on the Court would have shifted the ideological balance of the Court to the right. Liberal interest groups, especially women's groups, were concerned about the appointment and its potential impact on the Roe vs. Wade decision. Liberal groups mobilized first, contacting both Senate staffers and the public to oppose the nomination.

Conservative groups did rally around Judge Bork, but they were a little slow in mobilizing and didn't mobilize quite as quickly as the liberal groups did. This allowed the liberal groups to really set the agenda for the confirmation and the tone, which ultimately led to Bork's defeat.

Well, not all confirmations are quite as controversial as Bork. They even made it a verb; right? They call it to bork somebody.

Judge Bork is hardly an anomaly. The nomination of Roberts and Miers and Alito all had a much more negative tone than their more recent counterparts in the nominations of Ginsburg and Breyer. All three saw a fair amount of negative activity. This is especially true of Justice Alito, who, like Judge Bork, might challenge the ideological balance of the Court.

All this is to say that the selection of Supreme Court nominees is not only important from a legal perspective, but it is also

important from a political perspective. Who the Justices are and what they believe and their past experiences all influence their decision making and the outcomes of the cases that come to the Court.

More importantly, the influence of the Justices far outlasts the President who appoints them, so the nominations have become relatively high stakes.

The Court we see today is a relatively conservative Court influenced by nominations as far back as Reagan and George H.W. Bush and George W. Bush. President Clinton only appointed two of the nine current justices. It's within this conservative context that the Court makes decisions today.

With that, I turn the podium to Professor Rahdert to talk about some of the Court's current decisions. Thank you.

MR. SOBEL: Professor Rahdert.

PROFESSOR RAHDERT: Good evening, everybody. It's a real thrill to be here and I just wanted to say a word about my pleasure at having an opportunity to participate in a program that is part of the Adams Center, because I personally know Judge Adams and his wife. I have the highest regard for him. He is one of the pillars of, first, the Bench and then the Bar in Philadelphia and has been a wonderful public servant for this Commonwealth. It's terrific to be part of a program that was made possible in significant degree by the generous gifts that he and his wife made to create this Center, so it's a real thrill to be here.

I am going to be talking about a couple of different things. I want to talk a little bit about sort of what makes the Supreme Court the Supreme Court and I also want to talk a little bit about how the Court goes about its business, and then, finally, I would like to talk a little bit about the Justices who are currently on the Court and here, if I might, a little bit into the future to see what might be over the horizon in the way of new developments.

Interesting place to start in any discussion of constitutional law is with the Constitution of the United States. And one of the interesting facts not well known about the Constitution of the United States is that, while it clearly contemplates the creation of other courts, the only one that it actually requires is the creation of the Supreme Court of the United States itself. Most of the language of Article III of the Constitution, which is the part about the judiciary, is really an article that describes what the Supreme Court of the United States will be and will look like and what kind of jurisdiction it will possess.

The Constitution gives the Court judicial power. It does not define what judicial power is except to say that it is power over cases and controversies. It also describes the different kinds of jurisdictions that the Court will exercise. But other than these bare outlines, the rest of the structure of the Court is really left to Congress to create. And most of the way in which the Court functions is actually determined not by the Constitution, but by statute.

Remarkably, the Constitution does not even address the Court's most important function. That is something known as the power of judicial review and it is the authority the Court uses to determine, first of all, what the Constitution means and then to determine whether the actions of government, be it Congress or the President or the other actors in the federal government or the government of the various states, whether their actions are consistent with the commands of the

Constitution itself, and it includes the power of the Court to say when a law or government action is unconstitutional, that it is of no effect, that it is not to be enforced.

The Constitution is silent about that power, but the Supreme Court declared in a famous case in 1803, Marbury vs. Madison, that it has that power and it has exercised it ever since without any serious challenge. That power, the power of judicial review, is the Court's defining characteristic. It is what makes the Supreme Court the formidable institution that it is today.

Now, during the nation's first century the Court almost never used the power of judicial review; only a handful of times at most. But since the Civil War, the work of the Court has steadily grown in importance and I would like to mention at least three stages in that development that I think are stages in which the Court moved significantly towards a greater power and a greater, more active role in American government.

The first was the Civil War reconstruction era itself, when the Constitution was thoroughly revised. The states were made subject to federal constitutional commands and guarantees of human rights were extended to the citizens of the United States vis-a-vis the states. It was a major step, major transformation in the United States Constitution. Of course, at the same time slavery was also eliminated and discrimination on the basis of race was constitutionally prohibited.

That was a period of time that led to the development of a significant new set of powers and authorities for the Supreme Court of the United States. Essentially that's a pattern that continues ever after, which is that every time the power of the federal government is expanded, whether it's been by statute or by Constitution, the power of the Court also comes to be expanded because the Court, after all, interprets those laws and determines how they are to be enforced.

The second big period happened during the time that we call the New Deal period, during the Great Depression and during the years of World War II, when Franklin Delano Roosevelt was President. That period of time witnessed a major expansion in the signs and the authority of the federal government. That expansion was supervised and supported constitutionally by the Court and it also had the effect of making the Court's own role in American life much more active.

The third great period was the period of the 1950s and '60s that started out with the famous decision in Brown vs. Board of Education that Professor Williams mentioned earlier and it was a time in which the United States Supreme Court came to be thrust into the center of the affairs of the American state and to take a leading role in determination of human rights under the United States constitution.

Whether for good or ill, there is no turning back. Each of these changes has brought with it sort of permanent changes in the role of the Court and permanent changes in its relationship with society. I don't see us ever returning to any earlier times and a more subdued role for the Court and if you look back all the way 200 years, I think in some respects you could say these were the inevitable consequences of the claim to the power of judicial review this Court made in Marbury.

There are, however, besides judicial review, several other factors that affect the work of the Court. You can count these many different ways. I am going to try briefly to mention six items that I think have a significant role in the life of the Court. A couple of

them were also mentioned by Professor Williams, so I will skip over those fairly quickly.

The first is a point which she did discuss. The Justices are appointed. They are not elected. Many state court judges in our system are elected judges and they perform their role very differently when they are subject to election or retention by the people than do the federal judges, who are all appointed.

The second big factor is life tenure, the fact that the Justices, once appointed and confirmed, will remain on the Court essentially for life or as long as their health permits them to serve. It causes the Court to take a very, very long view of the matters that come before it. Very different time perspective on the Supreme Court of the United States than what one would experience in Congress or in the executive offices, where the focus is always pretty much on the next election, which is either two or four or maybe, at most, six years away.

The third is one I mentioned before, the fact that the Court possesses jurisdiction over cases or controversies. It must await the developments of litigation. It cannot simply decide to go out and address an issue. It must wait for that issue to come to it in the form of a case that has been brought by litigants and tried in the lower courts, and then eventually brought on appeal to the Supreme Court.

But counteracting that effect to some extent is the discretionary jurisdiction of the Court through the writ of certiorari, the fact that the Court gets to set its own docket. Most of the courts in the country can't do that. They simply have to take the cases that are filed. The Supreme Court can sift through literally thousands of cases to find the 70 or 80 or 90 that it wants to actually hear and decide. That work of deciding which cases to decide actually consumes -- albeit it's fairly invisible to the American public, consumes a great deal of the Justice's time.

I had to smile a little bit when Allan Sobel said earlier that the Justices get their summers off, because, in fact, the Justices all summer long are receiving cert applications, just like any other time of the year, and those will all have to be processed, just like they are at any other time of the year, and the work of the Court goes on incessantly, even if the Justices happen not to be in Washington at the time when it happens.

Fifth, I would say that it's very important that the Court reflects in its work a commitment to the rule of law and to the force of precedent. Rule of law is a very much debated concept, but at the minimum it requires the Court to appeal to established and relevant legal principals as the basis for its decisions. It can't base them on polls. It can't base them on what it thinks is popular. It can't base them on any kinds of extraneous situations. It must base them on principles of law.

And, secondly, the Justices share -- regardless of their political or jurisprudential orientation, they share a commitment, a general commitment to honor precedent. They don't do it slavishly. They don't have to do it every time. They can depart from prior cases if they choose. But, in general, the Court believes that what has been decided before should be followed unless -- as long as it's relevant, unless there are very good, strong reasons not to do so. That tends to narrow the scope of choices that the Court has about how to decide the issues that it faces.

And the sixth major factor in defining the work of the Court, in my opinion, is finality. Once the Court pronounces on the meaning of the federal law, that's it. That's what that law means unless and until it is changed. If it's a statute, it can be, of course, amended by Congress or repealed, but if it's the Constitution of the United States, the Supreme Court's decision as to what it means stands unless and until the very cumbersome and difficult process of a constitutional amendment is completed.

That gives the Court enormous authority because pretty much what it says is going to go with respect to -- certainly with respect to the meaning of the United States Constitution and very frequently with respect to the meaning of all federal law.

There are many other factors that affect the work of the Court, but I think these are the major ones that tend to define how it goes about its business.

Now, how does the Court do its work today? Well, the first thing I would like to point out about that is that relative to other branches of government, the United States Supreme Court is tiny. Each Justice has a little tiny office in a very big building, tiny in terms of the number of people who work for that Justice. There are only a handful of law clerks who are recent law graduates who work for the Justices.

I had the honor of doing that for Justice Blackman about more years ago than I care to count. And they have a small administrative staff complement to go with that.

The Court, in general, has a library. It has other administrative offices. It has a clerk's office to process all of the paperwork. But if you added up all the employees of the Supreme Court of the United States, it would be no more than maybe a couple of hundred at most working in that building every day. If you compare that to the Department of Defense, with literally tens of thousands, or the Department of Homeland Security or the Social Security Agency or other major agencies of government, that's tiny. That's nothing in terms of the size of government today.

The work of the Court also follows patterns and procedures that have changed remarkably little over 200 years. Things have been modernized, of course, to incorporate new technical developments like electronic word processing and the like, but at heart it's still very much the same process that it was in John Marshall's day.

If John Marshall, who was Chief Justice from 1802, '03 to, say, 1835, if he were to come back, he could settle right down into the Supreme Court and do his work. It wouldn't feel very different from the work of the Court in his day. The main difference would be he wouldn't have to live in a boarding house and wouldn't have to ride circuit, which the Justices used to have to do during the summer months.

The second thing I would like to point out is that the work of the Court -- again, Allan Sobel made light of it -- but it is, in fact, so demanding that the Justices have little time left over for other pursuits. When I was a law clerk -- of course, I wasn't a Justice, but I was a law clerk -- I literally worked 16 hours a day, basically seven days a week. I had half a day off at Thanksgiving. I had a day and a half off at Christmas and that was it.

The Justice didn't work quite that hard, but he did work six days a week and every night he left the office at 7:30, but every night he took a briefcase full of work home, which was all back on the

clerk's desk the next morning at 7:00 o'clock, so I know he worked well into the night to get that work done.

The Justices do not have time for partying. They do not have time for the Washington social circuit. They have relatively little time to do anything else other than their work for the Court. And that tends to be very isolating. It tends to put them apart from the rest of Washington; not because the others in Washington don't work, but because this work is so consuming that the Justices tend to be drawn unto themselves.

The work is also highly confidential. While in other branches of the United States government it seems that we often have what I could characterize as government by news leak, which practically everything is out to the press before it's officially announced, that just simply does not occur in the Supreme Court of the United States and it would be regarded as a tremendous breach of the responsibilities of the employees there if they were to talk about pending cases.

The Justices themselves also do not talk about pending cases and, as a consequence, that, too, tends to be very isolating. You simply can't say anything about your work.

The year that I clerked for Justice Blackman, my wife, who is also a law professor, clerked for a federal judge in Baltimore and she actually reminded me just the other day that there was a time when I was clerking that her judge had a case that had issues precisely in line with issues in the Supreme Court of the United States and I simply would not tell her what was going on nor would she ask. She had to deal with those issues in her chambers without any knowledge of what might transpire in the Supreme Court because it would have been a huge breach even in the privacy of our own home for me to say anything about what was happening.

And now I am about to say something that is contrary to everything you have ever heard about the Supreme Court, which is that, relative to other government agencies and very much contrary to public opinion, the Court is remarkably accessible. People think of it as the least accessible branch of government, but in some ways, in fact, it is the most accessible.

I like to tell my students, I say, Go to the White House. You can go to the White House, but what will you see when you go to the White House? You will get a tour of china and wallpaper. I know. I've done it. I've been there. Will you have a chance to talk to the President or Vice President? Not unless you forked over hundreds of thousands of dollars to political action committees. That's regardless of which party the President happens to represent. You simply won't get any access.

Go to Congress and check out what is happening. You will come away wondering who in heaven's name is minding the store because while you can sit in the gallery, there won't be any Senators or Representatives down there. There will be some person droning to a camera up in front and maybe a few people milling around, but the notion that they actually gather for the debates almost -- whatever happens happens behind closed doors and you don't have access to it.

Go to the Supreme Court of the United States. You get to see the Justices actually doing their work in public. They sit for oral arguments. They come prepared for those oral arguments. They do it all before the American public and it's the best show in Washington. It's real government work being done right before your eyes.

They also announce their decisions in public. They give the reasons for their decisions in public, and guess what? The reasons

that they give are the real reasons for the decisions. Ask that of any other branch of government and you can't get it anywhere but the Supreme Court.

Not only that, but people who would go nowhere in their attempts to get the attention of the other branches of government can get the full attention of the Supreme Court of the United States if their case merits it. That means poor people. That means prisoners. That even means unlawful enemy combatants can bring their case to the Supreme Court of the United States, get its full attention, and if they have the merits of the case with them, they can win. No contributions to political action committees required. That's amazing.

Well, how about the Roberts Court? What is going on up there? By statute, as Professor Williams said, the Supreme Court has nine members, the Chief Justice and eight associate Justices.

Our current Chief Justice is John Roberts. He was appointed by President Bush in 2005, so he hasn't been Chief Justice for very long. Prior to his nomination he was fairly briefly a lower court judge, but, more importantly, had served for a long time as a very, very prominent Washington, D.C. appellate lawyer who often argued cases in the Supreme Court. Many years before he had actually served as a law clerk to the man he replaced, Chief Justice William Rehnquist.

Roberts' appointment as Chief has begun and commenced a period of change that is likely to witness a great transformation in the Court. By the Court's timing standard, that change is just under way. It's been going on for three years, but it will probably take another ten before we actually know what its real scope and extent might be, but we know that the Court is very much likely to be in transition.

Of the eight Justices -- Associate Justices on the Court, seven are men. One is a woman, Ruth Bader Ginsburg. They range in age from the late 50s, Justice Alito, who will be here next week, to the late 80s, as Justice John Paul Stevens is, what, 88?

MR. SOBEL: Fifty-five and 33, 88.

PROFESSOR RAHDERT: He is the Senior Justice. He was appointed by President Ford in 1975. He has been on the Court for more than 30 years. The Junior Justice, Justice Alito, has been on the Court only since 2006.

Ideologically and jurisprudentially this Court is conservative. It is a result of a long conservative trend on the Supreme Court. Twelve of the last 14 Justices appointed to the Court were named by Republican Presidents and 13 of those 14 appointments were of an individual more conservative than the one that he or she replaced at the time.

On the present Court seven Justices are Republican; two are Democrat. Conservative and liberal don't mean quite the same thing on the Court that they do in conventional electoral politics, but there is a significant overlap between them.

The Court, however, is far from monolithic. In terms of the legal issues it regularly considers, the present Court as it's presently comprised tends to divide into three groups with one swing Justice.

The first group -- and I am following another professor's labels here -- is what you might call the visionary conservatives. They are Justice Anthony Scalia and Clarence Thomas. They not only tend to prefer conservative outcomes, but they also want to remake a good deal of American Constitutional law. They do not feel generally constrained

by precedent and they are willing to limit, interpret or disregard precedent if it happens to conflict with their chosen theories of Constitutional law.

A recent example of a visionary triumph is the case that was just decided this last term, in 2008, called District of Columbia vs. Heller. You may have heard about it. In it the Court for the first time in over 200 years of American history held that there is an individual right to keep and bear arms. The Second Amendment mentions the right to keep and bear arms. It seems from preparatory language to connect that up somehow with the authority of the states to operate militias, what today we call the National Guard, but the Court in the Heller case said that preparatory language is of no real significance. Each American has a right to possess certain kinds of firearms and it's guaranteed by the Constitution.

The Court basically discarded precedent, which had read the right much more narrowly in that case.

The second group is what I will call, again following another commentator, the minimalist conservatives. They are Chief Justice Roberts and Justice Alito, your guest next week. On ideologically-charged cases these Justices often vote the same way as Scalia and Thomas, but they are generally more willing to work within existing doctrine and precedent. Since both are fairly new to the Court, it remains to be seen whether they will continue in this role or whether they will move closer to the visionary as time goes on or in some other direction. Who knows?

An example of a minimalist decision is another one you might have heard about decided in 2007. It's called Morse vs. Fredrick, which was famous because it involved a banner that a student in a high school raised that said, "Bong Hits for Jesus," and the question was whether the student had a First Amendment right not to be punished by the school for erecting that banner.

The Court decided in favor of the school and decided in favor of punishment, but there was a division on the Court. Justice Thomas, in particular, argued that the Court should abandon all precedent that had recognized First Amendment rights for public, primary, and secondary students. He said there really should be no First Amendment rights for those folks and that the First Amendment should be irrelevant, essentially, to the decision. In an opinion by Chief Justice Roberts, however, the majority chose instead to read those existing student free speech cases narrowly in the way that didn't reach this one and to conclude that the school's interest in deterring illegal drug use overcame any free speech rights.

That's an example of a more minimalist kind of approach; nonetheless, reaching a conservative outcome.

And then there are the moderates. I don't accept the term liberal. Liberal is something that died on the Supreme Court when Justice Brennan and Justice Marshall retired.

But there are some moderates on the Court and they are Justices Stevens, David Souter, Ginsburg, and Stephen Breyer. Their votes and reasoning actually can vary from issue to issue. They are within that group. They are not monolithic, but particularly on the highly-charged cases they tend to offer an alternative, and a relatively more liberal alternative, to the position of the conservatives I just discussed, one that tends to favor a more generous view of political and civil rights, a more pragmatic and non-dogmatic form of reasoning, and a more open form of statutory interpretation.

Within this group I'd say that Stevens and Ginsburg lean to the left, while Breyer and Souter lean more to the right, though I would classify none of them as a true liberal.

Leading examples of this group's influence include the famous enemy combatant cases of 2006, Hamdan vs. Rumsfeld, which held that military commissions set up by President Bush were unconstitutional, and in 2008, Boumediene vs. Bush, which held that Congress' attempts to cut off habeas corpus jurisdiction for enemy combatants were unconstitutional.

Then there is the swing Justice, Anthony Kennedy. Though his instincts are conservative -- after all, Kennedy was appointed by Ronald Reagan -- on some of the highly charged questions before the Court Kennedy's vote is less predictable. Sometimes he will join with the moderates for a relatively liberal result and sometimes he will join forces with the conservatives.

An example of the former is when he joined with the liberals in the enemy combatant cases I just mentioned. An example of joining the conservatives arise in cases involving abortion and affirmative action decided in 2007. So that in a highly divided case Justice Kennedy's vote often tips the balance, just as Sandra Day O'Connor's often did during the Rehnquist years.

Examples of Kennedy's swing role include Kennedy vs. Louisiana -- no relation between the Kennedy who wrote the opinion and the Kennedy who was the party -- where Justice Kennedy agreed with the moderates that the Eighth Amendment prohibits the imposition of the death penalty for the crime of child rape.

Another example of Kennedy swinging the other way is Gonzales vs. Carhart, the abortion case, where he joined with the conservatives to rule that the federal statute prohibiting partial birth abortions does not violate a woman's constitutional right to terminate a pregnancy. In each instance Kennedy wrote the lead opinion for the Court.

Well, what lies ahead? That depends on whether, when, and how the composition of the Court will change. Justice Stevens, as I said, is in his late 80s. He is virtually certain to retire very soon. Justice Ginsburg, although younger, is in relatively poor health and is expected to retire before long. Justice Souter has often said that he does not plan to serve on the Court forever and that he will retire when he thinks it's time.

Most observers, therefore, expect at least two or maybe more vacancies in the next four years. If so, the stakes for the Court in the current presidential election are high.

Election of John McCain, who says he favors appointments like Roberts and Alito, could produce an unstoppable six-vote or seven-vote conservative majority, one that would not depend on Justice Kennedy's vote. Election of Obama, who has been less overt about what appointments he might choose, but almost certainly would not pick people who look like Roberts and Alito, would be more likely to appoint something like the present balance or perspectives of the Court.

Either way, the direction of the Court and, therefore, the direction of the Constitution and of federal law will be vitally affected by the choices the voters make in November at the polls. And in a strange twist of fate, if the election turns out to be the kind of dead heat we saw in 2000, as the polls suggest that it will, the future of the Court may fall into its own hands in the form of another case like Bush vs. Gore, the case that decided the 2000 presidential election, in which the Supreme Court could effectively determine the

outcome of the presidential election and, therefore, the choice of the kind of Justices that will join the Court and set the future of the Roberts term.

If the election is that close, as they say down the road at Hershey Park, buckle your seat belts, hold onto your hats, and get set for a wild ride.

MR. SOBEL: Both of our guests will entertain questions. If anybody has a question, I appreciate it if you would move into the aisle and give us your name and ask your question. So if anybody has a question, please step into the aisle now.

QUESTION: We don't hear much about the decision of the Court in ensuring that Bush was elected President. I am wondering, what do scholars -- what is written in the law reviews and other things over the years regarding that position?

PROFESSOR RAHDERT: You are asking about Bush vs. Gore?

QUESTION: Yes.

PROFESSOR RAHDERT: Okay. Well, I think that the decision has been pretty heavily trashed. The question was really whether the Court had an appropriate basis for intervening and deciding the matter.

If you look at the United States Constitution and how it structures the Electoral College, and then you look at the statutory law that Congress has enacted regarding the presidential Electoral College process, it's pretty clear that both the Constitution and federal law contemplate that challenges to the legitimacy of a slate of electors is to be decided by Congress. There is no provision for a decision by the Supreme Court of the United States.

So it's fairly clear to most scholars, I would say, that the Court stepped into that case. It didn't have an appropriate basis, an established basis for asserting its jurisdiction. Its claim to jurisdiction was to some extent trumped. It was based on sort of an aloof due process and equal protection ground and the Court was clearly not even very comfortable with that ground because it said in its own opinion that the opinion was not supposed to have set any precedent for any other electoral situation.

How the Court can get away with that, I don't know. I told my students it reminded me of my Dutch great-grandmother, who loved cooking but every time she went to the cookie jar and her desire for cookies overcame her sense that maybe she should be dieting, she would always say, "Well, this is once, but never again."

That's what the Court said there. Well, precedent never looks like that.

So my view is that the Court was on slender legal grounds. Now, whether it did the right thing or not to decide that case is a very different question. Many people say it really was going to boil down to whether the election was decided by the Florida Supreme Court or the Supreme Court of the United States and if that's the choice, the Supreme Court of the United States is the better place to have the election be decided.

So it's kind of a practical argument for the outcome, but I think the Court was on pretty slender ground legally.

PROFESSOR WILLIAMS: I think the interesting thing about the Supreme Court's decision, it hasn't affected the Court's legitimacy with the American public. Two scholars, Jim Gibson and Greg Caldeira, did a massive public survey after Bush vs. Gore. It was actually going on while the presidency was undecided.

They were asking people how they would rank the Supreme Court as being a legitimate institution and, surprisingly, the Court did not suffer at all for that decision. It's still the most highly regarded institution of government, more high regarded probably than the President. And that hasn't really had an impact on it.

While everybody was clamoring about what a bad decision it was, what a poor decision it was, how illegitimate it was for the Court, the public didn't really -- it didn't really affect the Court's perception in the public.

The Court: Any other questions? Well, please join me in thanking our speakers.

(Whereupon, the presentation concluded at 8:40 p.m.)