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LIBRA JOURNALIST-IN-RESIDENCE LECTURE

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We are now in the midst of an amazing Supreme Court term—more than halfway through on the calendar, far short of halfway through in terms of what has yet to be decided. It's been a roller-coaster term of sorts, beginning with the highly unusual early-September argument in the campaign finance case,[2] followed by a rather quiet fall and winter, and then ending with an April sitting during which the Court will consider, in the context of the country's response to terrorism, cases that are likely to go quite far to define for the modern age the meaning of citizenship and, indeed, of the rule of law.[3]

But any consideration of the current term has to begin with a look back to the last term, the term I am referring to when I ask, in the title of this lecture, "What Got Into the Court?" It was a surprising term, highly consequential, potentially transformative, and no conversation about the current Court can really begin without considering what occurred and trying to come to some understanding of how it occurred. I will go into a few cases in some detail, but my real purpose is to propound a theory, not so much about legal doctrine, but about the Court's institutional behavior at the current moment, and to persuade you that my theory is (1) at least plausible, and (2) at least suggestive of what might happen in the near future.

The 2002-2003 term will, of course, be known in history for the two decisions the Court handed down during the last week in June: the ruling in *Grutter v. Bollinger*[4] that upheld affirmative action in university admissions, and in *Lawrence v. Texas*[5] that endorsed a constitutional framework for gay rights. Not to keep you on the edge of your seat: we will get to those. But no Supreme Court case stands alone. Many different streams of thought flow continually across the Court's docket. Each precedent the Court creates or considers has roots and branches. So I'd first like to spend a few minutes talking about two other, less noted cases that the Court decided last term in the months that led up to the June landmarks. I want to show you that the affirmative action and gay rights decisions were not the only times last term that the Court defied widespread expectations and, in doing so, told us something quite interesting about where the Court is today, what cues it responds to, and what kind of dialogue the Justices are currently engaged in with the legal, political, and social culture that surrounds them.

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2. McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

3. Rasul v. Bush, 124 S.Ct. 2686 (2004); Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004); Rumsfeld v. Padilla, 124 S.Ct. 2711 (2004).

4. 539 U.S. 306 (2003).

5. 539 U.S. 558 (2003).

The first of these straws in the wind arrived last March 26, when the Court decided *Brown v. Legal Foundation of Washington*.[6] On the surface, this decision appeared to resolve only a question of specialized interest to the legal profession: the validity of state programs that pool the escrow deposits that lawyers hold for their clients for brief periods of time, and that then direct the interest earned on these pooled deposits to legal services for the poor. These programs, which exist in all fifty states under the name Iolta, for Interest on Lawyers' Trust Accounts, have been lightning rods for conservative groups that have packaged their objections, not as overt opposition to government-supported legal services, but as an argument against what they claim to be an unconstitutional taking of private property.

In an earlier round of this battle five years previously, the Court had decided that the pooled interest was in fact the clients' property, leaving open the decisive question of whether its use in these public programs amounted to a Fifth Amendment "taking." As the issue came back to the Supreme Court for an answer, the stakes were more than theoretical, amounting to some $160 million a year, or about fifteen percent of all money from private and public sources spent in this country on legal services for the poor. Given the Court's prior decision, it appeared highly likely that this important source of money was about to dry up.

So those who supported the Iolta program made it their business to make sure the Court at least knew what the real-world stakes were, beyond the intricacies of the takings doctrine. The American Bar Association, the chief justices of the fifty states, the National League of Cities, and the attorneys general of thirty-six states—in other words, a fair representation of the country's legal and political establishment—filed briefs urging the Court to save the program. Since the earlier decision had been five to four, the program's supporters needed only one vote, and they got it: Justice Sandra Day O'Connor, who voted with the majority in the earlier decision, now joined the four previous dissenters in a majority decision, holding that while the interest was private property, its public use could not be considered a taking. This conclusion was based on the real-world fact that the interest would not have existed in the first place except for the Iolta program itself. The tiny bits of interest earned by each short-term escrow account would have been consumed by the transaction costs of opening and closing the account. The property owner's loss rather than the government's gain is the measure of an unconstitutional taking, Justice John Paul Stevens wrote for the majority, and since the depositors suffered no actual loss, there was no taking.

Shift ahead two months to my second case, *Nevada Department of Human Resources v. Hibbs*,[7] decided May 27. *Hibbs* was last term's chapter in one of the Rehnquist Court's more riveting dramas, the federalism revolution. The question, as has often been the case, was one of state immunity from suit under a law that Congress intended to apply universally, to state and private employers alike. The statute in question was the Family and Medical Leave Act of 1993, which obliges employers to provide up to twelve weeks of unpaid leave for workers, male and female, to take care of family emergencies. The constitutional question was whether Congress had the authority to abrogate the immunity the states claimed under the

6. 538 U.S. 216 (2003).
7. 538 U.S. 721 (2003).

Eleventh Amendment, which—to oversimplify more than a bit—bars suits against states in federal court, unless Congress has invoked a proper basis of authority to declare otherwise.

This is an intricate constitutional issue more suitable for a law review article than for our gathering here today. I'll make only two points. One is that in a series of highly visible lockstep five-to-four decisions, the Court had upheld state claims of immunity from suit under other federal laws, including among them laws against discrimination on the basis of age and disability. Congress in these statutes thought it was opening up the federal courts to suits against states, but the Supreme Court ruled that Congress had lacked the constitutional authority to accomplish that goal.

My second point here is that of all the recent federalism cases, the stakes in *Hibbs* were arguably the highest. That was because the Family and Medical Leave Act addressed sex discrimination, a category of discrimination to which the Supreme Court's precedents accord heightened judicial scrutiny. The law was aimed at removing a particular burden from women in the job market and workplace: the assumption by employers that if a problem came up at home, it was going to be the woman who took time off to deal with it. The statute's rationale was that mandating a sex-neutral leave policy would help erase the stereotype that care-giving is women's work, a stereotype that causes women to be less valued as employees.

Unlike official discrimination on the basis of age or disability, permissible as long as the government can put forward a "rational basis" for its policies, distinctions on the basis of sex are valid only if they serve an important governmental interest. Under this analysis, policies that discriminate on the basis of sex (or race) stand on weaker ground, and are much more difficult to justify than those that make distinctions on some other basis that does not receive heightened scrutiny. Congress's authority under Section Five of the Fourteenth Amendment to enforce the Equal Protection guarantee is consequently at its peak when it comes to enacting federal legislation designed to combat these particularly troublesome forms of discrimination.

At least, such had been the accepted wisdom as *Hibbs* reached the Supreme Court, and that is what made the case so important. The Court's obvious skepticism about Congress's exercise of its Section Five authority, its new solicitude for state immunity under the Eleventh Amendment, had raised a real question about whether the Court would continue a long tradition of deferring to Congress in these heightened-scrutiny areas. If the Court were now to rule that even here, the Eleventh Amendment immunity trumped Congress's power under the Fourteenth Amendment, the federalism revolution would move from the margin to the core, raising serious questions, at least theoretically, about the validity of such basic federal civil rights laws as Title VII of the Civil Rights Act of 1964. So *Hibbs* attracted a great deal more attention from civil rights groups, scholars of women's history, and others (including a spirited defense of the statute by the Bush Administration) than it might have appeared, on the surface, to merit.

The *Hibbs* case produced the major surprise of the term—and I do include the June decisions in that judgment. Perhaps it was not surprising that Justice O'Connor, a mainstay of the five-Justice majority in the earlier federalism cases, changed sides here, because her voting record indicates that she accords a very high value to combating sex discrimination. But I think no one would have predicted that it was Chief Justice Rehnquist who would write for the six-to-three majority, reject-

ing the states' immunity claim and upholding the power of Congress to remedy what he described as "the pervasive sex-role stereotype that caring for family members is women's work." The Court endorsed the theory behind the law, finding it sufficiently "narrowly targeted" to remedy a well-documented problem for women in the public as well as private workplace. It was the first time the states had lost a major immunity case since the federalism revolution gathered steam in the early 1990s.

With that background, we can now turn to the last week in June. I will assume that the cases are still vivid in our collective memory. The University of Michigan's affirmative action policies, which explicitly took account of race in admissions to the law school and undergraduate school and concededly made it easier for minority students to gain admission to these competitive programs, were challenged by several disappointed white applicants who claimed to have been the victims of unconstitutional race discrimination. The Texas sodomy law applied only to same-sex couples, making it a crime for such couples to engage in sexual practices that were perfectly legal in Texas for opposite-sex couples. The law was challenged by two men whom the police found having sex in the privacy of their own apartment, the police having been called there by a hostile neighbor.

Those are the basic facts, and I will limit myself to a few observations. When the Court agreed to hear the Michigan affirmative action cases, it appeared that the most that supporters of affirmative action could hope for would be language from somewhere in some eventual opinion that could be invoked for damage control. The Court's major last word on affirmative action in higher education, the 1978 *Bakke* decision,[8] had been dying an incremental and very public death for fifteen years, and it seemed most unlikely that either of the challenged Michigan programs would survive: certainly not the undergraduate program, with its twenty points for minorities on a 150-point admissions scale; and not the law school program, either, which while promising a "holistic" consideration of each applicant's special qualities somehow managed to produce a class with the same proportion of minority students year after year. Maybe, just maybe, the Court would be persuaded not to shut the door completely, but even that prospect seemed dubious.

Yet something happened during the four months between the grant of *certiorari* in December and the arguments in early April that changed the polarity. I sensed the change in the weeks leading up to the argument, and I wrote about it, but lacking access to the only nine people who could really tell me what was happening, I worried that the change was one of perception rather than reality. By the end of the two hours of argument, however, it was quite clear that the sun would not set on affirmative action.

Still, I think that no one leaving the courtroom that day would have predicted the scope and sweep of the majority opinion in *Grutter*.[9] This was not some grudging acceptance of affirmative action as a lesser of evils. It was, rather, an unapologetic embrace of a proposition that put affirmative action on a stronger footing than Justice Powell's solitary opinion in *Bakke* itself: that diversity serves a compelling state interest not only as an educational tool for enriching life in the classroom, as in the *Bakke* formulation, but as a pathway for full participation by mem-

8. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 912 (1978).
9. Grutter v. Bollanger, 539 U.S. 982 (2003).

bers of minority groups in the civic and economic life of the country. "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized," Justice O'Connor wrote. This is not, explicitly, a rationale based on remediation of historic societal wrongs—a rationale foreclosed by the Court's cases—but it is very close, projecting the asserted benefits of affirmative action out of the classroom and onto the canvas of American history and society as a whole. A Court that was widely expected to overturn *Bakke*, in other words, instead incorporated and moved beyond it.

So what happened during those months following the grants of *certiorari*? As in the *Iolta* and the *Hibbs* cases, the Justices had the chance to consider what was really at stake and to contemplate whether following the logical consequences of their recent precedents in each of these contested areas (takings, federalism, equal protection) took them to where they really wanted the Court to be.

Of course, the Justices were well aware that the mere fact of granting an affirmative action case in the current climate would galvanize the country and place the Court in the full glare of public attention—from the Court's point of view, never a desirable place to be. Of course the Court expected to be flooded with briefs from all sides.

But I don't think the Justices had any idea of what they were about to get. The handful of amicus briefs filed at the certiorari stage gave no hint of what was to come as both sides prepared for the argument on the merits, an argument that was, after all, twenty-five years in the making. Certainly the Court expected to hear a defense of affirmative action from the traditional civil rights community and from colleges and universities, and it did. But briefs also poured in from Fortune 500 companies, talking about the need for a workforce that was both educated and diverse, to compete in a global marketplace. A brief from retired military officers and superintendents of the military academies described affirmative action at the service academies as essential for maintaining the diverse officer corps needed to serve an integrated military. It was clear during the argument that the Justices had read this brief and at least a good sample of the others. More than 100 briefs, a record number, were filed in these cases.

The briefing was notable not only for numbers but for lopsidedness: with few exceptions, the only anti-affirmative action briefs were from advocacy organizations whose mission is to oppose affirmative action. One of those exceptions was the brief filed for the petitioners by the Bush Administration. But it was so labored and internally inconsistent—neither embracing affirmative action nor opposing it, offering the Texas "10 percent" plan (guaranteeing admission to the University of Texas to the top ten percent of every high school in the state) as the only example of an acceptably narrowly-tailored way to take race into account without explaining what relevance that approach could have for law school admissions—that there is little question that it did the Administration's ostensible cause more harm than good.

Clearly, the opponents of affirmative action were out-briefed, but this was not simply a numbers game. The briefs gave the Court a societal reality check. Who was affirmative action important to, and why? How would the country look and

feel if the Court actually followed the logical consequences of *Croson*,[10] *Adarand*,[11] *Shaw v. Reno*,[12] and other decisions that barred counting by race in other contexts? What would it mean for higher education? What would the numbers be? What would the reaction be? Those small green booklets posed and answered those questions.

The briefs, in other words, supplied an ingredient that was crucial to the outcome of the case: a sense of the culture, in Robert Post's phrase, the *constitutional culture*, in which the Court was operating.[13] Of course, the Court was being asked to address the question in the cases as a question of law. As de Tocqueville pointed out many years ago, most great questions in American society present themselves as questions of law. But no great Supreme Court case is only a question of law. It is always also an episode in the ongoing dialogue by which the Court engages with the society in which it operates and in which the Justices live. Sometimes a case arrives rather early, sometimes even too early, in that dialogue and sometimes, as with affirmative action, it arrives when it appears there might be nothing left to say; what was perhaps most surprising about *Grutter* was that the Court seemed to take stock, realign itself, and tell us something new after all.

Lawrence v. Texas also arrived on the Court's docket in the midst of an ongoing constitutional conversation. By one measure, it was rather early in that conversation: there were only a handful of decisions on the books dealing with gay rights. One was overtly negative, and others were not free of ambiguity. But it seems to me that one remarkable thing about the *Lawrence* decision was that this was not the conversation the majority chose to continue. Instead, the *Lawrence* Court resumed a very long running societal dialogue—one of the very oldest—about individual liberty, privacy, and freedom from government intrusion. The turn the majority made in *Lawrence* was to conclude that this was the conversation that mattered. Yes, *Bowers v. Hardwick*[14] gave the wrong answer, but what *Lawrence* really tells us is that it was the answer to the wrong question. The rights of gay people do not exist under a separate heading, detached from the larger theme and trajectory of individual rights. Instead, the constitutional status of the claims of gay men and women to "dignity" and "respect," in Justice Kennedy's formulation, is itself a measure of the vitality of society's commitment to individual rights for all: gay rights as nothing more or less than human rights. *Lawrence v. Texas* is a supremely inclusive opinion, bringing those who had been strangers to the law inside the protective circle defined by due process and equal protection.

Where did this come from? *Lawrence* traveled a quite different path than *Grutter*. The Justices granted *certiorari* in the Michigan case because there was a conflict in the federal circuits on an important issue the Court had been rather transparently avoiding. For reasons of institutional legitimacy, I think, the Court had to reassert control over a raging debate that was clearly not going to die down on its own. Political realists express surprise that the Court would grant *certiorari*

10. City of Richmond v. Croson, 488 U.S. 469 (1989).

11. Adarand Constructors v. Pena, 515 U.S. 200 (1995).

12. 509 U.S. 630 (1993).

13. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 1, 8 (2003) ("I shall use the term 'culture' to refer to the beliefs and values of nonjudicial actors.").

14. 478 U.S. 186 (1986).

on such an incendiary issue without having a clear sense of the outcome. While the Court may usually be reluctant to take a case under those circumstances, in this instance it seems to me quite possible that the Justices concluded that the time had come when they could no longer remain silent—even if it was not clear at the time what they would eventually say.

There was no such conflict over gay rights, at least in the federal courts; state courts and legislatures had been steadily dismantling the old regime of criminal sodomy laws, but there was no particular reason for the Court to intervene in December 2002. The only reason to take up the challenge to the Texas law was that a majority of the Court had come to the conclusion that it was time to confront *Bowers* and to dismantle it. Unlike the Michigan cases, the bottom line in *Lawrence* was never in doubt. The Texas law would be overturned. The only questions were how broadly the Court would rule and what analytical path it would take.

As in *Grutter*, the briefs proved unusually enlightening for the Court. While victory has a thousand fathers, some of these briefs were particularly important. I would mention these: an international brief, filed by Harold Koh of Yale Law School to inform the Court of legal developments in other Western judicial systems and demonstrate the error of the *Bowers* majority's generalizations about how "Western civilization" regards various sexual practices; briefs by professors of history and by a coalition of gay rights groups led by the Human Rights Campaign, likewise demonstrating that the assumptions in *Bowers* about the historical treatment of gay people were also incorrect; and briefs describing the demography, lives, and aspirations of the gay community in ways that underscored how out of synch with current perceptions and realities the *Bowers* opinion, and the premises behind it, had become. The National Lesbian and Gay Law Association filed one such brief, and the American Psychological Association filed another. There were also important briefs from the American Bar Association and two libertarian organizations that the Court recognized as repeat players, the Cato Institute and the Institute for Justice.

Clearly, the Court was ready for this type of presentation when it granted *Lawrence* and specifically included the question of whether *Bowers v. Hardwick* should be overruled. The briefs offered confirmatory research to support the Justices' own sense that the culture had changed, not only outside the Court, but within it. It is no longer the Court it was in 1986, when *Bowers v. Hardwick* was pending and an oblivious Justice Powell was able to say to a closeted gay law clerk: "I don't believe I've ever met a homosexual."[15] Gay men and lesbians are open in their identity, whether as law clerks and employees at the Supreme Court or as leading members of the Supreme Court bar. Their presence is simply a given, a good deal more plausible, in fact, than the advent of a female Supreme Court Justice appeared to be back in the 1970s, when I began covering the Court. A female Justice was seen as so fanciful a notion that such an imagined event was the stuff of comedy in a Broadway play, *First Monday in October*, fewer than three years before Sandra Day O'Connor's nomination in 1981.[16] Perceptions can and do

15. *See* John C. Jeffries, Jr., JUSTICE LEWIS F. POWELL, JR., 521 (Charles Scribner's Sons 1994).

16. The play, presented as a comedy, was written by Jerome Lawrence and Robert E. Lee. It ran on Broadway for 17 previews and 79 performances in the fall of 1978.

change, sometimes nearly overnight, on the basis of personal experience and direct observation. To adhere to the regime of *Bowers* would have been to negate the way a majority of the Court now sees the world, and the way a majority of the Justices wanted the Court to appear in the world's eyes.

The current term has seen some equally interesting outcomes. On February 25, the Court decided *Locke v. Davey*,[17] a religion case that raised the question of whether a state that chooses to subsidize post-high school secular education for needy and worthy residents must also, in the name of neutrality or equality or the free exercise of religion, provide an equivalent subsidy for those who want to train for the ministry. The Ninth Circuit had said yes, relying on a series of equal access and free exercise precedents from the Supreme Court.

The case was extremely important because it answered the question left open two years earlier in the Cleveland voucher case, *Zelman v. Simmons-Harris*,[18] which held that a program providing vouchers to parents for use toward tuition at private schools, including religious schools, did not violate the Establishment Clause. If vouchers for parochial school tuition were constitutionally permissible, as they now were, were they also constitutionally required? That was the real question in *Locke v. Davey*, and the Court's answer, not necessarily predictably, was no, in a seven-to-two opinion by Chief Justice Rehnquist. Noting that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause," the Chief Justice said: "If any room exists between the two Religion Clauses, it must be here."[19]

By the same seven-to-two vote, the Court overturned a Texas death sentence on the ground of prosecutorial misconduct. The case of Delma Banks,[20] who had come within ten minutes of execution before the Court had granted him a stay a year earlier, was particularly interesting because it came up on federal habeas—the old federal habeas, before Congress tied federal judges' hands even tighter than Supreme Court decisions already had by passing the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[21] Justice Ginsburg's thirty-four page opinion for the Court analyzed in great detail the exculpatory evidence that the government had withheld.

It occurred to me as I read it that this opinion did not have the grudging tone of the habeas decisions the Supreme Court issued so often back in the days when the Court was trying to persuade Congress to relieve the federal courts of the burdens of capital habeas. And this was not the first recent death penalty opinion that sounded different. Last term, in *Miller-El v. Cockrell*,[22] the Court had overturned another Texas death sentence, that time by a vote of eight to one, (Thomas, J., dissenting). *Miller-El*, in contrast to *Banks*, was a post-AEDPA case, where the federal court's scope of review was constrained by statute as well as by Supreme Court precedent, but Justice Kennedy, writing for the majority, said that "deference does not imply abandonment or abdication of judicial review."[23]

17. Locke v. Davey, 540 U.S. 712 (2004).
18. 536 U.S. 639 (2002).
19. Locke v. Davey, 124 S.Ct. 1307, 1315 (2004).
20. Banks v. Dretke, 540 U.S. 668 (2004).
21. Pub. L. No. 104-132, 110 Stat. 1214 (1996).
22. 537 U.S. 322 (2003).
23. *Id.* at 340.

Clearly, at least some members of the Court are at least a little uncomfortable with how eagerly Congress responded to the call for limitations on habeas review. Reading *Banks* in light of *Miller-El*, it occurred to me that this might be a case of "watch out what you wish for"—that the post-AEDPA experience ironically may well have re-sensitized the Court to the need for searching judicial review and for the need to rein in the federal circuits that have embraced their marching orders a bit too eagerly. It may also have mattered that in both these cases, the death-row inmates were represented by highly skilled advocates, repeat players at the Court, whom the Justices know and respect.[24] And beginning with the emergency application for a stay of execution, Bank's appeal was supported in an amicus brief from a group of retired federal judges, who told the Court that "the integrity of the death penalty in this country" was at stake.

Finally, it is time to return to our opening question. What got into the Court? A combination of advocacy and opportunity—arguments in the hands of skilled lawyers reaching a Court that was primed and willing to listen. A Court that thought long and hard about the logical consequences of its recent precedents and turned back from following them to their logical conclusions—from following them, if you will, off the cliff. A Court composed of men and women who, despite their exalted positions, live in the world as employers, spouses, parents, grandparents, and have seen the world change around them. A Court engaged in an ongoing constitutional conversation, in which all of us as devoted court-watchers are not only privileged but obliged to take part.

Perhaps there is a natural regression to the mean at work here, a retreat to the center on the part of some Justices from theories that have been tested and found wanting. These nine people have worked together for an awfully long time, and they know each other very well. Has that made a difference? Maybe.[25] Are we seeing delayed fallout from *Bush v. Gore*,[26] with the Court feeling the need to reassure the middle after that searing episode in judicial polarization? I would not have thought so, but I am asked about the aftermath of *Bush v. Gore* so often that I thought I should put it on the table. In any event, we can certainly conclude that the Court cares about its own institutional legitimacy even if we can't precisely define how the Justices perceive the sources of that legitimacy and the threats to it.

These observations naturally raise the question of what happens next, as the Court is about to delve into the heart of this historic term. Will the Court's behavior in these last twelve months prove predictive? As a preliminary matter, I think it's safe to conclude from *Grutter, Hibbs,* and the rejection of the takings claim in the *Iolta* case that nuance, context, and realpolitik rather than pure doctrine seems to be the order of the day. The recent majority opinions have been criticized in some quarters for paying insufficient attention to formal doctrine, to levels of scrutiny and standards of review. It seems clear that this Court is less concerned about satisfying the law reviews than it is about satisfying itself that its opinions make sense in the real world. As John Jeffries wrote in a recent reappraisal of Justice Powell's opinion in *Bakke*, what some may criticize as a "failure to achieve intel-

24. Seth P. Waxman for Miller-El and George H. Kendall for Banks.

25. *See generally* Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003).

26. 531 U.S. 98 (2000).

lectual clarity" may better be described as a "sacrifice of cogency for wisdom."[27]

As for *Lawrence v. Texas*, the clarity of that decision has been somewhat obscured from public view by the sudden, unexpected, and obviously unfinished debate over gay marriage. It is worth setting that debate aside for a moment, stepping back to last June, and considering a significant aspect of the *Lawrence* Court's analysis: the majority's open embrace of a fundamental rights jurisprudence in which constitutional meaning evolves to keep up with society's changed perceptions and needs. To say that this has been disputed territory for twenty or more years on the Court is an understatement. In this respect, the *Lawrence* opinion may prove significant in the new term and in terms to come in ways that we cannot now imagine. I will quote from the conclusion of Justice Kennedy's opinion for the Court:

"They knew," he said, referring to the founding generation, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[28]

Just as last term was defined by the affirmative action and gay rights cases, the current term will almost certainly be defined by the Court's response to the Bush Administration's War on Terrorism. Indeed, this Court may well be known in history for how it responds to the cases it will hear in the next few weeks,[29] on whether federal court jurisdiction exists to hear the claims of the Guantánamo detainees and on whether the President's characterization and treatment of two United States citizens as enemy combatants is subject to meaningful judicial review.

The Court knows this. It is quite significant that the Court accepted the Guantánamo detainees' cases over the objections of the Administration. It would have been very easy for the Supreme Court to turn away from these cases. When the Court declines to hear an appeal, after all, no explanation is required. The Administration told the Justices that there was no role for the federal courts here, and to leave the entire matter in the hands of the executive branch. This was an argument, at the threshold, that the Administration was unable to sell and, given the Court that we saw last term, I think it is fairly easy to understand why. This is not a Court that is going to take orders from one of the coordinate branches on a core aspect of its jurisdiction. At the end of the day, when it is time to decide the merits of these cases, the Court may well declare, as it has at similar points of foreign or domestic stress, that judges should give substantial deference to the executive branch in determining what policies best serve the national interest. But it is the Court that will make that judgment, not the White House.

The briefs filed in these cases offer a snapshot of the national debate on these issues during a tense and unsettled time. What comes through clearly is that although the Court is being asked to define the appropriate legal regime for those currently under detention, these cases are not only, or even principally, about *them*—the enemy, the other. They are, most importantly, about *us*, about the legal regime we live in together.

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27. John C. Jeffries, Jr., *Bakke Revisited* 2003 SUP. CT. REV. 1, 21.
28. Lawrence v. Texas, 539 U.S. 558, 579 (2003).
29. *See supra* note 3.

In a speech he gave in September, 2000—three months before *Bush v. Gore*, a year minus one day before 9/11—in other words, in a different world, Justice Breyer observed that "the constitutional system that protects our liberties consists not simply of fine words on paper, but also of habits, customs, expectations, settled modes of behavior, engaged in by judges, by lawyers, by the general public."[30] The past few years have challenged our settled modes of behavior, have tested all of us. But one habit we have not lost, obviously, is to turn to the Supreme Court with our hardest questions. Together, now, we wait for the answers.

30. Stephen G. Breyer, The Legal Profession and Public Service, Gauer Distinguished Lecture *in* LAW AND PUBLIC POLICY, NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST, Sept. 12, 2000.