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## In Other News...: Developments at the Supreme Court in the 2002-2003 Term that You Won't Read about in the U.S. Reports

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## **“IN OTHER NEWS . . .”: DEVELOPMENTS AT THE SUPREME COURT IN THE 2002-2003 TERM THAT YOU WON’T READ ABOUT IN THE U.S. REPORTS**

Tony Mauro\*

The words of two legal giants have inspired this article. The first is the late Bernard Schwartz, who was the Chapman Distinguished Professor of Law at the University of Tulsa until his untimely death and who helped launch this Supreme Court review as an annual event. The second is United States Chief Justice William Rehnquist.

Professor Schwartz, whom I was lucky to know, managed to be a prolific, respectful, and iconoclastic scholar of the Supreme Court all at once. In his pursuit of the truth about the Supreme Court, his inquiries did not begin and end with the Court’s published opinions. He believed strongly that to understand the Supreme Court, one has to go beyond the United States Reports. He was fascinated, as am I, with the Court’s procedures, traditions, and policies regarding matters that are not, strictly speaking, related to its formal jurisprudence. “[I]t is in the interest of both the country and the Court itself for the public to learn as much as possible about the operation of the highest tribunal,” wrote Professor Schwartz in 1996.<sup>1</sup> He believed just as strongly that this goal could be reached without damaging the Court’s operations or tearing it down in the public’s eyes. In Schwartz’s view, more knowledge about the ways of the Court would lead to greater respect for the institution, not less. “No other governmental institution could be subjected to comparable scrutiny of its internal processes and come out so well.”<sup>2</sup> Most of the time I agree with that assessment, though in some other article at some other time I could catalog some of the boneheaded things the Court has done that are comparable to the foolish acts of any other institution of government. But much of the time when I have urged the Court to be more open and accessible to the public and to the news media, I have felt like a proud parent nudging a shy child toward center stage, knowing the audience would approve. At other times, I push for more openness not out of pride but out of a strong belief that the Court, as different as it might be from other institutions of government, is

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1. Bernard Schwartz, *The Unpublished Opinions of the Rehnquist Court* 4 (Oxford U. Press 1996).

2. *Id.* at 26.

still doing the public's business and does not deserve the lack of scrutiny it usually gets.

As for Chief Justice Rehnquist, he came to mind in connection with this article because of how he handles his own annual review of the Supreme Court term. Each year in late June, the Chief Justice speaks before the circuit conference of the U.S. Court of Appeals for the Fourth Circuit. Perhaps to avoid controversy, or maybe to have some fun, Rehnquist has settled on the same theme for his talk every year. He speaks briefly about four or five decisions from the term that he thinks deserve more attention than they got when they were handed down. Fancifully, the Chief Justice has adopted the phrasing of eighteenth century poet Thomas Gray in describing his pantheon of little-noticed cases as "flowers born to blush unseen and waste their sweetness on the desert air."<sup>3</sup> At the end of this term, Rehnquist turned up the metaphorical heat, characterizing them also as "Cinderella" cases, which he defined as those cases "left at home to clean the stove while the constitutional cases go to the ball."<sup>4</sup>

I, too, intend to report on the Supreme Court's under-appreciated desert blooms from the past term, but not the ones that sprouted from actual Supreme Court opinions. My focus instead will be on other aspects of the Court's work which, while setting no precedent and crowning no victor, do illuminate the workings of the nation's highest court. Professor Schwartz, I believe, would approve of placing these non-jurisprudential developments on the record at this conference and in the *Tulsa Law Review*.

In writings and speeches, Justices are fond of saying that the Supreme Court speaks only through its opinions. For example, the late Justice Lewis F. Powell, Jr., often rejected the widely perceived view that the Supreme Court is a secretive institution. He pointed mainly to the fact that the Court's oral arguments and decisions are public, as if nothing else that happened at the Court mattered.<sup>5</sup> Justice Powell was, of course, correct in boasting that the key components of the Court's formal decision-making are public—something that cannot always be said for either the executive or legislative branches. But the Court, an institution with more than 400 employees, does many other things besides issue rulings. It speaks to the public in other media and in other forms that are not so public, and it is some of these "communications" that I hope to record. In so doing, I think a fuller picture of the Supreme Court at the beginning of the twenty-first century emerges.

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3. William H. Rehnquist, Address, *Highlights of the Term* (Richmond, Va., June 28, 2003) (available at <<http://www.c-span.org/videoarchives.asp?CatCodePairs=Series,AC>>); see Thomas Gray, *Elegy Written in a Country Churchyard*, in *The Complete English Poems of Thomas Gray* 61, 63 (James Reeves ed., Harper & Row 1973).

4. Rehnquist, *supra* n. 3.

5. See e.g. Lewis F. Powell, Jr., *What Really Goes on at the Supreme Court*, in *Views from the Bench: The Judiciary and Constitutional Politics* 71, 71-73 (Mark W. Cannon & David M. O'Brien eds., Chatham H. 1985).

## I. ORAL ARGUMENT FOR THE MASSES

The first development to mention from the 2002-2003 term is the decision by the Court, for only the third time in its history, to expand the reach of oral arguments to millions by allowing the quick release of the audiotapes of the arguments in *Grutter v. Bollinger*<sup>6</sup> and *Gratz v. Bollinger*,<sup>7</sup> the anxiously awaited affirmative action cases. Soon after the cases were argued on April 1, 2003, the arguments were broadcast by C-SPAN and other news and public affairs outlets.

Why is this unusual, and how did it come about? As Justice Powell correctly said, Supreme Court oral arguments have throughout history been open to the general public,<sup>8</sup> but only to the several hundred who can attend in person.<sup>9</sup> Access becomes more limited when a high-profile case is to be argued, as lawyers representing interested parties and others, ranging from members of Congress to family members of the attorneys, fill up the limited number of seats in the majestic Supreme Court chamber. In recent years, the Court has alleviated the problem somewhat by feeding the audio portion of arguments into the nearby lawyers' lounge, which can accommodate upwards of fifty members of the Supreme Court bar.<sup>10</sup> That move was significant because it marked the first time that any members of the public—in this case, members of the Supreme Court bar—could listen to oral arguments in real time outside the four walls of the Court chamber. But efforts to extend that precedent in other ways and to other venues have met with only limited success.

Prior to 1998, reporters could not simultaneously witness the Court's opinion announcements and receive the corresponding opinion texts. When the Court sat for oral arguments and when one or more opinions were ready to be released, the Court began its sessions with the author of an opinion announcing, in summary fashion, the holding of the Court. At that moment, one floor below, staff members of the public information office released the printed full-text version of the opinion to waiting journalists. Reporters who covered the Court on these days thus faced an unappetizing choice. The first option was to sit in the courtroom and observe the announcements in person, to capture nuance and the occasional vigorously read dissent, and then proceed downstairs to obtain the text. The other choice was to forego the announcements and the nuance, and wait in the public information office downstairs for the printed opinions to be released. Many journalists reluctantly picked the latter because of deadline pressure.

In 1998, the Court agreed to a modest request from the news media to begin piping the audio of the Justices' announcements into the public information office.

6. 123 S. Ct. 2325 (2003).

7. 123 S. Ct. 2411 (2003).

8. Powell, *supra* n. 5, at 71.

9. By one count, the Court chamber contains a total of 355 seats to be divided among lawyers, the public, and the news media. David M. O'Brien, *Storm Center: The Supreme Court in American Politics* 253 (5th ed., W.W. Norton & Co. 2000).

10. It is difficult to determine when the audio of arguments was first transmitted to the lawyers' lounge, but press references to the practice began appearing in the mid-1990s. See e.g. Tony Mauro, *Courtside: Fish Story*, 19 Leg. Times 9, 9 (Mar. 24, 1997).

As a result, reporters are now able to hear the announcements on a speaker and read the opinion texts at the same time, thereby saving steps and precious minutes.<sup>11</sup> But reporters are strictly instructed not to tape-record or broadcast these piped-in announcements. And the moment the opinion announcements end and oral arguments begin, the transmission stops. Only opinion announcements, not oral arguments, can be heard in the public information office. So even with these small steps, the reality remains: reporters and non-lawyer members of the public who want to hear oral arguments on the same day still must do so by being inside the Court chamber.

On the occasion of the presidential election cases of 2000, *Bush v. Palm Beach County Canvassing Board*<sup>12</sup> and *Bush v. Gore*,<sup>13</sup> the Court for the first time broke that iron rule and made a slight concession to public interest. While rejecting the requests of media organizations for live broadcast coverage, the Court responded favorably to a more modest request by C-SPAN. The Court agreed to release, for public and broadcast use, audiotapes of the oral arguments as soon as possible after the arguments were over.<sup>14</sup> The Court apparently felt that this was not a real change in policy, but rather an acceleration of what it was already doing.<sup>15</sup>

The Court released audiotapes of oral arguments on both December 1, for *Bush v. Palm Beach County Canvassing Board*, and on December 11, for the fateful arguments in *Bush v. Gore*. The result was, for many members of the public nationwide, an eye-opening if somewhat old-fashioned peek into the Supreme Court. Television cable and broadcast channels that aired the audiotapes were reduced to showing stock photographs of the Justices and lawyers as their words were aired. Nevertheless, the availability was widely hailed as a positive step that helped the public understand the complex and fast-moving events of the election controversy. Justices themselves have indicated that they were satisfied with the experiment in quick, if not simultaneous, access.<sup>16</sup> But in various contacts between journalists, Justices, and Court officials, the cautionary advice from inside the Court building was this: do not expect that the experiment will be repeated routinely or anytime soon. For more than two years, in fact, the Court did not consent to the release of audiotapes for any more oral arguments.

The affirmative action cases from the Term we are reviewing presented the Court with another obvious candidate for early release of audiotapes. While perhaps not as momentous as the Florida election cases, the affirmative action cases attracted enormous public interest. Groups supporting and opposing

11. See Tony Mauro, *Courtside: Breaking the Sound Barrier*, 21 Leg. Times 8, 8 (Dec. 7, 1998).

12. 531 U.S. 70 (2000).

13. 531 U.S. 98 (2000).

14. Herald Wire Servs., *Supreme Court to Make Audiotape Available*, Miami Herald 31A (Nov. 29, 2000).

15. Under a longstanding arrangement with the National Archives, the Court has turned over the tapes for public use at the end of each term—a schedule that makes them of very limited use to journalists, who are usually not inclined to wait so long for access.

16. See *This Week with George Stephanopoulos* (ABC July 6, 2003) (tv broadcast, transcript available in LEXIS, News & Business library, ABCnew file) [hereinafter *This Week*].

affirmative action demonstrated outside the Court, and more than 100 amicus curiae briefs were filed. C-SPAN, as it had with the 2000 election cases, asked the Court to expedite release of the audiotapes.

One indication that the Justices found the experimentation successful in the affirmative action cases is that five months later, they authorized another quick release of audiotapes.<sup>17</sup> But given the Court's reluctance to change too quickly, it still seems likely that it will be an exception to the rule that will arise only once every term or so.<sup>18</sup> The current court persists in its reluctance to expand broadcast access—by radio or television—beyond these modest steps, and even the change represented by its handling of the affirmative action cases should not be read as a hint of greater access to come.

## II. TAKING NOTE(S)

Another less-noticed development at the Supreme Court this past Term also relates to oral arguments and how they are observed. With no notice or fanfare, the Court dropped its longstanding policy against note-taking by public spectators in the Court chamber during public sessions. From roughly November of 2002 on, Court police officers no longer enforced this baffling rule. Law school students, historians, and casual visitors all may now record what they see in the Court, at least with pen and paper.

When the policy was first promulgated or enforced—and why—are lost in the mists of Court history and folklore. But there is some documentary evidence of the policy. In a September 1988 letter to his fellow Justices, Justice Harry A. Blackmun raised questions about it, as he often did about the details of Court life and procedures.<sup>19</sup> The letter was among the documents found in Justice Thurgood Marshall's papers, which were released soon after Marshall's death in 1993. Blackmun also shared with his brethren a letter on the subject from then-Police Chief Kenneth Conlon, who at Blackmun's request had looked into the rule as well as another policy that bothered Blackmun: the rule against spectators leaning their arms or elbows on adjacent chairs or railings.<sup>20</sup> From his observation during arguments, Blackmun said, enforcement of the rules was "embarrassing and sometimes humiliating to the spectator and is distasteful for the enforcing officer."<sup>21</sup> Blackmun also commented that "[t]he note-taking proscription is of

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17. On September 2, 2003, the Court announced that the same procedure for quick audiotape release would be followed for the September 8, 2003, special oral arguments in the consolidated cases known as *McConnell v. Federal Election Commission*. See *Make it Official*, Wash. Post A16 (Sept. 3, 2003) (available in 2003 WL 62212461).

18. Even after the affirmative action arguments, Justice Anthony Kennedy, speaking at a House Appropriations Committee subcommittee hearing on the Court's budget on April 9, 2003, said, "I don't think it's going to be a common practice." H.R. Subcomm. on Com., J., St. and Jud. of the Comm. on Appropriations, *Hearing on the FY 2004 Supreme Court Budget Request*, 108th Cong. 19 (Apr. 9, 2003).

19. Letter from Harry A. Blackmun, Assoc. J., S. Ct., to William H. Rehnquist, C.J., S. Ct., *Courtroom Rules* (Sept. 30, 1988) (copy on file with *Tulsa Law Review*).

20. Memo. from Kenneth Conlon, Police Chief, S. Ct., to Harry A. Blackmun, Assoc. J., S. Ct., *Court Decorum* (Sept. 30, 1988) (copy on file with *Tulsa Law Review*).

21. Letter, *supra* n. 19.

particular concern for visiting law school student groups that are there for instruction purposes primarily.”<sup>22</sup> Blackmun further wrote, “I wonder if perhaps we go too far in our quest for ‘decorum.’”<sup>23</sup>

To his credit, Conlon said he could not explain the note-taking rule, though he said it had “changed back and forth over the years from being permitted and not being permitted.”<sup>24</sup> As for the offense of elbow-leaning, Conlon offered the explanation that it “could interfere with other spectators and, perhaps, lead to slouching, sleeping and other unacceptable behavior.”<sup>25</sup> Conlon also said candidly, “Without stretching these points, there is also consensus that the two issues, whether permitted or not, are not significant security considerations.”<sup>26</sup>

The Marshall files did not contain any further correspondence on the issue, but the policy has generated some public comment over the years. A *Washington Post* opinion column railed against the policy in 1997. Noting that some people (accredited Supreme Court journalists and members of the Supreme Court bar) are allowed to take notes while other spectators are not, the column stated:

The ‘rule’ runs counter to every American constitutional principle of free speech, equal protection and due process.

Citizen note-taking is permitted in countless appellate courtrooms from the U.S. District Court of Appeals for the District to the Supreme Court of Oregon to the Canadian Supreme Court. Why, then, not in our nation’s highest court?<sup>27</sup>

That question, along with Justice Blackmun’s concerns with the policy, went unanswered until the 2002-2003 Term. The Court, and not just the Chief Justice, apparently decided to change the rule at one of its private conferences. The change itself might have remained private, since neither the Court nor the Court public information office announced it. The explanation for the silence on the issue was that since it was an unwritten rule in the first place, a change in the rule did not need to be formally promulgated. The change was first brought to public attention by a “blog”—short for weblog—that comments on Supreme Court matters. In an April 25, 2003, entry, blogger Ted Metzler, then a law student, recounted attending a recent oral argument at the Court.<sup>28</sup> “The officer told us we could bring in a notebook and pen and we all looked at each other,”<sup>29</sup> Metzler wrote. Court officials then confirmed the new policy, which allows note-taking unless it for some reason disrupts the working of the Court. (The rule against elbow-leaning, commented on in 1988 by Justice Blackmun, remains in effect.)

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22. *Id.*

23. *Id.*

24. Memo., *supra* n. 20.

25. *Id.*

26. *Id.*

27. Ronald K.L. Collins & David M. O’Brien, *At the Whim of the Court*, Wash. Post A19, A19 (Aug. 18, 1997).

28. See Tony Mauro, *Courtside: Nota Bene*, 26 Leg. Times 10 (May 5, 2003).

29. *Id.* (internal quotations omitted).

The change on note-taking got scant coverage in the news media, and readers of this article might think that inattention is well-deserved. True, it is not an earth-shattering matter either way. But among the non-jurisprudential ways in which the Court interacts with the public, the change in policy does send a significant message, as does its release of oral argument audiotapes. It is a message of recognition and acceptance that the public has a role to play at oral arguments. In discussing the value of oral arguments, Justices usually speak of their value in informing and persuading the Justices. In one commentary on oral arguments, Chief Justice William Rehnquist writes that the Supreme Court oral advocate is presenting his or her case to “nine flesh and blood men and women,”<sup>30</sup> making no mention of the hundreds of others who are also in attendance—or the millions who now, electronically, have been able to hear the arguments in the cases discussed above. The Court’s new policies in this area signify at least a tacit recognition that oral arguments are also meant to be heard—and annotated—by the public. To my journalist’s mind, that is a very positive step.

### III. MINORITY LAW CLERKS

On a matter of considerably more public concern, the Court also reached a milestone in the October 2002 Term. Nine of the thirty-five law clerks hired by the Court’s Justices for the Term were African-American, Hispanic, or Asian-American—the highest number of minority law clerks in the Court’s history.<sup>31</sup> This number is dramatically higher than the total as recent as five terms ago, when the dearth of minorities as law clerks was first brought to public attention in articles I wrote while covering the Supreme Court for *USA Today*.<sup>32</sup>

The main point of the articles was to alert the public to the considerable power and influence these law clerks—hired for a single term and most no more than a year out of law school—wield within the Court. But we also sought to find out who these clerks, largely unknown to the public, were. We undertook the first ever “census” of all the clerks hired by the current Justices. The resulting numbers turned out to be the aspect of the stories that gained the most attention. The demographic survey revealed that only seven among the 394 clerks hired during the tenure of all nine sitting Justices were African-Americans, four were Hispanics, and eighteen were Asian-Americans. No Native American had ever served as a law clerk. Only one-fourth were women. And four Justices, including Chief Justice William Rehnquist, had to that point never hired an African-American as a law clerk.<sup>33</sup> The next Term, only one minority—a Hispanic—was among the ranks of the clerks.<sup>34</sup>

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30. O’Brien, *supra* n. 9, at 259 (quoting William H. Rehnquist, Speech, *Oral Advocacy: A Disappearing Art* (Mercer U. Sch. of L., Oct. 20, 1983)) (internal quotations omitted).

31. See Tony Mauro, *Courtside: Minority Clerks: For the Record*, 25 Leg. Times 11, 11 (Nov. 4, 2002).

32. See Tony Mauro, *The Hidden Power Behind the Supreme Court: Justices Give Pivotal Role to Novice Lawyers*, USA Today 1A (Mar. 13, 1998).

33. *Id.*

34. Tony Mauro, *Only 1 New High Court Clerk is a Minority*, USA Today 9A (Sept. 10, 1998).

These numbers proved deeply offensive to the leadership of civil rights organizations. While the Court had, through its rulings, played a crucial role in promoting racial equality in public schools, public accommodations, and the workplace over the decades, its own law clerk hiring practices showed an insensitivity that shocked some. “If the chief justice can’t find a single black law clerk in more than a quarter of a century, that speaks volumes about his soul,”<sup>35</sup> civil rights scholar Roger Wilkins said. Prompted by the low numbers, Wilkins and hundreds of others participated in a demonstration on the steps of the Supreme Court in October 1998. Eighteen demonstrators got themselves arrested as an act of civil disobedience.<sup>36</sup>

The low numbers caused concern for other reasons. While the class of law clerks was not designed to be a representative democracy, the absence of minorities meant that minority perspectives were not brought to the important work law clerks do. For example, Native American issues occupy a significant percentage of the Court’s docket, which is initially screened by law clerks—none of whom are Native Americans. Court critics also point out that a Supreme Court clerkship becomes an instant ticket into the upper echelons of the legal profession. (Two of the current Justices, Rehnquist and Breyer, had been law clerks.) The demographic statistics meant that minorities were simply not in line to grab that ticket.

Initial reaction to the controversy among the Justices and other defenders of the Court was to minimize the importance of the issue or to assign blame elsewhere. Few minority law clerks were hired, according to this line of reasoning, because factors and circumstances further down the line, so to speak, placed fewer minorities in the pool of potential applicants for clerkships.<sup>37</sup> Inadequacies in public school and undergraduate education have resulted in fewer minorities applying to or thriving in the highly competitive elite law schools from which most law clerks are drawn.

Justices themselves struck these themes when questioned by members of Congress. Every year since the articles and the demonstration in 1998, the issue of minority law clerks has been raised at the Court’s annual budget hearings before Congress. “[W]e are creatures of our feeder systems,”<sup>38</sup> Justice David Souter told House members at the Court’s 1999 budget hearing. But at the same hearing, Souter predicted that the attention to the issue would create incentives and

35. Tony Mauro, *Activists Protest Court’s Lack of Minority Clerks*, USA Today 10A (Oct. 6, 1998) (internal quotations omitted).

36. *Id.*

37. For example, Linda Greenhouse, the esteemed and Pulitzer Prize-winning Supreme Court correspondent for the *New York Times*, whom I admire and like very much, went on record as believing that focusing on the raw numbers of minority law clerks without knowing how many minorities there are in the pool of potential applicants is “completely acontextual, inherently misleading, and hurtful to a lot of people who become persuaded that the Court is populated by racists who are turning down minority applicants right and left.” *Online Exchange: Race and the High Court’s Clerks*, 21 Leg. Times 14, 14 (Oct. 19, 1998).

38. H.R. Subcomm. on Com., J., St. and Jud. of the Comm. on Appropriations, *Hearing on Appropriations for the Supreme Court*, 106th Cong. 28 (Mar. 10, 1999).

pressure within that system to increase the number of minority law clerks. “[W]e are going to see the fruits of some pushing,”<sup>39</sup> Souter said.

It has taken some time, and the number of minority law clerks has fluctuated in years since, but it now appears that Souter was correct. Law professors say anecdotally that the feeder system has in fact become more sensitized, and more minorities have entered the pipeline and become law clerks.<sup>40</sup> The Justices themselves have also softened their stance on the subject. At the 2001 judicial conference of the U.S. Court of Appeals for the Eleventh Circuit, Justice Anthony Kennedy was asked about the issue. He expressed the view that part of the reason for the low number of minority clerks was that fewer minorities attend top law schools and some, because of inadequate public education, do not have the depth of knowledge of history needed for the job.<sup>41</sup> He said he has encouraged some potential applicants to work at law firms for a year or two to sharpen their legal skills and backgrounds. “We have a special obligation to find the minority applicants,”<sup>42</sup> Kennedy said, adding that “[t]he Court was well-served by the debate.”<sup>43</sup> Justice Clarence Thomas, also speaking at the conference, added, “I do think the debate has been a good one.”<sup>44</sup>

At the 2003 budget hearing, Kennedy also spoke of the high level of loan debt minority and other law students often are burdened with. He related conversations he has had with law students. “I’ll have breakfast with the kids and I’ll say, ‘How many of you have a student loan of over \$70,000 that you’re carrying?’ And about two-thirds of them will raise their hands. And that means that it’s hard for us to recruit these clerks.”<sup>45</sup>

This past Term’s record number of minority law clerks has been applauded by some of the same leaders who were critical five years ago. “One-quarter, as opposed to nearly zero, is tremendous,”<sup>46</sup> said former National Bar Association President Randy Jones. After the numbers emerged in 1998, the black lawyers’ group launched an internship program that brings minority law students into contact with state and federal judges. “The message is getting through,”<sup>47</sup> Jones added.

To some, there was special significance in the fact that the record number of minority law clerks was achieved during a term of the Court in which the issue of affirmative action in law schools was before the Court in the aforementioned case *Grutter v. Bollinger*. In a commentary published before the ruling came down, adjunct Pace University law professor Debra Strauss, author of a book on judicial clerkships, drew a direct connection between the two occurrences. She noted:

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39. *Id.*

40. Tony Mauro, *Courtside: Clerks: Minority Ranks Rise*, 23 Leg. Times 10, 10 (Oct. 16, 2000).

41. Tony Mauro, *Courtside: Justices Double-Team Circuit*, 24 Leg. Times 8, 8 (May 21, 2001).

42. *Id.* (internal quotations omitted).

43. *Id.* (internal quotations omitted).

44. *Id.* at 10 (internal quotations omitted).

45. *FY 2004 Supreme Court Budget Request*, *supra* n. 18, at 9.

46. Mauro, *supra* n. 31, at 11 (internal quotations omitted).

47. *Id.* (internal quotations omitted).

[W]hat would happen if, in the wake of the Michigan admissions cases, affirmative action were to be downplayed or even deplored? Would the latest gains in the diversity of the Court's law clerk staff become just so much legal history? Or would the Court simply continue its present hiring policy? As the Justices begin to deliberate on the Michigan cases they might bear in mind that what they do may come home to haunt—or help—themselves.<sup>48</sup>

As it turned out, the Court upheld the University of Michigan Law School program in *Grutter*,<sup>49</sup> while striking down the more rigidly race-conscious undergraduate program at issue in *Gratz*.<sup>50</sup> In her opinion for the majority in *Grutter*, Justice Sandra Day O'Connor stressed the importance of selective law schools in filling the leadership ranks of American society—and the concomitant need for minorities to be represented in those law schools. “[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders,”<sup>51</sup> O'Connor wrote. She continued:

Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.<sup>52</sup>

O'Connor could have added that the same handful of schools accounts for the vast majority of the Court's own law clerks as well. According to the original *USA Today* survey in 1998, nearly forty percent of the Court's law clerks got their law degrees at Harvard or Yale, and most of the rest were from a handful of other top law schools.<sup>53</sup> In short, it could be said that to imagine the impact of their decision in the affirmative action cases, the Justices needed to look no further than their own chambers. Whether that close proximity had any impact on the outcome is difficult to say.

So what are we to make of the Supreme Court's increased hiring of minority law clerks this past Term? After all, it is probably as much a result of changes further down the law clerk pipeline as it is of any conscious moves by the Court itself—though both factors probably played a role. And it would be difficult without further study to draw much more than a circumstantial or atmospheric connection between the rise of minority law clerks and the Court's jurisprudence.

But again, in terms of how the Court's actions outside its opinion-making communicate important messages to the public, this one is especially fraught with meaning. It says that the Court can, in its own way, respond to the tenor of the times and to public pressure concerning its own practices and operation. It also

48. Debra Strauss, *Jurist, Opinion, Forum, Diversity Begins at Home: Supreme Court Clerkships and Affirmative Action* <<http://www.jurist.law.pitt.edu/forum/forumnew105.php>> (Apr. 4, 2003).

49. 123 S. Ct. at 2347.

50. 123 S. Ct. at 2430-31.

51. *Grutter*, 123 S. Ct. at 2341.

52. *Id.* (citation omitted).

53. Tony Mauro, *Corps of Clerks Lacking in Diversity*, *USA Today* 12A (Mar. 13, 1998).

signifies that many of its Justices have, either through special effort on their part or through changes in their applicant pool, been able to benefit from greater diversity in their own workplace. And these increasingly diverse clerks are not just routine co-workers; to hear the Justices and their clerks tell it, clerks become part of Justices' extended families, maintaining lifelong connections after their service. Justices sometimes speak of their professional isolation from the rest of the world, the result of their exalted status as well as ethical concerns. Having a more multicultural group of law clerks become part of their everyday circle of professional and personal contacts alters the Justices' outlook on their work and, perhaps, their outlook on the world.

#### IV. CALENDAR ADJUSTMENTS

By statute, the Supreme Court begins its term on the legendary First Monday in October.<sup>54</sup> But as a result of two actions taken by the Court during the 2002-2003 Term, that requirement was fulfilled in an unusual way at the beginning of the 2003-2004 Term. The first change came with the announcement in January 2003 that, while the upcoming Term would begin on Monday, October 6, 2003, as required, no oral arguments would be held that day. The reason for not scheduling oral arguments, specifically referred to in the Court's announcement, was "so that Yom Kippur may be observed."<sup>55</sup>

As with most things the Supreme Court does, this announcement was not without relevant precedent. First of all, even though the law requires the Court to begin its work on the first Monday in October, it was not until 1975 that the Court began hearing arguments on that day.<sup>56</sup> Secondly, the conflict between the Court's argument schedule and the Jewish holy day had arisen before. In 1995, Yom Kippur also fell on a Supreme Court argument day in early October. After initially scheduling arguments for that day, the hearings were abruptly canceled, without public explanation. It was noted then that the Court for the first time in history had two Jewish Justices—Ruth Bader Ginsburg and Stephen Breyer—in its ranks, and that they may have exerted pressure to have the hearings canceled.<sup>57</sup> By one published account at the time, the Chief Justice initially balked, advising that any Justice who felt the need not to attend could listen to tapes of the oral arguments at a later date. But Rehnquist was also due to be absent from the Court because of back surgery during that period. So the Court, faced with the likely absence of three of nine Justices that day, canceled the arguments. But because of the coincidence of Rehnquist's surgery, it could not be said definitively that Yom Kippur was the main or only reason for the cancellation.<sup>58</sup>

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54. 28 U.S.C. § 2 (2000).

55. Memo. from Kathy Arberg, Off. Pub. Info., S. Ct., to Ct. Press, *Court Calendar for October Term 2003* (Jan. 17, 2003) (copy on file with *Tulsa Law Review*).

56. Robert L. Stern et al., *Supreme Court Practice* 575 (7th ed., Bureau of Natl. Affairs 1993).

57. Timothy M. Phelps, *Jewish Justices' Dilemma: Rehnquist Refused to Change Calendar for Yom Kippur*, *Newsday* (N.Y.) A5 (Oct. 15, 1995).

58. *Id.*

The announcement from the Court this time around was explicit in citing Yom Kippur as the reason for the cancellation of arguments. Here, the message of the Court's action may be read in tandem with the Court's jurisprudence. The Court has increasingly, though not always, ruled in favor of government policies or laws that accommodate religious practices or expressions.<sup>59</sup> Now the Court, in dealing with the religious needs of its own members and of the public, is willing to accommodate those needs in its own scheduling.

The other calendar-related action by the Court during the 2002-2003 Term is also noteworthy, though more ministerial. For the first time in recent memory, the Court scheduled oral arguments for a case—actually a dozen consolidated cases—in September, not waiting for the opening of the term in October. The cases, argued on September 8, involved the various challenges to the Bipartisan Campaign Reform Act, also known as the McCain-Feingold law.<sup>60</sup> By the law's own text, the Supreme Court was directed “to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.”<sup>61</sup>

The extent to which Congress can force the Court to do anything regarding its own scheduling of cases has never been tested. But the Court generally does heed these statutory exhortations. The urgency for the Court to expedite its consideration seemed particularly great in the cases brought against the campaign reform law. If the cases had been scheduled according to the Court's ordinary pace, they might have been heard in late fall of 2003, with a decision unlikely before the 2004 presidential election was well underway. The three-judge panel that handled the appeals, as also required by law, took a long time to fashion its ruling, issuing it on May 1, 2003, more than a year after the appeals were first filed.<sup>62</sup> The panel's delay dashed any hopes that the Supreme Court would hear and decide the cases during its normal sitting schedule, which ends in late June. The Supreme Court noted probable jurisdiction in the cases on June 5, 2003, and set the arguments for September 8—meaning that the cases were argued, strictly speaking, during the 2002-2003 Term. That Term ended when the 2003-2004 Term began on October 6.

Arguments in some of the Court's most historic cases have interrupted the Supreme Court's summer recess before; *Ex parte Quirin*,<sup>63</sup> the German saboteur case, was argued in late July 1942, and *U.S. v. Nixon*,<sup>64</sup> the Watergate tapes case, was argued in late July of 1974. But the last time a case was argued in September

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59. Compare e.g. *Capital Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (holding that a state's allowance of religious expression by a private party on the grounds of the state capitol building would not violate the First Amendment's Establishment Clause) with e.g. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that public school district's allowance of student-led prayer prior to football games did violate the First Amendment's establishment clause).

60. The cases are collectively known as *McConnell v. Federal Election Commission*, No. 02-1674 (U.S. argued Sept. 8, 2003).

61. Pub. L. No. 107-155, § 403, 116 Stat. 81, 114 (2002).

62. *McConnell v. Fed. Election Commn.*, 251 F. Supp. 2d 176 (D.D.C. 2003).

63. 317 U.S. 1 (1942).

64. 418 U.S. 683 (1974).

appears to be *Cooper v. Aaron*,<sup>65</sup> the Little Rock school desegregation case, argued on September 11, 1958, in advance of the start of school four days hence. The Court's ruling ordering the desegregated schools to open came down the next day, September 12.

After four hours of oral argument on the campaign finance laws, reviewing a lower court ruling that spanned more than 1,600 pages, the Supreme Court unsurprisingly did not issue its ruling the next day as it did in 1958. Meanwhile, millions of dollars are already being raised by presidential candidates in spite of uncertainty over the law.<sup>66</sup>

## V. DIGGING DOWN AND SPEAKING UP

This past Term also marked the beginning of the first significant renovation of the Supreme Court building since its initial construction was completed in 1935. To the average visitor, the building appears to have aged well and retains the majesty of the original Cass Gilbert design. But its infrastructure is crumbling, with inadequate heating, air conditioning, and fire protection systems throughout. “[T]he building is in bad shape,” Justice Anthony Kennedy told a House subcommittee in 2001.<sup>67</sup> In addition, modern-day security concerns that were non-existent when the Court opened its doors have created the need for more office space. Whereas the Court had no police force at all in 1935, now fully 120 of the Court's 400-plus employees are police officers.<sup>68</sup> To remedy the situation, the Court won approval from Congress to begin a \$122 million renovation project that began in June 2003 with construction of a two-story Court police station—completely underground and adjacent to the Court building on the Maryland Avenue side.<sup>69</sup> The second phase, set to begin in 2004, will modernize the infrastructure of all five floors of the Court building itself.

At a groundbreaking ceremony for the project, Chief Justice Rehnquist said, “The building has been kept in excellent repair and looks as beautiful as the day I first saw it in February of 1952. But after nearly seventy years, it is overdue for a renovation.”<sup>70</sup> Noting that the original construction of the building cost under \$10 million—and it was accomplished under the budget allotted, Rehnquist expressed the hope that “we will again be returning funds to the Treasury.”<sup>71</sup>

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65. 358 U.S. 1 (1958).

66. See Jim Drinkard, *With New Law, GOP Routs Democrats in Fundraising*, USA Today 1A (Aug. 21, 2003).

67. Charles Lane, *The Halls of Justice Badly Need Renovation*, Wash. Post A17 (Apr. 2, 2001) (internal quotations omitted).

68. Tony Mauro, *Courtside: Home Security*, 26 Leg. Times 10 (Apr. 21, 2003).

69. U.S. Government, *Supreme Court, The Supreme Court of the United States Building Modernization Project* <<http://www.supremecourtus.gov/publicinfo/modernization/buildingproject.pdf>> (accessed Oct. 6, 2003).

70. U.S. Government, *Supreme Court, Remarks of the Chief Justice: Groundbreaking Ceremony: Modernization of the Supreme Court Building* <[http://www.supremecourtus.gov/publicinfo/modernization/project\\_updates/groundbreaking06\\_17\\_2003.htm](http://www.supremecourtus.gov/publicinfo/modernization/project_updates/groundbreaking06_17_2003.htm)> (June 17, 2003).

71. *Id.*

One notable aspect of the modernization project is that the Court has gone to unusual lengths to inform the public about it. The Court public information office staged a briefing on the project for reporters, and has set up a special page on the Court's web site for information on the project and for updates on various street and sidewalk closings necessitated by the work.<sup>72</sup> Additionally, in April, Court officials made a presentation detailing the project at a meeting of the Capitol Hill Restoration Society, the main neighborhood association representing nearby residents. Society officials were favorably impressed by the presentation.<sup>73</sup> Once again, this effort to reach out to the public communicates something that the Court's opinions could not; that the Supreme Court feels some sense of accountability in how it spends taxpayer money, and in how it interacts with its neighbors.

The final development of the last term also involves the Court—or at least two of its members—reaching out to the public. On the morning of July 6, 2003, television viewers watching the ABC News Sunday show “This Week with George Stephanopoulos” observed a historic event: not one, but two Justices submitting to an open-ended broadcast interview.<sup>74</sup> Justices Sandra Day O'Connor and Stephen Breyer answered questions in what was generally considered to be an unprecedented event. Supreme Court Justices rarely have done broadcast interviews—or interviews in the print media, for that matter—preferring instead to eschew the limelight whenever possible.

So what were two Justices doing on television? The explanation had to do with a significant event two days before: the opening in Philadelphia of the National Constitution Center, an interactive museum and center for the celebration of the U.S. Constitution. Justice O'Connor was due to christen the building on its opening day, and both Justices Breyer and Antonin Scalia were in attendance. ABC News devoted considerable time and resources to covering the opening, so it approached the Justices for possible separate interviews. (Scalia, not surprisingly, declined.) O'Connor and Breyer agreed, and Breyer suggested that they sit down together with Stephanopoulos. A lively conversation ensued, on topics ranging from how the Court arrives at its decisions to how the Justices wish to be remembered.<sup>75</sup>

Stephanopoulos later said the public reaction to his interview with the Justices was surprisingly positive. “I've never had a more powerful reaction to an interview. . . . People were very interested to learn how the Court works.”<sup>76</sup> But he did not expect such interviews to become routine. His clear impression was that Breyer and O'Connor consented to the discussion as a way to give the new

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72. See U.S. Government, *Supreme Court, The Supreme Court Building Modernization Project* <<http://www.supremecourtus.gov/publicinfo/modernization/home.htm>> (last updated Sept. 3, 2003).

73. Mauro, *supra* n. 68, at 10.

74. See *This Week*, *supra* n. 16.

75. See *id.*

76. Tony Mauro, *Courtside: Double Play*, 26 Leg. Times 10, 11 (July 14, 2003) (internal quotations omitted).

National Constitution Center something of a publicity boost.<sup>77</sup> But it was difficult to watch the interview and not conclude that the Justices were also giving the Court itself a boost, whether by design or by accident. The two Justices, who readily said they did not agree on all matters before the Court, were explaining the Court to the public, asserting its collegiality, and describing its careful efforts to reach the right conclusion for the benefit of the public. Far from being unapproachable robed legal titans, they came across as personable, agreeable public servants. That, in itself, was a significant message, as important as the Court's decisions themselves.

## VI. CONCLUSION

In 1994, when I worked for *USA Today*, a national newspaper with a significant orientation toward sports coverage, I was asked by my editors to interview Justice David Souter about his reputed lifelong loyalty to the Boston Red Sox. I knew that Justices rarely agreed to interviews, and I had a small stack of rejection letters from Justices to prove it. But I figured that if Souter would agree to any interview at all, an interview about the Red Sox would appeal to him the most. So I wrote him a note, and got a polite reply. "Thanks for your invitation to comment on the Red Sox,"<sup>78</sup> Souter wrote, "but please include me out. When it comes to extra-judicial controversy, I'm risk averse."<sup>79</sup> I was not surprised.

Today, Justice Souter's reply would probably be the same. Though as an attorney general and supreme court justice in New Hampshire Souter had considerable exposure to the public and the media, he has proven to be one of the most publicity-averse Justices in recent memory. Other Justices are similarly reticent, as demonstrated by Justice Scalia when he turned down George Stephanopoulos' interview request.

But the Court as an institution has come a considerable distance in recent years toward taking a different approach in its interaction with the public. In ways big and small—from the quick release of oral argument audiotapes to creating a web page on its renovation project—the Court is slowly coming out of its self-created shell. When it hires a record number of minority law clerks and cancels arguments for Yom Kippur, it is recognizing the diverse demands of its public and its own members, as other institutions of government do.

There are some who believe that in becoming more public and perhaps more like the other branches of government, the Court will lose its exalted position in the public's esteem. "Although the Supreme Court of the United States is by no means a royal institution, its success in maintaining respect is nonetheless almost

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77. *Id.*

78. Tony Mauro, *Courtside: Would the Court Go to Bat for Baseball?*, 17 *Leg. Times* 8, 8 (Aug. 29, 1994) (internal quotations omitted) (copy of letter on file with *Tulsa Law Review*).

79. *Id.*

magical,”<sup>80</sup> political scientist Barbara Perry wrote in a 1999 book. “To spoil the magic by exposing it to excess ‘daylight’ might rob the nation and indeed the world of a stable and enduring emblem of the rule of law.”<sup>81</sup> In cataloging these developments of the past term, I hope to have demonstrated that by turning its face more readily to the public, the Court is gradually moving away from that romanticized fantasy of an invisible, Olympian institution. That gradual shift is not only inevitable, but it is a humanizing and altogether positive development for the Court. It cannot help but give the public greater understanding and appreciation of the Court’s essential role in society.

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80. Barbara A. Perry, *The Priestly Tribe: The Supreme Court's Image in the American Mind* 155 (Praeger 1999).

81. *Id.*