The Wednesday luncheon session of The American Law Institute convened in Salon III of the Ritz-Carlton, Washington, DC, and was called to order at 1:02 p.m. by President Roberta Cooper Ramo.

President Ramo: Good afternoon. I interrupt you for a very important reason. First of all, welcome to lunch. The reason I interrupt you is because it turns out that our speaker said he will answer questions. And so I wanted to give you opportunities at your table to decide just what questions you wanted to ask SCOTUSblog. Have a good lunch.

(*Lunch was enjoyed by the group.*)

President Ramo: Well, now I know that not only is Thomas Goldstein one of the most amazing Supreme Court advocates that there is, he's been involved in 10 per-cent of all of the Court's merits cases for the past 15 years. He's argued 38 cases himself.

And I don't want to take a lot more time talking about him, because I want him to talk to us. I will just say that we know you are worthy because you clerked for Pat Wald.

Ladies and gentlemen, Tom. (Applause)

Mr. Thomas C. Goldstein (MD): Thank you so much.And the first thing I want to say is I want to thank Roberta for her lead-ership. I mean, I have not seen, as a member of this organization, anyone with as much energy, active engagement with the bar and the legislatures, recruit-ing, in my experience with it. And I think I just feel personally very, very lucky to have you having been at the helm for us. So I'm very, very grateful.

In terms of my getting to talk with you, like I said, I'm very grateful. I feel wildly out of place in the sense that I'm not really worthy of the honor. I have spent my entire career kind of watching the Supreme Court from the first day, and now it's getting to the point where it's, you know, when we practice for a while, it's half my life.

And I get to practice with lawyers who are unbelievably talented. It's just that they also tend to be more creative and go and do other things as well. I'm totally myopic, and so I love the Court. I love the institution. I love the opportunity to get to talk about it.

And we do have what is for my wife and me our third child, SCOTUSblog, that, you know, has frequently been run from our kitchen table for, again, the last 15 years. And you've been—you know, Roberta and other people in this room and other contacts have been unbelievably generous about the blog, which we really just regard as an opportunity to get out there what there should be, which is a kind of objective, neutral take on what's going on in the Supreme Court in an era in which so much is politicized and so much is spin.

What I thought I would talk to you all about is the transition that we're in, as I see it, when it comes to the passing of the great Justice Scalia and the sure-to-be-great, in case he asks, Justice Gorsuch. (*Laughter*)

If he could only be greater. And you know, what this means, I think, for doctrine, for the trajectory of the Court, and what could have been. And so the place that I would start is that the Supreme Court, if we were to go back to January of 2016, the Court was kind of an ideological fracture, a fissure, a fault line with an actuarial bubble sitting on top of it that could explode.

And what I mean by that is that we, of course, have a Court that's closely divided. I'll talk about particular areas of the law and the direction of different doctrines just to illustrate a few points. But because it's so closely divided, you know, each person makes a huge difference, you know, 5-4. And then we had four Justices who were in their late 70s and early 80s, and so there was the real potential for the Court to tip in any direction.

So you could look at, you know, two different bodies of law, for example, to tell that as conservative as the Supreme Court is, and it's the most conservative that we've ever had, I think objectively, the project of advancing the law in that direction was far from complete.

So, and you can look at that in one of two ways. One is doctrine that just hadn't been filled out, and the second is stuff that Justice Kennedy was getting in the way of. And that— (*Laughter*)

You know? So that it either reached as far as it was going to go, or it was still on the way. And the first example, we have had an issue that has come to the Court for several times in the past few years involving union fees.

And so the question is, in a public-sector union, can nonmembers be required to pay what are called "agency fees" so that they're financing the negotiations on behalf of the union with the government, or is that an infringement on the right of association, the same way it is, the Supreme Court has held, when you require them to make contributions for just general union activities?

And so what had come to the Supreme Court over a series of cases was a change in the direction of the law from the kind of late Burger Court and the Warren Court era, and the Court had poised itself to hold that the leading precedent in this area, a case called *Abood*, was wrongly decided and that there was an associational right not to have to make these contributions.

And so that's what was going on. There and in a variety of other areas, the law was still advancing. You can think of it in areas like the Establishment Clause, where the law separating church and state was coming down in a variety of cases. You can think about doctrines that were just being given birth, the Second Amendment.

You know, before the Court's *Heller* decision, the Second Amendment was regarded as something of a typo in the Constitution. It, you know, was kind of there. (*Laughter*)

It didn't really amount to much of anything. It wasn't taken seriously.

Now think what you will whether it should be or shouldn't be. It just wasn't. And the project had just started. The Court had recognized the existence of the right and had not filled out what that right was at all.

So that and a bunch of other stuff, property rights and a bunch of other things were still in progress in the beginning of 2016. And then, as I said, there was the stuff that Justice Kennedy had kind of gotten in the way of. So you could think about things like the exclusionary rule.

So when I went to law school, it was—I thought it was written into the Fourth Amendment that if the evidence was unconstitutionally seized, then it would be excluded. It turns out not so. The Court had come up with this exclusionary rule, and the Court's most conservative members had been willing to say that they would overrule it entirely and leave folks who had their Fourth Amendment rights violated to civil remedies instead.

But Justice Kennedy said, no, I'm not going to overrule it. I'm just going to go this far and no further. And that's, you know, his approach. He's been at the center of the Court.

You can think about abortion. So we have the Texas abortion case that term, and just the future of Roe v. Wade, the Court has been narrowing it, but it could go substantially narrower still.

Race. Justice Kennedy for the first time that term voted to uphold a race-conscious program in the affirmative-action program that was before the Court. And so that doctrine could go even further if the Court could get another conservative member.

So the first batch of cases were just—they needed more cases, and the second batch was they needed another conservative member who would push Justice Kennedy out of the center seat.

And of course, you could imagine everything in reverse because the Court has done a number of very conservative things. If the Court were to switch in the opposite direction, the results are plain, and that is a bunch of things—*Citizens United* on down—would I think have been interred into nothingness or overruled outright. You know, the decisions on, for example, Section 5 of the Voting Rights Act.

All of those sorts of thing that were quite controversial and quite recent, so they didn't have a huge stare decisis effect, were, I think, back in play because they all hung by a single thread of a fifth vote. And that's where we stood at January 2016 in terms of doctrine, that the Court could become substantially more conservative.

And then when you think about—and that's the fissure that I was talking about. And then the actuarial bubble. And that is that we had two conservative Justices in Justice Scalia and Justice Kennedy, who were, you know, among the more wise and mature, also in their 70s and 80s.

And then we had on the left, we had Justice Breyer and Justice Ginsburg similarly. All of them genuinely at the top of their game. Absolutely everyone objectively would say that, all in apparent good health. But there is an inevitability to these things, and so there was the realistic prospect—I'm told. (*Laughter*)

I'm hoping inaccurately. But because of this prospect, the Court was poised to go in either of two directions, and that is if a Democrat—it is well settled now among the Justices that if they are given the opportunity to choose, they will retire under a President of similar ideology.

So you're just not going to have the situation that you had with Thurgood Marshall and Justice Brennan, although they had health issues. If at all possible, no member of the Court is going to allow the Court to change in the opposite direction.

And so, of course, under a Democratic President there would have been the prospect of an involuntary retirement of Justice Kennedy, and we saw this, what happened with Justice Scalia, and the reverse is true as well. And so you now have a Republican President. Obviously, you have a Republican Senate. And the real question is, you know, Justice—I think they would say objectively—Justice Ginsburg and Justice Breyer right now would have every intention to pass on the bench. They're not going anywhere.

But if that were to happen—not to be morbid about it, but this is the reality of the situation. If that were to happen, then the Court could pivot significantly. And that's what happened, obviously, in February of 2016 with the tragic passing, the completely unexpected passing of Justice Scalia. Because

there we had it set up. We had a Democratic President who could appoint a nominee and move the Court a step to the left and unwind, you know, 20-odd years of doctrine.

And because it was so obvious that Hillary Clinton was obviously going to win, there was the prospect that that would, you know, continue on. Because if a Democratic President gets to replace the more liberal Justices, well, then you just reset 25 years. You put somebody on the Court.

You know, we now have tended to put people on the Court when they're about 18. But if you were to just move to a reasonable 46 years old, (*laughter*) you're really at your prime, then you do have the opportunity to put people on the Court for quite a long time. And of course, we have life tenure in the federal judiciary. That happened in no small part because when the country was founded, the life expectancy was 39 years old. Nobody expected that people would be on the Court until basically 112. (*Laughter*)

So there was the opportunity to lock in your four votes, and the opportunity to move the Court in one direction. And so the President, who actually very kindly wrote for the blog about his decision, made what I think was a catastrophic blunder. It's just true. Of enormous historical importance. His greatest legacy, no matter what one thinks of President Obama, would have been the turn in the Supreme Court. And I think President Trump's greatest positive legacy will be what happens with respect to the Supreme Court as well.

And so the President's judgment here was as follows. He knows that the presidential election is obviously coming up. He knows the Senate is obviously in Republican hands, and so what he decides to do is pick a Supreme Court Justice from Central Casting and someone whom Republicans have asked for, and the calculus is, well, this is going to be easy.

This is obvious that Merrick Garland will be on the Supreme Court because he is dead down the center. You know, deeply respected, as are so many judges, but deeply respected on the left and right and was the most conservative Justice that you could reasonably expect to get from a Democratic President, absent a situation where the Senate is like 70/30 or something like that.

And so he picked Merrick Garland because his perspective as the President was quite different from his perspective when he was a Senator. As a Senator, Barack Obama had filibustered Justice Alito, for example. He had taken quite a progressive, liberal view of the Senate's role.

But the President, as a former law professor and as a lawyer, had taken the view that what he really wanted was people much more down the center. He wanted to bring the Supreme Court to the center, not try and engage in ideological wars, and you can see that in Elena Kagan. Elena Kagan is no firebrand liberal. Nobody would say that.

Now Sonia Sotomayor is a somewhat special case because it was a situation where you're appointing the first Latina to the Supreme Court, and so she's the Court's most liberal member by far. But he wanted affirmatively to bring the Court to the middle with an appointment that was obviously going to be confirmed.

That was a catastrophic error, and obviously, if anybody had really thought about the stakes of it, completely untrue. Because judicial conservatives understand the stakes and are invested in the stakes. And judicial conservatives are still pushing back and running against the Warren Court and the late Burger Court. They are still fantastically upset about what they view as the hijacking of the Constitution of the United States and it being taken in a terribly wrong direction.

And it is so much easier when you're trying to build a movement, and you're trying to accomplish things, to be against something, to be perfectly honest. And they have rallied around the cry of the Supreme Court being wildly out of control.

You know, you get kind of crazy views of these things. Chief Justice John Roberts, as a solid conservative vote on the Supreme Court, is demonized as wildly too liberal because of the vote in the Affordable Care Act. I mean, just anything, that kind of wing of the Republican Party and conservatives are fully committed to this project, completely invested. There is no other priority.

And then you get things like people who are pro-life, for whom this is an absolute life and death question and a passion project. And when you have the loss of Justice Scalia, they know the stakes.

And so what happened is that Republicans decided to lay down on the tracks and just say no. Now this was wildly unprecedented. The idea that there was some notion that you wouldn't as a president in the fourth year, that there was a hidden clause in the Constitution that says, you know, the President shall nominate, and with the advice and consent of the Senate, in the first three years of his term or her term.

You know, 13 different Presidents had appointed 19 different Justices, starting with George Washington, in the last year of their term. There was no precedent for this whatsoever.

Now Joe Biden, as he is often wont to do, had spouted off one day and said, when the Democrats controlled the Senate, "You know, I really think that this Republican President probably ought not to appoint somebody." And so there were things that you could point to rhetorically, but what had happened is the combination of the following.

And that is the Republicans had decided we're going to lay down the law, and the President had nominated, you know, the 53-year-old white guy—you know, 63-year-old white guy who's a dead centrist. You know how many people get excited about that? (*Laughter*)

You know, people are going to jump up and be like, "I'm headed to the polls for Merrick Garland." Merrick Garland doesn't want to be that person. His entire career is just being very, very solidly in the center.

So if the President had appointed, you know, a young African American woman, a progressive, someone who had life experience outside the Department of Justice and the judiciary, something that Hillary Clinton could have pointed to, well, then we would have had a fight on our hands.

But what happened instead is the Republicans said, "We are not going to hold a hearing. We don't care about this nomination," and the country went, "Okay, whatever."

And what in particular happened was the fact that everybody knew that Hillary Clinton was going to win, because what you got was that the progressive groups wanted Merrick Garland not to be confirmed and wanted him not to get a hearing in truth. At true bottom, what they believed is that when Hillary Clinton inevitably won the presidency, they could persuade her not to follow through with the Garland appointment and to appoint somebody younger and more liberal. And so nobody got behind him. Nobody put political pressure on.

And then there was this election going on that got a little crazy, and so everybody got distracted. And so he sat in a travesty. Just objectively, whatever you think ideologically or anything, just in terms of how the process ought to function. And so you were left, of course, with the seat being open.

Hillary Clinton manages to lose this election, and then we get an appointment of Neil Gorsuch, who is going to be, I think, very solidly in the legacy of Justice Scalia. Justices change while they're on the Court. They get exposed to things. They make choices that they didn't have to make before because, obviously, they're making more precedent, where before, they were following more precedent.

But I think Neil Gorsuch has been entirely straightforward in his views about things. He was before he was nominated and in his confirmation hearings. All you had to do was listen.

He is more committed to the project of originalism than any other member of the Supreme Court, save Justice Thomas, I think. I mean, he is very, very serious.

And there was no need to be as clear about this if it weren't the case. If you were to go back and look at the confirmation hearings of the Chief Justice, of Justice Alito, of Elena Kagan, so folks on the left and right, they uniformly give the answer, there is no one interpretive methodology. You know, it just depends on the case.

We have different tools that we look at—the original understanding, the plain text, what it's intended to accomplish, all those sorts of things. You give a classic nonanswer that will satisfy everybody. Neil Gorsuch said, I am trying

to figure out the original purpose—excuse me, the original meaning of the Constitution in a very much like Justice Scalia's original-public-meaning way of looking at the Constitution, except Justice Scalia blew a little bit hot and cold about it, to be perfectly honest.

The person who has been just down the line about it has been Justice Thomas, because he just doesn't care about precedent. I mean, if something is wrong, it's wrong, and he thinks that it should be overruled. He has no view of any real significance that the Court should be following stare decisis.

And when it comes to text, I think that what you've seen is Justice Gorsuch saying, "I'm a textualist," just like Justice Scalia. That he cares very much about this.

And what you really come to realize is that with Justice Scalia's passing, we lost an incredible voice on the Court, but he won the war. The way that we look at the Constitution and statutes right now is radically different. If you look at Supreme Court opinions now and 25 years ago, they bear almost no resemblance to each other when it comes to interpretive questions.

He single-handedly brought the law around, brought the lawyers in this room around, brought the judiciary around to the notion of paying much more attention to the text, and when it comes to the Constitution, its original meaning. And what you are actually going to get, I think, is a Supreme Court that is a little bit more conservative than when Justice Scalia was on it, because he had his quirks.

Justice Scalia, in his later years, would say he was criminal defendants' best friend on the Supreme Court, because he would go where his principles took him. Particularly, he had the view that the rule of lenity meant something in the criminal law, that there were these very vague criminal statutes, and folks weren't on notice of what could be a crime.

Merrick Garland wouldn't have gone along with that, and I doubt that Justice Gorsuch will be as strong in that view. And Justice Scalia was responsible practically for the birth, along with Justice Stevens, in the renaissance of the Confrontation Clause, in sentencing, for example, and all of those tended to lean left in the favor of criminal defendants in particular.

And if you take a kind of more purely doctrinaire conservative like a Justice Alito, you just don't see a lot of sympathy for that.

One way of looking at what happened with the Supreme Court with Justice Scalia is that the two wings of the Supreme Court, with Scalia and Thomas and the more liberal Justices, came around together against the center of the Court. You would have Justice Breyer and the Chief Justice and Justice Kennedy in dissent against the two wings of the Court, and I think now the center of the Court is going to take greater control.

So what happens in the more medium term? Well, and what does it mean with the prospect that Democrats conceivably could retake the Senate?

Well, if that were to happen, I think that the calculus changes, but not a ton because the President is committed to judicial conservatives on this question. And you see it in the list that was generated along with the significant input, if not writing, by the Federalist Society, by Heritage.

What he quite sensibly realized is that he could do this, and that is, identify conservative nominees, and by nominating them and showing that he would go in that direction, he would get the essentially unflinching loyalty of a significant part of the Republican Party that was committed to that as their first priority.

And so the President isn't going anywhere on this question. And Democrats, just as in the Merrick Garland instance, are just not "lay down on the tracks" people about this. They have other things that they are trying to accomplish.

So I would say that you would expect that it's quite likely that Justice Kennedy—one would say that President Trump's reelection is less than certain right now. It's at least a toss-up.

And so I would think that there's a very real prospect that Justice Kennedy will retire, a very real prospect that Clarence Thomas will retire. I don't think he's ever viewed this as kind of his, you know, lifelong project.

Then so immediately what you get is that second batch of cases where Justice Kennedy is in the way. And so you have a Republican President replacing a conservative nominee, but the law in that respect will move materially to the right because of issues like abortion and race and the things that Justice Kennedy has been holding the line on.

I think same-sex marriage, by the way, is not going anywhere. I think the country has just moved, and the Chief Justice, in particular, I don't think has any interest in overturning that decision.

But there are other things that Justice Kennedy has refused to do that I think are very much part of the project. And then if Justice Breyer or Justice Ginsburg were to leave the Court, then what you're talking about is a generational catastrophe for the left.

And that is, I do think that the upshot of what happened with Merrick Garland and with the election is that the law—the Constitution means something radically different now and will mean something radically different than it would have if that nomination had gone differently. I mean, the Court is divided 5-4, and it would have pivoted back decently hard in the direction of the Warren Court era.

And because it didn't do that, it is instead going to continue its trajectory to the right. And it is astonishing to think—you know, we have one document, we have a Constitution, we have a shared set of understandings—how much turned on the decision to nominate Merrick Garland, the quite correct strategic

calculus by Mitch McConnell to lay down on the tracks and say we're not going to hold hearings or confirm anybody.

And I think that what we should all expect is significantly more of the same in the direction of the Court. And you can think that's a great thing or a terrible thing, but I do think that we will look back, in 25 years, and think of this as a catastrophic mistake by a Democratic President and by progressives that has charted the course of the right to choose and affirmative action, gun rights, things that people care tremendously about and have effects every single day.

So, you know, it was a very interesting thing, obviously, to be able to get to go through with the blog. It's fascinating to be litigating in the Court in these times. I do want to say that I think that as a litigator, that what the Court is doing is perfect. (*Laughter*)

You know, the wisdom that is coming to the Court is exceptional. The writing is even better. They work harder every day, I think. You know, they need to do a little bit better in granting cases. I have a few suggestions. (*Laughter*)

But I mean, we should all—and no matter what you think of things ideologically—we should be proud of the institution. It's the only thing in this town that works. The Chief Justice really—have you ridden the Metro? (*Laughter*) The Chief Justice cares enormously about that. The Justices do. It is a very well-functioning institution, and we're lucky to have it.

So let me stop there. What I want to do—oh, thank you. (*Applause*)

Thank you so much.

I did want to take—I want to keep everybody on schedule so that we can get to our next session, which is at a quarter of. But I did want to take the opportunity to, if folks had any questions about what I talked about or anything else related to the Supreme Court, I'd be pleased.

Yes, sir?

Unidentified Speaker: I had a question. Like Winston Churchill, I am inclined to see the opportunity in every challenge. So I see the (*inaudible*).

But let me ask you this. Suppose Justice Gorsuch were to discover the original meaning of the Eleventh Amendment. (*Laughter*)

He might even discover the Constitution only allocates to Congress the power to declare war. And who knows, he might ultimately even come around and read the Ninth Amendment. Maybe there's hope.

Mr. Goldstein: Look, originalism is an extremely complicated topic, obviously. And where—how far Justice Gorsuch is willing to go, Justice Thomas, for example, is willing to think about all that stuff. In fact, nothing would make him happier than to think about every one of those things and have the opportunity to write about all of them.

And Justice Scalia was less interested in kind of novel re-understandings of established doctrine. Privileges and immunities, all kinds of stuff. The Ninth Amendment, for sure. A lot of Libertarian takes on the Constitution.

And it will be fascinating to see where Justice Gorsuch will go. And just realize that this is itself a half-century project. You know, Justice Scalia moved the law over a significant amount of time. This was all rooted, actually, in a set of dissents by William Rehnquist when he was an Associate Justice.

A ton of American law, you can go find it in dissents, solo dissents by him. And the things that Justice Thomas is doing now that maybe Justice Gorsuch will join him in it's fascinating to see if these are just seeds that are being planted that will be picked up. Because you know, our approach to the law is malleable. It's very different now than when—you know, just when I was in law school, and it has the prospect of being very different again.

And what's conservative and what's liberal? You know, every member of the Supreme Court is arguably more conservative than every member of the most liberal version of the Warren Court. So, you know, where you draw the line in these things is wildly different, and so it is fascinating.

Unidentified Speaker: It would be good to get a second Justice who shares that view.

Mr. Goldstein: Yes, privileges and immunities versus the Commerce Clause is another very significant issue.

Sir?

Unidentified Speaker: Where do you see church–state separation going? I think the playground case looks like it's been decided, but more generally and over a longer period of time, because that's a very tough area of the law.

Mr. Goldstein: Yes. So this was something that the Court really struggled with, with Justice O'Connor on the Court. You know, we have a couple of cases about Ten Commandments monuments that are—you know, you cannot—as brilliant as the Justices are, Homer nods, I have no clue what they were saying. You know, the cases seem to point in exactly the opposite direction. They were decided the same day.

This is, I think, a very significant part of the project, and I do think that you will see a number of very important decisions. The playground case is, I think, kind of easy. The left, on some religion issues, has come along, and I would think that that case may well be unanimously decided or something like 7-2 or 7-1.

I would think—I think it's quite likely that you will see a much more enthusiastic reception from the Court on things like vouchers, on things like monuments, on things like prayer. Do I think that they'll go all the way to school prayer in public schools? Not this majority.

But I do think that law, as it relates to religion, is on the fast track and is something, actually, you just didn't see in the first 10 years of John Roberts. It wasn't where the Court was focused. It was focused on other things, and I think religion is in the top three of what's next.

Unidentified Speaker: As somebody who exercises First Amendment rights, what do you see is the prognosis in terms of both comments and the effort to deal with whether we're going to have a revival of the Alien and Sedition Act?

Mr. Goldstein: You know, I think that where speech goes, where things as interesting and uncharted as treason go, is really, really, really uncertain. There's a lot of American law that the Justices just haven't had the opportunity to think about or any reason to think about.

I mean, I think the travel ban is a really interesting example of what's going to come to the Court. I think actually the second version is quite likely to survive the Supreme Court.

I think that what happens is you get these constitutional moments. The Supreme Court, when it came to the Gitmo cases, for example, just went at loggerheads with President Bush on President Bush saying the Court should get out, and the Supreme Court said, actually, you know, no, and said that there were rights of judicial review, and the Constitution would apply.

And so it is very interesting to me what the Court will do with this constitutional moment, what they will think of this President. I think lower-court judges have been deeply disturbed by some of the President's comments about judges and also about the substance of things like the travel ban. And I think the Supreme Court Justices are kind of more inured to that. So I don't think the politics of the moment will matter nearly as much to them as it has mattered in the litigation that's happened so far. But the travel ban is coming for sure.

The free-speech doctrine that I would watch the most is probably commercial speech. That was one that was kind of on a real pivot and is part of a constitutional deregulatory agenda, and that is that a lot of regulation, because it prevents communication that is thought to be deceptive, is a violation of the First Amendment. And that doctrine was pushing in the direction of saying that a lot of that regulation, like off-branded sales of drugs, is unconstitutional.

Sir?

Unidentified Speaker: So you mentioned religion was one of the top three. What are the other two?

Mr. Goldstein: If you were to say uncharted, you would say guns. Who knows what the firearm right is, and I don't think the Court really knows. I think it's struggling internally, which is why it hasn't taken any cases. And property rights, in the wake of *Kelo*, and whether the Court will take that sort of thing more seriously.

And then, of course, there's the high-stakes stuff, including particularly abortion, which is where I think, you know, the Court will invest a significant amount of capital, but do it as quietly as possible. You know, this is the difference. Justice Scalia accused the Chief Justice of faux judicial modesty because Justice Scalia wanted to put the pedal down. Little did he know that there was the real prospect that he was right.

Justice Scalia wanted to get to the end in these cases very, very quickly because he knew that how long this majority would last was fraught and uncertain. And the Chief Justice has been much more measured. He has preserved the Court's political capital.

So I wouldn't expect to see anything radical on anything. That's why we're at the situation with the union-fees case. That's why *Citizens United* is like the fourth in a line of cases.

This kind of judicial incrementalism is, I think, what you'll see, but it has very significant consequences.

Unidentified Speaker: Good afternoon. Good to see you again. The North Carolina case, Judge Motz's opinion in the Fourth Circuit, which actually took pretty big chunks out of the North Carolina state legislature, survived because the Court didn't grant certiorari. Many thought it would be granted.

I'm wondering if you have any thoughts on that vote count or that issue or what we're going to see with voting rights with respect to this Court as currently composed.

Mr. Goldstein: Sure. Well, voting rights is fascinating right now. We, of course, just had the racial gerrymandering case where Justice Thomas provides the decisive vote in favor of invalidating the districts. The case that we're talking about right now is the voter ID case.

And what happened there is, I think, that the conservatives that had a case like this before, I think they are relatively comfortable with these statutes. It's just that North Carolina politics got turned upside down, and nobody knew who was supposed to be pursuing the case in that court.

And the Chief Justice actually wrote about this to say this is just a train wreck in front of me. Do not take anything from the fact that we are not taking this case. And so I think you'll have voter ID back up there relatively soon, and I think that the conservatives will take a quite favorable view of it.

It'll depend on the precise statute, of course, but they may not think it's wise, and I think the Justices are probably extremely doubtful that there is this significant problem with voter fraud. But I think that they're going to find it hard to find in the Constitution something that says you can't require somebody to have ID.

Now if it's an ID that's super hard to get, and there's a record about that, that will be a different thing.

Maybe just one more, and then we'll get you on to the next session. Ma'am?

Unidentified Speaker: The premise of your Merrick Garland point was intended—had there been a different appointee, had there been a different nomination, rather, the left would have mobilized. But in the final analysis, would that have made a particle of difference?

Mr. Goldstein: Yes, it's—

Unidentified Speaker: There would have been a mobilization, but you'd be where you are now.

Mr. Goldstein: Right. It's a question that you can't know. It depends on how they mobilize, who does it, on what front.

There are two possible implications of nominating somebody, you know, a young African American woman who's a progressive. There are both implications in the Senate vote and the prospect that Republicans will be concerned that they are perceived as both sexist and racist because, you know, you are standing in the way of somebody extremely qualified.

And then the electoral implications. You know, the conservatives were mobilized about the Supreme Court. More progressive voters needed something tangible. They needed to be able to wrap their arms around it because they're decently satisfied with the Supreme Court.

Conservatives are still running against, you know, the Warren Court. The Court has gotten much more conservative about this, but progressives haven't managed to get upset about this. They care more about legislative things like the Affordable Care Act.

And so if they could have gotten somebody in there that Hillary Clinton would have wrapped her arms around and mobilized a set of voters, you know, it could well have been different. I'm not sure that—you know, we're talking about a very specific set of voters in the end and a very specific set of states.

It would have been quite different than it played out. Whether it would have been decisive I think is a much harder question. It's like Bush versus Gore.

So thank you so much. (*Applause*)

President Ramo: So, Tom, let me just say on behalf of all of us, that was completely riveting. On behalf of some of us, it was completely depressing. And on behalf of the other people, they're walking out with a smile on their face. So it was exactly what one would hope.

So as my very last thing I did as President of The American Law Institute, I'm really glad I chose you. And now on to Policing. (*Applause*)