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If there's a fork in the road, take it

Non-lawyers are understandably confused when the U.S. Supreme Court issues a 5-4 decision.

Last term, 26 percent of its decisions were decided by this margin. And in a quarter of those cases, all five justices in the majority were appointed by Republican presidents and all four dissenting justices were appointed by Democratic presidents.

In *Glossip v. Gross*, No. 14-7955 (June 29), the court considered the constitutionality of the drug cocktail used for executions in Oklahoma. The five Republican appointees required 47 pages to explain why the Oklahoma procedure was clearly proper. Predictably, the four Democratic appointees used 76 pages to conclude the opposite.

It's understandable for non-lawyers to say, "All these justices went to either Harvard or Yale Law Schools. So why can't they all agree on what the law says? How can pages and pages of legal reasoning lead to completely opposite conclusions?"

To answer this, take a look at a poem you probably have not read since high school. It is "The Road Not Taken" by Robert Frost.

"Two roads diverged in a yellow wood,/ And sorry I could not travel both/ And be one traveler, long I stood/ And looked down one as far as I could/ To where it bent in the undergrowth;/ Then took the other, as just as fair,/ And having perhaps the better claim,/ Because it was grassy and wanted wear;/ Though as for that the passing there/ Had worn them really about the same,/ And both that morning equally lay/ In leaves no step had trodden black./ Oh, I kept the first for another day!/ Yet knowing how way leads on to way,/ I doubted if I should ever come back./ I shall be telling this with a sigh/ Somewhere ages and ages hence:/ Two roads diverged in a wood, and I/ I took the one less traveled by,/ And that has

made all the difference."

Unfortunately, the poem has often been reduced to clichés such as "Be an individualist," "Don't follow the herd" and so on.

But David Orr in his new book "The Road Not Taken: Finding America in the Poem Everyone Loves and Almost Everyone Gets Wrong" (Penguin Press, 2015) argues that the poem has many more layers than the average reader perceives.

First, it is not clear that one of the roads really is "less traveled." It is true that one road is described as "grassy and wanted wear," but the speaker goes on to say that "Though as for that passing there/ Had worn them really about the same,/ And both that morning equally lay/ In leaves no step had trodden black."

Orr notes that, "The speaker wants to see the paths as different, but admits that the distinctions, if they even exist, are minute."

Second, even if one road is "less traveled," so what? Orr notes that the fact that the road is "less traveled" is usually interpreted as meaning it is "more difficult," but "This isn't necessarily true in either a literal or metaphorical sense." A road may be less traveled because it is less scenic or less interesting.

And even in the metaphorical sense of a road being a life choice, "The array of decisions that are 'less traveled' yet both easy and potentially harmful is nearly endless (drug abuse, tax evasion and so on)."

Third, Orr notes that the last paragraph is not the speaker currently explaining his decision. Instead, he is predicting something he might say in the future. In other words, he is constructing a future rationalization that he can use regardless of whether the road has led to good or evil.

He will emphasize to listeners in the future that one road was "less traveled," even though that may not be an accurate description of what the road was really like. And by ambiguously

CRIMINAL PROCEDURE



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insisting that this fact has somehow "made all the difference," he can either take credit if the choice has worked out or assess blame if it has not.

Orr notes that this reading is bolstered by something Frost once wrote about himself: "I [do not] know what is happening now: I am too flooded with feeling to know. I suppose I live chiefly in the past, in realizing what happened and taking credit for it just as if I had predetermined it and consciously carried it out."

Orr points out that that last sentence is precisely what is occurring in the last stanza of "The Road Not Taken." The speaker is already planning a confabulation he will provide "ages and ages hence." He has already "made up an impressively creative story" to fit whatever occurs in the future.

So what does this have to do with the Supreme Court?

Legal philosopher Stanley Fish distinguishes between how judges "use" and "make use" of theory.

Fish contends that no one in any practice, much less law, "uses" theory in the sense of consciously following a set of rules to reach a result. Instead, the result precedes the

reasoning. And a judge "makes use" of theory for the argumentative purpose of convincing the legal community that the result is not based merely on whim or caprice.

In the same vein, Justice Anthony M. Kennedy has described judging in this way: "[A]ll of us have an instinctive judgment that we make. ... But, after you make a judgment, you then must formulate the reason for your judgment into a verbal phrase, into a verbal formula."

The conclusion comes before the reasoning.

And 7th U.S. Circuit Court of Appeals Judge Richard A. Posner has said that when judges are faced with difficult cases where the law is not clear, "They necessarily fall back on their 'priors,' which include ideology as well as temperament, personal and career experiences, extrajudicial knowledge, religious beliefs and so forth."

Again, the conclusion drives the reasoning, not vice versa.

Compare this to Frost's poem. The first three stanzas describe the decision the speaker faces, while the last stanza is concerned with how he will present this decision to others in the future. How accurate is the speaker's presentation of his reasons for choosing?

Orr concludes that "Frost carefully works a sliver of doubt into the space between what has occurred in our lives and what we will tell ourselves we chose."

It is no surprise that the Republican appointees would be more naturally supportive of the death penalty in *Glossip* than the Democratic appointees. But are these 123 pages of reasons they ostensibly relied on really what "has made all the difference"? Did the reasoning actually lead them to their conclusions? Or does it simply provide argumentative cover for decisions they had already made in the first place?

A poem by Robert Frost should make us think twice.