AMERICAN CONSTITUTION SOCIETY

SUPREME COURT REVIEW

THURSDAY, JUNE 20, 2005
9:00 A.M.

THE NATIONAL PRESS CLUB
WASHINGTON, D.C.

PARTICIPANTS:

DREW DAYS, PROFESSOR OF LAW, YALE LAW SCHOOL
AND MORRISON & FOERSTER

SETH WAXMAN, WILMER CUTLER HALE & DORR

PREETA BANSAL, SKADDEN ARPS, FORMER NEW YORK SOLICITOR GENERAL

RANDY BARNETT, PROFESSOR OF LAW, BOSTON UNIVERSITY

AVIS BUCHANAN, DIRECTOR, DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA

RICHARD LAZARUS, PROFESSOR OF LAW,
DIRECTOR, SUPREME COURT INSTITUTE,
GEORGETOWN UNIVERSITY LAW CENTER

NINA PILLARD, PROFESSOR OF LAW,
GEORGETOWN UNIVERSITY LAW CENTER

PAUL SMITH, JENNER & BLOCK

KATHLEEN SULLIVAN, PROFESSOR OF LAW, STANFORD LAW SCHOOL,
QUINN EMANUAL URQUHART OLIVER & HEDGES

LISA BROWN: Good morning, everyone. My name is Lisa Brown. I am the executive director of ACS and I want to welcome you to one of ACS's annual signature events—our Supreme Court roundup.

And congratulations to the D.C. chapter for once again putting together a spectacular panel. This is our third annual Supreme Court roundup and it seems that both the panel and the audience get larger and more distinguished every single year. I am beginning to worry if we are going to have to be at the convention center next year. So thank you all for coming.

Thanks particularly to our eminent group of panelists who are going to share their assessments of the most recent term, what the decisions mean for various trends on the Court. And I know that obviously one question on everyone's mind is what would a new justice or two mean for the Court. And I'm sure that our panelists also have some views on that.

The growth and success of this event is actually indicative of the growth of ACS all across the country, which reflects the tremendous energy excitement and deep commitment to furthering a vision of our Constitution that really places the founding values of liberty, justice, and equality at center stage where they belong. And just in the past month, our lawyer chapters alone have held 18 major public events in 14 cities all across the country.

You add to that during the school year our network of now 125 student chapters, which hold on average four events a day during every week day during the school year, and you realize the ability of this organization now to really get some great ideas out there and for people to be connecting with each other.

And I encourage all of you – please I hope that you will become part of this growing network and this growing movement. If you're a student, become active in your student chapter. If there isn't a chapter yet on your campus, come talk to us. We will help you found one. If you are a lawyer, get in the D.C. lawyer chapter, write on our blog, or mentor a law student.

And all of you I hope, please get involved in our recently launched Constitution in the 21st Century project. The goal of the project is to further a progressive vision of the Constitution on a wide variety of issues. There is an overabundance of conservative ideas out there. We have got to get our values and our ideas out there, and to do that we want all of you to be part of this project. There are working groups on a wide variety of issues. Get engaged in it. Write – it doesn't have to be a large article. Write a five-page paper, 10-page paper, and we will disseminate to our network. We are going to have a publication pretty soon.

So please, all of you, I encourage you to get involved in ACS. And if you think this event is good, in another month, our convention is even bigger and better, described by one of the participants, one of the speakers last year as an intellectual spa for the mind. It is July 28th to 31st here in Washington. We have former Senator John Edwards, Professor Larry Tribe, civil rights advocate, Elaine Jones as three of our keynote speakers.

In addition, we have two-and-half days of panels on issues ranging from civil liberties and the war on terror to the right to education, election law to judicial nominations, moral values and the Constitution to religion and secularism. As you can see, it's a wide range of terrific issues with a fabulous group of speakers, plus organizing sessions for the working groups of the Constitution in the 21st Century project.

So I look forward to seeing you there. Today is the last day of early registration. Prices go up tomorrow, so if you have not yet registered, I hope you do so today. There are convention brochures, regular brochures outside. Please be part of ACS and I look forward to hearing the panel. Thanks.

NINA PILLARD: Thank you, Lisa. I'm Nina Pillard, Professor at Georgetown University Law Center, and I'm going to moderate the panel today. I am so pleased to be here and really excited to see such a great turnout. Thank you, Lisa. Thank you, the D.C. Lawyers Chapter of ACS, for assembling this great panel and inviting me to moderate.

We have some big cases this term, cases on takings law, the juvenile death penalty, prison racial segregation, medical marijuana, the Ten Commandments. Downloading music off the Internet may be about to get a little more expensive, but you may be happy to hear that buying wine interstate off the web has just gotten a green light. You may lose the family home to urban renewal, but at least your individual retirement account is exempt from bankruptcy. (Scattered laughter.)

The Court seems to be prepared to step back and defer to the EEOC on the Age Discrimination in Employment Act and to the FCC on the Communications Act. Meanwhile, after a generation of the sentencing guidelines in effect, judges are about to roll up their sleeves and get back into the business of discretionary sentencing. So we have some interesting trends to contemplate and as usual a lot of opinions that defy easy categorization.

The nine justices now on the Supreme Court have been together for 12 years. And I think that is the longest uninterrupted period without a new appointment since 1823. (Chuckles.) The chief justice was unwell in November, missed arguments, but he was only absent and unable to vote in 11 of the term's cases.

As you know, many commentators anticipated that the chief might step down on Monday. But to him it seemed that there were actually more justices not fewer. He was there on the bench quipping about the 10 separate opinions in the Ten Commandments cases, saying that he didn't know there were that many justices on the bench.

Well, we today have eight extremely distinguished panelists with us. And on the chance that they have more than eight separate views to express, I'm going to get going with introductions and the cases. Let me just very quickly introduce for you the panelists.

To my left, Drew S. Days III served as solicitor general of the United States from 1993 to 1996. Before that, he was a professor of law at Yale Law School, and he headed up the Civil Rights Division in the Department of Justice as assistant attorney general for civil rights. He is now again a professor at Yale Law School, and he is of counsel at Morrison & Foerster, and he is a member of the American Constitution Society board of advisors.

Seth Waxman, on my immediate right, was the United States solicitor general from 1997 to 2001. Before that he was a deputy attorney general and I think he held pretty much every post in the Justice Department. (Chuckles.) He is currently a partner at Wilmer, Cutler, Pickering, Hale, and Dorr. He is a distinguished visitor from practice at the Georgetown University Law Center, and he is the chairman of Legal Affairs magazine.

Preeta Bansal, to Seth's right, served as the solicitor general for the State of New York from 1991 to 2001 – I'm sorry, 1999 to 2001, and she was counselor for the United States Department of Justice and special counsel for the White House from 1993 to 1996. She is now of counsel at Skadden, Arps, Slate, Meagher & Flom, where she practices appellate litigation, and she is also currently serving as chair of the United States Commission on International Religious Freedom.

Randy Barnett, to Preeta's right, is a professor a law at Boston University Law School, and he is a senior fellow at the Cato Institute. This year he will be a visiting professor at Georgetown University Law Center. And Randy is the author of many books, most recently the well-received, "Restoring the Lost Constitution: The Presumption of Liberty."

Avis Buchanan, to Randy's right, is currently the director of the Defender Service for the District of Columbia, which is recognized as one of the best public defender offices in the nation. Avis has probably spent – (laughter) -- Avis has probably spent more time actually litigating cases than the rest of this panel put together.

Richard Lazarus, who is just beyond Kathleen Sullivan, is professor of law and faculty director of the Supreme Court Institute at Georgetown University Law Center. He worked earlier in his career at the Environment and Natural Resources Division of the United States Department of Justice and he was an assistant to the solicitor general of the United States.

Paul Smith, to Richard's left, is the managing partner of Jenner & Block's Washington, D.C., office. He is a leading Supreme Court advocate and he is a member of the ACS board of directors.

And last but not least, my former professor, Kathleen Sullivan, is a professor of law at Stanford Law School, where she served as the dean of the law school from 1999 to 2004. She is also now of counsel at Quinn Emanuel Urquhart Oliver & Hedges, where she practices appellate litigation.

All right, into the substance, what you all came for. This was a particularly active term in the area of takings, land use, and environmental law. So I would like to start with Richard Lazarus. Richard, the regulatory-takings movement has advocated very significant curtailment of regulatory power through intensified protection of property rights.

And in the last 15 years or so, the Supreme Court has seemed somewhat responsive to those claims, bringing new life into the Fifth Amendment Takings Clause in order to limit the ability of elected officials to regulate property, to protect the environment, or otherwise advance the public welfare.

But this term, it seems like we have a little bit of a slow down in that trend. We saw in *Lingle v. Chevron* that the Court upheld a rent cap on Hawaii gas stations as not an unconstitutional taking. The Court expansively interpreted the public-use restriction in the Takings Clause to permit the City of New London in the *Kelo* case to use eminent domain for private developers' urban renewal. And in the *San Remo Hotel* case, the Court barred re-litigation of a takings claim in federal court after the property owner failed to get compensation in state court.

Richard, I wonder, do this term's decisions suggest that the regulatory-takings movement is the dog that didn't bark?

RICHARD LAZARUS: Thanks, Nina. (Chuckles.) I think that there is some bark left in the dog. I think that one can say after this past term that the leash has just shortened a little bit, or maybe even a lot. The property-rights movement lost all three takings cases before the Court this term.

And since Justice Scalia joined the Court in October term 1985, there has really been a concerted strategic effort by the property-rights movement to sort of enlist the Court to persuade them to reinvigorate Taking Clause limits on land-use regulation, particularly those seeking to promote environmental protection – in October term 1985 – 1986, excuse me, when Scalia joined.

Immediately the Court came down with some significant rulings limiting land-use regulation. There was a case called *First English Evangelical*, creating a constitutionally required damage remedy, just compensation remedy for regulatory takings. And there was Justice Scalia's first opinion for the Court in this area, *Nollan v. California Coastal*

Commission, putting a heightened test on exactions in land-use regulation for regulation along the coastal zone.

When Justice Thomas joined the Court in 1991, the fall of 1991, the property-rights movement seemed to have a pretty solid five-justice majority on this issue. People may not remember, but actually, the opening questions that Senator Biden posed to Justice Thomas were on the Takings Clause and on the property-rights movement during the confirmation hearing. So everyone knew this could happen. As soon as Thomas got on with Scalia, they granted cert in a whole series of cases in October term 1991.

The one case that bore fruit – the other two fizzled out – was *Lucas v. South Carolina Coastal Council*. Significant decision it seemed at the time imposing takings restrictions on land-use regulation, again on the coastal zone. What is surprising though is that the property-rights movement – that was their sort of good year. And since then, it has been very much been on decline leading up to the current term.

I think the property-rights movement could justly blame Justice Scalia for that. I think he has had an inability to hold on to the Court. The *Lucas* opinion which he wrote – he didn't write it very well and he lost a lot of the Court – ended up with an opinion which hasn't had very good legs. The Blackmun papers, which I have been looking at recently, the official papers of Justice Blackmun show the original vote in that case was seven to two in favor with Justices Kennedy and Souter both in the majority.

And the way that Justice Scalia wrote the opinion for the Court, he pushed Souter to the – out of the majority and he pushed Kennedy out of his opinion and Kennedy wrote separately. I think he stumbled in *Lucas* early on and wrote an opinion which just didn't work very well.

He did the same thing influencing the Court in a case called *Dolan v. City of Tigard* in 1994. According to the Blackmun papers, he pushed the chief for a more extreme ruling and finally just a couple of years ago in a case called *Palazzolo v. Rhode Island*, he went after Justice O'Connor and pushed her away as well.

And the irony is that the justice who is taking advantage of this is Justice Stevens in the takings area. Justice Stevens, who was dissenting in case after case in the takings area during the 1980s and then again in *Lucas*, Justice Stevens has sort of become the once Maverick, now leader, of the Court in this area. And he has showed, remarkably, the ability to keep a majority and to bring Kennedy and O'Connor into his fold. He did that in the *Tahoe-Sierra* case, he does it in the *San Remo Hotel* case, and he does it to a lesser extent, but still with some in the *Kelo* case. So it is really the ascendancy of Justice Stevens in this area and the decline of Justice Scalia.

The first case is *Lingle*. This is an opinion by Justice O'Connor, unanimous opinion, just a wonderful case. This is the case where the Court unanimously eats Crow. That is exactly what Justice Scalia said at oral argument they were going to have to do.

They took a takings test, which was announced by the Court unanimously in June of 1980 in an opinion written by Justice Powell, an April argument, which is undoubtedly why it was written the way it was, where the Court announced a per se takings test. That is, if a regulation does not substantially advance a legitimate governmental goal, it is a per se taking. The problem was it didn't make any sense to say that a means-ends analysis, a takings test – that really is due process. That is a substantive due process test, not a takings test.

In this most recent case, in *Lingle*, the Courts took a close look at it. They repeated this over and over and over again since 1980. They have actually used it in the *Nollan* case and they threw it out, nine to zero. There is a wonderful first line in the opinion by Justice O'Connor, very candid, very refreshing when she says – this is the first line of the opinion: "On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase, however fortuitously coined." And then they say, you know, looking at it, there is nothing to it.

This is a significant thing, a significant development because this test has been the central part of the property-rights movement. They have never succeeded to go very far but they have been pushing it very hard because it gives them some advantages. If things sound as takings rather than substantive due process, they don't run into that problem with conservative judges who don't like substantive due process. So they could single out land-use regulation as a takings problem rather than substantive-due-process problem.

And the other advantage of the takings, as opposed to substantive due process analysis is that it provides a just-compensation remedy, provides as a damage remedy, and therefore makes it much more likely to get private attorneys who are willing to take the cases. There is a pot of money at the end for which they can be more assured they are going to be paid.

It's also an opinion – the *Lingle* case – full of benefits. There is lots of wonderful language in it which I think government regulators, environmentalists are going to use in the future to try to narrow the *Lucas* decision and also try to sort of put the Penn Central test, which is the leading test right now, in a more favorable light.

The second case was this case called *San Remo Hotel v. City and County of San Francisco*. Opinion by Justice Stevens argued on the winning side by Seth Waxman. This is one of those cases which is near and dear to the heart of a very small group of lawyers. (Laughter.) But I will give you a very quick explanation of it.

In 1985, the Supreme Court, in a case called *Williamson County*, opinion by Justice Blackmun, held that if someone is bringing a 1983 action in federal court claiming that a state or local land-use regulation is an unconstitutional taking in violation of the Fifth Amendment Just Compensation Clause, they have to satisfy two ripeness tests.

One is they have to make sure they get a final decision from the state that they in fact can't use their property the way they can't. The second thing is if the state allows for a just-compensation remedy somewhere, they have got to find out where they can get just compensation because the Takings Clause doesn't prohibit takings; it prohibits takings without just compensation. So you first have to find out where you can get it. And that may mean bringing a suit in state court before you can bring a suit in federal court.

The problem of course is if they go to state court and they litigate, they litigate their federal claim in state court; they then are precluded. They can't then bring a claim in federal court. What has also turned out is that they bring their case in state court and say we're only bringing our state constitutional takings claim; we are not bringing our federal one. We want to reserve that one; we want to leave that one so we can bring it back in federal court later on.

It turns out that what the federal courts later say is you're out of luck – full faith and credit. The issues are basically congruent. There is really nothing much different between the federal and the state Takings Clause, so they have denied the right to bring a case in federal court all together and they have been complaining about it.

In this case what they argued for was an exception to the full faith and credit. They said because of this ripeness test that forces us in state court, we should have an exception to full faith and credit and be able to bring it later on in federal court. The Supreme Court essentially said no, no exception to full faith and credit.

There is, however, a significant concurring opinion written in this case by Chief Justice Rehnquist. Chief Justice Rehnquist, joined by three others, by Thomas, Kennedy and O'Connor, said we are not so sure about the Williamson County Ripeness Test. We are not so sure it's really fair now that we see how it works. We are not sure it's fair to make people go to state court to find out where they can get just compensation. We might want to rethink it.

Oddly, Justice Scalia did not join that. I don't know why. I have been involved in cases; I have had Justice Scalia ask me questions. He is no fan of the second prong of the Williamson County Ripeness Test. I am not quite sure why he did it, but in any event, there are at least four votes pitching the right case up for the Court to revisit *Williamson County*.

The big case of the term of course in this area was the *Kelo* decision. This is where the Court ruled five to four in an opinion by Justice Stevens that state and local governments could use their power and their domain to promote economic development. It doesn't have to be property which is being used in some way that would constitute a common-law nuisance. It doesn't have to be a so-called blighted area. It doesn't have to be so you can condemn it so the public in fact can physically use the property somehow, like a highway.

It is enough that it is promoting economic development. Economic development can satisfy the Takings Clause requirement that eminent domain be used for quote, "public use," unquote. In this case, Kennedy supplied the fifth vote for Justice Stevens' opinion. He wrote a separate concurring opinion but, again, showing Stevens' talent, he joined Stevens' opinion; he didn't just write separately.

In a separate opinion, though, he does sort of a shot-over-the-bow of state and local government, sort of a warning shot. He says, okay, it's okay here to have eminent domain use, and even though it might be private-to-private property for economic development in this case. But it is okay here because we had a comprehensive land-use plan. We had a real comprehensive land-use plan. It is also okay because when they did it, they weren't sort of benefiting and enriching some identifiable private person that we could worry that there was really some individual and private sectors sort of using the local government to sort of enrich themselves. I thought it was a very responsible and quite appropriate concurrence in the case.

I thought the most striking thing about the case, though, was it was such a big deal. Normally eminent-domain cases are not such a big deal. (Scattered laughter.) They may be, you know, for those in my area, but most people don't care about these areas. This is a fairly settled area of constitutional law here. It was a tough policy as it applies to Mrs. Kelo, but governments are doing this sort of thing all of the time in lots of contexts. As Justice Thomas admits in his separate dissent, he would have to overrule, you know – he says the Court took a bad turn in 1896. (Laughter.)

So this is not really big news here. It was an extraordinary PR job by the property-rights movement. They had an article I think in the front page of The New York Times before cert was granted. They had a story on NPR before cert was granted and they ginned it up as soon as the decision came down.

O'Connor wrote just a remarkable dissent in the case, very un-O'Connor-like, her dissent. She proposes a bright-line test, not a balancing contextual – (laughter) – test. What really surprises me, its rhetoric is very harsh, it's more like a Scalia opinion, and there was really – from my view, almost nothing was forecast from oral argument in the case. I was sure she was going to concur just like Justice Kennedy. I thought that is what we were going to see in this case, was a separate concurrence. We can speculate maybe later why she wrote this kind because I have got some speculation about it, but it certainly whipped up a media frenzy as a result.

When I juxtaposed the *Kelo* case with the *Castle Rock* case, *Castle Rock* is just cited here at the end of the term involving whether or not a mother, who has a temporary restraining order, whether or not she has a constitutional due process right to have it enforced. It is really, really harsh horrible facts.

And the Court has no problem applying settled constitutional law and it is settled constitutional law that there is really not a constitutional claim in that case. In her case, her three children are murdered. In the other case, Mrs. Kelo has her property taken with

just compensation. Each one has applied horrible facts; in each case constitutional law. Mrs. Kelo is getting all of the headlines. (Laughter.) Nothing over here in Castle Rock, which I think is quite interesting. Nina.

MS. PILLARD: Seth, you represented the successful state petitioner in *Lingle*. You argued on behalf of San Francisco and San Remo Hotel. Anything you could add to Richard's comments?

SETH WAXMAN: Well, I agree with everything that Professor Lazarus says and I particularly appreciate the fact that he had the discretion not to mention the one so-called environmental case that I had this term that I lost – (scattered laughter) – a case called *Bates v. Dow Agrosciences*, which I will say a few words about, which I don't think really is an environmental case, although it is listed as one.

I do – I mean, *Lingle* is one of those cases that really was a wonderful case for those of us who wanted to sort of inter as illogical and potentially very damaging to government regulation and in a regulatory takings movement, this so-called substantially advances test.

And it really presented full square in a wonderful context an issue that the Supreme Court had been sort of trying to decide for many, many terms, which is whether there is a substantially advances prong to the Takings Clause, which manages to make it all the way through its text in the Fifth Amendment without seemingly applying any substantially advances prong, but which, as Richie pointed out, the Supreme Court in some dicta in *Agins v. Tiburon* had announced as standard and which had been repeated, you know, a half-a-dozen, or a dozen times in Supreme Court decisions with sort of pernicious effect but no real consequence in any of those decisions.

And the Court has granted cert and heard argument in a number of cases that have raised the question of whether there is such a means-ends test in the Takings Clause, independent of the Due Process Clause of the Fifth and Fourteenth Amendments, and *Lingle* was one of those vehicles that sort of seemed to me when it first came to my attention as sort of a dream come true.

This was pure economic legislation by the State of Hawaii which is, I don't know, 200,000 miles from the rest of the United States and is a small economic market and was facing the tyranny of potential hegemony, economic hegemony by the major oil companies because there are only two refiners that service the whole state. They own half of the service stations and the state legislature was concerned about the economic consequences of that kind of economic hegemony, and they passed a law that basically burdened the service, the refiner's abilities to terminate independent dealerships at the retail level.

And it was challenged originally under the Due Process Clause and the Takings Clause. The due-process issue fell out of the case, which is a point that is noted by Justice Kennedy in his separate concurrence. But, you know, the district court – it

bounced back and forth between the district court and the Ninth Circuit a couple of times before we had a chance to take it to the Supreme Court.

And basically what happened was the Ninth Circuit ordered the district court to hold a trial over whether the legislation as enacted by the State of Hawaii substantially advanced its economic – it's announced goal of preserving competition at the retail-service-station level. And sort of astoundingly for those of us sort of who grew up being told that economic legislation is judged under a rational-basis test under the Due Process Clause in which if there is any rational basis in which the legislature could be said to have acted, the law could satisfy as due process.

In this case, the district court heard testimony from two competing experts about the extent to which the law that the State of Hawaii had imposed in fact succeeded or would be likely to succeed in advancing its objective. And the district judge – and I say this as sort of a dream come true. It sort of was too good to be true.

The district judge basically says I find Chevron's expert to be more credible than the state's expert and therefore I'm striking this down as an unconstitutional taking. And that seemed to those of us who were representing the State of Hawaii as this is the case in which the Supreme – it's going to enable the Supreme Court to address this perplexing question if there is such a test under the Takings Clause and presents basically the strongest possible facts for us.

There was some question about – I mean, the State of Hawaii didn't like having its statute declared unconstitutional, but, you know, on balance didn't otherwise have that much of a stake in the outcome of this case, at least at some points.

But the case was – we wrote the brief in the case and the case was ultimately argued by the attorney general of Hawaii who did an absolutely wonderful job, and it did give, as Richie says, the Supreme Court the opportunity to say as that sort of wonderful diva of the old "Saturday Night Live," Rosanna Danna used to say, "Never mind" – (laughter) – in which they made absolutely clear that, you know, they had led lower courts and themselves astray by sort of announcing in dicta that there was such a purported test.

So it really – *Lingle* was really one of those sort of litigator's-dream-come-true cases where it presented the best possible facts in a context in which the Supreme Court would be able to decide an important constitutional question that it had repeatedly actually been unable to decide in cases that it had previously heard.

As far as *San Remo* is concerned, *San Remo* in retrospect looks like a really easy case. We, you know, managed to win the case in yet another Stevens opinion resoundingly. It is really not that much of an environmental case. It is really a civil procedure case that involves the application of the principles of full faith and credit and particularly the federal full faith and credit statute.

The San Francisco ordinance and issue in the case presented an almost irresistible target of the property-right champions on the Supreme Court. In fact, the Supreme Court had denied cert in another case involving the application of this San Francisco statute, which basically placed a very substantial burden on the owner of any residential hotel who wanted to convert it for tourist use.

And Justice Scalia, I think joined by Justice Thomas and the chief, dissented from the denial of cert in that case a few years ago in which the dissent basically said, well, I agree that the constitutionality of this ordinance is not fairly or even conceivably property presented in this petition, but I live in the hope that some day somebody will find a vehicle to bring this god-forsaken ordinance before the Supreme Court so that we will be able to get our hands on it.

And the concern about *San Remo* was this was that case; the ordinance was viewed as sort of red meat by the property rights movement because it seems very much like the legislative form of the type of exaction that was at issue in a case-by-case basis in *Nollan* and *Dolan* and there was a concern that the Supreme Court might extend the concept of exactions to legislative takings or regulatory takings.

But we argued the case as a straight full-faith-and-credit case where the constitutional takings issues had been presented to and litigated in front of the state courts albeit in the context of California's constitutional takings clause, which the California Supreme Court said applied an identical or analogous test to and our argument was, you know, you don't have to decide whether *Williamson County* was or wasn't correctly decided.

You don't have to decide whether you think this ordinance was or wasn't an unconstitutional taking. This case was fully and fairly litigated in the state courts at the petitioner's request and that is all you need to decide because state-court judgments as to both rulings of law and findings of fact are entitled to full faith and credit.

Now, for me, the sort of hard and sort of cognitively dissonant thing about taking this position is that I have spent virtually since I started practicing law have been quite involved in habeas corpus litigation largely on behalf of death-row inmates, but also others. And in the habeas corpus area, the federal courts have historically been viewed as sort of the champions and the backstop for the application of constitutional rights in the criminal law context.

And being in a position of arguing in the Supreme Court that, hey, it was a full and fair hearing in state court on these property rights issues – (scattered laughter) – and that is all you need to think about was something that I had to sort of recycle over and over in my mind. (Scattered laughter.)

MS. PILLARD: Swallow, take that pill.

MR. WAXMAN: I mean the – I mean, it's not that – there isn't ultimately any theoretical dissonance because in the end both issues are decided by statute. There is a habeas corpus statute that makes clear that there are all kinds of deference that have to be given to state court fact findings in the habeas context.

But ultimately federal courts, assuming that, you know, 18 different procedural thresholds are otherwise satisfied, federal courts do apply an independent judgment about what the Constitution does and doesn't mean in habeas cases, whereas in other contexts under the full faith and credit statute, there is a requirement that was enacted by the first Congress that it provides a sort of a – a correlation with the Full Faith and Credit Clause of the Constitution that determinations of fact and law by state courts are entitled to, entitled to respect by federal courts. So it really was a civil procedure case.

And lastly I'll just say about *Bates*, that was a case involving the preemptive effect of certain labeling provisions of FIFRA, which is the Federal Insecticide Fungicide and Rodenticide Act. (Scattered laughter.) The case is really much – it was a very, very, very difficult case to win and needless to say I didn't win it. (Laughter.)

The only thing that sort of made it a little embarrassing was that the Supreme Court granted cert in the context in which 11 of 11 circuits had agreed with the position of my client, Dow, that the statute in fact did preempt state common law suits by people who were alleged – in this case farmers who alleged that they had been injured by the application or economically injured by the application of a certain pesticide. And 22 out of 23 state supreme courts had also agreed.

And so my job, you know, with respect to my client in the case was simply not to lose something that virtually all other lawyers in this area had easily won, and even with the bar set that low I didn't manage to succeed. (Laughter.) There is an important, there is an important debate I think that transcends certainly environmental law because the case really doesn't have anything to do with the environmental regulation of pesticides and that is the question of how the Supreme Court, how a generally states-rights oriented Supreme Court will address statutes, economic statutes that the national legislature enacts that appear to preempt states in areas of traditional state regulation.

This has been sort of an anomaly in the federalism area because unlike Eleventh Amendment cases and state-sovereign immunity cases and some of the Fourteenth Amendment cases that have been decided incorrectly in my view both during Drew's tenure and largely in my tenure.

The preemption cases have sort of not fallen into the state's-rights mold, and as several people have observed, typically what you find in the preemption cases – this was true in *Cipollone* and in *Medtronic v. Lohr* – is the sort of liberal wing of the Supreme Court, largely Justice Stevens writing opinions saying there has to be a presumption against preemption because that is built into our federal system.

And the other side of the Court, Justice Thomas and Justice Scalia basically saying what are you talking about? I mean, when we are talking about implied preemption, sure. We don't lightly imply federal preemption of state regulatory rights. But when Congress enacts a statute that has a preemption provision, there is no presumption against preemption.

And this case, *Bates*, actually offered the Court the opportunity to clear up a very, very muddled area of preemption law that was sort of announced by the Supreme Court in the tobacco – *Cipollone*, the tobacco advertising case, and was not in any way made easier in the medical device preemption area, *Medtronic v. Lohr*.

Bates does reaffirm that when Congress establishes a provision that seeks to preempt state requirements that are inconsistent, that includes common law clauses of action under state tort suits and that is good news for Congress and for federal regulation. On the other hand, the Court, with Scalia joining, announced that there was a strong presumption against preemption even in the context of an express preemption statute. He went along with Justice Stevens I think for the first time in this area. And the Court really did read the FIFRA preemption provision in a very narrow way.

MS. PILLARD: All right. I know there are actually probably other comments about this but I really want to get some more of the cases on the table. So I hope we have a chance to circle back for those who – others who want to comment. I want to turn to criminal law and procedure. One very sort of foreshadowed development this term was the Courts holding in a pair of sentencing cases, the *Booker/Fanfan* cases, which deal with consistency of the sentencing guidelines with the Sixth Amendment jury-trial right.

And this pair of cases yielded two distinct five-four majorities. Part of the opinion was written by Stevens and part by Breyer, and as I understand it, the Court in the Stevens opinion held that a judges fact finding – judges fact finding by a preponderance as opposed to the jury's fact finding beyond reasonable doubt – the judges fact finding cannot increase a mandatory sentence beyond what the jury's findings would support.

But, a separate majority of the Court, in an opinion by Justice Breyer, with only one, Justice Ginsburg, common to both majorities held that the problem is cured and judges are allowed to find facts and hike up sentences so long as they treat the guidelines as discretionary rather than mandatory. So you have this intriguing contradiction with the guidelines violating the jury right when they are mandatory but when they are discretionary they don't. Now these decisions and *Blakely* from last term and *Apprendi* from before that have already spawned entire symposia, and I don't pretend that we are going to unravel all of this for you today.

But, Avis, perhaps you can put this in some context and just tell us what you see as some likely practical effects of these sentencing guidelines cases.

AVIS BUCHANAN: Well, as you noted *Booker* and *Fanfan* dealt with the sentencing guidelines, their effectiveness after the *Blakely* decision. In both *Booker* and *Fanfan* – well, in *Booker*, a judge imposed, under the guidelines, a harsher sentence than would have been permitted had the Court relied exclusively on the jury's verdict in the case, adding about 10 years to the sentence. The Supreme Court had decided *Blakely* earlier and *Apprendi*, signifying that when you take things out of the province of the jury, decision making out of the province of the jury, that is going to be of concern to the Court.

So many courts and the U.S. Attorney's office – U.S. Attorney's offices across the country had actually anticipated *Booker/Fanfan* in some degree by changing how they indicted cases, including aggravating factors in order to insulate sentences from *Booker* – a *Booker/Fanfan* outcome such as the one the that the Court issued.

This was a complex scheme passed by Congress. It has been in place, had been in place for about 20 years. Judges, article-three judges, non-article-three judges had come together. There was a Sentencing Commission established by Congress and they painstakingly created this very complex grid based on the person's background and facts of the case, and it was a very mechanical application of the facts where you looked across in this box and looked down in the row in this box to get the intersecting box and that gave the range of the sentence.

And it was designed to eliminate disparities or substantially reduce disparities and sentences that judges and Congress and the public had been concerned about, particularly in this anti-crime atmosphere in the country. So there was a lot riding on the *Booker/Fanfan* decision.

At this point, now that the guidelines have been ruled – are held to be advisory as opposed to mandatory, which was the key for this Court, there – it has a retrospective application or implication and it has a prospective implication.

The retrospective implications are now, in order for people who had already been sentenced to try to reverse their sentences or reduce their sentences under the guidelines, they have to prove prejudice; they have to prove that they had a sentence that was – their sentence was increased directly as a result of the guidelines and applications of the guidelines, and that a lower sentence would have resulted in the event that the guidelines had not been in place at the time, which is a fairly high standard and difficult to prove if the Court didn't make any kind of explicit findings. So there is a lot of litigation going on for people who are trying to show that the impact of the guidelines did prejudice them.

Prospectively, there are many states who have implemented guidelines following the trends of the federal courts. I don't know if Congress – how much Congress is paying attention to *Booker/Fanfan* or how much of a priority it is in this Congress given Social Security and tax relief, et cetera, et cetera. But many states – several states had enacted sentencing guidelines. The District of Columbia voluntarily adopted guidelines at the

urging or the suggestion of the D.C. Council. The local D.C. guidelines are voluntary so they were not subject to invalidation as a result of the *Fanfan* decision.

But there is still a concern about disparate sentences. I think judges are using the guidelines still in an advisory capacity. They are not as concerned about – I would imagine they are not as concerned about departing from the guidelines because of *Booker/Fanfan*. On the other hand, there are efforts by the executive and by Congress to track judges' sentencing. So they are still concerned about disparate sentences, and when they mean disparate, they mean too low. (Laughter.)

So I think in the future, as long as those sentences are still within the ranges anticipated by Congress, there will be some comfort level by all of the – all involved in this to let things lie. On the other hand, there are some judges who are definitely uncomfortable with the guidelines and will feel much freer to apply their own discretion, and that was conservative as well as liberal judges.

MS. PILLARD: Avis, I am sure you are highly conscious that criminal defendants have hardly been a darling of the Rehnquist court, notwithstanding this *Booker/Fanfan* decision. The chief justice has outspokenly advocated reducing death-row litigation, habeas review and intensive federal court review of criminal matters generally. But this term, criminal defendants saw some real victories with special attention to administration of the death penalty and issues of jury selection and sentencing.

A couple of more cases I would like you to comment on – *Miller-El v. Dretke* overturned a 20-year-old murder conviction of a Texan on death row on grounds of racial bias and jury section. *Rompilla v. Beard* reversed the death sentence due to ineffective assistance of trial counsel because trial counsel utterly failed to investigate some obvious mitigating circumstances. And of course the big case in the criminal area is *Roper v. Simmons*, where the Court held that the Constitution bars the death penalty for juveniles under age 18.

Avis, what do you make of these cases?

MS. BUCHANAN: Well – (audio break, tape change) – the general breakdown of the Court, those people who support the death penalty and those people who are – who have significant concerns about the death penalty has changed that much, but I think what the Court is saying in these three cases is that we have to be very, very careful when we impose this extreme penalty to the extent that we do impose it.

In *Miller El v. Dretke*, you had a situation where race played a – the Court found that race played a key role in jury selection and an improper role, and it vacated the death sentence in light of that. The Court went through a very painstaking analysis of the voir dire process in this case, and it applied some anti-discrimination-law principles in arriving at its conclusion. It essentially looked at all of the questioning of the jurors, looked at the jury questionnaires, looked at the transcripts of the voir dire process,

isolated black versus non-black jurors looked at the prosecutor's questioning. It was the prosecutor's exercise of preemptory challenges that was at issue in *Miller-El*, and the Court found that there was disparate questioning in light of similar answers to the questions that the jurors had given in that process, and it was very concerned and vacated the conviction. It even decided what – it made judgments about what it thought were good jurors for the prosecution, which I found interesting since parties doing jury selection don't always know what a good juror is, even when you're getting lots of answers from your panel.

But I think it was the intersection of death and race that really influenced the outcome in that decision, that we don't want our death sentences infected by racial concerns, and as you probably are aware, there's lots of research about the disparate sentencing based on race across the county, that black defendants tend to be subjected to the death penalty more often than whites, and when the victim is white, the penalties are harsher, and I think the Court is very much aware of that and that that allows them to take on these kinds of cases – take on these kinds of issues.

In *Rompilla*, the ineffective assistance of counsel case – you had a situation – again, a death sentence – where the sentencing counsel, or the first counsel – two public defenders who represented Mr. Rompilla had, in the Court's judgment, failed to, by objectively reasonable standards – the *Strickland v. Washington* standard for ineffective assistance of counsel – had failed to exercise, essentially, due diligence. This was a situation where, as the Court described, the defense attorneys knew that the prosecution was going to be relying on key aggravating evidence that was readily available, openly available and easily accessible to the defense counsel. While it didn't say that they had done nothing, which is often the case in death penalty issues – death penalty cases, which the defense took them to task for, they had failed to go to obvious resources. They had – in preparing their client for the death penalty – the penalty phase hearing, they had talked to the client, who was somewhat uncooperative, talked to the client's family, and reviewed the word of three mental health experts who had helped them during the culpability phase, none of which, in their view, led them to any very helpful mitigating evidence. There was, however, in the prosecution's file and in the Court file, evidence that showed significant alcohol abuse, problems in childhood, a very terrible, very – a mother who is alcoholic, abusive father, a lot of very striking problematic issues that had arisen that would have been good fodder for use to show mitigating circumstances.

They also knew that the prosecution was going to be relying on previous criminal history of violence in order to argue against mitigation. But they hadn't looked at those files and the Court was very troubled by the fact that here was this information, it was clear the prosecutor was going to be using this, it was clear that that was going to be a key factor in their arguments, and that they hadn't taken the trouble to go down the hall or go across the street and pick up the file. And those were the deciding factors in Rompilla. So, again, you have this concentration on care and caution in death penalty matters. Then in Roper, where the Court invalidated the death penalty for defendants under the age of 18, you have them looking at developing senses of moral decency – I forget what the exact – developing standards of decency over the course of time. Earlier

the Court had found that it was okay to execute juveniles and that it was okay to execute people with mental retardation. Over time, various states had enacted laws changing that approach, and the Court did that research, both in the mental retardation area in *Atkins v. Virginia* and then again here in *Roper*.

There was a similar approach in both cases. They looked at how legislatures, how the voice of the people had spoken to say, we don't want to execute children, or, we don't want to execute anyone. There were 30 states by the time *Atkins* was decided and 30 states by the time *Roper* was decided, rejecting the death penalty for each of those groups of people. And the Court also said, in contrast to the earlier decision accepting the death penalty for juveniles, that the Court was in a position and should exercise its own judgment about what's appropriate.

So, again, these are relatively close decisions generally but they are finding that we want to be careful in these very narrow cases – because not everybody gets the death penalty, even in serious cases. Your quote, unquote, "average murderer," to quote the Court in *Atkins*, doesn't get the death penalty so why should less culpable people, those with mental retardation and children who have less-developed morality, less-developed self-control or appreciation for being able to mold their conduct according to the dictates of society, why should we hold them any more accountable? And these were very egregious murders. I mean, the facts were horrible. In *Roper* the defendant had actually bragged about being able to get away with the murder because they were minors, but I think that changes in society showing the prevalence of mistakes in the imposition of the death penalty, the development of DNA science, people's acceptance of DNA as almost a fail-safe method – although, as a public defender we know that it's not and we constantly challenge DNA evidence when the government uses it in our cases, and even successfully challenged it; the first time in the history of DNA litigation across the country. As I said, the best public defender in the country (laughter).

So there's a sense with Governor Ryan commuting death sentences, recognizing that mistakes are made, people coming forward, eyewitness – we're doing eyewitness research to show the fallibility of eyewitness testimony, people who are absolutely certain – certain that this is the person who did this to them are shown to be mistaken, and drastically mistaken with huge consequences for people. And I think that those people on the Court are already sensitive and aware of that and concerned about it. Some of those things are maybe influencing others in the Court and it's making a difference, although death penalty activism over the years, I think, is having an influence on how courts see the exercise of these mistakes in death penalty cases.

MS. PILLARD: I just want to briefly give Seth a minute and Paul a minute to follow up.

Seth, you represented Simmons in the juvenile death penalty case and *Miller-El* in the jury bias case, with odds against you, I would have to say, of getting relief in either of these cases. What would you add to what Avis has said?

MR. WAXMAN: Well, I think they were both wonderful decisions. It's interesting because *Miller-El* has more enduring significance than *Roper*, although *Roper* has certainly got almost all the headlines this term. *Miller-El* was a very easy case to litigate this term and *Roper* was a very difficult case, but this was Miller-El's second trip to the Supreme Court. This was the Supreme Court's second decision in *Miller-El*. And the first time it was up it was a very, very difficult case. I mean, I think *Miller-El* is significant because the standard for determining or proving bias in the exercise of preemptory strikes has been set at least since the Supreme Court decided *Batson v. Kentucky* many years ago. The problem was, as Thurgood Marshall pointed out in his separate opinion is so long as you allow prosecutors to give any particular reason that they want and it's not manifestly implausible in individual cases, this guarantee of equal protection in the jury selection context is going to be a hollow guarantee.

And the problem was that Justice Marshall's predictions seemed to be borne out. That is, prosecutors and – you know, courts were giving extremely high deference to prosecutors, and in the civil context, private parties reasons for exercising what otherwise might appear to have been either race-based or sex-based preemptory strikes. And in *Miller-El* which originally came up when we had it two terms ago, the cert-worthy question really was whether the Fifth Circuit was misapplying the federal statutory standard governing when a certificate of appealability would or wouldn't be issued in habeas cases. And yet it seemed pretty clear to us that just telling – just getting the Supreme Court to tell the Fifth Circuit that it applied the wrong COA standard wasn't going to do anything for Mr. Miller-El because the problem – the Fifth Circuit had said, we'll look at the merits of this case. This claim of jury bias is frivolous; therefore we're not going to issue a certificate of appealability, and the challenge for us two terms ago was to get the Supreme Court to actually roll up its sleeves and apply *Batson*. There really was no federal question presented.

The argument that we were making then was the guarantee of equal protection in the Batson context is like the Fourth Amendment and the First Amendment in the sense that the tests are easy to state but the Supreme Court occasionally needs to model the application of these tests for lower courts and state courts. And I know you don't usually do this, I know this isn't what you think you do, but you guys really need to roll up your sleeves and look at these 100 or 200 jurors during this long 20-year jury selection process and explain to the state courts and to the lower federal courts that this is just a bridge too far, this is just totally implausible.

MS. PILLARD: Okay, I'll give you 10 more seconds if you'll tell me, well, isn't Breyer right? Should we just get rid of preemptory challenges?

MR. WAXMAN: Well, Breyer has picked up on a concurring opinion on Justice Marshall's original suggestion that preemptory challenges are just are inconsistent with the guarantee of equal protection. I think that's yet to be litigated. I hope it's wrong, because I actually do think that however difficult *Batson* is to apply, preemptory challenges are a very important safeguard for the protection against the seating of a juror

who has – probably is in fact biased in the case, but not to the point that you can establish a for-cause challenge.

MS. PILLARD: Okay, Paul, again just briefly, there has been a lot of discussion over the Court's invocation of foreign law in *Roper* and interpreting the evolving standards of decency test to bar the juvenile death penalty, and some similar discussion rose after the *Lawrence* gay rights case that you successfully argued, and the affirmative action *Grutter* decision. Is this a new trend, is it legitimate, is it really – is the Court really relying on foreign law?

MR. SMITH: Well, I think it was interesting that Justice Kennedy made a point of adding a whole separate section at the end of the *Roper* decision invoking foreign law. He had a perfect opportunity just to rely on the evolving consensus in this country, and there was a relatively well-accepted view that the Eighth Amendment does kind of evolve and you can look at what the states are doing. And there was, he thought an emerging consensus in this country against execution of people who commit the crime under the age of 18. But to add that separate section in this context I think is an example of Justice Kennedy's process that we've been seeing for the last few years of really declaring independence from the sort of governing conservative orthodoxy of originalism, because that is sort of like waving a red flag at the bull – Justice Scalia's way of approaching the Constitution, to say not only are we going to have an evolution in our own generation's instincts about – the human condition will be taken into account, but we're going to start looking at what the French are doing as well. (Laughter.)

And he had been pilloried in the press and in the conservative academy – academic journals and things – because of reliance on these kinds of authorities, particularly in *Lawrence v. Texas,* and for him to come back and do that, especially in the term when he shows up in case after case as sort of the fifth vote, aligned with the more liberal members of the Court, I think is a very interesting phenomenon, to the point now where the New York Times featured him as the justice that they don't want to have nominated in New York – on Monday.

So that's what I see *Roper* as really further cementing of Justice Kennedy's kind of new confidence of – he is going to have a much less originalist kind of jurisprudence, not just in the Eighth Amendment but in a lot of areas.

MS. PILLARD: Let's put the civil rights cases on the table, and in civil rights plaintiffs won some key cases. The Court handed a victory to African American prison inmates objecting to racially segregated cell assignments, and they were supported in that by the United States solicitor general; victory to older workers in holding that the Age Discrimination in Employment Act outlaws disparate impact, not just intentional age discrimination; victory to a male coach of a girls' basketball team who claimed retaliation for seeking equal facilities and funding for his girls' team, and victory to disabled individuals complaining of lack of reasonable accommodation on foreign flag cruise ships; and then the big but I guess not unexpected civil rights loss in *Castle Rock v.*

Gonzales, which Richard mentioned earlier, which is a case that dashed the hopes of some people that the Court might revisit the 1989 *Deshaney* case.

I can't think of anyone better to talk about civil rights and the Supreme Court than Drew Days.

DREW DAYS: Thank you, Nina.

I think overall it was a fairly good term for civil rights. There was certainly an expansion of the ability to bring certain civil rights actions under the Americans with Disabilities Act, Title IX, and the Americans with Disabilities Act. I think what's kind of interesting is that these are the children of the 1964 Civil Rights Act, and yet 40 years after the 1964 Civil Rights Act was passed, the Court is still struggling with some very basic issues that have to do with the implementation and enforcement of these other provisions. The ADEA was enacted in 1967, Title IX was 1972, and the Americans with Disabilities Act was in 1990.

In *Johnson v. California*, in particular, we have this whole question of the level of scrutiny to be applied to racial classifications. One would have thought that was fairly straightforward, but in that case and in a couple of the other cases, what seems to be going on is that justices have used these cases to revisit old grievances. There are actually two *Johnson v. California* decisions this term, both involving race. The second one had to do with peremptory challenges – something that Seth and Avis were talking about. The other *Johnson v. California* had to do with racial segregation for a short period of time by the California Department of Corrections to determine placement. And Justice O'Connor, writing for the Court, declared that this type of segregation had to be evaluated based upon strict scrutiny. That is the highest standard of review.

At work in that case were really two lines of doctrine, one having to do with their review of racial classifications and the other having to do with deference to penological interests, and the Court has shown an interest in both of those lines. They came into conflict in this case, and all that was quite interesting, but I think what was particularly interesting about the decision was the justices revisited *Grutte*r. This was a prison case but somehow grew back in the discussion of affirmative action in higher education, and Justice Thomas in particular went out of his way to point out that Justice O'Connor seemed to have a great flexibility when it came to strict scrutiny. She was of course known for having said in an earlier case that it's strict in theory but not fatal in fact, and she genuinely believes that, but if one were to follow her decisions over time, there is kind of a wavering line, to put it mildly, that she seems to follow in that regard. In this case she has a very definite position and Justice Thomas pointed out that this was all kind of curious and who knew what would happen the next time when a racial classification came into question.

In *Jackson v. Birmingham Board of Education*, we have the question of whether a suit for retaliation could be brought under Title IX of the Civil Rights Act, the education amendments of 1972, and here once again it serves as a battleground for a war that's been

going on in the Court for quite a long time. One of the things that Chief Justice Rehnquist has brought to the Court is a cutting back on so-called implied private rights of action, and yet in this particular case, Justice O'Connor, who apparently sees Title 9 as her personal prerogative in developing the law in that field, found that there was an implied private right of action with respect to retaliation, and not only that, a male coach could bring the suit on behalf of this discrimination, even though he was not discriminated on the basis of sex under normal understanding of the English language. As Justice Thomas pointed out, this was a situation where obviously the right was broadened in litigating under Title IX, and there was a very strong policy element in the Court's decision. Basically what Justice O'Connor said was, it's very important to have third parties – teachers, coaches – there to bring suits challenging discrimination on the basis of sex because they're likely to be the ones who can come forward and do so with knowledge of a situation and in a way that they can protect themselves – something that's not often available to schoolchildren. So this is an area where Justice O'Connor has continued to expand, in certain ways, the reach of Title IX.

In *Smith v. City of Jackson*, the Court approached an issue that had really been left open since about 1993, and that was the question of whether parties could bring disparate impact claims under the Age Discrimination in Employment Act. This is of course an act that I'm becoming fonder and fonder of as I grow older – (laughter) – and –

MS. PILLARD: I think we're all covered by it here on the panel.

MR. DAYS: Yeah, well, I'm in a number of covered categories actually. (Laughter.) The situation was one where police officers – older police officers claimed that they had been discriminated against in terms of raises – that younger officers got proportionally more in their pay envelopes. Now, Justice O'Connor had left a footnote many years earlier that she wasn't clear that disparate impact could be brought under the Age Discrimination in Employment Act.

The upshot of the case, Justice Stevens writing the opinion, was that, "yes it can, but" – and I think the "but" suggests that disparate impact, as used in the Age Discrimination in Employment Act, will not be the same disparate impact that we've come to acknowledge and rely upon in Title VII, for example, because of some textual differences in the Age Discrimination in Employment Act, as well as the Court's reference to the fact that Congress did not specifically address the Age Discrimination in Employment Act in the Civil Rights Act of 1991. Where disparate impact had been, under *Griggs*, a judicial doctrine, it suddenly became a statutory doctrine, but that was not applied to the Age Discrimination in Employment Act.

The other thing that I find interesting, and perhaps a little troubling given all the fight that went into first an attempt in 1990 to pass a civil rights act, and ultimately in 1991 to pass the civil rights act of that year, and that is in 1991 Congress intended to overrule certain decisions that the Court had passed or entered that cut back on the reach of the disparate impact claim. Now what we see under the Age Discrimination in Employment Act is the return of some of those very earlier decisions, for example *Wards*

Cove and the *Watson* case. I don't know how those are going to play out but I think this is a situation where we really can't tell what's going to happen on the ground; we'll have to look at cases as they're brought. It's not encouraging, I think, to plaintiffs who want to use this disparate impact test that the plaintiffs in the *Smith* case lost – the Court went out of its way to actually apply its new standard to the facts of that case and found in favor of the city.

MS. PILLARD: And isn't the case also somewhat of a fragile victory for plaintiffs in that – there was one of the cases that the Chief Justice didn't participate in, and it's unclear whether he would have been with the justices who upheld the application of disparate impact standard or whether he would have affirmed on the ground that the plaintiffs just didn't meet that.

MR. DAYS: Well, it's kind of interesting, the case. Justice Scalia joined in supporting this particular interpretation of the Age Discrimination in Employment Act out of deference to the EEOC. If there was any surprise in that case, that was certainly it for me. (Scattered laughter.)

The last case I wanted to talk about was *Spector v. Norwegian Cruise Line*, a decision by Justice Kennedy, having to do with whether the Americans with Disabilities Act applied to foreign flag cruise ships. These are ships of companies that really have their offices in the United States but they fly under foreign flags – Bahamas, Ghana, a variety of other countries, and the suit was brought by disabled folk claiming that they had paid premiums to get certain berths on the cruise ships but were not helped in terms of accessibility issues and a variety of other questions. The lower court had said that this particular statute didn't apply at all to foreign flag cruises. The Court, in *Spector*, rejected that, but went on to impose certain interpretive standards that I think once again will have to be sorted out on remand – for example, what constitutes an impact on the internal affairs of the cruise line, what types of changes simply cannot be approved under those circumstances, to what extent would applications of the ADA affect international relations or cause international conflict with international standards that apply to cruise lines, and so forth and so on.

So I think one can say, with respect to many of these cases, what the Court has done is set out some broad standards, pushed back interpretations of the Act that would have curtailed quite dramatically further enforcement of those provisions, but it has left open – and I think in a problematic way, exactly how these new standards are going to be applied.

I wanted to say just one further word about the town of *Castle Rock*. That was of course a loss, but once again this is a standard claim that comes to the Court from time to time about either procedural due process or substantive due process, and I think it's fair to say that the Court is simply not interested in those arguments. It is not interested in allowing further access to the Courts on a variety of claims that they think are pushing the envelope with respect to constitutional law. It does, I think, merit pointing out that in the dissent – Justice Stevens' dissent – he pointed out something that has certainly been on

the minds of members of Congress and elsewhere, that this was not just a question of a protective order; this was a protective order having to do with spousal abuse. It was an attempt by Colorado to go beyond what we normally think of the responsibility of law enforcement officials to do their jobs, to protect people from crime. And the majority was not moved by that argument. If we look at the Violence Against Women Act and a number of other things that have been going on, I think although this was a fairly predictable outcome, nevertheless, its notable because of the enormity of the crime committed by the ex-husband and the callous way in which the police department responded to this mother's cries for assistance that may have, had they been answered, saved the lives of three children.

Thanks very much.

MS. PILLARD: Drew, your comments make me sort of reflect on – one of the themes that I see in this term is muting of some of the major projects of the Rehnquist court, or at least some of the major projects attributed to the Rehnquist court – the regulatory takings, the cutting back on review of criminal cases, some civil rights curtailment. And I'm asking myself, is this muting of the projects or just slowing down the rate of change? We were used to seeing the slash and burn of civil rights standards; now we're seeing a more incremental change maybe.

An area that also raises these questions for me is the area of federalism. In affirming the power of the federal government to regulate purely local cultivation and use of marijuana for medical purposes, the Rehnquist Court arguably slowed its states' rights momentum. As you all know, starting in the mid-1990s with the *Lopez* case, the Court invalidated provisions of eight federal laws in an eight-year span on states' rights grounds – a wholly, then, unprecedented sort of rip tide against federal legislation that we haven't seen the likes of since the New Deal. But with the *Hibbs* FMLA case, *Tennessee v. Lane* disabled court access case and now the *Raich* case; has the riptide eddied?

Randy, you argued in the Supreme Court on behalf of the medical marijuana users in Gonzales v. Raich. What's left of the limits on federal power that loomed so large following *Lopez-Morrison-Boerne*.

MR. BARNETT: First of all I want to thank the ACS for inviting me to participate. It's my first ACS program that I've participated in. I hope it won't be the last. I also want to thank Seth for his line, which I'm going to have to memorize, which was that this was a very, very difficult case to win, and we didn't. (Laughter.) I can see that's the Washington way of what we in the prosecutor's office used to call "laying a mattress." In my case, I fortunately had a whole nation full of constitutional law professors who were laying the mattress for me in this case and I didn't have to lay it for myself. But it's a very, very difficult case to win, for a lot of reasons.

So your question is what is up with the new federalism, and I think the answer to that – first of all, it's pretty unclear, but the issue – at the very minimum we have to say that it's lost all momentum. I suppose if I had to use a metaphor, a *Norwegian Cruise*

Line metaphor, we have a ship out in the middle of the water and people have been projecting a certain forward momentum, and I'd say that ship has pretty much stopped. What hasn't happened yet is the laborious task of turning it around and going in the other direction. So that hasn't happened and so we're really not sure what's going on.

But let me just put this case in a bit of context. As you already noted, there were two – the statutes that you talked about being struck down were not all being struck down on Commerce Clause grounds, and the case that I had – the *Raich* case – which has had, by the way, a variety of different names as it's gone up through the proceedings. I'm sort of glad today that it wasn't called the *Kelo* case. (Laughter.) That would have been a pretty unfortunate – (laughter). I'll just let that sink in for a minute.

So the *Raich* case is a Commerce Clause case, and there really have been only two major Commerce Clause opinions – the *Lopez* case and the *Morrison* case. I think all of you who are here who are law students or were recently law students have all studied those cases because they were very newsworthy. *Lopez* represented the first case in 60 years to find that Congress had exceeded its powers under the Commerce Clause in passing the Gun-Free School Zone Act. After that case, most academics thought that it really was going to be a one-shot deal because the case made – (chuckles) – that really was no pun intended. (Laughter.) And the reason why is because the Court made a big deal in *Lopez* about the absence of congressional findings, and so what most academics thought was that the Rehnquist court would not have the courage of its convictions, and as soon as there were voluminous congressional findings then they would come out the other way, which was tested in the 2000 case. *Lopez* is 1995; then comes the year 2000 and the *United States v. Morrison* case, which concerned a provision of the Violence Against Women Act that created a civil cause of action for gender-motivated violence. And that statute was passed after months of hearings, reams of testimony, and so people were pretty confident that the Court would back down. They didn't. In a five-to-four decision they found that that case also exceeded the Congress's powers, so that was the second time.

So five years now go by and we bring our lawsuit. I have to say I not only argued this case; I'm one of the three lawyers that brought the lawsuit on behalf of Angel Raich and Diane Monson after having been involved in the *Oakland Cannabis Buyers' Cooperative* case, which I am happy to say I did not argue in the Supreme Court, but had I done so we still would have lost the case 8-to-nothing, as we did – (laughter) – on medical necessity.

So we brought this lawsuit in order to test the proposition that seemed to be suggested by *Lopez* and *Morrison* that if the underlying activity – the underlying intrastate activity was not only wholly intrastate but was also completely and totally non-economic, then the aggregation principle of *Wickard v. Filburn* and the substantial effects test that *Wickard v. Filburn* – which you all should have studied in law school – would not apply. And it would be a relatively easy case. And the reason we brought this case as opposed to – the *Oakland Cannabis Buyers' Cooperative* case continues to survive in the Ninth Circuit. I argued that case in the Ninth Circuit a month before I argued *Raich*.

It's now been remanded to the trial court awaiting *Raich*, and we just got the order from the trial court, not changing its original mind in *Oakland Cannabis*, but the reason why we brought our case was because in *Oakland Cannabis* you have people going into the Cannabis Buyers' Cooperative with money in their hand. They leave with less money and they have cannabis in their hands. So there looks like there is some kind of an exchange or economic activity going on in there, and I have to say it that way because I am a lawyer in that case.

So there looks like there is economic activity going on in there, and if so, then under *Lopez* and under *Morrison* the aggregation principle of *Wickard* and the substantial effects doctrine should apply. So we brought a case that we thought involved zero economic activity. We have Diane Monson, who grows cannabis for her own use, and we have Angel Raich who has two caregivers who grow it for her at no charge, completely non-economic activity we said. And for that reason we thought the Wickard simply didn't apply, and the substantial effects doesn't apply, and *Lopez* and *Morrison* should provide us with a clean wind – should in theory provide us with a clean wind.

The government had two arguments to make – and you need to know the government's arguments to appreciate what actually the Court did in the case. The government argued, pretty understandably, first of all this was economic activity. They said it was productive activity. It substitutes for market activity because it's a substitute for market activity. That makes it an economic activity. And the second argument they made was based on a single sentence of *Lopez* which said that the Gun-Free School Zone Act was not an essential part of a broader regulatory scheme that could be undercut unless this activity was reached – an essential part of a broader regulatory scheme that could be undercut unless this activity was reached. That was a single sentence in *Lopez*. They said, this is an essential part of a regulatory scheme; therefore it comes under what the government argued was an exception to *Lopez* and *Morrison* that would allow Congress to reach wholly intrastate and non-economic activity if it was essential to a broader regulatory scheme to do so.

We of course resisted both of these theories. What ended up happening here was that, as you know, Justice Stevens wrote the opinion; it was six-to-three. Justice Kennedy crossed over, as did Justice Scalia, from the "Federalist Five." The more liberal side of the Court – and I know that's a controversial term to use sometimes to describe that side of the Court but I'll do so for the sake of descriptive clarity – the liberal side of the Court held firm. There four justices held firm as they did in *Lopez* and *Morrison*, and they just had to break off somebody from the conservative "Federalist Five." They got Justice Kennedy and they got Justice Scalia. We don't know exactly why they got Justice Kennedy because he joined the Court's majority opinion without explaining how to reconcile this case with his concurring opinions in *Lopez* and *Morrison*.

Let me just say a word about that because it's part of – I think the underlying theme of this panel should be, what's up with Justice Kennedy – (laughter) – because he's clearly crossed some Rubicon. We don't know what's pushed him there. Maybe it is Justice Scalia who has pushed him across the Rubicon. Justice Kennedy is running

screaming away from Justice Scalia's side of the river. (Laughter.) We don't know what's causing this, but whatever it is, it's happening and it's happening in a variety of cases. That really is sort of the big news, I think, of this term. But what explains his behavior in this case? Since he doesn't tell us, it is quite a challenge to know because he concurred in *Lopez* and *Morrison*; he did not join either Justice Thomas's originalist opinion in *Lopez* – actually, Justice Scalia did not join Justice Thomas's originalist opinion in *Lopez*, I want you to know – but he didn't even join – he filed a concurring opinion which emphasized the traditional function of states in law enforcement and how both of these cases were trenching upon the traditional function of states to exercise their police power in their traditional function of law enforcement role. Well, we thought our case fit Justice Kennedy's criterion in *Lopez*, or for a Commerce Clause challenge even better than it might have even the majority. And a lot of our brief was written for specifically for Justice Kennedy.

He doesn't tell us – I think it's quite interesting that he didn't file a concurring opinion to try to reconcile this outcome with his previously expressed views in his concurring opinions. I suspect it's going to be – it was because it was difficult to do it, but I really don't know why. Justice Scalia, on the other hand, did explain why he joined the majority. He filed a somewhat temperate opinion for Justice Scalia in a concurring opinion, although he did say that his was more nuanced than the majority opinion. And in this opinion he said that really what's at issue here is the Necessary and Proper Clause, and if you understood the Necessary and Proper Clause you realize this is not a Commerce Clause case, it's really a Necessary and Proper Clause case, then the essential to a broader regulatory scheme fits right underneath that.

I should say I've always thought of this as a Necessary and Proper Clause case. In categorical terms I sort of agree with Justice Scalia's assessment. Our briefs to the lower court were much more necessary-and-proper-oriented, but the reason why we shifted away from emphasizing the Necessary and Proper Clause, although I think logically, structurally it is a Necessary and Proper Clause case is because, as you all know, Necessary and Proper Clause cases typically are handled by extremely deferential rational basis review whereas *Lopez* and *Morrison*, whatever they were – and Justice O'Connor points out in her dissenting opinion that those were Necessary and Proper Clause – they had to be Necessary and Proper Clause cases also, but there was some higher standard of review going on; there's some rational basis that meant something in those cases.

So it seemed like a good idea to continue to pitch this as a Commerce Clause case – which of course it is in part – than a Necessary and Proper Clause case because the standard of review would be different in that – might be different.

Well, Justice Scalia files his concurring opinion in which he says this is really a Necessary and Proper Clause case, and what's so interesting about it is what it doesn't say. It never says a word about standard of review. It never says a word about rational basis. Now, Justice Stevens, in his majority opinion in *Raich*, does adopt a traditional deferential – completely deferential rational basis review. So if you want to know what I

think is really – I'm not saying what's really going on here because honestly I really don't know what's really going on, but what's going to come out of this case – what's sort of the uncertainty about the future of the Rehnquist revolution and the new federalism coming out of this case is it's all about levels of review. It's always been about levels of review. Our theory is also about – we just want a hearing. We just want the government to come forward and explain why it is it's necessary – or why it is – this is what we said in our brief – why is it essential to a broader – essential to a broader regulatory scheme to reach this activity? They really don't tell us. And we believe the burden should be on them. The majority did not believe the burden should be on them.

So the majority adopted, under a Necessary and Proper Clause-type reasoning, extremely deferential rational basis review. Justice O'Connor writes another very Scalia-esque dissent, very un-O'Connor-type dissent in our case and I have to love her for it because it's really wholly our argument, so now our brief gets into the casebooks in the future – anybody who excerpts Justice O'Connor's dissent will now have our arguments from our briefs and our briefs don't typically get in the casebooks, so I'm very grateful to her. And Justice Thomas's dissent, both of them heightened their level of scrutiny, basically. They both say that if we don't heighten the level of scrutiny and really demand some showing of necessity to show why something is essential to a broader regulatory scheme, then the enumerated powers game is up because Congress can always draw the circle big enough to include interstate commerce, coupled with enough intrastate commerce to satisfy facial challenges, and with respect to as-applied challenges, they can also always say it was rational to try to reach this subgroup in order to prosecute the larger category of activities.

I'm very gratified that Justice Rehnquist, who nobody thought we were going to get – in fact, nobody really thought we were going to get O'Connor either. The best odds anybody ever gave me were eight to one, but Justice Rehnquist completely subscribes to Justice O'Connor's opinion, with one exception. I suppose I will close with this. As you know, the problem with inviting people who litigated these cases to be on panels is we can take at least 30 minutes to talk about these cases, until the red light goes on. But I think one thing that didn't get noted very widely in the press but it was noted pretty widely in the blogosphere is that Justice Rehnquist and Justice Thomas refused to join part three of Justice O'Connor's dissenting opinion. Part three of Justice O'Connor's dissenting opinion consisted of two paragraphs. The first paragraph was a very long quote from James Madison. That was it, and I doubt that Justice Rehnquist or Thomas disagreed with that paragraph. (Laughter.)

The second paragraph was where Justice O'Connor says that had she been a legislator in the state of California, or a voter in the state of California, she would not have voted for the proposition that made cannabis available and as a legislator she would not have voted for the Compassionate Use Act. Both Justice Rehnquist and Justice Thomas explicitly refused to join that paragraph of the opinion. (Laughter.)

MS. PILLARD: Judicial role –

MR. BARNETT: And I ask you all to think about that. (Laughter.)

MS. PILLARD: As the rate of change on the Rehnquist court slows, the rate of commentary on this panel is, of necessity, accelerating. But I did just want to ask you if you have 15 seconds, Randy, that you wanted to add to the commentary on the property rights cases mentioned before – anything that you want to chime in on?

MR. BARNETT: This is an example of where – even more so than in my case – where the previous law was reasonably clear, and this case is reasonably within the previous law, and what had happened was, like in our case, the parties had been asking for somewhat more than what previous law had offered, and then the Court refused to go there. So what law professors were doing was projecting a certain trajectory and now that trajectory has been altered. So they didn't get the more they were asking for.

In our case we had an as-applied challenge, which was more than the facial challenges you have in *Lopez* and *Morrison*, and there were a few other extra little things we were asking for. But by and large that's what I think explains the property rights case.

MS. PILLARD: So the reach is long in what's been given.

MR. DAYS: Yeah, I just wanted to go back to the federalism cases to say Randy that, as I said to you privately, I'm very hopeful that I will outlive *Lopez* because in the casebooks, which all my students read, they say, oh, Professor Days argued the *Lopez* case. I hope that *Raich* supplants *Lopez* in the constitutional law textbooks, so I won't have deal with that.

MS. PILLARD: Oh, Professor Barnett is responsible for that.

MR. BARNETT: And *Morrison*.

MR. DAYS: And *Morrison* and all the other cases that Seth argued. (Laughter.) When the Court announced *Lopez*, I was sitting in the Court and you know what it said. Well, several of my friends who teach constitutional law here in Washington said, oh, thanks, Drew, you've completely reopened constitutional law one, now there's something to talk about. (Chuckles.)

MR. BARNETT: Well, I hope I haven't closed it. As I'm writing down –

MS. PILLARD: Well, Kathleen, you also teach constitutional law. And again, mindful of the time, do you have a couple words to chime in on?

MS. SULLIVAN: Well, not so fast on kissing good-bye *Lopez* and *Morrison*, I think what's striking about *Raich* and what will come back to the Court next year in the Oregon assisted-suicide case is the question of whether limits on federal power protect blue states as well as red states. That is, those cases that restricted the power of

government to interfere with the prerogative of Southern states to regulate wife-beaters and gun owners might also extend to the power of blue states to permit people to have physician-assisted suicide, gay marriage, or to use homegrown marijuana to alleviate pain. The consistent justices here were O'Connor, Rehnquist, Thomas, who did say, states' rights for blue states and red states alike, and I think that those of us in ACS are at our peril in a nation in which federal power is so entrenched on the side of the red states to forego a transubstantive doctrine that would protect some local autonomy over social policy. So I'm not so sure that I want Seth and Drew to be wholly avenged if the principle could be applied equally to both kinds of states.

MS. PILLARD: Interesting, great. On Monday, the Court handed down two big wins to high-tech owners, owners of digital content seeking to protect their copyrights, and owners of fiber optic cable seeking to exclude rival internet service providers. The question that *Brand X* case put simply was whether internet service providers that owned cables have to allow their rivals access as telephone cable owners are required to do for their competitors. And in a show of deference to the FCC's interpretation of the Communications Act, the Court said they do not. And then in the closely watched *MGM v. Grokster* case, *Grokster* had argued basically that the existence of substantial legitimate uses by universities, government, libraries of its peer-to-peer file-sharing technology made that technology non-copyright-infringing, but the Court in *Grokster*, as you know, rejected that claim and held that at least where there is active inducement of infringement, a technology purveyor can be held liable under copyright laws.

Preeta, did the Court get these cases right in your view and what impact will they have? I'm especially interested in impact on consumers.

MS. BANSAL: Well, I think the Court in *Grokster* did kind of get it right in that they crafted a careful balance where they gave something to everyone. And it's interesting because I think Breyer's concurrence articulated in fact what the whole court did in practice. He basically said that we have to recognize the limit of judges and the law to regulate technology. And in many ways, that's what the Court did. They maintained the status quo in some ways, in the sense that the copyright holders – the entertainment companies and the creative content people – they won the immediate battle. They were able to slow down the development of or the marketing of this new technology in the peer-to-peer sharing. But at the same time, they kind of let loose all of the various forces by giving something to everyone and letting this situation work itself out, I think, in the future through market forces and business model things.

Basically, what the Court, I think, in essence, did was they said that the answer to the problem of peer-to-peer file sharing is not to stop technological innovation, and it's also not to take away the copyright owners' rights. It's really the answer is one of more innovation. They put the challenge for the various industries to develop more technology, especially filtering technology, digital fingerprinting to help enforcement of infringement on the web. They also kind of put it to both sides to come up with new business models, paid service like iTunes, so that there's legal ways of getting file-sharing and not through infringing methods. And they also put the challenge to the

industry to come up with new legal models to do massive enforcement of direct infringers on the web.

So, you know, when I say that the Court gave something to everyone, I think what they did was they decided the case on one of three possible grounds, which is the inducement ground, and in some ways, the least problematic and the least controversial of the three grounds. They said that if you actively encourage infringement, then you can be liable as a secondary infringer. But they did not decide, and they expressly left open the big question in the case, the Sony issue, the issue of whether or not technology that – what it means to be capable of substantial non-infringing uses or substantial lawful uses. The movie picture studios at MGM's side had argued that if a technology is principally used for infringement, then the owners of that technology and the distributors of that should be held liable for contributory infringement. The Court declined to definitively address what is a substantial, non-infringing use. They declined to say that it has to be the primary use or whatever.

And here, the Court was really concerned about chilling innovation. At oral argument, they had talked about concerns about well, what would happen if we adopted that rule. Wouldn't that mean that you wouldn't have a Xerox copier developed, because a Xerox machine could obviously be used for infringement? Wouldn't that mean that the printing press never would have been developed to allow the publication of the Gutenberg Bible? So the Court was clearly concerned that we should not be stopping innovation.

And yet so they kind of held ground for a while. They gave the copyright owners the victory on the inducement ground. They left open the Sony question. And the other question they left open was the alternative theory of liability that the movie picture studios had pushed, which was vicarious liability. And vicarious liability is a common law doctrine whereby someone can be liable for secondary infringement if they both economically benefit from infringement and they have the means and the right and ability to control infringement. So again, this goes to the need for all sides to develop filtering technology.

So I would go back to the point that basically I think the Court – I think *Grokster* in many ways is a display of judicial humility in some ways in the face of technology. It's saying that the market forces, all of the various industry people should work this out. I guess they're saying in an era in which the world is flat now, you know, we really should be in support of innovation or at least not be in the position of trying to shut the door to it, while giving the creative content people something.

Quickly on *Brand X*, I think, you know, *Brand X* is really an administrative law decision. It's really about deference to the FCC. It's an interesting decision, because on the one hand, Thomas talks about deference and he uses the language of – especially in this very complicated area of high-tech, we're really not in a position more than the Commission is to regulate these things. But then he has pages and pages and pages of analysis of whether or not the FCC's decision here, you know, made sense. And it's

really, if you read the decision, it's really quite astounding, I find, in what it seems to display about the Court's kind of delving into the substance of these issues. So on the one hand, it's about deference, but on the other hand it's really quite hands on.

MS. PILLARD: This Court can't quite get itself to let anybody else decide something that it wants to think about.

MS. BANSAL: The other high-tech decision, which I just want to briefly touch on is the *Merck* case, which was a patent infringement case. And again, this was a unanimous decision by Scalia. And it's kind of a narrow issue. It's really whether a statutory safe-harbor provision in the Patent Act should be applied to allow Merck to conduct pre-clinical tests using a patented invention, even when those tests and the use of the patented invention doesn't ultimately make it into a federal FDA application. So it's a narrow statutory case, but again, I think some of the language in the case in the case is very interesting, where the Court says something like scientific testing is a process of trial error. You know, in the vast majority of cases, they say neither the drug maker nor the scientist nor its scientists have any way of knowing whether an initially promising candidate will prove successful over a battery of experiments, and they're reluctant to kind of shut the door on potential new innovative uses of existing intellectual property. And they talk repeatedly about the need to leave adequate breathing space for innovation. And I think that's really ultimately what *Grokster* was about as well.

MS. PILLARD: Paul, your firm, Jenner & Block, represented the content owners. What will the decision mean for them? Was it a slam-dunk for content owners? Are they happy with the standard? Can they live with it, both them individually on remand and generally going forward?

MR. SMITH: Yeah, the content side of the case is very pleased with the decision. I think a couple of reasons for that – one, the inducement standard that the Court did set is a very broad one in that it turns on the intent of the people creating the software, and allows you to consider not just what they tell their subscribers, but also internal memos that show they're hoping to have infringement, a business model, which shows they would benefit from infringement, and the fact they designed their software without putting in filters, which they could easily have done.

So when you take all of those factors into account, it leaves open a lot of ways to go about attacking future efforts to do son-of-Grokster, grandson-of-Grokster. And by reopening the Sony issue, which the Ninth Circuit had shut down and having a strong concurrence from Justice Ginsburg as well as Justice Breyer, which says, in the long run, if we're going to kill copyright in order to have this software out there, we're going to make the people who create the software put in the filters. There's a lot of optimism on the Hollywood side that the process will go in a very different direction than it seemed to be going until this case came along.

MR. BARNETT: Can I dissent from that judgment? I think the audience might have even more interest in *Grokster* than they do in marijuana, but I could be mistaken about that. (Chuckles.) I don't think this was a big win for –

MS. PILLARD: We're in Washington D.C., Randy. Of course they have more interest in *Grokster*. (Chuckles.)

MS. SULLIVAN: The older people on the panel might have been interested in the wine case – (chuckles) –

MR. BARNETT: I don't think this was a big slam-dunk win for content providers. It was a win, but I don't think it was a big win. I think I disagree with Paul. It's a very limited theory that Justice Souter has provided in which he says now that you can prove intent, just because you can – you don't have to go the Sony route, you can go this other route. And so, if in fact, you've got parties, if you've got developers who have dirty hands about what their intentions are, yeah, there's a theory to go after them. But all other technology developers, I think, in particularly larger companies, where you will have other commercial uses, have been reasonably well-protected by this opinion.

And I'm going to limit myself, because I know we're running out of time here, but the one other reason why I think this was more or less a victory for technology over the content providers is it takes away the burden on Congress to legislate, which I think, if the case had come the other way, content would have had a much greater argument for some extremely onerous statutes that are now being considered, and which now the Court has alleviated the pressure to pass. And those statutes could have done more damage than any judicial opinion would have done. So I actually think, it's not great for Grokster. I wouldn't want to be their lawyer at this point. But it's not bad for even peer-to-peer in the long run and other technologies that do have infringing uses, but also have non-infringing uses.

MR. WAXMAN: I just want to say, I think they're both right.

MR. SMITH: And I agree with you.

MR. WAXMAN: It's plain that the Court's opinion in *Grokster* seems to usher in a sort of don't ask, don't tell version of copyright infringement these days because by focusing its decision on inducement and actual proof that this is what Grokster and Kazaa were all about and how they were pitching their business model, they really have limited this, the decision, in a way that's pretty narrow and suggests that the Kazaas and Groksters of the future will just say, hey, we're all about sort of advancing knowledge and true peer-to-peer and we urge everyone to avoid any copyright infringement, please, wink wink, nod nod.

On the other hand, I think the way the Court rendered the decision reflected exactly what Paul's partner Don Verrilli who argued the case, ultimately decided to do. The industry was pitching a broader, let's get rid of Sony, you know, version of this

thing. In order to protect intellectual property, we've got to really give a very wide berth to copyright owners. But by the time the case was argued, I was there to hear both arguments. I mean Don was basically up there saying, this was their business model. This is what these people did. There is a huge amount of evidence out there and they are just fooling you when they tell you that, you know, they are shocked and horrified to hear that there is actually any copyright infringement going on. So I do think that the industry got the win that it ultimately decided it was going to be able to get and not the broader win that – there's reason for optimism, there's plenty of things that the industry can continue to argue, but the Court took that cue from the industry and ruled narrowly.

MS. BANSAL: I think that's right, but I think also the content providers, I mean, they obviously pitched it as an inducement argument because that's what they could win. But I don't think the Court precluded their Sony argument. I mean there was three, three, and three. And Souter had three, Ginsburg had three on her side that would go more for them on the Sony argument, and Kennedy, I think, no I'm sorry, Breyer, had the other three. So I think the Court just left it all open. They decided this case on the narrowest ground in order to decide this particular case. And they said, we're not going to stop technology, we're going to let you guys all work this out in the marketplace. Come up with new business models and I think the Court was just, in a rare display of judicial humility, not willing to be the final say on all this.

MS. PILLARD: My panel is clearly really warmed up and I've been told I can keep you a few extra minutes, but we're in the National Press Club, we cannot get out of here without talking about the First Amendment, both religion and speech. The Court this term, unanimously upheld against an Establishment Clause challenge, the Religious Land Use and Institutional Persons ACT, RLUIPA. And the Court Monday decided to closely watch Ten Commandments cases, threading a needle between those displays like Kentucky's that violate and those displays like Texas' that don't. And the Court, in an interesting connection to the discussion you've just heard about *Grokster*, the Court held that the purpose behind a display is very critical, purpose and the context in which it's shown. Kathleen, is the split decision something for everyone or does it rub salt in the wounds of both the separationists and those who want more governmental-embraced religion?

MS. SULLIVAN: No, I think the Ten Commandments cases allow religionists not to have to tear out granite slabs with the Ten Commandments that Cecil B. Demille assaulted the country with some years ago, and it also allows separationists to wake up and know that we're not in Iran. We're not in a theocracy. We're not in a place in which religious symbolism can actually be imprinted on the organs of government and the walls of courthouses. So I think that the result in *McCreary v. ACLU* and *Van Orden v. Perry*, the two Ten Commandments cases jointly, suggests that the Court did, to quote not Moses, but Solomon, split the difference by giving something to each side. Interestingly, it was of course Breyer who cast the deciding vote. You have eight justices who think both the Ten Commandments in a frame on the wall of the Kentucky courthouse hallway and the six-foot granite slab on the grounds of the state Capitol of Texas in Austin where,

along with the founders of Texas, the pioneer women, the people who fought at the Alamo, we celebrate the Ten Commandments as also part of Texas' history.

You didn't know that Moses had been to Texas and -- (laughter) – but four justices would have said that both forms of a Ten Commandments display are mere acknowledgements of religion rather than establishments of religion. They don't coerce anybody, nor do they, according to those who would have upheld both, even require that anybody endorse or feel psychically excommunicated if they don't endorse those displays. And four justices would have struck them both down. It's Breyer, interestingly not O'Connor, who votes that both of them are Establishment Clause violations, who casts the deciding vote, harking back to the Justice that he clerked for, Justice Goldberg in *Abington v. Schempp* in saying that the Establishment Clause must be not a matter of categorical tests, but of legal judgment.

And so the cases do continue this legal judgment, case-by-case, context fact-specific approach to Establishment Clause symbolism cases. This is, if you like it, a kind of semiotics of Establishment. Is the crèche surrounded by wishing wells, reindeer and Santa in a commercial setting or is the crèche isolated with Christ the Creator on a courthouse steps? That may matter to whether the crèche, the symbol of the birth of Christ at Christmastime is an establishment of religion. So the Court goes one way in *Lynch v. Donnelly*, the other way in *Allegheny County*, and the Ten Commandments cases continue that semiotics of Establishment. The granite slab standing on the Capitol Mall in Austin, Texas with the Ten Commandments with other monuments at a distance nearby doesn't convey the same message of endorsement as the hanging Ten Commandments in the King James version that is the result, as Nina said, of purpose of attempts to introduce the religious version. That does convey a message of endorsement. So Breyer splits the difference. If you don't like that kind of reasoning, you call it, the science of interior decorating – (chuckles) – which is what Judge Frank Easterbrook once called it.

Let me take a step and say where I think these cases fit into the goals of the religious lobby over the last 20 years. On the free exercise side, the point has been to get lots of exemptions for religion. That hasn't always succeeded. We'll talk in a second, I hope, about the prison case. But on the Establishment clause side, the goal of the religious lobby has boiled down to two things, dollars and symbols. It's been extraordinarily successful on dollars. It's been surprisingly unsuccessful on symbols.

On dollars, recall, the question has been whether religious organizations should be permitted, notwithstanding the Establishment clause, to participate in public funding programs, such as the distribution of vouchers for use by parents to send their children to non-public schools. And over a series of cases, from 1980, when it seemed like a radical proposition from then-justice Rehnquist to say that religion should be included on a par with other organizations in public funding schemes in *Mueller v. Allen*, to *Zellman v. Harris*.

Over that time, the Court has said over and over again, yes, religion can participate in funding schemes, notwithstanding the Establishment Clause, and *Zellman v. Harris* says, finally, the principle is that neutrality means religion is in. Establishment Clause doesn't require the exclusion of religion from voucher schemes. It doesn't require the exclusion of chaplaincy students from scholarship schemes. It doesn't require that you exclude the public sign language interpreter from parochial schools that you would provide in a public school. That line of cases, which is arguably the far more important line of cases to the real interests of people seeking the power of religious groups in our society, has been a very successful defeat for Establishment Clause claims over time.

Surprisingly, on the symbols side, which is arguably less important to the real place of religion in public life, the religious lobby gets defeated. The key moment is again a Justice Kennedy moment in 1992, when in *Lee v. Weisman*, the case about middle school graduation prayer, Kennedy surprises and stuns some of his colleagues on the right of the Court by going over to the side that says, yes, it is an establishment to have prayer in middle school graduation. We're not going to adopt a narrow coercion test, which would say it's an establishment only if we make you believe in a religion, and we're going to uphold lots and lots of other symbolic acknowledgements of religion. Not only are we not going to have a coercion test, Kennedy votes for a five to four result that says that we're going to have a very broad endorsement test. It will be an establishment if it makes you feel bad when you come to something and you feel like, if you're not a member of the majority religion that's being endorsed, you are excommunicated. And he said, you feel psychically coerced at middle school graduation. And then, of course the Court goes on to say, you think you feel psychically coerced if they pray at your middle school graduation, think of how you feel if you're an atheist and you're not praying at a Texas football game in high school.

So in the symbolism cases, the Court continually holds for Establishment Clause invalidation of symbolic displays, with the exception that a few very well sanitized or Santa-ized crèches can be upheld. (Laughter.) So the Ten Commandments case is really a perfect continuation of that line of cases. It says we're not going to cave in to a view that would allow acknowledgement of religion always to be upheld against Establishment Clause challenge. We're going to strike it down if it goes too far, right on the wall of the Courthouse, and we're going to uphold it if it's sufficiently imbedded in a neutral scheme in which religion is on a par with other things. The monument with the Ten Commandments is standing out there on 22-acre park, next to lots of other symbols. It isn't preferring religion in a way that deviates from neutrality.

A couple of quick points – what can we take away from these cases? Important joint conclusion – Moses delivering the tablets in Hebrew in the frieze on the wall of the Supreme Court chamber itself, nine to nothing, it stays up. (Chuckles.) Surprise, you thought that we were going to have to bring back the blue drapes. (Laughter.) They've been in storage. They're not up in the Capitol Rotunda protecting the bosom. It was going to go up over Moses, but it was in Hebrew. Nobody thought they were establishing Judaism and – (laughter) – he was up there with Solon and lots of other secular lawgivers. So he is safe, nine to nothing, they could all agree on something.

Second important joint conclusion, *Lemon*, the aptly named Lemon Test, is still alive – the test that everybody loves to hate. Why, because it says that you have an establishment if you have an excessively religious purpose and excessively religious factor, an entanglement of church and state. Well, any accommodation of religion, such as the one the Court upheld in *Cutter v. Wilkinson*, the prison religious accommodation case, any accommodation of religion has a religious purpose, so the right doesn't like the *Lemon* Test. It seems to turn too much on purpose. A lot of people don't like looking for purpose, because how do you know what a legislature is thinking. So *Lemon* has been on the way out for years, and in fact, as Justice Scalia said some years ago, it keeps coming back like the ghoul in a late-night horror show, just when you thought it was down.

And it's back. In the Kentucky case, Justice Souter, writing for the majority of the Court, says, I'm applying *Lemon*. There was an excessively religious purpose here. Purpose is part of Sandra Day O'Connor's endorsement test, which is now the official law of the Establishment Clause, because if you have the purpose to promote a religion, you will be making the reasonable observer feel excommunicated by your purpose of endorsement of religion on the wall. But he's resurrecting *Lemon*.

Interestingly, Chief Justice Rehnquist, writing in the Texas case, says pay no attention to *Lemon*. *Lemon* is gone. *Lemon* doesn't cover symbolism cases. But he doesn't have five votes because Breyer concurs only in the judgment in the Texas case. And so if you take the Souter, which is a straight majority as reaffirming Lemon, and Rehnquist as dissing *Lemon* but only with four votes, *Lemon* is still the law.

And finally, I think you see this case, just to take a step back, it's a little bit like *Casey*. Abortion – *Roe*'s upheld, *Thornburg* and *Akron* are overruled, permit but discourage. Take a hot button issue, make both sides unhappy in a way, and diffuse the tension -- or *Grutter* and *Gratz*, in which you have two slightly different fact situations. Split the difference down the fact situations, make both sides a little bit unhappy, again, diffuse the ability of the Court to deliver a hot button issue to a pure ideological victory to either side. And so it's a great Solomonic, if not Solonic or Mosaic, decision.

Now, going over, just very briefly, the prison case, the Court upholds a federal law, RLUIPA, which, you remember the history. Supreme Court, led by Justice Scalia, says, do religionists get exemptions from generally applicable laws like drug laws? If you religiously want to smoke marijuana, if you religiously want to ingest peyote, are you exempt from laws of general applicability? And *Smith v. Employment Division* says no, you are not. No special affirmative action for religion in relation to general laws. Congress, outraged, passes the Religious Freedom Restoration Act, saying you can't deny an exemption to a religionist unless you have a compelling reason. The Court strikes it down, says it's beyond Congress' civil rights power, because there is no evidence that there is terrible discrimination against religionists. We're not tarring and feathering Catholics anymore and it's a thumb in the eye of the Court that Congress was in effect trying to overrule *Smith*, so RFRA was struck down in the *Boerne* case.

RLUIPA is an odd end-run around *Boerne*. The most important religious liberties, says the Congress, that we need to protect against state invalidation are preserving the landmarking of churches – the land use piece, and the denial of religious liberty institutionalized persons. In other words, you've got to protect prisoners' religious liberty against its suppression in the confined and captive monopoly of state institutions. And you just think about that for a minute, what was Congress thinking? It's a way of getting around *Boerne*. It's a narrowly targeted, rather than a general and sweeping statute, and so it fits the remedial theory of *Boerne*, and it also links to federal funding and so may ground the religious liberty in the Commerce and Spending Clauses. But play it out. If Congress wants to let prisoners pray, shouldn't it also think that once they keep praying when they get out, they should be able to vote? But I digress.

What the case does is reiterate that the Court upholds the statute against facial Establishment Clause challenge. It says accommodating Wiccanists in prison who want to pray on the same basis as Baptists, if the requirement is to give religious freedom to prisoners, that doesn't in itself establish religion. There may in fact be cases in the future though, where as applied, the prison officials can show that there is some particular security risk from particular kinds of religious worship, so as applied, there may be other cases.

But again, there is a gray zone between what free exercise compels and what establishment forbids, and there is a certain amount of autonomy here, so this is *Locke v. Davey* goes to prison. *Locke v. Davey* said, it's permissible to have vouchers. Establishment Clause doesn't forbid it, but it's not required to have vouchers for children to go to religious schools. If a state chooses not to require vouchers, that doesn't violate anybody's free exercise rights.

So just quickly on the free speech side, no stirring cases of dissent, protest, ideological difference from government, seditious libel, what we had this term was one free speech case and one free speech case only, and it was about the immortal right not to be compelled to support advertisements that say Beef, It's What's For Dinner. (Chuckles.) And there are a lot of these cases, Got Milk. There are cases coming out of the South about crocodile and alligator skin and whether you have to support marketing campaigns about those. The slogan that they were thinking of is, You, You're What's For Dinner. (Laughter.) There are a series of cases that are involving agricultural marketing order schemes, among many complicated aspects of which, there are compelled exactions from farmers to support generic advertising campaigns. And there's a long series of cases about this. And just to sum it up, stone fruit, no First Amendment rights. Mushrooms, First Amendment rights. Beef, no First Amendment rights. So Tornados Rossini is out, you cannot have beef and mushrooms. They don't both win.

The reasoning in the case is interesting – what's really at stake in these cases is compelled speech. You remember Jehovah's Witnesses don't have to salute the flag? It's just as much a violation of your liberty to make you speak as to bar you from speaking, and the advertisers here, the beef growers were saying, we don't want to have to support generic advertising campaigns. What if we want to say Organic Grass-Fed

Hereford Beef, that's what's for dinner. We should be able to say something on our own and not have to be compelled against our will.

Well, interestingly, I think there's one important, interesting takeaway point from this case and you've got to put it together with a few other cases. Many people had thought that the First Amendment was becoming the new *Lochner*, a basis for challenging economic regulations in the name of freedom of speech. That claim has been advanced in certain of the advertising cases in which advertising is regulated. It was at issue in McCain-Feingold, the *FEC v. McConnell* decision. It's at issue in these compelled speech cases involving wealthy business interests. And the claim was the First Amendment, if it's allowed to be used for commercial speech protection or for the right to contribute to campaign finance, if the First Amendment is used for wealthy causes, it's not really serving as a charter of freedom of speech, so much as a charter of economic liberty, a kind of stealth *Lochner* the back door, a way of getting strict scrutiny against economic regulations.

And that was really the tension in this *Johanns v. Livestock Marketing* case. Is the First Amendment being used as a wedge to go after economic regulation? And the Court says, we're not going to find a First Amendment violation here. This is effectively government speech. You have no right to withhold your tax money from government messages that you don't agree with. You have no right to, and the beef growers have no right to withhold their money from an advertising program that properly understood is really government speech.

Well, that doctrine has some dangerous implications, I think, if we expand the notion that everything supported through government, regulatory exemptions, or subsidies is government speech. We're in trouble and that might say something about the Solomon Amendment case that's teed up for next term. But I do think that just noting the muting of the Rehnquist revolution point that Nina made earlier, we have not seen the First Amendment delivered as a charter of economic liberty or free speech for rich people because *Nike v. Kasky* fizzles, McCain-Feingold is upheld against First Amendment challenge, and *FEC v. McConnell*, these cases with stone fruit plus beef, notwithstanding mushroom, suggest that you're not going to be able to use the First Amendment as a way to overturn a lot of agricultural marketing schemes. So the First Amendment as *Lochner* has not quite congealed any more than the liberty to resist public use has congealed in *Kelo*. So that's on the First Amendment.

MS. PILLARD: We're really out of time, over time, but I have to give Paul the last word. Paul, with all the scuttlebutt about a possible retirement and what's at stake in any new appointment, how much difference does one justice make? How much can an individual appointee's views be forecast? Randy referred to this as the term of Justice Kennedy. What do you have to say about that?

MR. SMITH: Well, I guess the conventional wisdom is that if the Chief Justice were to retire, he would replaced by somebody ideologically very similar and that that wouldn't make a huge difference in the lineup in the Court and I think that may well be

true in the short-run. But I think the long-run prospects are much harder to predict, and we've seen that with Justice Scalia. The thing about the Court that's so interesting is the way the interactions between the justices affect the way the Court goes and a very articulate person who gets along with the other justices who was appointed at the sort of John Roberts mode, could I think, over a period of about two or three years, have enormous influence in terms of the Court's future direction. So one vote by itself, if you just do the math, doesn't have that much of a difference, but I think a person can be very influential in this Court.

MS. PILLARD: Thank you. Thank you very much. (Applause.)

(END)