Erwin Chemerinsky
September 23, 2008

Danan Margason: My name is Dan Margason and I'm the President of the UW Student Chapter of the ACS. We're really, really excited to have Professor Chemerinsky here. For the 1Ls who haven't taken Con Law yet, you will love this man. He'll get you through it with his book.

[laughter]

Danan: One of my friend's outlines was titled "Chemerinsky, I Owe You a Beer," so...

[laughter]

Danan: He's definitely the man for Con Law. I just wanted to say really quick that after this talk, in the cafe, we're going to have some ACS sign-up sheets. We really want you to come there, get your email down. And we're not going to ask you for money quite yet.

But it's really important that we have membership for this organization so we can continue talks like this. The ACS is a national organization promoting a progressive legal system, renewing civil liberties in the Constitution, and et cetera. There's a lot on the website at ACSLaw.org.

I'm going to introduce Professor Katheryn Watts now, a former clerk to Supreme Court Justice Stevens, and now one of our best first year professors in Constitutional Law and also teaches Admin Law, as well, to the upper class students. So, Professor Watts.

[applause]

Katheryn Watts: It's my real pleasure to have the opportunity to introduce to you today Dean Erwin Chemerinsky. I just want to thank all of the students who worked so hard on behalf of ACS to get him to come and thank Dean Chemerinsky for making the time in his very busy Seattle visit to make a stop at the University of Washington.

I know you're all here to listen to him, so I just wanted to very briefly, in a minute or two, summarize some of the many, many accomplishments in Dean Erwin Chemerinsky's career and life. Dean Chemerinsky is currently Dean, as many of you have read about in the papers, at the newly-founded UC Irvine School of Law.

But before heading to Irvine, he served on numerous leading faculties including the faculties at Duke, USC, and DePaul in Chicago. Before going into academia, he earned his BS at
Northwestern, which I have to plug since it's my alma mater, as well. And he earned his JD at Harvard.

As an academic, he has established a record as an extremely prolific, high-profile, and highly-regarded scholar, particularly in the arenas of Constitutional Law and Federal Courts.

He's authored six different books in Federal Courts, Constitutional Law, and other areas. Many of you who are, I notice, in the room who are my 1L students, I know did live and die by his treatise and thank him and adore him for that treatise. And students that I had previously at Northwestern for Fed Courts thank him and adore him for his concise, one volume treatise on Federal Jurisdiction, as well.

In addition to his six books, he's also authored more than 100 different law reviews that have been published in a variety of places including the Northwestern University Law Review, Harvard Law Review, Stanford Law Review, Michigan Law Review, and the list goes on and on.

As if writing all of these books and law review articles doesn't keep him busy enough, he's also been a very frequent commentator for the national media and the local media on major issues, such as the O.J. Simpson trial. And he also somehow manages to find the time to practice as an extremely serious Appellate lawyer who has argued a number of cases before the United States Supreme Court and various Federal Appellate Courts.

When I was clerking for Justice Stevens, for example, I vividly remember watching him argue a case that was there in the October 2002 term, Lockyer versus Andrade. It was a case that involved a challenge to California's "three strikes and you're out" statute, and it was an Eighth Amendment challenge.

And although five Justices of the majority...the five Justice majority didn't ultimately agree with Dean Chemerinsky's client, my boss, Justice Stevens, sided with the descent, which would have given Dean Chemerinsky's client a win.

So these little snippets, I hope, just give you some of the highlights of his many, many accomplishments and hope to show you how lucky we are to have a first rate scholar and a very serious Appellate advocate here talking with us today.

So with that, let me please thank Dean Chemerinsky for coming and turn it over to him.
[applause]

Erwin Chemerinsky: Thank you. You are so kind, so kind of you. Thank you. Thank you.
Thank you so much for the incredibly kind introduction. It's really an honor and a pleasure for
me to be with you. Before I talk about my assigned topic, I do want to do a plug for the
American Constitution Society, especially for those of you who are first year law students who
may not know much about it.

It is an organization unlike any other in the United States. It's a place for the development of
progressive legal thought. It's a place to have law students gather to hear speakers. It also has
lawyer networks all over the country. It's an opportunity to have law students, lawyers,
academics work together to develop a progressive vision, Constitutional Law, and law work
generally. I so strongly encourage you to be involved here with the Lawyer Chapter and with the
National Organization.

I was asked to talk with you this afternoon about the Roberts Court and the future of
Constitutional Law. On June 26th, the Supreme Court finished the third year of the so-called
John Roberts Court. The fourth term will begin in just a couple of weeks. On Monday, October
6th, the first Monday in October.

Let me make five observations about where the supreme court is now and where it's likely to go
in the foreseeable future, and then I'll take your questions.

First, let me talk about the Supreme Court by the numbers. I think, often, the statistics about the
court are quite revealing. For example, last year the Supreme Court decided 67 cases after
briefing an oral argument. It's one less than the 68 cases they decided the year before. What
makes this striking is that through much of the 20th century, the Supreme Court was deciding
over 200 cases a year. As recently as the 1980s, the Supreme Court was deciding about 160 cases
a year. Now, as I said, it's down to 67.

There are a couple of Federal District Court judges in the room. My guess is their dockets have
not gone down proportionately during this time.

[laughter]

In fact, I don't think we can identify any court in the country that's had this type of docket
reduction. It has enormously important implications. For all of the areas of law that you study,
more major legal questions go a longer time before being resolved, where splits and conflicts,
where the circuits and the states go a longer time before being settled.

There's another less frequently noted implication of the smaller docket. As the number of decisions goes down, the length of the opinions goes up. I can show you a perfect inverse correlation as the number of cases per year decreases, the average length of the opinion as measured by words per opinion and pages per opinion goes up.

Now, I'm not sure what's cause and what's effect. Perhaps the Supreme Court is taking fewer cases because the Justices want to write longer opinions. My own guess is they're writing longer opinions because they have fewer cases. Last term there were a number of decisions where the split opinions were over 150 pages long.

One of the things I have to do every July is pair a supplement to my Constitutional Law case book. There is no way to edit 150 page opinion down to an assignment manageable for law students in one day without making a hash of it.

So I have a new campaign that I hope you'll join me in. And as law students, you really have a vested interest in joining this campaign. I think word and page limits should be imposed on Supreme Court opinions.

[laughter]

Some other numbers about the Court: Last year there were 14 5:4 or 5:3 decisions. That's less than the 24 5:4 decisions than the year before. I don't think it's that the Court found more consensus, I just think there were fewer cases on the docket last year that were defined by ideology.

The two Justices who were most often in agreement last term were Chief Justice John Roberts and Associate Justice Antonin Scalia. They voted together 88% of the time. The two Justices next most often in agreement were David Souter and Ruth Bader Ginsburg. The two justices next most often in agreement were Chief Justice Roberts and Justice Alito. I think it tells us a lot about the ideology of the two newest members of the court.

The justice who was most often in the majority last year, least frequently in dissent, was Chief Justice John Roberts. He dissented only six times for the entire term.

A second observation that I would make about the court is that when it matters most, it's the
Anthony Kennedy court. I know, out of tradition and deference to the Chief, we call it the John Roberts Court; I just did. But at least from the perspective of the lawyers who stand before the justices and write briefs to them, it's really the Anthony Kennedy court.

I'm terrible at making predictions about things. Every April, without fail, I predict that the Cubs are going to win the World Series.

[laughter]

You laugh. This is the year.

[laughter]

But it's very easy when a case comes before the Supreme Court that's ideologically defined. I can go out on a limb and say, "It's going to be a five-four decision, and Anthony Kennedy is going to be in the majority."

Think of the three cases last year that I think are widely regarded as the most important. In each of them, it was a five-four with Justice Kennedy in the majority.

One of them is "District of Columbia versus Heller." It involved the meaning of the Second Amendment.

The Second Amendment is an enigma. You read the text, it says, "A well-regulated militia, being essential to a free state, the right of the people to keep and bear arms, shall not be infringed." Gun-rights advocates want to look to the second half: "The right of the people to keep and bear arms shall not be infringed." But gun-control advocates say, "Look at the first half. It emphasizes that this is a right for purposes of militia service."

The framers' intent is unclear. Gun-rights advocates say that the right to have guns, particularly for self-protection, has been safeguarded ever since English law. Blackstone spoke about it. Every state that had a constitution--when the United States' constitution was ratified, it had a state constitutional provision safeguarding the right of individuals to have guns.

But those who favor gun control point out that James Madison drafted the Second Amendment--like he drafted all of the Bill of Rights--and his first draft of the Second Amendment had a clause
that gave an exemption from militia service for those who were conscientious objectors, suggesting that this was a provision that really was about militia service.

Each side has an argument based on history. Those who favor gun rights talk about the tradition of protecting gun rights, especially through the 19th century. But gun-control advocates point to the fact that never in American history, until June 26th of this year, had any law been found to violate the Second Amendment. Repeatedly, the Supreme Court had taken the position that the Second Amendment safeguards the right to have guns only for the purpose of militia service.

I don't know how it came to be that guns were an issue so defined by ideology, but we all know that conservatives tend to favor gun rights, liberals tend to favor gun control, so it's easy to imagine that the Supreme Court was going to come up five-four and Justice Kennedy would be in the majority. He did, siding with the conservatives.

Justice Scalia wrote the opinion for the court, drawn by Chief Justice Roberts, Justice Kennedy, Justice Thomas, and Justice Alito. And Justice Scalia's opinion restronged just the textual intent, historical arguments that gun-rights advocates always present. Justice Stephens wrote for the four dissenters, and he presented the other side in a traditional way.

I think the open issue, after this case--and it's one that many of you are going to be involved litigating in the initial years of your career--is what gun-control laws will be upheld and what will be struck down as a result of this decision.

For those of you who have not yet had Constitutional Law, when you do you'll come to learn that the outcome of Constitutional litigation very much depends on what's called the standard of review, or the level of scrutiny. To put it most simply, sometimes courts are very deferential to the legislature, even when individual rights are involved, where there are claims of discrimination. Sometimes courts give very little deference to the legislature, and they're quite exacting in their review and scrutiny.

Well, what of these approaches is the Supreme Court going to adopt, or the federal court's going to adopt, with regard to the Second Amendment? Justice Scalia's majority opinion doesn't say. His one sentence, where he says, "Under any standard of review, this law would be struck down." But that doesn't give guidance to future cases.

Then he said the Second Amendment is not absolute. He said surely the government can regulate where people have guns, like prohibiting guns in airports or guns in schools. He said the government can keep people with a felony conviction or a history of serious mental illness from having guns. But otherwise, he leaves that question open.
Justice Breyer wrote a dissenting opinion, in which he said, "Regulation of guns should be allowed, so long as the government is acting reasonably." He pointed out that 42 states have provisions in their state constitutions that safeguard a right of individuals to have guns, but in every one of those 42 states regulation is allowed so long as it's reasonable. Usually, if it's just a reasonableness test, the government will almost always win. Is that where the court will go? Or will the court go to more exacting, say strict scrutiny?

The other issue that's still open is whether the Second Amendment will be applied to state and local governments. For those of you who haven't had Constitutional Law, you might be surprised to know that when the Bill of Rights was adopted it was thought to apply only to the federal government. It was only after the adoption of the 14th Amendment in 1868, and really, only in the 20th century, that the Bill of Rights was applied to the states by being found to be a part of the liberty safeguarded by the due process clause of the 14th Amendment. The states can't deprive.

But there's still a handful of provisions to the Bill of Rights that have never been applied to state and local governments. The Second Amendment is among them.

On June 27th, the day after "District of Columbia versus Heller" was decided, the National Rifle Association filed challenges in Chicago and San Francisco to the city gun-control ordinances, clearly setting up this issue for Supreme Court review.

A second of the cases from last term that I regard as most important is a case called "Boumediene versus Bush." The issue here is whether the Military Commission Act of 2006 is an unconstitutional suspension of the writ of habeas corpus. The Military Commission Act says that non-citizens held as enemy combatants shall not have access to federal courts, via writ of habeas corpus or otherwise.

They have to go through a military proceeding. But there's nothing in the law that requires that there ever be a military proceeding. If there's one, they could then get review in the United States Court of Appeals for the District of Columbia Circuit. A review can be only based on constitutional or statutory claims. They can't bring any claims based on the Geneva Accords or other treaties.

I should disclose that I was representing, and still am, one of the petitioners in this case. I've been representing a Guantanamo detainee by the name of Salim Ghereby since July of 2002, filed a habeas corpus petition on his behalf in the summer of 2002.
I will tell you, in this room, without disclosing any classified information: I have no idea why he is in Guantanamo. He says he has no idea why he is in Guantanamo. Now, he may be a very dangerous person who deserves to be locked up. Or he may be, like we now know most who have been taken to Guantanamo, there just by mistake. How can we know, though, if there's not some form of due process?

In a five to four decision, the Supreme Court held the Military Commission Act to be an unconstitutional suspension of the Writ of Habeas Corpus. Justice Kennedy wrote the opinion for the Court joined by Justices Stevens, Souter, Ginsberg, and Breyer. Justice Kennedy said Article one Section nine says that Congress can suspend the Writ of Habeas Corpus in case of rebellion or invasion. No one claims that's going on here. He says the law by its very terms is a suspension of Habeas Corpus. The substitutes within it aren't adequate, so the law is unconstitutional.

Justice Scalia wrote a vehement dissent. He said innocent Americans will die as a result of this opinion. He said as a result of this decision Federal Courts will release terrorists via Writs of Habeas Corpus. They'll come back to the United States and commit acts of terrorism. Justice Kennedy ended his majority opinion by saying even in a time of crisis, even in the war on terror the Constitution, the rule of Law, the Writ of Habeas Corpus must be complied with.

I think that's what's most important about this case. I think there's no more profoundly significant legal issue than what is the appropriate role of the Federal Judiciary in the context of the War on Terror. Justice Scalia on behalf of the dissents said that this is a matter the Federal Courts should stay out of. That the Judiciary should leave this to the Executive and the Legislature. But as Justice Kennedy said, what's the meaning of the limits in the Constitution if there are no courts there to enforce that. What is left of the rule of Law if we give it up in a time like now just because there's a crisis.

The third of the cases from the last term that I'd mentioned is a case called Kennedy vs. Louisiana. The issue in this case is whether or not the death penalty for the crime of child rape is cruel and unusual punishment. Consistent with the theme I'm pointing you to, it was a five, four decision. Justice Kennedy writing the opinion for the court joined by Justices Stevens, Souter, Ginsberg, and Breyer. The Supreme Court held that the death penalty is Constitutionally to be used only for the intentional taking of the life of another.

Justice Kennedy pointed out that there are 36 states that have the death penalty. Only six of them allow the death penalty for the crime of child rape. He said Federal Law does not allow the death penalty for the crime of child rape. He said no one has been executed in this country for over 30 years for that crime. He said to determine what's cruel and unusual punishment a court has to look toward evolving standards of decency. He said all of this is evidence that evolving standards of decency make the death penalty for child rape cruel and unusual punishment.
Now one thing that's interesting about Justice Kennedy's opinion is he made a mistake. No one denies here that he made a mistake. He said that Federal Law does not provide for the death penalty for child rape when in fact a few years ago Congress amended Military Law to provide the death penalty for child rape for those who are in Military service. So at the end of July the state of Louisiana filed a petition for rehearing in the Supreme Court because there was an error.

I think this is a really interesting question: What does the Supreme Court do when it makes a mistake like this? Federal Courts of Appeals, State Courts often issue just revised opinions. I've never seen the Supreme Court issue a revised opinion.

About 10 days ago the Supreme Court asked for briefing on the error that was raised in the Louisiana petition for rehearing. I can't imagine that this will cause the Supreme Court to change its mind. I don't think the five Justices of the majority based their decision on what Federal Law had, but it is an interesting procedural wrinkle to be on the look-out for. How does the Supreme Court correct a factual error like this?

At the very least, as I said, I think this insight that it's the Anthony, Kennedy court matters so much for the lawyers who stand before the Justices and write briefs to them. I wrote a brief last term in the second amendment case. I'll tell you, my brief was a shameless attempt to pander to Justice Kennedy.

[laughter]

If I could have put Justice Kennedy's picture on the front of my brief, I would have done so. My brief was not unique among those in this case. This case is not unique among those on the docket. As long as these are the nine Justices, it is the Anthony, Kennedy court.

There's an easy explanation for this. John Roberts and Samuel Alito have been everything that Conservatives could have hoped for and Liberals could have feared. Almost without exception in their three years on the court, they have always voted together with Justices Scalia and Thomas in ideologically defined cases. Usually equally predictable is the block of Justices Stevens, Souter, Ginsberg, and Breyer on the other side leaving Anthony Kennedy as the swing Justice.

The third observation that I would offer to you is that this is the most pro-business Supreme Court since the mid-1930's. I know that we commonly talk about the Court in Liberal, Conservative terms. I've done so; but I do think in understanding this court, in getting past the headlines, it's important to see it as a very pro-business Court.
Let me give you a couple of examples of this, though I could give you many. What is an area of Law that might seem technical, but it's really not. It's about when is State and Local Law preempted by Federal Law. Now one would think that a Conservative court committed to States rights would want to limit the situation in which State and Local regulation is preempted by Federal Law. The narrower the scope of preemption, the more governance that's allowed to State and Local governments.

But did you know that literally every preemption case to come before the Roberts Court in its three years in existence the Supreme Court has found preemption. Almost all of it involved business challenges to State and Local regulations. Let me give you an example, tell you about a case that's on the docket this term, and tell you what I think is going on here.

The example I've mentioned is a case from last February called Regal vs. Medtronic. Here's the issue: If the Food and Drug Administration approves a medical device does that then preclude State Court claims about it? The case involved a balloon catheter that's used in angioplasty proceedings. It was used on a particular person, and it exploded in his body and caused great harm. He ultimately died as a result, and a law suit was brought. The question is: Is the manufacturer protected from any Tort Liability because the FDA approved the device?

Now there's a provision in the Medical Devices Act that says that States cannot impose requirements inconsistent with Federal Law. That's the literal word in the Law, "requirements." Does this preclude State Liability? The Supreme Court eight to one said yes. Justice Scalia wrote for the Court. He said liability can often have the same effects as regulation, changing behavior. So therefore liability is in essence something that's imposing additional requirements, those not doing so explicitly. Therefore a preclusion, a preemption of requirements also preempts liability.

Justice Ginsberg wrote the dissent. She said where Congress wants to preempt liability, it knows how to do so. There are many Federal Laws that expressly say there cannot be State Tort Liability or other forms of liability. Pretty clear, isn't it? She said Congress didn't do that here, so there's supposed to be a presumption against preemption. It didn't exist.

I'll give you another example from last term, a case that got no media attention at all. A case called California Chamber of Commerce versus Brown.

There's a provision of California law that says that if an entity, like a business, gets more than $10,000 of state money it can't use that money to engage in anti-union organizing activity. The business can still use its own money to discourage workers from unionizing. But it can't use its state money. Is that preempted by federal law? There's no provision in any federal law speaking
The whole scheme of federal labor law indicates that Congress meant to leave employers like employees free to speak about union organizing. Therefore, the field is occupied by Federal Law - there's preemption.

But Justice Briar said in dissent "All that this law does is keep businesses from using state money to engage in anti-union organize activity. Shouldn't the state be able to decide how its own dollars are being spent?"

The case to be on the look out this term is a case called Wyeth Labs versus Lavine. And it may not get the headlines as some of the other cases that I will mention in a moment. But it maybe one of the most important case on the docket right now.

The issue here is if the FDA approves the warning label on a prescription drug, does that preempt state to a liability? The particular case involves a drug that is used to treat sever migraines. It was administered to a woman through an IV pump. Turns out it's very dangerous to administer the drug in that way. The woman ultimately lost her arm as a result. There is a warning label on the drug, approved by the FDA, but it doesn't mention this, even though the drug company apparently knew it should not be administered in that way.

Can the drug company be sued? Or is the fact that the FDA approved the warning label preemptive the liability. Most litigation about pharmaceuticals, like Vioxx, has been this "failure to warn basis". Whether such losses go forward, whether injured patients and consumers going to recover will depend upon where the Supreme Court finds preemption.

Here's what I think is going on. The conservatives on the Roberts Court are very pro-business. The more liberals Justices on the Roberts court tend to favor broad federal power. They come together in coalitions often by lopsided margins, to find preemption.

I will give you another illustration of what a pro-business court this is, and that's in the area of punitive damages. In the last two years there are major cases imposing limits on punitive damages. Two years ago there was a case called Philips Morris versus Williams.

The widow of a heavy smoker sued a tobacco company for fraud and marketing cigarettes. A jury awarded $80 million in punitive damages, which were 90 times the size of the compensatory damages.
The Supreme Court in a five to four decision reversed. The justices were not defined by ideology. Justice Briar wrote the opinion for the court. His opinion was joined by Chief Justice Roberts, Justice Alito, Justice Souter and Justice Kennedy. But to put it another way, the four dissenting Justices were Stevens, Scalia, Thomas and Ginsburg. You don't find that split very often on the Roberts Court. [laughter]

Justice Briar said that, "a jury can use punitive damages only to punish the defendant for the harm suffered by that plaintiff. Punitive damages can't be used to punish a defendant for harm suffered by third parties". But where does that come from? You often hear conservatives rallying against the Supreme Court making up constitutional rules. Throughout American history there had never been such a rule announced by the Supreme Court.

Now to make it even more incoherent and much less clear, three paragraphs later Justice Briar said, "When a Jury considers the reprehensibility of the defendants conduct, the most important fact of determining punitive damages, a jury can consider harm to third parties.

Judges, I have no idea how you instruct your juries after this test. [laughter] You can repeat Justice Briar's words. You can say to them, "Only punish the defendant for the harm suffered by the plaintiff, not by third parties. But in accessing reprehensibility consider harm to third parties." But if I was a jury, can I say "I don't understand. Can we or can't we consider harm to third parties?"

The Supreme Court sent the case back to the Oregon Supreme Court. It reinstated and affirmed the punitive damage award. The Supreme Court granted review again. It will be argued this coming term.

One more example with regard to punitive damage is, to show that this is a really pro-business court, a case came down in June - it was Exxon Shipping versus Baker. This is a case that arose from the tragic Exxon Valdez oil spill. There was a lawsuit brought by people who lost their businesses, their property, their livelihood. The jury awarded $507 million in compensatory damages and $5 billion in punitive damages.

In 1996, when the Supreme Court first imposed a limit on punitive damages based on due process, in BMW versus Gore, the Ninth Circuit reversed the punitive damage order and sent it back to the District Court. The District Court then created a new punitive damage award, went back to the Ninth Circuit. And then after the Supreme Court decided State Farm versus Camblin in 2003, the Ninth Circuit sent it back to the District Court, went back to the Ninth Circuit a third time and the Ninth Circuit said the punitive damage award could be $2.5 billion.
The Supreme Court in a five to three decision reversed. Justice Souter wrote for the court. Justices Stevens, Ginsburg and Briar dissented. Souter wrote for the court. Justice Alito did not participate.

Justice Souter writing for the court said that "the holding is that in admiralty maritime law, punitive damages have to have a one-to-one relationship with compensatory damages. They have to be the same size as compensatory damages." But his reasoning had nothing to do with admiralty maritime law at all.

He said, "Juries have too much discretion in setting the amount of punitive damages." He likened the desertion that Federal District Court Justices had in imposing criminal penalties before time of the sentencing guidelines. He said, "The only effective way to limit jury discretion is to have a one-to-one relationship to the compensatory punitive damages."

Now unlike Philip Morris versus Williams, this wasn't based on the constitution. But like Philip Morris versus Williams, where did this one-to-one relationship come from.

Now, the court, as I said, was only speaking about admiralty and maritime law. But there is no doubt that judges throughout the country are considering whether this applies across the entire range of litigation.

Last Wednesday, I was in Cincinnati, and argued a discrimination case in the Sixth Circuit. I was representing somebody who was a victim of age discrimination and other forms of discrimination. The jury awarded him compensatory damages and awarded him punitive damages. The punitive damages were in a 1.67 relationship to the compensatory damages, so, very close to one-to-one.

And yet the hardest questions that I got from the court was "Well, in light of Exxon Shipping versus Baker, shouldn't we have to reduce this to a one-to-one relationship - why not a one-to-one relationship?" And as I say Exxon had nothing to do with the constitution. But it's sent a message to the lower courts and made a widespread affect.

These are examples - I can give you many other illustrations. But what they show is, I think, the most pro-business court we've had since the mid 1930's.

Fourth observation that I would make about the court is tell you a little bit about what's on the
docket for this term to be on the look up. Usually the court sets by half of the docket before they adjourn in June, and then fill rest of the docket between the end of September and the beginning of January.

There are some really important, very interesting cases on the docket this term. The case that's going to get the most media attention is called Federal Communication Commission vs. Fox Broadcasting. There a couple of instances where performers at award shows used expletives. One involved Cher, one involved Nicole Richie, one involved Bono. They all used the so-called f-word.

Now, the last time the Supreme Court dealt with this was in a case called FCC vs. Pacifica in 1976. It involved a radio station in New York that broadcast the George Carlin monologue on the seven dirty word.

I always tell my students they don't have to memorize the list of the seven dirty words for the final exam. They'll often be the first words that come to mind anyway when they see my exam questions.

[laughter]

The Supreme Court ruled that a radio station could be punished for the broadcast of the seven dirty words. The FCC, following this, had a policy that a fleeting use of an expletive, used as an adjective, say, was protected, that it wouldn't be punished. But then, in 2004 the Federal Communications Commission changed its position. It said that any use of the f-word is inherently sexual, it's inherently a verbal assault, and that therefore it can be punished.

A lot has changed since 1976. Probably social attitudes towards profanity have changed over the last 30 years. But the media has changed. It used to make sense to have a medium by medium approach, where there would be one set of rules for telephones, and another for television, and another for cable, and another for the Internet.

We just moved into a new house at the end of June. We get all of those services from one provider through one cable. Does the medium by medium approach really make any sense? Now, there's also an issue here of whether the Federal Communications Commission justified changing its 30 year-old policy.

Another case that's docketed that involves the First Amendment is called Pleasant Grove vs Summum. There's a city in Utah that has a 10 Commandments monument. Another religion said,
"Well, we want to come and put up a monument with our religious precepts there. If the city can put up its, we can put up ours." Now, there had been a lot of cases in the Supreme Court and lower courts, but when can the government put religious symbols on government property?

I argued one of those cases in the Supreme Court. In 2005 I argued a case called Van Orden v. Perry that involved six foot-high, three foot-wide Ten Commandments monument that sits directly at the corner between the Texas Supreme Court and the Texas State Capitol.

This case is different, though, because this is an instance that raises the question, once the government chooses to put a religious symbol there, then do others have the right to put their religious symbols in the same place as well?

For those of you who have taken evidence or criminal procedure, probably the most important decision in recent years is a case called Crawford v. Washington in 2004. It used to be that a prosecutor could use statements against a criminal defendant if the witness was unavailable, so long as the statements were reliable. Crawford changed that. Crawford said that if the statements are testimonial, they can't be used against a criminal defendant, even if they're reliable.

There's a case before the Supreme Court this term that's called Melendez-Diaz v. Massachusetts. It asks the question does Crawford apply to laboratory reports? Every time a prosecutor wants to use lab reports, do they have to bring in the person who did the study and compiled the report?

The Supreme Court in Crawford and the cases since has wanted to talk about how the Sixth Amendment means the same thing today as it did in 1791. I want to see how that applies to the question of lab reports.

In the criminal procedure there is also another interesting issue. The Supreme Court has long held that if the police order somebody out of a car and get the occupants out of the car, the police can then do a search of the car. It's a case called New York v. Dalton.

Well, does that make sense if it's a situation where by the time the police get to the person, they're already out of the car? That was based on the idea of concern for the officer's safety if somebody could just reach into the car to get a weapon. If the people are already out of the car, should the police still be able to do a search of the car that leads to an arrest? That's in a case called Arizona v. Gant.

Another important issue that's before the Supreme Court is whether Congress had the power to re-extend the Voting Rights Act. Some did a couple of years ago. The Voting Rights Act is a key
statute with regard to voting equality in the United States.

Those are just a few of the things to be on the lookout for this term, but there are many more cases yet to come as the Supreme Court fills up the docket for October term 2008.

The fifth and final observation--then I'd be thrilled to take your questions--concerns what's the November election likely to be for the future of the Supreme Court. My conclusion is that this election is likely to determine whether the Supreme Court becomes more conservative in the short term or whether it stays ideologically about what it is now.

It is very unlikely that this election will cause the Supreme Court to become more liberal in the short term. Why do I say that? Think about where the vacancies are likely to come on the Supreme Court between January 20th, 2009 and January 20th, 2013.

John Paul Stevens turned 88 years old on April 21st of this year. He's in good health, but it doesn't seem that likely that he'll still be on the court in 2013 at age 93. Ruth Bader Ginsburg turned 75 this year. She's in good health. Perhaps because she's frail in appearance there's always rumor that she's going to step down. There is a widely circulated rumor that David Souter wants to retire and go home to New Hampshire.

Now think of the other side of the ideological island. John Roberts turned 54 in January of this year. If he remains Chief Justice until he's 88, he'll be Chief Justice until the year 2042. That means for most of your legal career, and all of mine, John Roberts is going to be Chief Justice of the United States.

Neither Clarence Thomas nor Samuel Alito has yet to celebrate a 60th birthday. Anthony Scalia and Anthony Kennedy have both turned 72 this year. I think the best predictor of a long lifespan is being confirmed for a seat on the United States Supreme Court.

[laughter]

It's not likely that any of these five justices will be leaving the bench during the next presidential term, and probably not in the next 10 years or so. So, if it is a President McCain who gets to replace, say, Justice Stevens, or Justice Ginsburg, or Justice Souter, he should do with more conservative individuals.

You heard his interview with Rick Warren. He said he wants to appoint justices like John
Roberts and Samuel Alito. If he does so, no longer will Anthony Kennedy be the swing vote on the Supreme Court.

On the other hand, if it's a President Barack Obama, and he gets to replace Justice Stevens, or Justice Ginsburg, or Justice Souter, he's likely to do so with individuals of about the same ideology.

That's why I say that the court is not likely to become more liberal in the short term. In this way, the November 2008 election is very different from the November 2004 election. Can you imagine if John Kerry had replaced William Rehnquist and Sandra Day O'Connor? The court would be very different now. Almost the 5-4 decisions in the last few years would have come out the other way.

But this election, I think, it's going to either mean a court that's significantly more conservatives or about where it is now. I guess the bottom line, then, when you think about the Supreme Court now and for the foreseeable future is that if you're politically conservative, this a court to rejoice over. And if you're politically liberal, you should be glad the court is deciding only about 67 cases a year.

[laughter]

And I'm glad to take your questions.

[applause]

**Erwin:** Please.

**Audience Member:** According to [inaudible 43:31:16] are we seeing the demise of the facial challenge question in a range [inaudible 43:35:09]?

**Erwin:** The question is, "Are we witnessing the demise of the facial challenge?"

For those of you have not yet had constitutional law, to over-generalize: A court can declare a law unconstitutional as applied in a particular case.

This means that the law remains on the books. It can be used in other cases, but it cannot be applied in that way.
Or, a court can say, "The law is facially unconstitutional." That means that is never going to be capable of constitutional application. It is going to be struck down.

There are advantages of facial invalidation. It means that an unconstitutional law is off the books and it is not going to chill behavior that is safeguarded by the Constitution. There is also a disadvantage, that perhaps a law that has constitutional application is removed. And maybe it is better to go just as applied.

The Roberts' Court has shown that it is very hostile to the idea of facial challenges. It very much prefers "as applied" challenges.

You mentioned examples. I can give others from last term. There is a case called Crawford v. Marion County. The issue is whether or not the Indiana law requiring photo identification for voting violated the Constitution.

The Indiana legislature adopted this requirement exactly along party lines. Every Republican in the Indiana legislature voted for it. Every Democrat in the Indiana legislature voted against it. The reason is that there is a dispute that will hurt Democratic voters and especially voters of color more that Republican voters.

The ACLU brought a challenge the day after it was adopted, so it was a facial challenge. There was virtually no evidence of a voter fraud problem in the state that this would solve. As Justice Souter pointed out in his dissent, Indiana could identify only two examples of fraud that might be related to this, and one was from the 19th century.

On the other hand, nor was there evidence that this kept people from voting. The law had not been put into effect yet.

The Supreme Court, six to three, upheld the statute without a majority opinion. Justice Stevens wrote an opinion, joined by Justice Kennedy and Chief Justice Roberts. Justice Stevens emphasized that this was a facial challenge. There was no evidence here that people were kept from being able to vote by it.

You might know that a couple of weeks after this decision came down that Indiana held its presidential primary. There were some well publicized instances of 80 year old nuns being turned away from the polls because they did not have photo ID. Now there can be an "as applied" challenge. But that would be an example of it.
Two years ago, the Supreme Court dealt with the issue of abortion with regards to a federal statute called the "Federal Partial Birth Abortion Act." It was a case that was called Gonzales v. Carhart. In 2000, the Supreme Court had struck down a Nebraska law that prohibited so-called partial birth abortion, saying that the law had to have a health exception for the woman.

The federal law has no health exception. The Supreme Court, five to four, upheld the law. Justice Kennedy writing for the Court, and joined by Chief Justice Robert and Justices Scalia, Thomas and Alito, said that the law was facially constitutional, but it might be challenged as applied.

Think about what this means. It would mean that a woman who is probably nearing viability and who needs this procedure would have to argue that it is unconstitutional as applied to her. Just imagine how that litigation would realistically go forward. But that is what the Supreme Court said. It has to be as applied.

I do not want to go as far as your question. I am not going to say that there is never going to be a law declared facially unconstitutional. Finding a law to be unconstitutionally vague, for example, is a facial challenge.

But clearly, this is a court that prefers as applied challenges to facial challenges.

Please.

Audience Member: Yes. Let's say that John McCain is elected president. If John McCain died and Sarah Palin became president, who would break ties in the Senate? The other question is, do you think John McCain is an American citizen?

[laughter]

Erwin: As to the first question, you might know that the Constitution was amended to provide that when there is a vacancy in the vice-presidency that the president gets to nominate a new vice president who is confirmed then by the House and the Senate.

We have had that procedure used one time or actually two times. You might remember that when Spiro Agnew resigned as vice president because of his involvement in a scandal in Maryland, President Nixon appointed Gerald Ford, who was the Speaker of the House of Representatives... Rather the minority leader of the House of Representatives at that time... to become the new Vice President. The House and the Senate confirmed him.
Then, when Richard Nixon resigned, Gerald Ford became president. He nominated Nelson Rockefeller to be vice president. So, that would be the procedure. We have under the Constitution, a mechanism for filling the vacancy.

And, yes, I think John McCain is a citizen. His parents were American citizens. His father was in Panama, his parents were in Panama, at the time that he was born. So he was born in Panama. But I believe that a person who is born to American parents and the American parents are serving for the military is an American citizen.

I used, as a question, in my Federal Courts exam this past spring, "Who would have standing to bring such a challenge?" It is an interesting question. Would anyone have the standing to bring such the suit?

Other questions?

**Audience Member:** Regarding the last question...

**Danan:** OK.

**Audience Member:** The Supreme Court in the Stoneridge case last year definitely made the ability to bring fraud for securities violations. Do you think that the current financial meltdown might bring some political pressure on the Court and review these sorts of things?

**Danan:** When I was talking about this being a very pro-business court, one example that I could have used is the Stoneridge investors for the Scientific-Atlanta case that you mentioned.

It is not a constitutional case. It is about the ability to sue under securities law. What was involved here was a cable company, Charter Communications. [It] was not doing so well financially. It wanted to make its books look better to attract investment.

So it came up with a fraudulent scheme. It would pay the companies it was purchasing cable boxes from twice as much as they were worth, with the understanding that those cable box companies, like Motorola would then buy ads on Charter Communications' stations. So, it would then be able to show inflated ad revenue.

It did this. Ultimately the fraudulent scheme was learned, and the investors wanted to sue the cable company's [vendors], like Motorola, that were part of the scheme.
The Supreme Court ruled five to three, split along ideological lines, that the investors were not able to sue the vendors, like Motorola. It fits what I said, though. Justice Kennedy wrote the opinion for the Court, joined by Chief Justice Roberts, Justice Scalia, Justice Thomas and Justice Alito. Justice Breyer did not participate, which is why it was a five to three decision.

[This was] an enormous victory for business. Do I think that this will cause the Supreme Court to reconsider the Stoneridge case? No.

I do think, though, that the proposed bailout legislation, if it goes into effect in its current form, is going to raise fascinating constitutional issues. I have never believed that there is much ability to challenge Federal laws on the grounds that they are an access of delegation of legislative power.

There used to be a doctrine that Congress could not delegate its legislative power. But the Supreme Court, since 1936, has not struck down any laws in access of delegation of legislative power.

At least based on the three page proposal, this seems to be an enormous delegation of the spending power. Congress is basically saying to the Secretary of Treasury, "Go spend 700 billion dollars."

The other issue, if you look at the proposal, is a preclusion of judicial review. There cannot be federal court review of what the Secretary of the Treasury does. That raises profound constitutional issues. What if the Secretary of the Treasury is led to violate the Constitution or the law is unconstitutional? How can there not be judicial review?

So, I do think that there will be constitutional issues out of the bailout legislation. I do not see the Court reconsidering Stoneridge. To me, Stoneridge reinforced what I was saying [about] what a pro-business Court this is.

Thank you again for having me.

[applause]

[end of audio.

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