Georgetown University Law Center
Supreme Court Institute Annual Press Briefing:
Anticipating the Supreme Court's October Term 2006
September 25, 2006

Professor Richard Lazarus: Good morning. I wanted to welcome everyone to this annual press briefing for the Supreme Court's upcoming October term 2006. The annual briefing is a traditional event here at Georgetown, sponsored by the Supreme Court Institute. The Institute sponsors a series of events at the Law School here during the year, press briefings like this, we have special classes now on the Court, special lectures on the Court, often proceedings on recently decided or pending cases before the Court. As many of you know our signature program, though is our Moot Court program, in which we provide on a strictly pro bono non-partisan basis rigorous practice sessions for attorneys with cases before the Court on whichever side comes to us first. In recent years we have been holding moot courts in approximately three-quarters of the cases before the Court. Last year we did 56 counsel and two-thirds of them were first-timers. This year we are trying something new we're trying to see if we can actually not say no to somebody as long as the other side hasn't called first and so far this time we're doing I think all but one case in October, all but one case in November and we'll see whether we can keep up the pace while keeping the moots high quality.

Today the moderator for the panel will be Professor Susan Low Bloch. I

think all of you know Professor Bloch, a graduate of the University of Michigan School of Law, and she went on to clerk for Thurgood Marshall on the Court. Professor Bloch is one of the nation's foremost experts on the Supreme Court and its decision making process. She's a frequent and highly regarded commentator on the Court and its rulings and I'm delighted she agreed to serve as the moderator today.

Professor Susan Bloch: Thank you very much Richard, that was nice. I think now I should go home. Welcome everybody. This promises to be a very interesting term more about that in a minute. Let me just a few words about last term. As you know, we saw the first new blood on the Court in more than a decade, first new Chief Justice in about 20 years and at first it looked like Chief Justice Roberts was accomplishing his goal of getting more unanimity and fewer dissents but not surprisingly that didn't hold up. At the end of the term we had the graphic illustration in *Hamdan v Rumsfeld* when sitting next to Chief Justice Roberts who had to be mute, because he had recused himself Stevens proceeded to announce that they were reversing the decision that Roberts had voted on in the D.C. Circuit. *Hamdan* was obviously not the only divisive vote on the Court. We saw the Texas redistricting, Vermont campaign finance, Clean Water Act. We saw some interesting fireworks at the end of the term.

Overall the term had a fair number of 5-4 decisions, 17 of the 69 cases were 5-4. That's about 23 percent not terribly different from the numbers in the past few years. In the 17 cases that were 5-4 Kennedy was in the majority 12 times so as you all have observed already he's the new swing voter, he's not so new but he's now our main swing voter.

Notwithstanding these facts about the dissents there was some more unanimity on the Court than there had been in the past terms. And one of the more striking ones was the abortion case out of New England where the Court somehow managed to narrow it down so much that they were unanimous the first unanimous abortion case in history. And I thought that Roberts decision to give the opinion to O'Connor was a very graceful and generous thing to do, let her do it as sort of her swan song and I think it was characteristic of his seeking more collegiality and unanimity. And Roberts was in the majority in about 92 percent of the cases last term, which is a higher number than Rehnquist had been in his tenure on the Court.

Speaking of records, for those who wonder if Justice Stevens is slowing down now that he is 86 and commuting from Florida, the answer is clearly no. He wrote the most opinions of any justice this term, 27 and the most dissenting opinions, 14. Turning now to the upcoming term, one of the more striking features about it how few cases the Court has already granted. Depending on how you count

the consolidated cases that it has only 27 or 29 cases so far. Significantly fewer than the 37 and 39 cases that it had at comparable times in the last couple of years. In those 27 cases are not enough to, they go through October, November but they certainly can't fill up December so I think the fear among some of the lawyers in town at least as Paul Clement expressed it the other day they fear that the Court is going to grant a bunch today and expedite it and put the pressure on the lawyers to get ready for December. Fortunately we don't have to worry about that and the cases that they have granted are particularly interesting. So I think we should have a very interesting session this morning.

We'll start with Professor Randy Barnett who recently joined our faculty as the Carmack Waterhouse Professor of Legal Theory. I hope you can say it better than I can Randy. Prior to joining our faculty Professor Barnett was the Austin Fletcher Professor at Boston University School of Law. Professor Barnett will talk to us now about the upcoming abortion cases challenging the constitutionality of the federal law banning so called partial birth abortions. Because the federal law is very similar to the Nebraska law struck down by the Court in 2000 the case will give us some indication of how Roberts and Alito deal with stare decisis. Professor Barnett.

Professor Randy Barnett: Thank you. I'm here to talk about the partial birth abortion cases. There are two cases that have been accepted by the Court. The first

is *Gonzales v. Carhart*. The second is *Gonzales v. Planned Parenthood*. The *Carhart* cases is out of the Eighth Circuit. The *Planned Parenthood* case is out of the Ninth Circuit. These do involve the federal partial birth abortion statute but they do cause the Court to revisit a case they decided in 2000, *Stenberg v. Carhart* in which they struck down the Nebraska partial birth abortion statute as unconstitutional because it lacked a health exception for the mother. It did like the federal statute under consideration here have a life exception for the mother, that is the procedure known as partial birth abortion would not be permitted except to save the life of the mother but it did not have an exception for the health of the mother and that was held unconstitutional. The case *Stenberg v. Carhart* and since there are overlapping names here let me suggest when we talk about the *Stenberg v. Carhart* case we call it *Stenberg* and we talk about *Gonzales v. Carhart* we call it *Carhart* and when we talk about *Gonzales v. Planned Parenthood* we called it *Planned Parenthood* and should anybody mention *Planned Parenthood v. Casey* we'll call that *Casey* so to try to keep them straight.

In the *Stenberg* case it was a 5-4 case with Justice O'Connor in the majority so she's gone. And Justice Kennedy in a very vehement emotional impassioned dissent so Justice Kennedy wanted to uphold the partial birth abortion statute in

Stenberg v. Carhart, so if he sticks with his impassioned dissent in this case, if he sticks with the same position he took in *Stenberg v. Carhart* he does not look like he's going to provide a fifth vote to strike down the statute unless stare decisis influences him more than perhaps it has in the past. We can get into that in a moment. Anyway so that's the line up. It's the reason why these two cases have been accepted are significant bellwether cases is simply because of the change in personnel in which we now have Justice Alito and Justice Roberts replacing Justice O'Connor and Chief Justice Rehnquist. Justice O'Connor who had been in the majority in *Stenberg*, Chief Justice Rehnquist who had been in the dissent in *Stenberg*, there are certainly enough votes now to flip that if Justice Kennedy continues to have his same position. The case is pretty much identical to the other case. The statute is pretty much identical to the other statute. The only difference in the facts presented which could provide an out for the Court is that in the Nebraska case the state case there were no major factual findings made by the state of Nebraska on which the Court could rely or defer, whereas in the federal statute there were extensive federal findings or factual findings about the necessity of ever performing a partial birth abortion in order to preserve the health of the mother Congress found it was never an appropriate procedure, never necessary to preserve the health of the mother and therefore as factual matter they justified the

constitutionality of not including a health exception in this circumstance. So that's really the only difference in the case.

This again makes this an excellent case to see if the change in personnel is going t change the direction of the Court in abortion cases generally but I do think one of the two main points I want to make this morning is that it's somehow of a mistake to view this as strictly an abortion case. Or at least it's a mistake to view it as the kind of abortion case that *Planned Parenthood v. Casey* and *Roe v. Wade* were. Why. This is the first of the two points I want to make. First because those cases *Planned Parenthood v. Casey* and *Roe v. Wade* were decided on the basis of what you know what you all call the right of privacy, what is called the right of privacy. So when you think abortion cases you think the right of privacy although I believe it was always a mistake to report *Casey* as being based explicitly on right of privacy. In fact Justice Kennedy the joint opinion by Justices Kennedy, O'Connor and Souter based its decision on a right to liberty not on a right of privacy which I think caused that case to be improperly characterized as a right of privacy case. But nevertheless that is how these cases are dealt with. Whether you call it a right of liberty or call it a right of privacy they do deal with the right of a woman to choose to have an abortion as a private decision made by the woman in order to control her own body, to control her own life, to control her own reproductive destiny. That is

the right that is vindicated in *Roe v. Wade* and *Planned Parenthood v. Casey*. That is not the right that is really at issue in, in my view, in these two partial birth abortion cases, *Carhart* and *Planned Parenthood*. Why. Because we're dealing here not with the right to control one's reproductive destiny we're dealing here with the right to preserve one's health. The right of a woman's to preserve her health. That is a different right.

Also involved in the partial birth abortion situation is the right to preserve one's life. That is also a different right than the right to control one's reproductive destiny. That's a right that is so fundamental that the statute exempts it. That's a right the right to preserve one's life is so fundamental that the statute includes an exception to protect that right and what we're debating about is whether there should also be an exception to protect the right of a woman to preserve her health. So that would be the right that is going to be at issue here. I predict that the litigants in the case, I can't be sure about this but I think they are going to emphasize the difference between the cases. Why it makes a difference here is that a right of privacy the right to decide whether or not to have an abortion in order to control one's reproductive destiny is one that tends to, is deemed the Court after *Casey* to fade out or to recede after viability, after a fetus is viable. The right to preserve

one's health is not. The right to preserve one's health lasts throughout pregnancy just as the right to preserve one's life lasts throughout pregnancy or at least arguably does. So it's a different right. It has a different basis and it lasts and it applies in the abortion context in a different manner than a right of privacy does. So the first thing I would emphasize is that that would be the right at issue here. And that means that the recognition of this right should the Court decide to recognize this right or uphold its previous decision in *Stenberg* which was a Justice Breyer decision in which they upheld the right to preserve one's health as something that was necessary for the statute, that if they decide to uphold that, that doesn't automatically tell us what they are going to do in a right of privacy case. They could uphold *Stenberg*, they could insist on having an exception for the health of the mother and still change their minds about whether there is a decisional right a privacy right to make a decision in order to exercise reproductive choice. That's really a separate issue. Okay that's the first point I want to make. I would characterize this as a right to preserve one's health rather than a right of privacy. I think that's what is at issue here. One more thing about that is that a recognition an explicit recognition of a right to preserve one's health could have implications beyond this case. For example in the medical cannabis context it is a right that is asserted in the medical cannabis context in a due process clause challenge that is in

the Ninth Circuit as if the right to life. Okay in the interests of full disclosure it's the case that I represent Angle Reich in the Ninth Circuit on remand from the *Gonzales v. Reich* case we are now in the Ninth Circuit on remand and I argued that case in March. We are waiting for a decision in the Ninth Circuit.

Okay the second point I want to make about these two cases is the standard the Court applied in *Stenberg* as to once you recognize that there is a right to health then what is the standard by which you apply that right to a particular facts. And it is a kind of an interesting move that Justice Breyer made here. And it probably will attract a lot of attention by the Court and that has to do when it is medically necessary. Even if you are going to do a rationality test, even if you are not going to find the right to preserve one's health to be fundamental and it's pretty amazing if the right to preserve one's health is not deemed to be fundamental, but even if you deem it not to be fundamental you still have to do a rationality test. You have to decide is it rational to prohibit this procedure in order to preserve one's health when it's arguably necessary to preserve one's health well the issue is when is it necessary to preserve one's health and who decides. And the standard that was chosen in *Stenberg* is a very interesting one because what Justice Breyer did in *Stenberg* is said so long as there is substantial disagreement amongst medical

authorities as to whether this procedure is necessary then a woman and her physician get to choose it. It is not solely the woman and her physician's choice or decision that it is necessary that counts. Not entirely that it isn't just an individual physician's opinion that this procedure is necessary that justifies an exception being made to allow it. But when there is substantial disagreement amongst established medical authorities who have major medical authorities on one side and you have major medical authorities on the other side under that set of circumstances in which there is disagreement then a woman and her physician get to make the choice. So it used the substantial disagreement standard and then it held that the issue to be decided in terms of what the findings of Nebraska were and then we'll have now in lower courts address this in the context of the federal statute is did Congress make a rational finding or depending on how deferential you want to be to Congress, was Congress correct in saying that there is no medical necessity, did they apply the standard of *Stenberg* . If they applied the standard of *Stenberg* and they found there was substantial disagreement then under those circumstances they would say at the point the women can choose with her physician. But that's not the standard that Congress applied in passing the federal statute. They found as a medical fact that this procedure was never necessary. Despite the fact that there was disagreement they chose sides Congress chose sides. They decided that the side that said it was

never medically necessary was correct and the substantial medical authorities that said it was medically necessary were incorrect. So that is going to be the major issue that is going to be argued. Does Congress get to make that call. To say that Congress did get to make that call would be to gut *Stenberg* even if ostensibly they are upholding *Stenberg* in some sense that was at the heart of *Stenberg* and to say that Congress gets to make the call as to who is right and choose sides with respect to the division among medical authorities would be to gut *Stenberg*. It would then be to place the liberty that the woman has and her physician has to choose up to Congress at opposed to saying that there is a liberty to choose so long as there is substantial medical disagreement.

So those are the two issues that I think one would focus on and that issue, that latter issue as to whether the standard is whether there is substantial medical disagreement and then if so the woman gets the right to choose that is an issue that could be applied or could be referred to by the Court even if they do not find a fundamental right here, even if they are applying a rational basis test a rational basis scrutiny to say that Congress is acting irrationally if they say that the procedure is never medically necessary in the face of substantial medical disagreement that says it is medically necessary.

Professor Bloch: Thank you. Now we're going to turn to Professor James

Forman. Professor Forman is a graduate of Brown University and Yale Law School. After law school Professor Forman clerked for William Norris on the Ninth Circuit and then Supreme Court Justice Sandra Day O'Connor. Professor Forman will talk about the race education cases from Seattle and Louisville. While these cases are different from the Michigan cases from a couple of years ago they too might show us something about the Court's approach to stare decisis. Professor Forman.

Professor James Forman: So this is how you know your age. When Sue introduces Randy she tells you about named chairs and when she introduces me she tells you about what college I went to and who I clerked for. So I'm going to talk about these two race and student assignment cases. So you all know that a couple of years ago the Supreme Court decided in the Michigan affirmative action cases *Gratz* and *Gruder* upheld the Michigan Law School's affirmative programs struck down the undergraduate plan. And these cases involved not affirmative action as is sometimes has been mentioned but these cases involved K-12 educational systems using race as a factor in determining student assignment in their local schools. The way this case is going to be decided though is very much I think tracking the lines of the higher ed affirmative action cases. That is to say the Court is going to be looking at whether or not local school districts have a compelling state interest in promoting the sort of diversity that they discuss promoting. And whether or not the

way they've gone about it is narrowly tailored to achieve that end. And this isn't the probably the last time you're going to hear but this is a lot like the abortion cases that Randy just talked about because here we have a 5-4 decision in the affirmative action cases. We have O'Connor providing the fifth vote. We have O'Connor gone from the Court and we have the question of so what is the Court going to do now with these new justices replacing O'Connor and Rehnquist.

On the question of the compelling state interest in diversity my guess is and it seems like this is going to be something to look for in the argument, but it seems to me that this is the area where the Court is going to be most likely to go along with the school districts. That is to say the diversity interest that the Court saw as compelling in the affirmative action cases there is a lot of evidence that it is as or more compelling in the K-12 context. So there is a lot of evidence that will be presented to the Court about the benefits that flow to students of all races by going to race and class integrated schools and the harm that occurs from going to race and class segregated schools. Now on the question of narrow tailoring it seems to me is going to be probably where the Court spends most of its time and probably the area where if these plans are struck down they will struck down.

In the higher education context in the Michigan affirmative action law school case Justice O'Connor places great weight on the idea of there being a holistic

review of the individual's application and this followed out of even Justice Powell's opinion in *Bakke*. The question is going to be whether or not the Court is going to require that same sort of review when you use race at the K-12 level because in the secondary and elementary school context when they are using race to do the pupil assignment they are not individually examining each student's application reading their essays, making a determination about whether this student is going to contribute to diversity. The way it works at the K-12 level is much more mechanical. And the question is whether or not the mechanical nature of the process is going to allow the Court to say well this is different, this doesn't meet the *Gruder* test and we're striking it down. For the side that is arguing for the school districts and for the lower courts, one of the interesting things about this case is that the courts of appeals that ruled on these issues on these two cases both upheld the plans. For the school districts their argument is context matters, this is not about access to an elite university setting where you have typically if you have higher scores and higher grades there is this sense of you have an entitlement to the slot and therefore to deny you that we need to ensure that this other candidate in fact has all of the factors on their side. The argument that the appellate courts have made here and that the school boards make is that there is no entitlement to be in a particular school. You are going to get to go to a school in this community. You

don't have a right to be in one versus the other and therefore the Court should look at this differently. I think this case as I said is going to most of the time is going to be spent on that narrow tailoring issue.

Another issue that I think is worth paying attention to in this case is how much deference is the Court going to give to local school officials. In the education context there is now decades of jurisprudence of the Court saying there is no area where local control is more important than schools. That is how the Court including Justice Kennedy who will be clearly a very important vote in this case that was one of the arguments that was made consistently throughout the 1990s to argue for why the Court should not be involved in ordering busing or otherwise overseeing what happened at the local level. Well now you have a flip which we're seeing increasingly of the traditional sort of activism positions because here we have local elected officials accountable to the voters who are saying we control our schools and we would like to create integrated schools. And the question is whether the Court is going to say no you cannot do that. We the Supreme Court are going to overrule what you have chosen to do.

Another issue that I think is important to keep in mind as we think about these cases is how the attempts by these school districts to create integrated schools is in a lot of ways is the last gasp of the integration movement in education. Court

ordered integration is largely a thing of the past. And more than that, when you look at the modern initiatives within education policy whether you want to talk about testing, standards, accountability, no child left behind, school choice, charter schools, vouchers all of those sorts of initiatives which are really where the action is in terms of education reform today, all of those assume for the most part that we will take the race and class makeup of the schools as a given. They are not largely with the one minor exception arguably of vouchers they are not an attempt to change that. What they are an attempt to do is say accepting the race and class makeup as a given accepting a number of high poverty high minority schools because that is where most of the action is how to make those schools better are we going to improve the educational outcomes in schools that are largely minority and largely poor. This what we see out of Seattle and what we see out of Kentucky and I've read I don't know this to be for sure but I've read there are about 1,000 school districts, this is the number that has been bandied about that have some sort of race, and that's about 1,000 out of about 15,000. These are really the about the only thing left that is trying to alter the race and class composition of the schools.

And I think the last question that these cases leave us with and it's related to what I just talked about but it's really what is left of *Brown* and what is left of one of *Brown*'s central insights because one of the central features of *Brown* was a

recognition that having white kids in one school and black kids in another school caused harm. Now over time the Court said with the de jure de facto distinction we’re not going to hold you the government accountable for that harm unless you caused it, right that’s the difference that’s the de jure de facto distinction but there was always a recognition that racial segregation, racial isolation, racially identifiable schools was a problem. It as something that we would be better off as a society if we didn’t have. And here as I started with you have local communities saying well we don’t want the pre-*Brown* model, we don’t want schools that look like they looked before *Brown*. And I think a question these cases leave is the Court going to allow communities to make that assessment. I do think that this is an area where not just doctrinally but otherwise Justice O’Connor’s absence is going to make a difference. Because one thing that is true about Justice O’Connor and it’s not just rue about the race, it’s not just true about the Michigan cases, but those are reflective of this sense that she had because you can see it in her cases about jury discrimination and otherwise. Justice O’Connor in a very deep and personal and real way got that diversity mattered. She got it. She talked about it. When Justice Marshall retired she talked about the benefits that Justice Marshall brought to the Court as a black African American justice and then she talked about it in the jury cases and then she talked about it in the Michigan cases. It will be interesting to see

whether there is anybody on the Court today or more specifically whether there are five people on the Court today that get how diversity matters.

Professor Bloch: Thank you. Now I'm going to turn to Lisa Heinzerling who graduated following the model Lisa must be on the young side because I'm going to tell you where she went to school. Lisa went to the University of Chicago Law School where she was editor-in-chief of the Law Review; she then clerked for Judge Posner on the Seventh Circuit and then Justice Brennan on the Supreme Court. Professor Heinzerling will discuss the upcoming environmental cases, cases in which the Court granted cert despite the opposition of the government. Lisa.

Professor Lisa Heinzerling: The two environmental cases that the Supreme Court has granted so far are *Massachusetts v. EPA* and *Environmental Defense v. Duke Energy*. And I want to talk about *Massachusetts v. EPA* first. First I want to disclose that I was the lead author on the merits brief that was filed on behalf of petitioners in *Massachusetts v. EPA* and I still continue to represent them. I'll try to be unbiased but I wanted to let you know that was the case. The two cases before the Court are similar in some respects. They both arise under the Clean Air Act. They both involve quite conventional even if sometimes fairly complicated issues of statutory interpretation and they both involve potentially at least an enormous amount of air pollution. In *Massachusetts v. EPA* there are 30 petitioners, all

represented by the same group of attorneys as I said including me, there are 12 states, three cities, an American territory and numerous public health and environmental organizations all represented as petitioners in this case. I can only ask you to imagine the conference calls that occur in this case. The case arises out of petitioners requests that EPA regulate emissions of greenhouse gases from motor vehicles and so the case arises naturally from the motor vehicle program of the Clean Air Act.

There are two questions presented by petitioners in this case. The first is does the EPA, the Environmental Protection Agency, have the authority to regulate greenhouse gases or air pollutants associated with the climate change that are emitted by motor vehicles. Does it have that authority under the Clean Air Act. Secondly, EPA declined to regulate these pollutants based on policy considerations that are not mentioned in the relevant statutory provisions. Let me first begin by saying what is not at issue in this case because I think this is really important to your work and in not confusing the stakes in the case. The first thing that is not at issue is the Court is not being asked to rule that climate change either is or is not occurring. It's not being asked to do that. It's not being asked to regulate greenhouse gases from motor vehicles. If the petitioners win this case the case will go back to EPA

and EPA will decide whether greenhouse gases should be regulated from motor vehicles. No party before the Court is asking the Court either to say that climate change is happening or to come out with an outright ruling that they should be regulated under the Clean Air Act. The case involves a fairly conventional statutory question, that is did the EPA get the legal standard right in declining to regulate greenhouse gases under the Clean Air Act. I think the statutory provisions relating to the first question, that is EPA's authority are pretty straightforward. The provision of the Clean Air Act that triggers regulation of motor vehicles says EPA shall regulate air pollutants emitted by motor vehicles when in the administrator of the EPA's judgment these emissions these pollutants cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. And so that standard is triggered only when you have an air pollutant. Air pollutant is further defined under that and here I'm quoting forgive me but it is a statutory case, any air pollution agent including any physical chemical biological radioactive substance or matter which is emitted into or otherwise enters the ambient air. Any physical chemical biological radiological chemical or substance emitted into the air. EPA's response to a petition to regulate greenhouse gases from motor vehicles was to say that the air pollutants at stake carbon dioxide, methane, nitrous oxide and hydrofluoric carbons aren't air pollutants. So they say we don't have authority to

regulate these pollutants under the Clean Air Act. What they did was interesting from a statutory perspective. What they did they first concluded they don't have the authority to regulate greenhouse gases because they said among other things Congress would have been much more explicit if they had really wanted action on climate change. And then they turned around and said therefore these must not be air pollutants under the Act.

Our position is backwards from that and quite the opposite from that. It is that these substances are chemicals and physical matter emitted into the ambient air by motor vehicles. And as you will recall when I just quoted the language it exactly tracks the language of the statute, the physical or chemical matter emitted into the ambient air. Therefore we say these pollutants are air pollutants within the meaning of the Clean Air Act. There is here an interesting I think jurisprudential twist which is that in recent years as you probably know the justices have disagreed about what exactly counts as decisive evidence on what statutes means. So Justice Scalia, for example, thinks that you look at the text of the statute and you really end there. My sense is that Chief Justice Roberts and Justice Alito will be not completely along the same lines but will be sympathetic to that idea. And so you've had for years you've had associated with conservatives justices this kind of plain language school of statutory interpretation. But here the petitioners who are asking for government

regulation are the ones saying all you have to do in order to rule for us is read the statute. Just sit down and read the statute and we believe we win. And on the other hand you have the administration saying basically look at a lot of other stuff beyond the statutory language, so it's an interesting flip in jurisprudential positions that is happening here.

The second question in the case is whether EPA may decline to regulate on the basis of policy considerations not mentioned in the Act. EPA went ahead when it declined to regulate and it said we're not going to regulate because things are uncertain and because we don't like the policy approach of the Clean Air Act, we're worried about foreign policy and so on and so forth. It said a whole lot of stuff and said even if we have the authority we wouldn't do it. The position of petitioners is you can't do that, you have to look at what the statute says and rely on the factors stated there, and they don't include the factors that EPA mentioned. A lot of times when I get to this point in the presentation people will say well this turns out to be a really boring case, right, you just read the statute and the statute is so plain and you win with the plain language justices and you don't lose with the non-plain language justice why is this an interesting case, let's move on.

Let me give you two wrinkles. There are more but I'll give you two. One is standing. The United States has argued from the beginning that the petitioners don't

have standing to sue, they don't have the kind of injury that is necessary or in the United States' case what they've said our injury isn't redressable by judicial action. New cars are just a piece of the climate change problem and it won't be solved by this law suit. They also say that our harms inundation of Cape Cod and so forth aren't caused by new motor vehicles, they are very small part of the problem and therefore we don't have standing. And since several justices have been very strict about standing this is potentially a big question in the case. It's hard to say right now what will happen. I'll just give you one fact to consider as you think about whether the Supreme Court might wade into this particular area. And that is that the United States in its opposition to our petition for certiorari specifically added a question on standing. It added a third question that question was on standing the Court did not grant that question separately. It' s a little bit it's not a lot, it's suggestive but that's all we have right now.

A second wrinkle in the case is that I think the Solicitor General can be expected in the case to re-characterize what happened at least that's my view re-characterize they will say characterize what happened in the decision below, and that is what they'll say is that all we were doing is declining to make a finding about whether endangerment to public health or welfare was occurring, that's all we were doing, we were just saying look we're not doing that right now. And when agencies

act in that way when they make that kind of decision they are often given a great deal of leeway by the courts. Courts thinks they are not the ones to get into agencies' regulatory priorities, time priorities and so forth. So the United States is allowed to re-characterize their decision in that way, the case becomes more complicated.

Let me talk about the second environmental case, I'll spend less time on it. *Environmental Defense v. Duke Energy*, this case is amazingly complicated. I do environmental law and it's complicated for me. And so what I'm going to try to do is simplify it without distorting it. The case arises out of an enforcement action brought by the United States in the 1990s. EPA said that Duke Energy had engaged in a number of renovations in its existing plants without getting a permit and if it had gotten a permit it would have had to install state of art control technology. The case is one of a bunch of cases brought by the EPA in 1990s against similar facilities, facilities that had made renovations without getting permits. The stakes in these cases are incredibly high. The pollution reductions that would occur if the United States gets or had gotten what it asked for in these cases collectively are enormous. Now the legal question is did the new source review provisions of the Clean Air Act apply to these existing sources. And those provisions apply only when existing sources undergo modifications within the meaning of the Act. And because

Congress was aware when it created this program it was aware that it was a lot easier for existing facilities to put in control technology if they were already doing something, they were already doing some kind of renovation. Congress said existing facilities only when you are already undergoing some kind of construction or some kind of renovation do you have to install control technology. So the question is were these facilities already undergoing modifications and therefore they had to get a permit under the Clean Air Act. In order to have modification you have to have an increase in pollution and the question is what that means. And these are the two options at issue in this case. Does it mean that you increase the hourly rate of emissions at the facility, how much pollution is put out an hour, or does it mean you increase the total annual amount of pollution put out by the facility. It might not sound like it makes a difference. It does. A lot of plants require permits if you go with the annual definition of increase. Almost none do if you go with the hourly increase. And so the question is what does increase mean.

And what EPA did here it defined increase differently under two different programs. And in this case under this program it wanted to define increase to mean an annual increase in output. And the Fourth Circuit told it you can't do that. You have this other definition of increase under another program under the Clean Air Act, you have to have the same definition of this same word throughout the statute

and therefore you lose EPA. Two questions presented, one is whether the Fourth Circuit stepped out of bounds in ruling at all on this case because the D.C. Circuit, the Court of Appeals here is the one with exclusive jurisdiction over national rules under the Clean Air Act and the question is whether it should have been the D.C. Circuit that answered the question answered by the Fourth Circuit. That seems like an arcane question but it matters a lot for example it matters a lot for states to know when we get an answer from the D.C. Circuit is that final, can people come back years later and challenge that answer.

And then the second question presented has to do with whether this definition of increase that EPA wants to use is valid. And that has to with can the agency say increase means one thing over here and another thing over there in the statute even though it's the same word.

Professor Bloch: Thank you Lisa. Next to we go Professor Jay Thomas who joined our faculty in 2002 moving over from George Washington University Law School. He clerked for Helen Nies on the Court of Appeals for the Federal Circuit and he will discuss the two patent cases to be argued before the Court in this.

Professor Jay Thomas: Thank you. After the e-Bay case last term the Supreme Court has continued to show its profound interest in the patent system and it's showing less deference to the court of appeals that has exclusive jurisdiction

over patent cases of the Federal Circuit. The first of these cases is potentially a watershed. It's of broad and general importance. It affects every application issue patent, patent challenge and potentially could work a broad scale transfer of technology from proprietary rights to the public domain. And the case involves a fairly humble technology. It's an electronic sensor that automatically adjusts the height of a gas or brake pedal on a truck or SUV depending on the individual driver. Now KSR sells this kind of electronic sensor and it got sued by Teleflex which owns a patent covering this kind of sensor. One of the issues in the case was whether it would have been obvious for a skilled person to come up with that invention. And if that's so then the patent is invalid. Now the patent system features this doctrine of non-obviousness and that is the fundamental gatekeeper to patentability. Basically what it says is propriety rights cannot be granted if the invention would have been within the capabilities of a skilled artisan. And the purpose of the doctrine is to preserve the public domain and also not to hand out these sort of proprietary rights to something that is really already within the abilities of an ordinary practitioner.

Now the Supreme Court has not heard an obviousness case since 1976 and in

that case, the *Secrada* case the Court recognized that most inventions that are patentable from computer software to pharmaceuticals to business methods to tax avoidance techniques, all these sorts of things that are patentable today most of them are combinations of old elements. They are combinations of things that came before that are put together in different ways or modified. Now in the *Secrada* case the Court said that a combination that only united old elements with no change in their respective functions is precluded from patentability. Now under the *Secrada* standard it probably would have been obvious to put together the Teleflex patent so that patent should not have been granted and it will be struck down by the courts. How does that compare to what the Federal Circuit has done, the court of appeals again that has exclusive jurisdiction over patent cases. Over the past quarter century the Federal Circuit has attempted to develop an objective obviousness standard. Now under this standard it's not enough that all the elements of the patent invention existed in the state of the art. There has to some motivation to combine them. There has to be some motivation from a reference, from general knowledge and the art. Now again the rationale for this motivation standard is to prevent hindsight. Once we've see a technology that has been put together and all placed together like a new I-pod it seems very clear, it seems very obvious that this is something that should have been done. Of course the statute compels us to measure non-

obviousness at the time the invention was made. Patent examiners are not going to review that application until many years later and of course that patent won't be litigated until many more years later. So at that point the technology may seem routine, so the notion for this motivation standard is to prevent this hindsight bias, this Monday morning quarter-backing where everything seems obvious. Now that sounds like a pretty good account but many observers believe that this motivation requirement has led to the current patent pandemic. Many of you may be aware that laptop computers, I see a few of them around, there are probably 40,000 to 50,000 patented inventions in that technology in that product and of course there is a fragmented ownership of all those patents. So for the patent system to have a high burden upon manufacturers if too many patents are granted. And it's felt that the motivation standard makes the patent office too porous. There is too much of an evidentiary burden for the patent office not just to find all the elements out on the prior art but show some kind of objective teaching some sort of other article or other reference that would encourage someone to put them all together. If that kind of reference existed probably means that person would have done it herself so as a result the patent office is very lenient. Now this porous patent office may contribute patent trolling and this is practice where patent speculative entrepreneur buys up patents and asserts them against manufacturers. Many of your first major

encounters with the patent system may have been the Blackberry patent case, *Rim v. NTP,* where those mildly inductive portable e-mail devices may have been taken away from you unless you were part of the federal government. So you know the notion is well the motivation standard is contributing again to too many patents being issued. Also the statute compels us to look at this question from the perspective of the skilled artisan. And the sense is well skilled engineers, scientists, business persons they don't necessarily need to connect the dots step by step motivation to put everything together. Their own incentives and skills will fill that gap. So since we don't believe skilled practitioners are such dullards to require this step by step combination we ought to get rid of it.

What's going to happen in the case. It seems pretty likely that the Supreme Court is going to dispense with the Federal Circuit's motivation requirement. That might be the epitome of obviousness but I doubt it will be required in each and every case. The interesting issue is what is going to take its place and the most likely answer to that is return to *Secrada* that non-obviousness requires some sort of showing of a functional shift from the combination of old elements. That in turn leads to a lot of tough questions and one of them is an even administration. Now the patent office consists of 5,000 or more individual examiners and each of them effectively acts as a one person patent office. Now the patent office is allowed to

rely upon such things as common sense or an individual examiner's general notion of what she thinks the state of the art is may mean very uneven results that are obtained by individual applicants.

The other question is what's the right level of obviousness. What's the best level to enhance social welfare and that is a tough question. Most members of the patent bar think that a lenient level of obviousness is pro-inventor because everybody gets a patent. But perhaps that's not so because of course there are primary and follow-on inventors. If everyone gets a patent then the primary innovator has to share his success with those who come later because they have to cross-license each other. If we raise the standard of obviousness the follow-on inventors don't get patents. And that means only the primary inventor does and that gives him a more robust right. So at the end of day this raises a lot of interesting questions. Again we could see with a higher obviousness standard that may mean a large number of issued patents were improvidently granted and that means they will return to the public domain if challenged.

The other case is *MedImmune v. Genentech* and that involves a license on a patented method of using cell cultures to develop human antibodies. Now this case is a little more technical but it actually has a lot to do with how patent licences are

going to be negotiated on the ground. And that is an important issue because a lot more patents are licensed an order of magnitude are licensed than are actually formally subject to litigation. And the *MedImmune* question is whether a patent licensee who is in good standing, that means a licensee who is usually continuing to pay running royalties under the license may bring a declaratory judgment action challenging the validity of the licenses patent. Now in patent law it's pretty well established that if the patent proprietor accuses another of infringing its patent a sufficient case or controversy exists and the accused infringer may seek a declaration that the patent is invalid. But what about a patent licensee who is paying for the rights to practice the patented invention but gets a case of buyer's regret and decide that I've been paying royalties under the license but I think this patent was probably invalid. Now what options do they have. Well it used to be that courts would restrict licensees from challenging patents at all and the notion is by accepting the license I've agreed that the patent was correctly granted and I must stop myself from challenging it. Again the notion of entering the license was an implied acknowledgment of the validity of the patent. But all that changed in 1969 when the Supreme Court issued a case called *Lear v. Adkins* which rejected the licensee estoppel doctrine. The Court there is a paramount interest in getting invalid patents struck from the rolls. And so if you are a licensee you can challenge the

patent. That issue exceeds that of sanctity of contract effectively. Now what that means under *Lear* is that every patent license is an option contract effectively because the patent licensee can always wait until later and at any time of her choosing challenge the patent and the patentee can have nothing to say about that other than to defend the patent. Now many people don't like that result of *Lear* and there has been a lot of arguments that we ought we dethrone it simply because it reduces the freedom of parties to contract. If the patentee could get a binding statement from the other party saying I'm not going to challenge your patent it may be willing to lower the royalty rate. So in light of those criticisms the Federal Circuit has been kind of trying to restrain the *Lear* doctrine. So what it said is if a licensee is paying royalties under a patent license it has received permission from the patentee to practice that invention and not to be sued. There can be no case or controversy under those circumstances. It's not an actual case and declaratory judgment jurisdiction is inappropriate. That is what the Federal Circuit held in *MedImmune*.

Now the Supreme Court has taken the case so the question is are they going to uphold this rule or are they going to reverse it and allow someone who is paying royalties under license to challenge at the same time. Now *Lear* represents a pretty compelling public policy that those most suited and most motivated to challenge bad

patents should be able to do so. Now patentees on the other hand argue that allowing licensee DJ suits allows the licensees to have its cake and eat it too because it can challenge the patent but it's insulated and protected under the license and that's too advantageous for the licensee. On the other hand the patentee should not have any right to collect royalties on invalid or unenforceable patents at all. So it's hard to say which way this is going to do. I really don't have a good feel for it. If the Supreme Court reversed the Federal Circuit in this case I believe we will see an increase in patent litigation filings. And the reason is that patentees will need to settle within the judicial context obtaining a consent decree, that consent decree will give rise to additional policies like the strong judicial preference for the settlement of litigation res judicata that in turn might limit the long arm of *Lear*. Thank you very much.

Professor Bloch: Thank you Jay. Now last but not least we hear from Professor Michael Gottesman. Professor Gottesman joined our faculty in 1989 and teaches virtually everything, but he specializes in labor law, constitutional law, torts and civil rights and today he's going to talk about the tort cases that are on the Court's docket.

Professor Michael Gottesman: Thanks Sue. Well the biggie of course is *Philip Morris v. Williams*, the tobacco punitive damage case. The plaintiff's

husband in this case smoked Marlboros for several decades and ultimately died of lung cancer and the plaintiff tried this case on a rather sophisticated theory. One that has evolved as plaintiffs lawyers have seen more and more o the internal documents of tobacco companies. And this is what those documents reflect as the Oregon Supreme Court said, this is what the jury was entitled to find. When the Surgeon General's report first came out saying that cigarettes caused cancer the tobacco companies panicked because they believed even people who were addicted would be able to rise above the addiction if they internalized the idea that this could cause their death and they conducted a number of opinion surveys and the like and discovered something quite interesting. Because people were addicted they would be very receptive to any suggestion that just maybe the Surgeon General's assertion is incorrect. As their internal documents Philip Morris' internal documents put it we need to cast doubt on the Surgeon General's report because that will provide the psychological crutch, these are his words, that will enable smokers to self-rationalize that they can continue smoking. And pursuant to that idea they for a period of 30 plus years suggested that the evidence was uncertain, that it was not proven that, they didn't argue that cigarettes don't cause cancer, what they argued was that this is still a question that is open. But of course the internal documents also show that they knew with certainty that cigarettes did cause cancer despite

what they were saying publicly.

The jury in this case awarded $82,000 in compensatory damages and then a punitive damage award of $79.5 million which is 95 times the compensatory damage. And the Oregon Supreme Court upheld that. Now of course there is a background to the Supreme Court's grant of cert in this case. The Supreme Court has decided two prior cases involving alleged excessive punitive damages. The first was *BMW v. Gore* which in our spirit of full disclosure here I confess I argued and lost in which the Supreme Court for the first time held that a punitive damage award that is quote excessive is a violation of the due process clause. In that case they set aside a four million dollar punitive damage award to somebody who had purchased a new BMW but which actually been repainted, a fact not disclosed by BMW. So the punitive damage award of four million for a $4,000 compensatory was a ratio of 1,000 to one. The Court struck it down grossly excessive. Then three years ago in *State Farm v. Campbell* the Court struck down $145 million punitive damage award awarded to a policyholder who had an automobile liability policy was sued in an accident and State Farm initially disclaimed that this accident was covered by the policy and refused to defend. Ultimately before any suit was filed State Farm came around and did in fact pay on the policy. But the jury found that they had acted in

bad faith in denying coverage and awarded a million dollars in compensatory damages, $145 million in punitive. Again set aside as grossly excessive by the Supreme Court. And now it's granted cert in this third case where there is a 95 to one ratio. And the conventional wisdom is that the Court has granted this case to reverse yet again to say some more about how you can detect what are grossly excessive punitive damages in the hope that there will be more information that will guide state courts to do this thing right. And the conventional wisdom may well be right that may in fact be what is going to happen here but there are at least some wrinkles to this case that make it interesting. The first again is the two new justices. In *BMW* where the Court first held there was a constitutional ban on excessive punitive damage awards, four justices dissented and their position was that the Supreme Court should have no role in this. States are free to do whatever they want with punitive damages. It is not a violation of the due process clause. And in *State Farm* three years ago three of those justices said they continue to adhere to that position and will continue to dissent from any rulings that find punitive damages a violation of the due process clause. Those three stalwart dissenters are an interesting combination, Scalia, Thomas and Ginsburg. So from the right and the left. And obviously with those three being where they are there has got to be a lot of interest in where the two new justices stand. My own prediction for what's it

worth is that at least the Chief Justice is not going to reverse *BMW v. Gore*. Now because he would necessarily agree with it, though he might, but after the long dialogue he had with Arlen Specter about the importance of stare decisis it's just hard to believe that this is the case in which he is going to take his stand and reverse a ten-year-old Supreme Court decision. But at least it bears watching where the two new justices align themselves in this.

A second difference is that in this case unlike the two prior cases the state supreme court was extremely careful in the writing of its opinion. It wrote quite a nuanced opinion that paid appropriate deference I think to what the Supreme Court had said in the prior cases. And the point of its opinion is that tobacco cases are quite unlike the other cases the Court has decided with respect to the three factors that the Supreme Court has identified as bearing on whether a punitive damage award is grossly excessive. And the Court said there are three things that determine how big a punitive damage award can be. And it said by far the most important is the reprehensibility of the conduct. Now in *BMW v. Gore* the Court said the conduct wasn't reprehensible at all. In *State Farm* it said the way the insurance

company treated that one policyholder arguably was reprehensible but it was an isolated incident there was no pattern of behavior here like that and so they cabined it as being reprehensible only a little bit. But in this case and the Court in those cases listed what they said were five indicia of what would make something really reprehensible. And in this case at least four and arguably five are present unlike the other two cases. The first thing the Court said is it physical harm, a tort that its physical harm is more reprehensible than one that does economic harm. And here of course the tort resulted in death. The second was indifference or recklessness regard for the health and safety of others. Now the other two cases didn't involve health and safety. The Oregon Supreme Court had no difficulties saying that if the tobacco companies did what the jury could find here that reflected a reckless disregard for the health and safety of others. The third was that the conduct was pattern of wrong and not just an isolated incident. And of course here the tobacco companies have been engaged in this campaign for several decades. The fourth was that the harm was caused by trickery and deceit and here the tobacco companies public statements were inconsistent with what they were acknowledging internally. The only one the Oregon Supreme Court said of these indicia of reprehensibility that wasn't clearly present here was that the Court had said targeting economically vulnerable people made it more reprehensible. Well here it said we don't have

economically vulnerable people but we have addicted people and targeting people who are rendered weak in that sense and indeed exploiting that weakness which is what the internal documents show, could arguably be treated as that as well. So the Court said on what the court said was the most important factor this case is in the stratosphere. They would turn to the third factor, they skipped over the ratio, and I'll come back to that in a minute, they turned to the third factor the Supreme Court has said you should look at in determining whether a punitive damage award or how high a punitive damage award should be which is how does this award compare to the kinds of penalties that the legislature has set for comparative conduct either civil fines or criminal penalties. And in both of the prior cases the state legislature had made the fine for engaging in this behavior quite small and the punitive damage award of course was gigantic. And the Court said that's troublesome in two ways. First of all what the statutes say is an indication of the legislative judgment of how heinous this conduct is and secondly the legislation gives notice to corporations of what the possible consequences are. So if the legislative penalties are small companies don't have reason to anticipate that they would be socked with huge punitive damages. Well the Oregon Supreme Court said here what the company did if the jury found as it is entitled to constitutes manslaughter under Oregon law. And they said an individual who commits manslaughter is subject to ten years in jail and

a quarter million dollar fine but a corporation that commits a felony under Oregon law the penalty that the judge can impose is two times the amount gained by the corporation through commission of this wrong. And how much did tobacco companies gain from inducing people to keep smoking through this campaign said the court is much more than the punitive damage award here. Finally the court got to the one that everyone always talks about the ratio, what is the ratio of punitives to compensatories. And the court said it's true in the prior cases the court has said that punitive damage awards should rarely be more than 10 to one. In some parts they said rarely more than four to one. But the court was quite insistent that this was not a rigid rule. This was a guide post. There would be a presumption that awards of more than ten to one were excessive. But the Oregon court said if there are to be exceptions this case is the classic because of the other two factors. Now in this case Andy Fry who is the lawyer for the Philip Morris and has argued all three of these excessive punitive damage cases and won the first two, in each of these cases he's tried to get the Court to adopt a rigid ratio. And the Court has resisted and he is now come up with a more nuanced ratio. His theory now is that where the compensatory damages are large that is not just a trifle four to one should be the absolute cap and he's arguing that to the Supreme Court in this case. So far the Court has resisted these absolutes but maybe they will go with it. I want to close

with this just mentioning he does have a second issue in this case which is that as a matte of law you cannot punish for other wrongs than the one that is involved in this law suit so that Philip Morris may have done harm to many people in Oregon shouldn't count the punitive damage award has to be focused only on the one.

Now here it is a lot of language in the two prior cases that runs against that. The Court itself said, as I mentioned, that in determining reprehensibility it's worse if there is a pattern of wrong. And in *BMW* the Court suggested that since there had been 14 of these cars sold maybe that's the formula that should be used to determine the amount of punitive damages, 14 others besides the plaintiffs. So and the Oregon Supreme Court was very careful in this case. It said we cannot in looking at the ratio count the harm that is done to others. But the Supreme Court has said in determining reprehensibility we can look to the harm to others and that's all that was done here. So that's the case. I don't have time for *Norfolk* so if anybody is wildly interested in knowing what it's about I'll be happy to respond to questions.

Professor Bloch: Thank you. Now it's your turn. We'll take any questions that you have for us. Linda.

Speaker (Linda Greenhouse): Professor Forman on the school case. You talked about creating integration . . . is maintaining integration in districts . . . they had a lot of problems and struggled to get some kind of integration over a period of

years and . . . difference in the way the Court may look at . . . de jure de facto distinction whether they will look at the two cases differently because of their respective histories.

Professor Forman: I think it's possible that the Court would treat the Kentucky case differently because of it did have a history of de jure segregation. And potentially I mean I could certainly see an argument that in light of that history the local school board should have more ability to do what it was doing. And so maybe they will. The problem with that is it seems as if the Court is really wants to move away from a focus on the historical discrimination and ground any efforts to either maintain or create diversity or integration in some sort of diversity rationale. But perhaps I mean perhaps you are right perhaps the Court will one of the possible outcomes is upholding one and striking down the other and one basis for upholding the Kentucky and striking down the Seattle would be that one.

Professor Gottesman: Can I add something on that. A couple of things about the Kentucky case. One the original court orders had been rescinded with the court's finding that whatever the historical violation they had quote been cured. So one might think that at that point you start at the same place here as the other case. The other is there is a big difference between the two cases when you get to narrow tailoring and the design of the program. Kentucky's is clean in the sense that what

they want and what they set out to get was every school would have a roughly equivalent percentage of white and black. Seattle only applied its preferences to people who sought transfers. And as a result since nobody sought transfers to the 100 percent African American schools its program left those schools 100 African American. Really all the program did was allow people to transfer from bad schools to good, nobody wanted to from good to bad. And so the argument is there and it's made in the Seattle case that what they are doing is irrational because they are tinkering around and forcing a few people to be bussed across town and they aren't really addressing the seriousness of the problems they've had. Kentucky in that sense is a clearer case as well.

Professor Bloch: Nina, can I ask you to go to the mike because we're recording this. Thank you.

Speaker (Nina Totenberg): Well I'm glad the Duke Power case is so complicated because I spent a day thinking I was losing my mind. I wanted to asked all of you but in particular Professors Forman and Barnett and perhaps Professor Gottesman you know when you talk bout the Court you talk about the old Court really, what the Court did and what the Court has wanted vis-a-vis diversity or burdens or whatever but that's not the Court we have any more and the Court we had last year was extremely benign because it wanted to be that way. As you look

forward though, the real question is seems to me is how aggressive is this Court going to be. The conservative majority that now seems to be exist about reversing precedent. Given the fact that neither Justice Alito nor Chief Justice Roberts committed really to the idea really of stare decisis. They committed to the idea of giving strong consideration to stare decisis. So where are we. What do you think.

Professor Bloch: Who wants to start?

Professor Barnett:: I'll go first because the partial birth abortion cases are just an absolutely clear case presenting stare decisis issues. We have almost an identical statute that was struck down in 2000 5-4 and to the one we have now the only difference was that was state, this is federal, the Court tends to be more deferential to Congress than they are to the states and secondly that there were extensive findings made by Congress that didn't exist before. Those are the ways in which you could distinguish the statutes. Otherwise they seem very, very similar. And you do have the key swing in personnel with Justice O'Connor in the majority in *Stenberg* in 2000 now not being on the Court and that could be endless 5-4. One of the things I didn't get to in the interest of time was the fact that Justice Kennedy was vehement in his dissent in *Stenberg*. I mean really vehement so can he climb down off of this outrage I mean virtually outrage he showed in his dissenting opinion in

Stenberg . On the grounds of stare decisis Justice Kennedy was somebody who advocated a strong stare decisis role in the *Casey* opinion when it upheld *Roe v. Wade*, when he said perhaps when the three justices said that even if they might not have made this decision on the day *Roe* was decided there are strong stare decisis reasons for doing so now. Will he say well I felt very strongly about this but *Stenberg* is the law and I have to follow the law. So this is going to put Justice Kennedy's commitment to stare decisis to the test. My own view, I have no idea and I don't have a sense of what Chief Justice Roberts or Justice Alito's view of stare decisis is, but I generally take a pretty skeptical view of stare decisis arguments, that is it seems most of the time stare decisis arguments are made when it's convenient to make them and are not made when it's inconvenient to make them and even though the Court identifies principles that are supposed to govern when stare decisis governs these principles themselves are malleable and as a result I think stare decisis rarely does really decides the outcome of these cases so for that reason Nina I would suspect that none of the justices are that committed to stare decisis including the new ones and will use stare decisis when they find it's in their interest to duck an issue, I mean just because stare decisis can be used opportunistically doesn't mean it isn't used opportunistically when justices don't want to decide an issue and they do want to punt or they don't want to create a huge

public outcry on particular issues they have that as a means of doing so. But it's very hard to predict which is what you're asking, it's very hard to predict that they are going to do that in any given case when in fact they can choose to or choose not to and always have been able to choose to and choose not to.

Professor Forman: I agree with that and I think in the context of these cases that the race and education cases the stare decisis issue is less directly presented, I mean it's there, there is no question but this is different from the higher ed context on that, that the Court was addressing in *Gruder* and *Gratz* and certainly on the narrow tailoring analysis it's just, if they were to reject the diversity as a compelling rationale then that would be I think a clear overturning of a holding of *Gruder*. If though they are to say that these plans aren't narrowly tailored to achieve that objective then I don't think you can say it's you know a rejection of *Gruder* and a rejection of stare decisis. I do think and this is an important point that I didn't mention in my opening that if they go that route and strike these plans down on narrow tailoring grounds then an interesting question about the legacy of Justice O'Connor is will somebody like Justice Kennedy identify how it is that a school district could use race in the student assignment context in a way that was legal. Right because that's sort of the key question and that's the sort of thing that Justice

O'Connor was famous for doing is if she was often if she was rejecting a law she would point out the very specific defects that at times would provide a roadmap for a way to fix it. The Solicitor General's briefs are a little cagey on this point because the Solicitor General says well these aren't the right ways to go about using race so this is not narrowly tailored. And they say but then when they talk about how you can try to promote diversity they only cite examples that don't involve using race as a factor so the US never says how you could legally use race in the student assignment context. So I think it's unclear where the Court is going to go with that. I do think on the Justice Kennedy point there are a lot of folks that would like in the civil rights community who are defending these plans who are placing whatever hope they have in Justice Kennedy ah which in the context of the racial classifications seems somewhere between quite too outlandishly optimistic on their part because whatever you want to say about where he stands on the Court generally where he has stood in the context of whether you can ever use racial classifications is not in a place that seems likely to uphold these plans.

Professor Bloch: Peter.

Speaker: Thank you. Still on that same case Professor Forman you were contrasting the expectation one might have of getting into college that you are entitled to it with test scores and good grades as opposes to no expectation of

getting into any particular public school, but what about another distinction between the college situation and the grade school situation. What evidence should a public school district will the Court expect a public school district to offer about the advantages of diversity. Is it enough just for the school district to say it's generally good. Do they have to show that minority students do better in certain schools than others or that white students do better in certain schools than others. Do they have to have that kind of data to be able to back up claim of advantages of diversity.

Professor Forman: I don't know but it exists. So I think that actually even if the Court were to say that we are only going to allow diversity when there is such evidence there really is a very compelling body of evidence that talks about the benefits on a number of lines on educational outcomes for minority students and that also for both minority and majority students that talks about changes in attitudes, different perceptions that people have of other races and that body of evidence has come out in a series of studies over the past 10 or 15 years and in some ways is actually more well developed today than it was 10 years ago when the civil rights community was trying to defend the busing plans. One of the sort of ironies is that some of the best evidence about the attitudinal and educational benefits of diversity and of integration came out after the Court basically put an end to busing. And so a lot of people are saying wow it's like a bummer that we got this so late because it

would have been nice to have it to present in the 90s and they were litigating *Freeman v. Pitts* and *Missouri v. Jenkins and Dowell* and those cases. But it's there now. Now there is a separate question which is how strict would the Court be about whether that evidence was factually developed in the context of the particular plan at issue. Like has a factual was a factual record developed by that school board that it was relying on that evidence as opposed to just more generally what is presented in the briefs now to the Court. Because I can guarantee that there is all of this you know all of this research that I just talked about is going to get thrown up to the Court, it's going to have it the compelling benefits of diversity for both of integration for both minority and majority students.

Professor Bloch: Mike, did you want to add. Yes.

Speaker: Hi I'm Brian Hanson with the Platts New Service. I would like to ask Professor Heinzerling about the Duke new source review case, the complicated one, as you know after EPA lost in the Fourth Circuit it proposed a rule that basically would have put forth this hourly emissions test that it argued in the Fourth Circuit was illegal. And then the environmental groups appealed the case to the Supreme Court. The administration or the Justice Department opposed that, they said no don't take the case, well of course it did take the case. So it seems to me that the United States is in a tremendous legal bind here because on one hand

they've said well where we sided with the environmental groups in the case you know for the continuity of the Fourth Circuit but on the other hand it has this rule out here now that it wants to go forth with this hourly test. So I wonder if you could talk about that a little bit and tell me will they ever be able to finalize this hourly test based on the outcome of this case.

Professor Heinzerling: Yeah that's an excellent question. There is a technical reason why they can get away with this. And then there is a larger picture observation about why they might not. The technical reason why the United States can say both we've got a proposed rule that adopts the hourly emissions rate understanding of increase and can say we are supporting this case in which we adopted an annual emission understanding of increase is because what they say they say the statute is ambiguous and when a statute is ambiguous then if the agency is reasonable about what it does the tie goes to the agency, the agency gets to win under a case called *Chevron*. And so if an agency is saying this is a *Chevron* step two case we win the statute is unclear. Now the payoff for them if they win under *Chevron* step two they both win this case in which they've come in on the side of the environmentalists but then they can turn around and finalize the rule in which they adopt a different approach. And so that the environmentalists I think would

very much want and do want the administration or to win at what is called *Chevron* step one, that is the Supreme Court would say the statute is clear, there is one way to understand the statute and the only way to understand the statute is that increase means annual emissions output. And if that's so then an answer to the question you posed just as you finished then the federal proposed rule would not be legal. In other words if the only thing it can mean is annual output then that proposed rule would not be legal. Let me just give you very briefly the big picture notion about why this might not work in that a lot of case has to do with did the administration change its mind, did it change its mind midstream, was this something that could have been foreseeable, this goes to the question about should this have been in the Fourth Circuit or in the D.C. Circuit. And when you get added to the rest of the mix you get added the fact that the administration is both pursuing this case on behalf of environmentalists and pursing a proposed rule that says just the opposite, I think it adds to the whole mood that well something must have changed it's very complicated, surely they couldn't have known all this would happen. And so it was appropriate for the Fourth Circuit to rule as it did. It makes even in my opinion at least it makes it even more complicated than it might have been otherwise.

Speaker (Nina Totenberg) : Can I ask a follow-up question. But if they rule that the Fourth Circuit shouldn't have been in this case at all, then they don't have to

got to the next step right.

Professor Heinzerling: Yes that's correct.

Speaker (Nina Totenberg): That's a separate D.C. Circuit holding.

Professor Heinzerling: Yes that's correct and all I'm saying is that the confusion might lend them to think the Fourth Circuit could have been in because nobody cold have foreseen the EPA would take this position. Yes you are absolutely right.

Speaker (Nina Totenberg): I don't understand that last thing you said the Fourth Circuit should be in because

Professor Heinzerling: Nobody could have foreseen the position that EPA took here if indeed what EPA is doing is something new it's only for the purposes of this enforcement action which is what the respondents say then they are saying the case is properly in the Fourth Circuit.

Professor Bloch: We could pass the mike too I don't know which is better.

Speaker: Professor Barnett on the abortion cases, can you talk a little bit about the federalism aspect and whether Congress legislating in an area that states usually occupy and does not a lot of commerce I guess involved and if conservatives vote to uphold the federal law are they basically killing off the Rehnquist federalism movement.

Professor Barnett: It's a great question. This is a serious forum, if it weren't I might have mentioned right of the bat that the jurisdiction of Congress over this action is very sketchy on originalist grounds, on the grounds of the original meaning of the Constitution which is based on the meaning of the commerce clause. The only jurisdiction claimed is that these are abortions performed affecting commerce or in commerce and it's hard at least immediately imagine how abortion and abortion in particular affects commerce, it's a pretty long stretch and if you look at the ten pages of factual findings that precede the statue there is not a single finding on effect on interstate commerce which is really quite amazing after the *Lopez* and *Morrison* cases. I mean in *Lopez* there were no findings in support of the gun free school zone act but in *Morrison* and that was 1995 and in 2000 in *Morrison* there were a lot of findings. This is a statute that was passed I believe in 2003 in which there were no findings whatsoever on whether these abortions that were performed had any effect on interstate commerce and it would take some effort to try to show that it did. That's on the one hand. On the other hand under the post New Deal jurisprudence with respect to the commerce clause what you do have are what you would call economic transactions. These are medical procedures that physicians and hospitals are being compensated for. You have economic transactions here for

example which you did not have in the medical cannabis case that we brought. We brought the medical cannabis case we did *Gonzales v. Reich* as opposed to pursing the *Open Cannabis Buyers Cooperative* case which I'm also a lawyer in, the *Open Cannabis Buyers Cooperative* case involves cooperatives in which money and cannabis are changing hands, thereby leading to the potential argument that's an economic transaction and that's treated differently under commerce clauses cases. We brought a case in which no money was changing hands in which one person growing cannabis for herself another one has two John Doe care givers growing cannabis for their at no charge nevertheless the majority of the Court 6-3 found that was an economic transaction. So after the *Reich* case it looks at though economic transactions may be much easier to find. It would be easier to find it here. What's interesting is that Congress anticipated *Reich* in 2003. *Reich* wasn't decided until the case didn't come down until 2005 in basically assuming they had jurisdiction here. I think it's for that reason. I'm totally ambiguous what I mean by that. I think because the abortions are typically conducted in an economic atmosphere in which there is insurance and there is hospitals an there is compensation going on, given that fact this is a pretty conventional commerce clause case that falls outside of *Lopez* which did not involve any economic transactions and *Morrison* which involved violence against women which itself was not deemed by the Court to be an

economic transaction though it might have effect on the economy. And so given that this does tend to arise in an economic context it seems much more of a conventional commerce clause case that would not itself I mean deciding it would not pose a challenge necessarily to the *Lopez Morrison* line whatever might survive *Lopez* and *Morrison* after *Reich*.

Speaker: Pat Zapor with Catholic News Service. I just wanted to ask a big opened what else is out there that looks promising. Particular areas that would be of interest to me would be death penalty, more abortion related cases anything in immigration which would certainly be lively right now. What else did I think about, anything related to detention in the war, what else is looking hopeful or promising or particularly interesting to any of you.

Professor Bloch: One that comes to mind for me is the South Dakota statute that I believe is in effect or has been passed which virtually tracks the statute that was at issue in *Roe v Wade* so I think lower courts will probably strike it down just following *Roe v. Wade* in *Casey* but so I'm watching to see if the Supreme Court takes it and what it does. But that's a while away. Anyone else watching any.

Speaker: How about the municipal statutes relating to immigration like the one in Pennsylvania for instance and there have been a couple of states a couple of cities where they try to rule you can't hire illegal immigrants or we prosecute the . .

.that sort of thing, anything like that look like it's got much chance of getting anywhere yet

Professor Bloch: I think that kind of issue will probably be challenged in the lower courts again the time frame would be a few years before it would get to the Supreme Court.

Professor Barnett: I have one more thought in response to Tony's question. I had a mind blank out and I forgot to mention this. What you said about federalism and how this is traditionally handled in the local areas, is another reason why Justice Kennedy's vote could conceivably be in play if he is willing to climb down off of his outrage at the decision in the Nebraska case because his concurring opinion in *Lopez* was not based on a formalist reading of the commerce clause but was based on the traditional state functions that were normally done by states. Well abortion law even specific forget criminal law but specifically abortion law is something that is traditionally done by states. If he still wants to pursue that federalism aspect he could distinguish easily. He could distinguish the *Stenberg* case from this case on his own principles of federalism. And then there is a third reason why Justice Kennedy could use to distinguish this case is on something he feels strongly about and that has to do with the *City of Boerne* idea that Congress should not be the one to reverse a Supreme Court decision, that once the Supreme Court has announced a

right then Congress can't through creative fact finding and decide that that right is not really decide its own standard for whether that right so and that is something he feels strongly about as well, so we felt strongly about stare decisis in *Casey* he felt strongly about Congress not reversing a Supreme Court decision in *City of Boerne*, he felt strongly about local government federalism traditionalist state functions and federalism in *Lopez*. Three principles he feels strongly about could account for a change of vote in this case which is what you would need to preserve the 5-4 even if Justice Alito and Chief Justice Roberts decide to strike down the statute, I mean uphold the statute.

Speaker: Ken Jost with CQ Press. First Susan let me correct you. Based on a trip to South Dakota I can tell you that the law is not in effect, opponents qualified it for referendum public opinion polls indicate right now that it would go down and there were eight abortions performed on the day I was there.

Professor Bloch: Thank you.

Speaker: Let me ask a legal realism question like similar to Nina's question and I'll state it as a proposition. Chief Justice Roberts and Justice Alito voted last year in virtually every divided case in favor of a quote conservative close quote result as opposed to a liberal result. And if that's true all of the cases that you've decided today that you discussed today were decided in the nomination and

confirmation process and the only question is what rationales Chief Justice Roberts and Justice Alito will find for voting for a conservative result. Can I ask the generalists to debate that affirmatively or negatively.

Professor Gottesman: Well first of all you have to decide there is a conservative and liberal side if you are going to apply that formula in the punitive damage case. I'm not sure what's what here, that is Scalia and Thomas are against striking down punitive damages so is that the conservative position. Whereas Justice Kennedy and Justice O'Connor who were thought to be conservatives as well but less so were quite happy about striking down punitive damages. So at least in that issue I'm, not sure there is a conservative and liberal side.

Heinzerling: In the kinds of regulatory cases I'm interested in the ones before the Supreme Court there often is a conservative and liberal side and there is somebody who is in favor of the government stepping in and regulating business and there is somebody who is against it and in those cases I think that the justices stated approaches to statutory interpretation will often serve the environmentalists and other public interest groups well. That is a lot of these statutes are very broadly worded, are very helpful to environmentalists and others and the question is and this gets at your question will they stick to those philosophical positions when it means regulating greenhouse gases for example. It's a hard question to answer. I think if in

the *Massachusetts v. EPA* case I think it's hard to look at the language of the statute and say these aren't air pollutants. And so I think what the possibility another possible wrinkle is for them to think boy this is just too big, we can't do this, Congress should do this, which is a way of stating a kind of conservative position courts won't intervene but can also be seen as incredibly activist insofar as what you're doing you're deciding as a justice which of the cases I think are too big for us to decide and in those cases I'll rule against regulation. It's very non-conservative position.

Professor Barnett: And one thing about conservative and liberal is that during both of those confirmation hearings one of the big issues is that they were both questioned about both nominees were questioned about by Arlen Specter among others was deference to Congress and both were challenged to see whether they would strike down laws and in fact both were and some of the conservative Republicans on the Judiciary Committee seemed rather skeptical about things like *Lopez* and *Morrison*, that kind of conservative judicial activism and would they be deferential to Congress well in the partial birth abortion case deferential to Congress means upholding the partial birth abortion statute. So that would fit neatly within a conservative commitment to deference to Congress which both affirmed during their confirmation hearings.

Speaker: Hi, Steve Cook with BNA and my question is for Professor Heinzerling. What do you think of the proposition that EPA changed its interpretation of emissions increase with regards to the new source review program and two you think the recent wetlands decision offers any guidance as to how the justices may rule in the *Duke* case in particular the role that Justice Kennedy might play.

Professor Heinzerling: Yes as far as the first question I don't quite understand what you are trying to ask, what you are trying to say is why did EPA change its position or

Speaker: Well EPA's position in environmental defense is that their position has been the same all along that the annual increases is what they have used and the Duke and the power industry is saying not that's not their position is in the past they have sued this hourly rate increase test.

Heinzerling: Yeah and that's what I was getting at with Brian is that I think that change in position it muddies the waters at least a little bit. It makes it a little bit more complicated a little bit easier to think about well maybe they have changed their position, maybe the petitioners could not have challenged the understanding of the rule in 1980 maybe this case does belong in the Fourth Circuit . I think it does muddy the waters. You know if you read the petition, it's interesting it's incredibly

well briefed case and you read the petitioners brief and you say boy they have the same position that they had in 1980, they had every opportunity to challenge this, it's clear as day, you read the respondents brief and you say boy they changed their position, right. How could they get away with that. So to me if you look at it squarely it seems to me that there is not enough there to say that they changed their position. That's just my read on it. You could read both briefs. They briefs are excellent. And the briefs make a good case for both positions. As far as *Rapanos* my main question about *Rapanos* is actually goes to the *Massachusetts v. EPA* case which is *Rapanos* did even the plurality opinion not Kennedy's but even the plurality opinion by Scalia talked about how failed congressional enactments aren't evidence of what Congress meant. And in this case EPA is relying somewhat heavily on Congress's failure to enact greenhouse gas legislation as evidence of why Congress hasn't given EPA that authority and in a case like *Rapanos* here I think supports the environmental petitioners and the state petitioners in saying you can't rely on failed enactments in order to say that there is no power here.

Speaker: Professor Gottesman I have a question about the tobacco case. Number one if the Court says yes you can have these big punies is that sort of happening as the trend is going the opposite direction against the tobacco industries. What difference would this make in tobacco cases. And number two to what extent

does this case raise this question of can individual juries over and over again punish a corporation for its overall conduct.

Gottesman: Right. Let me take the second first because I think it's easier. First of all Oregon was very careful to say we only look at what happened in Oregon, they've learned from the two prior cases you do not punish for what happened in other states. Second this is the first punitive damage award in the tobacco case in Oregon so there is not a problem in this case of we're overlapping with an award given in a prior case. But Ohio law is very clear, it's statutory law in a second punitive damage case the judge after the jury has come in with its punitive damage award must subtract from that award any amount that overlaps with the award in the prior case. How exactly you figure out what overlap is is a complication. Yes I meant Oregon. Thank you. So while Andy Fry does in his brief in argument about how you shouldn't be allowed to look at anybody except injury to the actual plaintiff makes the point, he doesn't make it as a separate legal issue but he makes the point that if you don't do that you run the risk of multiple punishments for the same conduct. The Oregon Supreme Court's response to that was that can't happen in Oregon because we have this principle well established that you have to subtract after the first award you have to take account of that in any future awards.

And rather than just tell that to the jury which would be a little bit hard to do it's actually an instruction to the judge to do this after the jury has awarded. Now with respect to what the trend line would be for tobacco I assume if the Court were to uphold it which I doubt they will but if they did this would be very troublesome for the tobacco industry. They are at least looking at 50 potential punitive damage awards, one in each state. And but there is a bigger trend line here that I think what will trouble the Court however tempted they might be to uphold this award if they are tempted, and certainly some of them don't like tobacco, if we send a signal that you can do this we have to worry not just about the tobacco cases but whatever rationale we give for upholding an award in this case is going to ceased upon in those states and there are a number of them where the state supreme courts are utterly hostile to what the Supreme Court is trying to do here and are looking for every edge to I mean they just have a completely different philosophy about the role of punitive damages. The Supreme Court of Utah amazingly is the most aggressive on this, they were the ones involved in *State Farm* and the justices on that court have told me they just hate the Supreme Court for these cases. By golly they are not going to stop us that's their view about this. Any signal in which they upheld the large punitive damage award with a big multiplier is potentially a problem and I think it relates back to what is the Supreme Court's peculiar problem here. One of

the things that the dissenters said in *BMW v. Gore* is how can you police this. These issues don't come to any lower federal courts. The state courts are going to come up with whatever damage awards they want and the only way you are going to be able to impose any discipline of them is to grant cert and overturn them. And how many of these can you do. And I think what the Court has tried to do in both *BMW* and *State Farm* is send out enough signals that hopefully it would discourage state supreme courts from doing this. The signal being if you get out of line we are prepared to grant cert and overrule you. The minute they uphold a really big punitive damage award they are sending the opposite signal and I suspect that part of the reluctance they would have to affirm this is to that oh my god we'll just set all these other courts free to say well our case is different too. I mean tobacco is a kind of special case and I suppose they could write an opinion that is limited to tobacco but that would be hard.

Professor Bloch: Okay you can have the last question.

Speaker: Another question on the global warming case. As I'm sure you know last week California filed a public nuisance suit against auto makers. There is also a similar case in the Second Circuit against power companies and my question is how might this Supreme Court global warming case affect these types of public nuisance cases.

Heinzerling: That's a great question. The possibility is that to the extent that the cases are based on federal public nuisance the more the federal government does under the statute, under the Clean Air Act the more courts are likely to say that the statutes displaces federal common law. And so that if there is regulation under the federal statute then those cases to the extent again they are based on federal common law become weaker in my opinion. The California case notably does have a state public nuisance component as well which I don't think would be directly affected by the result in this case.

Professor Bloch: With that I think we'll close this. If you have individual questions some of us can hang around. Thank you very much and it should be an interesting year.