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UCI panel weighs in on Supreme Court decisions

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For some experts viewing the Supreme Court's recent 5-4 decisions on key cases (prayer before public meetings, covering employees' contraceptive costs and banning affirmative action relative to university enrollment), the division seems clear.

Five of the Supreme Court justices are Catholic men. The other four in the minority are either women, Jewish or both.

"This is a court that really lacks empathy of those who are different from them," said Erwin Chemerinsky, dean of the UC Irvine School of Law, during the school's panel looking at the Supreme Court's latest

decisions on campus on Thursday.

It was the fourth year in a row that UC Irvine's law school hosted an expert panel to debate the impact, if any, of the court's decisions in its last term. The court's empathy, or lack thereof, was just one of several ideas delved into by panelists in a little more than an hour.

Whether the latest crop of Supreme Court decisions were somewhere between "dull and amazing" or "monumental or no big deal" as the panel's moderator said they've been characterized, they certainly prompted a serious, and sometimes humorous, discussion among experts.

In the Hobby Lobby decision, Chemerinsky said it was the first time in American history that a for-profit company was told it could claim the right to freely exercise its religion and effectively injure someone based on religion. In this case, a company is allowed to not cover the cost of contraceptives for employees based on the business owners' religious beliefs.

While it's been argued that the ruling only applies to closely held family-owned businesses, Chemerinsky said the same reasoning could apply to all corporations and there's no knowing where the limits could stop. Could a company say that a person couldn't use his or her salary to pay for an abortion, he asked.

Panelist Dahlia Lithwick, Slate.com's legal reporter, pointed out that in the case of Hobby Lobby, Justice Ruth Bader Ginsburg wrote a lengthy dissent raising the concern that the decision could be taken further. The majority's opinion simply assured that it wouldn't. "Trust us, it's not going to get crazy," Lithwick said, adding that the Court's majority reassured the public again with another concurring opinion. An assertion to back up an assertion, she pointed out.

Lithwick also noticed the Supreme Court's rulings along its gender, religious and racial divide.

In a case involving a ban on affirmative action in Michigan's public colleges (upheld by the Supreme Court), Justice Sonia Sotomayor, the Supreme Court's first Latina, disagreed in a 58-page dissent that was largely cribbed from her own life experiences, Lithwick said.

In the case involving prayer before city meetings, *Town of Greece v. Galloway*, a divided Supreme Court said the town wasn't in the wrong to have prayer, almost exclusively Christian prayer, before its meetings. Justice Elena Kagan, who is Jewish, disagreed in her dissent writing what it was like to be a religious outsider sitting through years of Christian prayer, Lithwick said.

If the Supreme Court justices can empathize with a certain circumstance — for example, having their own cell phones searched by authorities without a warrant since they all likely own a cell phone — they're likely to rule

it unconstitutional, which explains the unanimous decision in the Riley vs. California case, Chemerinsky pointed out.

Panelist Jeffrey Fisher was the lead counsel representing Riley in arguments before the Supreme Court and on Thursday he mentioned that a few cases forced the justices to grapple with tradition versus a changing world, something that could also arise with forthcoming gay marriage cases.

In the case of Riley, Fisher argued successfully that a search warrant should be required (except in an emergency) to search the contents of a person's phone. But first he had to argue that cell phones aren't akin to a police officer searching a person's purse, wallet and/or pockets and finding a diary or address book, for example. What information a smartphone can store is the equivalent of millions of diaries, Fisher said.

He said he's asked his Stanford Law School students, "if you had to give the police an hour in your home or your smartphone, what would you choose?" He implied that the students unanimously opted to have their house searched.

Jennifer Chacon, a UC Irvine School of Law professor and panelist, said that some decisions involved potentially explosive cases that didn't quite blow up.

Case in point was *Bond v. United States*, which involved a woman, her cheating husband and her best friend, impregnated by the woman's cheating husband. Angry, the woman spread a chemical agent on her friend's car, mailbox and doorknob hoping to cause her harm. There was a minor chemical burn, but, for the most part, the woman was unsuccessful in her attempted attacks.

Nonetheless, she was charged with using chemical weapons, a federal offense. The Supreme Court ruled unanimously that a statute on chemical weapons use was simply never meant to apply to this kind of behavior. But Chacon said the decision could have gone further to address the constitutionality relative to the 10th Amendment, which includes a state's power to police.

Other experts on the panel included Mark Sherman, the Associated Press' Supreme Court reporter and Bert Rein, an antitrust and commercial litigator with Wiley Rein.

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