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PANEL 1: ABORTION AND GAY RIGHTS

MODERATOR: ERIC SEGALL

PANELISTS: JONATHAN ADLER, PAM KARLAN, AND MARK
TUSHNET

Professor Eric Segall: Good morning. Thanks for coming, everybody. One quick apology. We had three of the most prestigious Supreme Court reporters in the country, who were supposed to be here today: Nina Totenberg, Adam Liptak and Emily Bazelon. On Wednesday at around noon, all three called me up and said, “We are so sorry, but our bosses are making us stay in D.C. because of the Kavanaugh hearing.” I was hoping they would be a buffer to all the law professors in the room. But I will play that buffer’s role. I apologize for them not being here.

Today is about discussions not speeches, and we’re going to have a conversation. I expect to have thoughtful answers, but I will not allow speeches, so I apologize in advance if I cut somebody off. But this really is all about having the best kind of informal conversation we can have. I am not going to do introductions of our guests other than their name and where they teach. These are all accomplished people, and their bios would take all day to read. They are in the program. I do urge you to read those because the list of accomplishments of the people today in this room is staggering.

There’s going to be a question and answer session during the last fifteen minutes or so after every panel. I hope people in the audience ask questions. I know our guests will really enjoy that. If you do ask a question, there’s a microphone right here in the middle. Please introduce yourself and your affiliation. Because, I guess, we are being taped for television today, so we should know who’s speaking.

Our first panel today is about abortion and gay rights. Before I introduce the panelists, I just want to say that Justice Kennedy was, of course, the dominant and median Justice of our court from 2005

when Justices Alito and Roberts replaced Justices O'Connor and Rehnquist. In constitutional law, in virtually every 5–4 case decided since 2005, Justice Kennedy was in the majority opinion, and in many of those he wrote the majority opinion.

The law of this country today, on affirmative action, abortion, gay rights, federalism, separation of powers, the Eleventh Amendment, the Fourteenth Amendment, and virtually every other important constitutional law issue is the law of Justice Anthony Kennedy. So, we're going to talk a lot about that today, and we're going to talk about how that may change, or likely will change, in the near future.

Our first panel has Pam Karlan from Stanford Law School, Jonathan Adler from Case Western, and Mark Tushnet from Harvard. I just want to say that Jonathan kindly stepped in Wednesday afternoon around 1:00 when we learned that Nina Totenberg would not be able to be on this panel. So, Jonathan, we really appreciate that.

With that, we will begin our conversation. We'll start with gay rights for the first half of this and then go on to abortion. There have been four gay rights opinions in the history of the Supreme Court that ruled in favor of gays and lesbians, and Justice Kennedy wrote every single one of them. My first question is, are there any common themes in those four opinions? Feel free to speak up, whoever wants to speak up.

Professor Pamela Karlan: One commonality among them is that all four opinions relentlessly refuse to fall into any of the pre-existing doctrinal boxes. There were two routes the Court could take on gay rights. One is a straightforward substantive due process route, focusing on decisional autonomy and the liberty interests involved and the other is an equal protection route that either says that it's irrational to treat lesbians and gay men differently than heterosexuals or that distinctions based on sexual orientation fails some kind of heightened scrutiny. At the end of the four opinions, I don't think we

know much more than we did at the beginning about where exactly, doctrinally, you'd put the cases.

Professor Mark Tushnet: My reaction is that it's not only that they didn't fall into the any of the pre-existing doctrinal boxes but that they don't fall into any doctrinal box at all. My line on this is that if I were to mount a challenge to limiting Medicare to people over whatever the relevant age is, I would cite *Obergefell* because denying Medicare to people under age 65 violates their right to equal dignity.

Professor Karlan: And when they call out in the middle of the night, no doctor comes.

Professor Tushnet: And if I were to challenge Medicare as unconstitutional, I'd cite *Obergefell*. That by forcing people to accept charitable care, it violates their right to equal dignity.

Now, obviously, in Kennedy's mind, these are not extensions of *Obergefell*. But, why not? I think Mike Dorf is going to say something about the lack of doctrinal shape to a great deal of Justice Kennedy's work. My own view is, the lack of doctrinal shape in his work makes transparent what's true of legal doctrine, generally. But, I find it striking that *Obergefell* could mean anything or nothing. If it's doctrine, then you can use it for anything. If it's a result, the thing at the bottom, the thing that says whether it was reversed or affirmed, if that's all it is, fine.

Professor Segall: Jonathan, you're probably the most formalist person on the stage right now.

Professor Jonathan Adler: Yeah, I mean, I agree with what's been said in terms of how we understand the opinions, and I think that reflects the way I read it, but with Justice Kennedy, you get his issue.

I also think that the opinions themselves don't create their own doctrinal line at anything more than a very broad level of generality. I agree that dignity, and Justice Kennedy's conception of what it means to be treated with equal dignity, is an impulse or a driving

force in all the opinions. But, if you try and draw out how that's defined in each of the opinions, it doesn't quite fit. There are overtones of federalism in *Windsor*. There are issues about criminalization in *Lawrence*. There's animus in *Romer*.

So, if you try and define them with any kind of precision, they don't even fit squarely together, other than they all represent efforts to ensure that gay men and lesbians have equal dignity, or greater equal dignity, within our society than they had before.

As trying to figure out what they mean and how they apply, it's challenging. Because, other than appealing to Justice Kennedy and his vote, it's not entirely clear how you mobilize and deploy these opinions if you're trying to convince a lower court judge how to decide a case, or other justices, or even teach them to students.

Professor Karlan: To be fair to Justice Kennedy on this, though, I think that the gay rights issue does lie at the intersection of what we think of as liberty issues and equality issues. Indeed, I think that even separating out the gay rights cases and the abortion cases from one another has this same flavor to it. You can talk about both of these as equality issues, and you can talk about them as liberty issues, but they're really at the intersection of the two, which is why think of these as what I've called the stereoscopic part of the Fourteenth Amendment.

Professor Segall: I want to talk about animus in a second, but I don't want to let pass that Justice Thomas, in his dissent in *Obergefell*, criticized Justice Kennedy very, very strongly for his idea of dignity. Justice Thomas said, "Dignity is not in the Constitution. The government can't even give dignity. It's something you have." I just want to make one comment about that: This from the man who joined in the invention of colorblindness as a principle for affirmative action cases, which is no more in the Constitution than dignity.

I think that Justice Kennedy's lack of doctrine today is going to be talked about a lot, but I don't want to lose sight of the fact that other Justices take the same step in very important cases.

Let's talk about animus because I believe in all four of those gay rights decisions, Justice Kennedy talked about animus. What did he mean by that, and how did that apply to these cases?

Professor Adler: He was clearly concerned—and we see this in *Masterpiece Cake Shop* as well—about what happens in our political system, and in our civic life, when policies are motivated by hostility to the other, and belief that there are people who sufficiently different from the majority that it justifies treating them less well. That's a hard thing to crystallize in a doctrine, but that clearly mattered to him, and I think if you think of the timing of the decisions, too, and how gay rights was viewed more broadly in our society, you also see how one could argue that in each of these cases the issue being addressed was on the cusp of where what we might've at one time thought were neutral policy arguments on a question were really had fallen away, and that all that was left to justify a particular policy was some sort of animus or hostility to the other. And I think that offended him, and he thought that was contrary to what the Constitution is supposed to protect and ensure.

Professor Segall: Justice Scalia felt strongly it was not a constitutionally recognizable concept. Do we think it can be applied in other—it was applied in one other case, *Cleburne* a long time ago, but other than that, I think animus has only been applied in the gay rights cases. Is animus a gay-rights-specific concept?

Professor Tushnet: Well, I think there are resonances of the idea in other settings. Justice O'Connor's Establishment Clause stuff is—if the policy makes outsiders feel like it sends a signal to outsiders that they're outsiders. That's in the same ballpark.

I want to make a couple of observations. One is that I'm pretty critical of Justice Kennedy as a jurist, a doctrinalist. I also think

of the last line of *Some Like It Hot*, where Joey Brown says, “Nobody’s perfect,” which actually has interesting gender-policy overtones these days. Or, Phil Kurland ended his Harvard foreword with a line, “Don’t shoot the piano player. He’s doing the best he can.” I think there’s something to that. One aspect of the animus idea is a certain degree of empathy that Justice Kennedy could feel for some other people. As with everybody, I think, his capacity for empathy was limited. I think of *Town of Greece v. Galloway* where he just doesn’t see when Justice Kagan puts it right in front of him, he doesn’t see what’s going on.

And the flip side of seeing animus—being empathetic with the targets of animus—the flip side is something that Stephen Smith emphasizes, which is you don’t really understand what’s going on in the heads of the people who are doing the thing that you think is exhibiting animus. I think Smith’s argument is made most clearly, and best, in connection with *Romer*, but it’s true. Whatever his capacity for understanding harms of a certain sort, it was, as everybody’s is, limited to understanding why people did the things that he thought exhibited animus.

Professor Karlan: I think two things about the animus point. First, you could tie it into something that Justice Scalia wrote in his concurrence in *Cruzan*: The Equal Protection Clause requires “the majority to accept for themselves and their loved ones what they impose on you and me.” I think that notion of equality was animating a lot of what Justice Kennedy was talking about in the opinions. But the opinions really break, I think, into two separate sets of cases. I think of both *Romer* and *Windsor* as being very clearly animus cases in the sense that those laws were passed out of animus against gay people. There’s no question about that.

A little anecdote about the litigation of *Windsor*. I was one of the lawyers who represented Edie Windsor in the Supreme Court, and the Supreme Court granted certiorari on a Friday, on December 7th, oddly enough. A day that, for some people, might live in infamy.

Saturday morning, first thing, I got an email from my co-counsel saying, “We got our first request to file an amicus brief in the case. It’s from the Westboro Baptist Church. What should we do?” I said, “We should consent.” She said, “Really?” And I said, “Yes, because the more people like that file amicus briefs on the other side, the clearer it will be that the whole purpose of DOMA was to degrade gay people, and that’s something that I think Justice Kennedy will really dislike intensely.”

So, those two cases were really, I think, pure animus cases, whereas I think the other two cases, *Lawrence* and *Obergefell*, were really cases where the law had not changed as people’s understanding of gay people had changed. That is, I think if you look back at the original history of sodomy laws, they were not about gay people directly because there wasn’t yet even the notion that there were people of different sexual orientations. They were about acts.

I think if you go back to the time when marriage statutes were passed, I think people were not thinking about gay people and our relationships. That was a very different world, and the maintenance of marriage restrictions over time may have reflected a kind of animus, but the origination of those laws was not in animus in the way it was in the other ones. It’s interesting that Justice Kennedy used the same concept to deal with both the enactment of the laws and the maintenance.

Professor Segall: I want to ask a question that has nothing to do with legal doctrine, or rules, or the law. This might be an uncomfortable question, but I want to ask it, anyway. There’s a guy named Gordon Schaber, who was Dean of McGeorge Law School and then University of Pacific Law School. He was a mentor for Justice Kennedy, and they were very, very, very close. To my understanding, other than Justice Kennedy’s family, this was the person closest to Justice Kennedy.

This man was a closeted gay man for most of his career and seemed to suffer, like most gay men did at the time, a lot of indignity

because of that. There are theories that Justice Kennedy's empathy for gays and lesbians arise directly from his very close relationship with this person.

I guess I have two questions. One, do we think that's right? And two, what does that tell us about our country, the Supreme Court, and the law? Because it is extremely likely, in my opinion, that if Justice Kennedy hadn't had that mentor, we'd have none of these cases, because they were all, except for *Romer*, they were all 5-4. They would've gone the other way without Justice Kennedy.

Professor Karlan: Well, I have no idea what goes on in people's own biographies, but I do think that, as gay people came out of the closet, there was a huge difference in the Justices' understanding of gay people.

I'll tell just one other little story like this that illustrates this. I was clerking the year of *Bowers v. Hardwick*, and if you went to the arguments in the case, as I did, the hypotheticals from the Justices were things like, "Well, if we decriminalized homosexual sex, aren't people going to start having sex in bathrooms and in cars?" As if straight people never had sex in bathrooms and cars. The whole tenor of the courtroom was what it was. The Justices went into Conference (I'm not violating any confidence here because these materials appear in the public papers of Justice Blackmun). Justice Powell, who was the swing vote, said at the Conference, "I don't think I've ever met a gay person." Of course he had. That was then.

I was also in the Courtroom for the oral arguments in *Lawrence*. After the argument, we were all standing around, and I was standing with Walter Dellinger, and Linda Greenhouse, who was then the New York Times Supreme Court correspondent, came up to us. Walter asked her, "So, what did you think was the most interesting thing about the argument?" She looked at him, and without missing a beat, she replied, "The Bar section of the Court." What she meant by that was that, I would say a huge number of lesbian, gay, or bisexual law clerks from the past had come back, and they were all sitting in the

Courtroom in the Bar section. You could see when Justice O'Connor walked out, it was like . . . She looked around the room.

The Justices knew gay people, and they knew who gay people were, and that made a difference to them. The sad thing is that they don't know a lot of poor people; they don't know a lot of undocumented people; they don't, for the most part, know a lot of many other marginalized groups in America. So, they don't have that same empathy for them that they have for gay people. I would just love it if they would all wake up one day and discover that their best friends were undocumented. I don't think that's going to happen, but I think that that makes a difference. Whether this particular man is the source of Justice Kennedy's empathy, or whether it's a whole lot of other people, I don't know, but I do think that makes a difference to how Justices think about the cases in front of them.

You can see this in the cell phone cases, right? It's not just in this area. In the oral argument in *United States v. Jones*, one of the Justices asked something like, "You mean they could put a GPS device on *my* car?" And then the next thing you know, it's 9–zip. Police need a warrant for this.

So, I think they rely on their own experience in an awful lot of areas of law.

Professor Tushnet: When I was doing my research for my book on the Rehnquist Court, I heard—I don't even know who told it to me—an anecdote about Justice Kennedy and some gay men he knew. I couldn't pin down the details of the story—the details that were told to me actually could not have been true—but the burden of the story was that unlike Justice Powell, who didn't know that he knew gay people, Justice Kennedy knew that he knew gay people. The story was that they were folks down the block from him. I think that's right.

I feel like channeling the inner Obama/Sotomayor here. The capacity for empathy is an extremely important one. But everybody's

capacity is limited. One of the things that I think we want to look for in our best judges is empathy, an awareness of the limits of one's own empathic capacities, and an awareness of the limits of empathy as a way of guiding the development of the law.

Sure, it's nice, given the outcomes. My point of view is that Justice Kennedy had this view of gay people. On the other hand, I'm sorry I have to say this, Chief Justice Roberts clearly doesn't like people to say this, but Justice Kennedy joined in the most racist opinion in the Supreme Court since *Korematsu*. Just because he didn't understand what it meant to be a Muslim wanting to come to the United States. That's a bad thing.

Professor Segall: We're going to talk about the travel ban case this afternoon, for sure, but it does show the limits of Justice Kennedy's empathy. I think that's right. Jonathan, did you want to add to this?

Professor Adler: Yes. Far be it from me to want to defend Justice Kennedy's doctrinal approach, but I think it's not really just about empathy. Underlying these opinions, and a lot of what we see in Justice Kennedy, is an underlying view about both dignity and liberty, which I think really resonates with decisions like *Allgeyer*, that there is this background notion of liberty, and the right to control one's own life, family, pursue one's own ends, and that if there is a group that is part of our broader civic community that is being denied that, that is a problem.

In our modern doctrine, we have a really hard time with that because we're so focused on putting things into the various boxes and the various tests, and what's the relationship between means and ends we want for this level of scrutiny, and so on. And that's not how Justice Kennedy is viewing these things. The role that empathy, I think, plays here is facilitating the recognition that there are members of our community that are not given the opportunity to have that same degree of liberty and dignity. But I think a lot of what's doing the work is this background, dare I say it, almost *Lochnerian* conception of liberty. If you go back and look at those cases, they're

not really about contract, right? They're about a kind of autonomy and ability to do your own thing even if the majority of the body politic thinks it's weird that you want to teach your kids German, or you want to send them to a Catholic school, or whatever else. It's very much that sort of thing.

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So I think the empathy point is just that it makes it easier to recognize that that is being denied to a group, but I don't think that's really the driving impulse if we try and take his jurisprudence on its own terms.

Professor Segall: In none of these cases did Justice Kennedy or the Court come out and say gays and lesbians were a suspect class similar to people of color or women. And, in none of these cases did he formally apply any kind of heightened scrutiny, and my question about this is, and it's hard to answer, would these decisions be safer or better accepted if he had done that? I do wonder why the Court just didn't say, once and for all, "Gays and lesbians have been—history of discrimination, and we'll give them heightened scrutiny or compelling interest test-type analysis." He never did that. He had the votes. The four Liberals would've done that; I think we all agree on that. Why didn't he do that?

Professor Adler: He didn't want to that, and the other Liberals on the Court didn't want to lose his vote, right?

Professor Segall: Right.

Professor Adler: But I don't think it actually relates to whether these decisions are safe. Unlike perhaps the abortion decisions, these

decisions are safe. I don't expect the Court—if Alabama or some other state manages to conjure up a scenario to try to challenge these statutes, I have a hard time seeing it getting to the Court, and if it gets to the Court, I have a hard time seeing anything other than a per curiam opinion, given the reliance interests, in particular. I don't think is a battle that more than maybe one or two Justices on the Court have any interest in, and I think that's independent of the doctrinal soundness of the opinions or the extent to which they fit into our more well-established doctrinal boxes.

Professor Segall: Do you agree with that? That these decisions are safe?

Professor Karlan: Well, it depends on what you mean by these decisions being safe.

Professor Segall: The same-sex marriage ones. Sorry.

Professor Karlan: I think the same-sex marriage decision is probably safe in the sense that no state is going to be entitled to simply deny gay people the right to get married at all. But, there are cases that involve things like spousal benefits and the like that I think are different. That is, there are some cases where local jurisdictions want to deny spousal benefits to gay couples, and there are some of these cases working their way through the system. How those cases come out is anybody's guess. There are some cases about rights to adopt. Those cases are anyone's guess.

There is a case, the *Bostick* case in which certiorari is being sought that raises the question whether Title VII's prohibition on sex discrimination covers gay people. But, even if that statute doesn't protect gay employees, that's a case that involves a public employer. So there's still the question, as a matter of equal protection, whether public employers can discriminate on the basis of sexual orientation. I don't think any of those cases have been answered completely by the existing cases, but I think the reliance—I think Jonathan's absolutely right. The reliance interest, or if you wanted to go back to

what you're talking about with the earlier liberty idea, the idea that the government can take your marriage away from you, strikes me as one for which you're not going to get five votes from among the current eight and a half Justices.

Professor Tushnet: Although, I think that *Obergefell* is about as stable an opinion as there is in the world.

Professor Karlan: Yes.

Professor Tushnet: On the other hand, it wouldn't be difficult to write an opinion that said, "Going forward, you can deny marriage to gay people, just the ones you have, you can't overturn."

Professor Segall: I will push back a little bit by saying that Justice Roberts ended his long dissent in *Obergefell* by telling people that if you're in favor of same-sex marriage, be happy, but this case has nothing to do with the Constitution. That's what he said. "This case has nothing to do with the Constitution." From the man who came up with the equal state sovereignty principle. Anyway, I do think Justice Roberts is very good at the long game, and that sentence worries me. That sentence worries me.

Professor Karlan: But given that the Chief Justice does play the long game, this does not strike me as one of the issues that is high on his list of things he wants to get rid of, despite his angry dissent from the bench in *Obergefell*. This is not affirmative action. This is not some of the First Amendment issues. I think society is changing awfully fast on this particular issue, in a way that makes it really hard for the Court to go back on it. Even if you look at the polling data among the most conservative groups in America, people under thirty in those groups are at worst evenly divided on same-sex marriage. And whereas the culture wars on some of these other issues are going forward, this one is past. There's no political traction, and there's no real political movement, I think. Obviously, things could change, but now, I don't see any real traction in getting rid of same-sex marriage going forward.

Professor Segall: Before we move on to abortion, I do want to read something that Justice Kennedy wrote. This'll happen a couple times today, because we're talking about Justice Kennedy. We should hear his words, I think. Justice Kennedy picked the gay rights decisions, all four of them, to make points similar to the point he made in *Lawrence v. Texas*, which I want to read, and this is about something broader than gay rights. It's a famous paragraph.

He wrote, "Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might've been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."¹

There's never been, in my knowledge, a paen to living constitutionalism as clear as that paragraph, or a rejection of originalism, as clear as that paragraph. That paragraph, I'm sure, incensed Justice Scalia as much as anything Justice Kennedy has ever written. I am wondering if we have a theory as to why he picked the gay-rights cases to make this point over and over again? And was he throwing the gauntlet down on, "Originalism is not going to carry my vote, and don't think even think about that for a minute, because it's not going to happen?"

Any thoughts? Did I stump you?

Professor Adler: I'm not sure I read that passage quite the same way you do.

Professor Segall: Okay.

¹ *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

Professor Adler: I think, especially when you look at Justice Kennedy's federalism opinions, which we can criticize as perhaps being not entirely accurate in the way they characterize the original understanding of the constitutional structure, they certainly show that while Kennedy was not an originalist, he wasn't an anti-originalist. He thought that the original understanding of the structure of the Constitution, in particular, was important. There is an argument that the Privileges or Immunities Clause of the Fourteenth Amendment was designed to embody this broad, *Allgeyer*-like conception of liberty that Justice Kennedy embraced, and if so, for reasons that have already been raised, it's not anti-originalist to recognize that, because of our own failings and our own limited empathy, that we will not always understand how the principle that is embodied applies, but that's not to reject the meaning of the text. That's to understand that our own ability to always understand how it applies is sometimes limited. So I'm just not sure that's the gauntlet that you think and I'm not sure he's picking up your cudgel against Scalia in that passage.

Professor Segall: Are you suggesting that if the Fourteenth Amendment was originally meant or intended to allow judges to change the definition of liberty over time, which is what Justice Kennedy is saying, that is, in fact, an originalist view? Because I characterize that as the rejection of originalism and originalism are exactly the same thing.

Professor Adler: I'm saying that there isn't, and I haven't done the research myself, but there certainly are plenty of folks that have done research arguing that the Privileges or Immunities Clause embodied this broad—I won't say unlimited—but this broad, capacious, and unified conception of liberty that involved the degree of autonomy and dignity to go your own way, that had—arguably had—long roots in the Anglo-American legal tradition, that, by its nature, would never be fully understood at any given point in time because of the nature of our ability to understand what those principles mean. And I'm just saying that that understanding is not inherently anti-

originalist. We can get into a question about, with originalism, at what level of generality are we defining things, and so on, but that's my only point.

Professor Segall: Okay. All right. So, we'll move on to abortion. Something less controversial. Just so we're all on the same page here, in 1989, in the *Webster* decision, Justice Kennedy didn't write anything, but he joined an opinion by Chief Justice Rehnquist, which would have, in fact, overruled *Roe v. Wade*. Rehnquist didn't say, "We're going to overturn *Roe*," but he wanted to apply a rational basis test to abortion restrictions, which would lead to the overturning of *Roe*. Justice Kennedy joined that opinion. There were four votes for that opinion. When Justice Thomas replaced Justice Marshall in 1991, if you add the four people who joined *Webster* to Justice Thomas, we get five votes, possibly, to overturn *Roe v. Wade*, and then Justice Kennedy famously changed his mind and joined with Souter and O'Connor, in *Casey*, to not overturn *Roe v. Wade* and give us the undue burden test that we currently have today for abortion restriction.

My first question: any theories as to what happened between 1989 and 1992—it's three years—that changed Justice Kennedy to an "overturn *Roe v. Wade*" to a "reaffirm, in part, *Roe v. Wade*?" Any theories? We don't know.

Professor Karlan: I have no idea.

Professor Adler: Rehnquist's opinions were often somewhat brief and kind of underdeveloped. As a consequence, even if you thought you knew he was he was trying to do, it wasn't spelled out. If I recall correctly, in *Webster*, Scalia writes separately to complain about that. "Yeah, you're leaving a trail of bread crumbs to overturning *Roe*, but you're not actually saying it. Rather, what you are saying is, *Roe* has to be limited to account for this interest that we are saying the State has in protecting fetal life."

Well, there are parts of *Casey* which, I think, say quite clearly, “We are limiting the right in *Roe* to accommodate the State’s interest in fetal life.” Given that Kennedy didn’t write in *Webster*, I think it’s possible that his read of Rehnquist’s opinion, in some respects, was like Scalia’s. That Rehnquist was outlining a path, but because the opinion didn’t actually go to the end of that path, you could join that opinion without actually committing to taking the next step. And so in *Casey*, we do get this undue burden test that by some interpretations, is kind of this balancing: You have the woman’s rights here; you have the State’s interests here; and depending on where you are in the pregnancy, we balance those interests against each other to produce different outcomes.

Given the underdeveloped nature of Rehnquist’s opinions, I think I could make an argument that there’s a continuity there or at least not an overt contradiction.

Professor Tushnet: Two things here One is, I believe that’s it’s in *Webster*, and it’s certainly rattling around in the pre-*Casey* abortion cases. Justice Stevens has this line about the rational basis test, which is, “Look, under this test, you could say the State could require a woman, before she gets an abortion, to stand on her head and recite ‘Mary Had A Little Lamb.’” That’s about as close as you can get to saying the doctrinal implication of this is overruling *Roe v. Wade*. So, it’s not as if the idea that this doctrine, taken seriously, would imply the invalidity of *Roe v. Wade* wasn’t around.

But second, it occurs to me that maybe what’s going on is an expression of the same, call it anti-doctrinal impulse, that we see in *Obergefell*. That doctrinal formulations are just the vehicles for reaching results in this case, without having implications for other cases. I guess one way to think about this is, sort out the things that Justice Kennedy thought were undue burden—“Justice Kennedy thought” meaning that he joined opinions saying—were undue burdens and things that he thought were not undue burdens, and is there any coherence to the sorting of them, other than in, say

Gonzalez v. Carhart, this is icky. More icky than other forms of abortion, which seems weird to me.

I think there is in a fair amount—we’ll hear more about this, particularly in connection with the First Amendment stuff—but I think that there’s a fair amount of anti-doctrinalism in Justice Kennedy’s work as a whole, and, then, I think it’s worth pondering whether, or to what extent, anti-doctrinalism is a good thing. My footnote on this is that I think doctrinalism turns out, on analysis, to be anti-doctrinal anyway. So, it might be just as well that Justice Kennedy just displays it on the surface of his opinions. But, my position is much more controversial and much more difficult to develop than I have time here.

Professor Segall: I will say that we lost our two most famous and powerful anti-doctrinal judges—lost, I mean retired—this year in Justice Kennedy and Judge Posner. At the end of his career, Judge Posner wrote an abortion decision, and others, that were very, very anti-doctrinal, and I think losing both of them at the same time is a loss to those of us who don’t like doctrine all that much.

Justice Kennedy is blamed or given credit for the undue burden test, but in reality, I believe it was Justice O’Connor who first articulated that test. I believe I’m right about that.

Professor Tushnet: Yeah.

Professor Segall: It is a vintage Justice O’Connor move, right? Because—does anyone in this room know what undue burden means in most contexts? I mean, the answer’s going to be, “Ask Justice O’Connor.” That ended up playing out to be, “Ask Justice Kennedy.” Maybe we should talk about Justice O’Connor’s role in this a little bit because I think it was very substantial. Anyone?

Professor Tushnet: I think her contribution here was to offer a verbal formulation that allowed for greater regulation of abortion than the doctrinal formulation emerging out of *Roe v. Wade*. She offers the undue burden test.

Professor Segall: She came to Georgia State several times, and after her retirement, she hinted that she maybe wasn't that happy with how the undue burden test had been implemented. Maybe that wasn't what she was thinking.

Professor Karlan: One of the areas of law that isn't scheduled to be talked about here, at least explicitly, is the other area where the Supreme Court moved from heightened scrutiny to an undue burden standard over the course of the Rehnquist and Roberts Courts: the right to vote. Restrictions on the right to vote used to be subject to strict scrutiny, and now there's an undue burden sliding scale there as well. That puts tremendous pressure on who is doing the judging because what some people see as undue burdens, other people don't.

You can really see this when you look at the lower court opinions where there's a much wider range opinions, particularly at the district court level, where single judges decide whether something is an undue burden or not. It's really quite interesting to watch how that test gets applied across both these areas of law when you have very different people with very different senses of the interaction between the ability to exercise these rights and poverty. For most upper-middle-class women in the country today, there isn't an undue burden on their right to terminate a pregnancy because they have private doctors. If worse comes to worse, they can take a day off work and go fly someplace. But think about poor women in a part of Texas—for example, in *Whole Woman's Health*—who would have to drive hundreds of miles, and there's a waiting period, and the like, or non-affluent women in the 90% of counties in the United States where there is no abortion provider at all. They face a burden. There's much more of an undue burden on poor women than on more affluent women.

This same thing with things like voter ID. It's much more of a burden for a poor person to get an ID, especially if they have to go to a DMV, which is located in a place you can drive to, and you don't

have a car, than it is for probably everybody in this room who has a currently valid passport so that they can go on vacation overseas.

Professor Segall: I don't, this is a sentence I don't utter very much, but to Justice Scalia's credit, he did, in *Casey*—I think the strongest part of his dissent in *Casey* is that he predicted this undue burden test would be implemented by judges with their own personal views on abortion, not the law. I think Justice Scalia's prediction has come true on that.

Professor Adler: It was true in the Supreme Court as well, right? I mean, look at the two *Carhart* opinions. The three judges that wrote the controlling opinion in *Casey* could not agree among themselves what the undue burden test meant in subsequent cases. They were able to agree on language in *Casey*, but I don't think any of them changed their minds in subsequent cases. It's that they understood how that language applied differently. And if they couldn't agree about how that language applied, consistently among themselves, how could we ever expect lower court judges to be able to figure out, in a consistent way, precisely how that test applies? I think it's just inherent in the way the test was formulated.

Professor Segall: I want to talk about *Gonzalez v. Carhart* for a minute because we are talking about Justice Kennedy today, and *Gonzalez*, I think, is maybe his most puzzling opinion, or one of his most puzzling opinions. For people who are pro-choice, there was a lot—maybe even people who aren't pro-choice—there was a lot of language in that decision that he wrote that is strange for him.

He talked about abortion doctors. It's a kind of pejorative term. He talked about how women suffered depression after having abortions, though he said there's no data to support that, but he said it anyway. The entire opinion is written very much in a kind of pro-life rhetoric. That doesn't fit into the rest of his decisions on abortion, I don't think.

So, I'm wondering what we think about that, because I know that opinion offended a lot of people. Dahlia Lithwick wrote a column about that case, I recommend everybody read it. She goes through the opinion sentence by sentence and shows how offensive it is if you are of a certain point of view.

That case upheld Congress's law on "partial-birth abortion" after the Court had struck down Nebraska's law, and it was just a change in votes not a change in doctrine. Any thoughts on that?

Professor Tushnet: I have one observation that I wanted to make earlier, which is, in some ways, the disadvantage imposed on us as scholars of both knowing the people who we're talking about and, in some instances, having been there, or having been there working with them, which we mostly have internalized as norms about proper disclosures and the kinds of things we can say, or ought to say, about this person we work with and so on.

I met Justice Kennedy once in my life, so I'm free of that, but I, in writing about Justice Marshall, felt constraints. I still think what I've written is, on a sort of interpretive level, better than what most other people have written, but I felt some constraints. In this particular context, I would want to know who drafted those words.

One of the things that we never talk about is the extent to which the words published in the U.S. Reports come from the pen of the person whose name is attached to the opinion. We all know that the proportion ranges from 0% to 100%. We don't know or those who know are unwilling to say about particular things what the actual proportion is.

On this, could be that the clerk who was assigned to this opinion had strong pro-life views, and it was natural for that clerk to write in that way. Justice Kennedy either didn't notice, or didn't care, or wanted to maintain a relationship with a law clerk. Maybe they're Justice Kennedy's lines—words—but maybe they're not.

Professor Karlan: I have a slightly different take. One of the interesting evolutions, and it's going on at the same time as the doctrine is moving, is the shift back and forth between what the purpose of restrictions on abortions is. The words that he's writing in *Gonzalez v. Carhart* are coming at a time when there's this inflection point between the claim that the purpose of regulations on abortions is to preserve fetal life, or has something to do with the idea that life begins at conception, and a quite different theory: that the restrictions are designed to protect women, an ostensibly "feminist" theory of abortion restrictions.

This case comes right around the time that those two things are both going on. So the opinion gets written from the point of view of Justice Kennedy asking himself, "If I were a woman, how would I feel about this particular kind of abortion?" That requires a lot of levels of hypothesizing one on top of the next.

I don't know exactly how that plays out here, but I do think that the argument, and you get to this obviously and most strongly in *Whole Woman's Health*, is it's hard to take seriously a woman-protective rationale for abortion that says, "No woman could ever want an abortion, and therefore, we're just going to close down all of the abortion clinics in Texas." But that was what Texas was claiming, right? So, if you take their rationale seriously, their purported rationale for those restrictions, it's really hard to uphold them. But I think there's a lot going with respect to this question of why exactly we regulate abortion and in the service of which particular values.

Professor Tushnet: I think that simultaneously credits the rationales with more than they are worth and undervalues the motivation for offering those rationales. That is, my view is that—

Professor Karlan: Oh, I think they're both strategic.

But the arguments that people make and the way that the cases play out are quite different depending on what the rationale is that's offered.

Professor Tushnet: Well, but the strategic point is how do we who believe that abortion is murder persuade people who don't have *that* belief to nonetheless uphold restrictions to the point of a complete prohibition on abortion?

Professor Karlan: Right.

Professor Tushnet: Then you have to ask not why is there this shift in the rhetoric to the pro-woman but what is it that leads pro-life people to believe that this rhetorical shift from rhetoric A, which hasn't yet succeeded, to rhetoric B, will succeed? What are they thinking about the targets of the rhetoric that they're generating?

Professor Karlan: But that's what I just said.

Professor Segall: Okay, we can—we'll go with that. In the last few months, two different Courts of Appeals have upheld laws substantially identical—similar—to the laws the Supreme Court struck down in *Whole Woman's Health* just a couple years ago. They did so making distinctions that none of us would find persuasive. What do we think is the future of this? Because certainly these two different Courts of Appeals, the Fifth Circuit and I believe the Tenth or the Eighth, are really saying to the Supreme Court, "We don't view *Whole Woman's Health* as binding. We're not going to follow it." They upheld laws that were struck down.

Professor Adler: As a start, I think it's worth noting that I think Justice Kennedy certainly thought *Gonzalez v. Carhart* was consistent with *Casey*. I think one can find plenty in *Casey* to support not just the outcome in *Gonzalez v. Carhart* but also the rhetorical moves.

What's interesting about *Whole Woman's Health* is not, to me, at least, is not Kennedy's vote, but Kennedy's decision to assign the

opinion to Breyer because the framework and the way it's applied, -- the way Justice Breyer understands undue burden, and discusses undue burden, and applies undue burden-- is a break from the way it was articulated in *Casey*, and certainly in the way it was understood and applied by Kennedy in *Gonzalez v. Carhart*. I think when you see that, doctrinally, in any area, lower courts have a difficult time because they may see a certain continuity, and then they see an opinion that breaks that continuity. The question is, do we have to re-understand this whole doctrinal line, or do we assume that that's an outlier?

I think when you combine that with the fact that there are clearly quite a few judges that have a disagreement with or a hostility to the entire abortion jurisprudence since *Roe*, you would expect this. Knowing how to understand the undue burden test, post-*Whole Woman's Health*, is hard because *Whole Woman's Health* is Breyer's formulation. It's not the formulation we had been trying to make sense of for the preceding twenty-five years.

Professor Segall: But it is more rigorous, though. I mean, you would think that Justice Kennedy's—Breyer's analysis is more heightened scrutiny than undue burden, I think.

Professor Adler: Well, it's this kind of balancing. It's a way of approaching means/ends balancing, which we see in a lot of Justice Breyer's jurisprudence, that is different than the way at least a lot of lower courts had understood undue burden to work up until that time. We see this in lots of doctrinal areas where you see the one case that marks a departure from the way a doctrine had been understood. You often see lower courts spending some time, sometimes struggling, to figure out how to account for that departure and how to make sense of it. When you add to that the underlying resistance to the doctrine to begin with, we shouldn't be surprised to see these sorts of decisions.

Professor Tushnet: Just one point about these recent opinions and one more general point. The recent opinions—I don't recall whose

analysis this was, it's not mine, originally—say, “Let's look at what Breyer said in *Whole Woman's Health*. Here are the kinds of things he said we have to take it into account. Some of the things that were taken into account in *Whole Woman's Health* were Texas-specific. Other things were general scientific stuff.” The critique of these other more recent opinions is that they reevaluate the non-state-specific information that was used in *Whole Woman's Health*. That's different from saying, “We take those general things to be established, but in doing the balancing, the state-specific things come out differently, lead to a different outcome.” They challenge the non-state-specific stuff. That's the difficulty.

For the more general point is, I think the relevant case to be thinking about here is *Janus*. That is, what are the conditions for overruling? Suppose one of these Eighth or Fifth Circuit cases gets to the Supreme Court, and they decide to grant review on it. That's also a contingent question. If they grant review, are they going to say, “Well, let's go through *Whole Woman's Health* and see if this really is an undue burden,” or are they going to say, “Let's think about overruling it, and what did we say about overruling decisions in *Janus*?” You go through the five or six criteria in *Janus*, and they are all satisfied with respect to *Roe v. Wade*, with one exception of the reliance discussion, which was the weakest discussion in *Casey* anyway.

I think that, depending on one's time horizon, probably unproductive to worry much about the application of the undue burden test in particular cases. I'm not saying that the Court's going to overrule *Roe* next year or in two years or three years. But, with a changed composition, assuming that it occurs, I don't think there's any question about whether *Roe* will be overruled or not, Senator Collins notwithstanding.

Professor Segall: All right. Two comments before we take questions. One is, I think these lower court decisions might anger Chief Justice Roberts because I don't think they fairly interpret

Whole Woman's Health at all. I think they basically don't follow them at all. That may or may not make Chief Justice Roberts mad as an institutionalist protecting the Court's integrity.

I was asked by a reporter yesterday if I thought the Supreme Court, assuming Kavanaugh gets confirmed, would reach out to decide issues involving women in the next couple of years, and how controversial would that be, if they have five votes, to do something to *Roe*, or some other case involving sexual harassment or discrimination against women. Would these Justices do that in the next two or three years? I'm pretty sure they would not, based on something you said a long time ago, which is, "Try to imagine a New York Times headline, and if you can't, then the Court probably won't do it." It's hard to imagine with Kavanaugh getting on the bench, this Supreme Court doing something dramatic that's perceived to hurt the interests of women in the next few years. Could be wrong.

With that, questions from the audience. Please come to this podium here. Introduce yourself, and we'll take it from there.

Professor Adler: If I could just, really quick, while people are lining up.

Professor Segall: Yes.

Professor Adler: I think we have to think, too, about what leads cases to go to the Court. It's not clear to me that abortion-rights groups are going to file cert. petitions for fear of an opinion that would, at the very least, narrow *Casey*, or severely constrain *Whole Woman's Health*, and so on. The real question will be whether or when a State law gets struck down, I'm not sure the Court accepts those cases when a State seeks cert. in the near term. So, in the short-term horizon, it's not clear to me how soon one of these cases gets to the Court.

Professor Segall: I agree with that.

Professor Michael C. Dorf: I'm Mike Dorf; I'll be on the next panel. So, I have one tiny little point, and then kind of a comment/question. Earlier in the discussion of the gay rights cases, the question came up whether the Court had applied this animus idea elsewhere. One case that wasn't mentioned was a per curiam from 2000 called *Village of Willowbrook v. Olech*, which involved a so-called class-of-one discrimination. There was discrimination against just one woman. The issue was whether that kind of allegation states an equal protection claim. The Court said "Yes."

Breyer wrote a concurrence in the per curiam saying that the lower court actually preserved a claim that the village's decision was based on animus toward this woman in particular. The village made her give a thirty-some-odd-foot easement when everyone else had to give a fifteen-foot easement. She says that the people in the village who run the village hated her. So, Breyer says, "You can't do that. That's animus."

Interestingly, Kennedy didn't join Breyer's concurrence. I'm not sure what we make of that, but that was interesting to me.

The other point was on the nature of the undue burden test. Jonathan said, correctly, that Breyer's version of the test in *Whole Woman's Health* is not exactly the earlier version from *Casey*. However, the earlier version is not remotely O'Connor's still-earlier version. O'Connor's version in dissents in a couple of cases in the 1980s said, "We don't even apply strict scrutiny, or any kind of heightened scrutiny, unless the law first passes a threshold of unduly burdening the right to abortion."

That's not what the plurality opinion says in *Casey*. What they say in *Casey* is, "undue burden is a shorthand for the outcome of this sort of test, which you see whether the burden is substantial." Thus, the test has changed at least twice. But that isn't especially unusual to this area. Think about the way in which strict scrutiny evolves in affirmative action cases. People take the preexisting tests, and they move with them. The question then is whether that's a reason to be

skeptical of all doctrine, as Mark is, or is it just to say, well, that's the nature of a common law system.

My question is, is that a feature or a bug?

Professor Adler: The description is right. The common law aspect, I think, is an important part, because you're writing an opinion to explain the doctrinal application given a particular set of facts that have been presented and particular arguments that have been presented. While you may be trying to articulate the underlying principle in a way that will enable lower courts and future courts to do something consistent, it's necessarily going to be underdeveloped in future cases, especially the cases that reach the Supreme Court because, for a whole bunch of reasons, those are the cases that are most likely to have been the least controlled or least dictated. And so that is an—and whether that's a feature or a bug of the system, I would just say that that's the way the system works, and we have to make the best of it. There are positives to it; there are negatives to it.

Professor Segall: Before we get to the next question, I do feel obligated—because this is being shown on C-SPAN at some point, other places—to mention, in light of Mark's comment earlier that Mike Dorf, who just asked that question, was Justice Kennedy's law clerk during the term that *Casey* was decided. Not suggesting anything Mike just said reflects anything about what actually happened during that time, but I do think it shouldn't go without passing.

All right. Next person.

Professor Eugene Volokh: Hi. Eugene Volokh from UCLA. I was going to say the same thing that Mike said, so let me elaborate a little bit on it because I think it's important, in part, because whatever flaws there may be in *Casey*, I think criticizing the undue burden test, it seems to me, has become a cottage industry in ways that I'm not sure is entirely justified. Mike has written about this. There's also

Alan Brownstein at UC Davis. He wrote an excellent article about this.

Here's a possible hypothesis. For pretty much every substantive, non-equality right, the Court adopts some form of substantial burden test. The undue burden test, as somebody quoted, the three-Justice opinion in *Casey* says, "It suddenly has the purpose or effect of interposing substantial obstacle." So, that's basically the substantial burden test.

If you look at ballot-access cases, there's a substantial burden threshold. Traditional right to marry cases, like *Zablocki v. Redhail*, substantial burden threshold, which helps explain why certain marriage-license fees aren't struck down, marriage waiting periods, and such. Indeed, for voting rights, historically, one of the things for registration waiting periods, one inquiry has been on how burdensome they are. The emerging Second Amendment case law is chock full of discussion of whether something is really a very serious restriction on abortion or a less than substantial burden. Time, place, and manner restrictions in free speech law don't say substantial burden, but they ask if something leaves open ample alternative channels. That is, in effect, as Alan Brownstein pointed out, a substantial burden test because if it leaves open alternative channels then the theory is it's only a modest burden.

So, if that's so, doesn't it make sense that, difficult as it is to draw the substantiality line, but that abortion rights would have a similar threshold requirement to try to distinguish what are seen as, rightly or wrongly, as a modest burden from ones that really go to the heart of the right?

Professor Karlan: I don't think anybody disagrees with any of that. The question is, what counts as a burden? What's interesting is the retreat on the Court from thinking about things that actually burden the right. So, that's why I said that the action is all in who is applying these tests. Because if you read, for example, Judge Myron Thompson's abortion decision from Alabama, he talks about just how

difficult it is for a woman to get to the places where abortion is still allowed, and he has to spend a lot of time going through a whole lot of GIS expert testimony about just how hard it is, and how costly it is, and how long it takes. I don't think that people on the left would have a problem with an undue burden test if it was applied by people who took into account the actual situation of the lives of the people who are being burdened. That's not the problem.

I would have no trouble with an undue burden test at all if it was applied by people who understood the burdens on the actual people's lives who are affected. What tends to happen instead, though, is that it's abstracted up to a level where you think to yourself, "Well, if it wouldn't be an undue burden for me, then it's not undue." That's, I think, where the trouble is. I don't think people think that abortion jurisprudence is unique here, and I think you're right in pointing that out. For example, when courts talk about these things in the context of voter ID, different courts have very different views, depending on whether they think it's actually a burden on poor people to make them spend \$32.

I had a witness on the stand in my voter ID case when I was working at DOJ who said her cash income per month is \$300. So, for her, \$32 to get an ID and three hours on buses to go and get it is an undue burden. I guarantee you, there are a huge number of judges—Judge Posner before he had his recantation on this—who just thought everybody has an ID. How difficult could it be to get one? Well, if you were born at home, and you don't have a birth certificate, it's really difficult. If your parents were illiterate, so they misspelled your name on the birth certificate, it's really difficult. If you don't have the sophistication to understand how to deal with government bureaucracies, it's really difficult.

The same thing is true of abortion. What's distressing about the Supreme Court is that, unless you spend huge amounts of money, and millions of dollars were spent on *Whole Woman's Health* by foundations that funded the litigation, you would not have had the

data in the record there that would enable you to show what the burden is, and that's what makes an undue burden test so frustrating for people who believe in the underlying right. The undue burden test requires a kind of litigation that is very difficult to do.

Professor Tushnet: This is responsive to the bug/feature point, but I think Eugene's comment brings it out. I've been waiting for years to do this. This reminds me of the scene in Chinatown, "She's my daughter. She's my sister." It's a feature, and it's a bug. It's a feature of legal reasoning, and the bug is, it's entirely dependent on who is doing the reasoning.

Professor Segall: I do want to mention that Eugene Volokh, who just asked that question, clerked for Justice O'Connor in the 1980s. I'm not sure exactly when.

We have time for maybe one more question. I'm sorry, Ilya.

Esmat Hanano: Good morning. Esmat Hanano. I am on the Law Review here. So, I had a pretty great Constitutional Law II professor, and we talked a lot about the messiness surrounding the gay rights decisions and Justice Kennedy's writing focusing on animus. My question's kind of predictive. I know you all said that the decisions are safe and nothing to worry about, but looking forward, who would step into his role and take the charge for gay rights, and what would be the test that should be applied going forward? Do you see the liberal wing hardening their stance and saying, "We need to push for heightened scrutiny," or calling back to the earlier opinions?

Professor Adler: There's no replacing Justice Kennedy on these issues. Whether you like or dislike his approach, there were features in the way he approached these cases, wrote about these cases--because he wrote the opinions, laid out--there isn't anyone on the Court that's going to do that. Are there reasons to believe that the Chief Justice, for example, might be particularly resistant to overturning or undermining certain aspects of some of these cases due to his concern about maintaining continuity? Perhaps. But you're

not going to see a Chief Justice Roberts opinion that remotely resembles a Kennedy opinion. I mean, that's just not going to happen.

Professor Karlan: Until gay people become states, at which point, he'll talk about their equal dignity.

Professor Tushnet: There are two things. One is on what I think of, somewhat disparagingly, the mopping-up issues: the spousal benefits, the adoption issues. There's nobody going to replace Kennedy, and the odds are that cases will come out to say, "Well, we said gay marriage, but we didn't say any of these other things." Maybe one or two of them will say, "Yes, you have to provide spousal benefits," and those will be assigned randomly with the—

Professor Adler: Or they'll be per curiam.

Professor Tushnet: I just want to note, if a direct challenge is brought, it wouldn't be surprising to see Chief Justice Roberts doing a Chief Justice Rehnquist in *Dickerson*, "Of course, I thought *Miranda* was wrongly decided, and I still do, but you can't come in our face even though we said you could. We're going to reaffirm *Miranda*." Similarly with *Obergefell*, were there to be a direct challenge.

Professor Karlan: One thing I'd like to say to you because you're in law school now is that when I was in law school, Georgia still had a sodomy statute that made it a twenty-year sentence for anyone who engaged in oral or anal sex, regardless of the sex of their partner, but it was obviously applied differently. When I was clerking, the Supreme Court decided *Bowers v. Hardwick*, so if you take a slightly longer view of this, where the Supreme Court will be when you're the age of the people on the panel, and what the Supreme Court's approach to gay rights will be at that state, is very different than over the next short term.

One of the things you should be thinking about is, where do you want to move the Court over your professional lifetime? You should

be thinking about more than just where is the Court going to be over the next five or ten years. History's longer than that.

Professor Segall: All right.

Professor Karlan: I hope.

Professor Segall: Ilya, if you can be quick, you can have the last word.

Professor Ilya Somin: Just a quick question.

Professor Segall: Identify yourself first.

Professor Somin: Sure. Ilya Somin, George Mason University. The question actually relates to the first part of your discussion about the gay-rights cases that, as you and a lot of people mentioned, is not clear to have much doctrinal coherence, but—and I've criticized them on this basis myself—but maybe what's really going on is a confluence of several things that come together in the gay rights cases, like it's a group with a seemingly mutable characteristic, they're the object of prejudice, the rights and questions in many cases involve intimate or very private behavior, it's very important to people's ongoing liberty and autonomy, and so on.

Kennedy mentions all these elements in his different opinions. But, he's reluctant, or he was reluctant, to tell us what would happen if some of these elements were there but other ones were not. This also has the advantage from the point of view of some of the Justices, perhaps, of ensuring that these precedents are not easy to use outside the gay-rights area, where maybe only one or two or three of these elements are present.

Could they perhaps be explained by the idea that this is a confluence of several different things which come together here, and they didn't want to tip their hand or didn't agree on what should be done in situations where some of these elements are present but not others?

Professor Adler: I was going to say it also could be a concern about, even within the gay rights area. I think *Masterpiece Cake Shop*, which we haven't talked about, illustrates this: A recognition that one consequence of putting things into clear, doctrinal boxes is that the implications for other cases become more clear, more determinate, and the hydraulic pressure for certain outcomes follows. So, if his concern is, this is a particular affront to equal dignity that has to be overturned, but I'm really not sure how questions relating to gay rights should play out in the anti-discrimination context, or in context where there might be issues with religious objection, or wherever else, not putting things in a doctrinal box makes it easier to reserve those questions.

I don't think it's just an issue of implications outside of the gay rights area. It's quite possible that it's a recognition that defining the doctrinal categories puts in motion a set of outcomes that it's quite possible Justice Kennedy wasn't sure what he thought the outcome in those other sorts of cases should be, and *Masterpiece Cake Shop* might reflect that, right? An ambivalence about precisely how to balance these competing concerns. You get the sense that Justice Kennedy, had he been on the Court, would've been happy to revisit that and may have had more firm conclusions five or ten years from now, but he wasn't ready to fully cast his lot now.

Professor Segall: We will talk about *Masterpiece Cake Shop* at lunch, but I have to leave it there. Mark, do you want the last word?

Professor Tushnet: Suppose you offered that analysis of *Obergefell* in your class, and then you said to a student, "Well, here. Let's consider a spousal-benefits case, where one of these elements is absent. What is the implication of *Obergefell* for this spousal-benefits case?" Your student says, "Beats me." Now, either that's an incredibly sophisticated student or a student who you were going to say, "You ought to think some more about what legal reasoning is." That's the anti-doctrinal critique of *Obergefell*, that doctrine is

supposed to provide some guidance beyond the particular case at hand.

Now there are strategic reasons for reserving some issues, but those are—when you do that, it is, I would say, a defect. I have to say, I feel like I’m coming out of the 1950s tradition of legal reasoning when I do this sort of stuff, but I think they were right.

Professor Segall: I think “beats me” is the right answer.

All right. Thank you very much, panel. We’re going to try to stay on schedule, so we’ll take a fifteen-minute break, and then we’ll come back.