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Justice Kennedy's Prose – Style and Substance

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PANEL 2: JUSTICE KENNEDY'S PROSE—STYLE AND SUBSTANCE

MODERATOR: ERIC SEGALL

PANELISTS: ERIC BERGER, MICHAEL DORF, AND JAMAL
GREENE

Professor Eric Segall: Our next panel is going to be devoted to Justice Kennedy's—I think we would all agree—unique writing style and how that maybe, or maybe not, affected the substance of his opinions. Our guests are Jamal Greene of Columbia Law School, Mike Dorf of Cornell Law School, and Eric Berger of the University of Nebraska, and I do want to mention that this is a little bit special. In that many, many—not that many—years ago, Eric was Mike's pupil at Columbia Law School, so we have a teacher and a pupil on the stage here. Although, Eric has definitely graduated from that—

Professor Michael Dorf: —student has become the master.

Professor Eric Berger: Definitely not.

Professor Segall: I do want to begin this panel by reading two of Justice Kennedy's passages, so we get the flavor of what we're going to talk about for the next hour and fifteen minutes. Perhaps his most famous, or infamous, paragraph or sentence comes from the *Casey* opinion, where he wrote, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life,"¹ which is a sentence that angered many, many formalists and people on the right. I will say that he said something very similar to that during his confirmation hearing, so he wasn't hiding the ball.

¹ Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 851 (1992).

This is what he said in *Obergefell*, and this is longer, and so bear with me, but I think it's important, again, to understand Justice Kennedy's unique writing style. He wrote, "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity"²

I guess my first question is, is it possible to imagine any other Supreme Court Justice writing either of those two passages?

Professor Greene: I'll start, I guess. I do think it's unique to Justice Kennedy, and I talk about this exercise with my students. When you read the *Casey* opinion, which is written by three different Justices, and there are three different styles in the different parts of the opinion, and you don't really need to know for sure who wrote which—you don't really need to know for sure who wrote which opinion if you know something about the Justices. You can tell that the "sweet mystery of life" stuff is Justice Kennedy. Even without knowing about the doctrinal history of undue burden, you'll know that's Justice O'Connor. If you look at Justice Souter's writing style, you'll know where that shows up in the opinion as well, stare decisis discussion especially, so I can't imagine anyone in the modern Court writing in just the way that Justice Kennedy wrote, but there is a certain aspect of his writing that is kind of reminiscent of 19th century Supreme Court style. This is what Grant Gilmore sort of called "the grand style."

² Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

Professor Segall: They want you to talk into your mic a little more, I think.

Professor Greene: Right here next to my mouth.

Professor Segall: Okay. Alright.

Professor Greene: Maybe I'll do—it is on, but something about the—okay, that's better. So, there is an aspect of his style that I think mimics some of what you would have seen 150 years ago. I can imagine—putting to one side the actual issues in the case—I can imagine John Marshall speaking somewhat like Justice Kennedy.

Professor Dorf: I guess, so I agree with Jamal about that. I would add you might think of other prose stylists on the Supreme Court, so in the 19th century you looked to Marshall, you looked to Story. Outside of *Dred Scott* and a few other horrible decisions, Taney was actually quite a stylist.

In the 20th century, we tend to think about Holmes and Brandeis from the early 20th century. Jackson is considered possibly the greatest writer of all time on the Supreme Court. He had phrases a little bit like Kennedy's, although they tended to be less—

Professor Segall: That's Jamal.

Professor Dorf: Jackson's great lines also had that way of using metaphors and so forth—talking about the loaded weapon lying around in his *Korematsu* dissent, the language in *West Virginia State Board of Education v. Barnette* waxes eloquent. So in that sense, yeah, I agree. There are precursors to Justice Kennedy in this kind of grand style.

I do think it's worth noting a difference between the two passages you quoted. The language from *Obergefell*, while emotional, is mostly rational, right? I don't mean the *Casey* language is irrational; it's just that you could be talking about anything. By contrast, you can criticize the *Obergefell* language, as people have done, on the

ground that it's saying that single people are going to be condemned to a life of loneliness. That's pretty harsh, but pointing this out is a criticism of the substance. As far as the language itself, I tend to think of the *Obergefell* language as just a peroration that follows linearly in a way that the so-called sweet mystery of life passage from *Casey* does not. The *Casey* language is just pure rhetoric.

Professor Berger: I don't have a whole lot to add. I agree with what both Jamal and Mike said. The grand, almost quasi-poetic philosophical gestures toward big ideas sound more like some of the 19th century Justices. One Justice it reminds me a tiny bit of is Cardozo. I think Cardozo was a better writer than Justice Kennedy, but he would also sometimes gesture towards these big ideas and at the end of the opinion you're not exactly sure what the doctrine is, which ties back to what the first panel was talking about: Justice Kennedy was often less doctrinally moored than many of the other Justices.

Professor Segall: I guess I should be careful to add, because even though I think Jamal is right about *Casey*, hyper technically we don't know that Justice Kennedy wrote the mystery of life passage, because it's a three-Justice opinion. We know he wrote it, but we don't know he wrote it in that sense.

Justice Scalia has said throughout his career that he wrote his dissents for law students. He really did say that, and I think it turned out to be, for better or for worse, an excellent strategy for Justice Scalia. Who do we think Justice Kennedy was writing for?

Professor Greene: I think he's writing for the—I mean, in very broad terms, and Mike's out in his chamber, so he'd have more to say about this, but for the history books. People talk about Donald Trump picking Justices or picking a Secretary of Defense because they look the part. I get the sense that Justice Kennedy wanted his opinions to look the part. If there was something that, there's a certain style that a Supreme Court opinion's supposed to express, and I don't know that it's necessarily the public or law students in any specific sense, but

rather that he thought there was a kind of institutional style that he wanted, especially in the rights cases, he wanted the cases to look like. Maybe that's a little bit inchoate, but that's my sense.

Professor Dorf: Justice Kennedy liked to talk to groups of students—he still does, especially high school students—and tell them about the glories of the Constitution. But in big cases—not in an ERISA case where he'll just follow the doctrine—but in a case where there's going to be a lot of public debate, I think he was quite consciously trying to speak to the people broadly. There's a tension between the anti-doctrinalism that everyone on the first panel talked about and this grandiloquent style because the anti-doctrinalism works well in reaching the general public but the grandiosity does not. The public doesn't know about or care about the three-part test, with the sub prongs and so forth. They want to know is this a denial of equality or liberty? Abandoning the formal tests makes sense if that's your goal.

However, the style we're talking about now, which critics would call pompous, doesn't work especially well in reaching the general public, and so maybe Jamal's right in that maybe it's not aimed at them. But insofar as I think one of Justice Kennedy's goals—and a laudable goal—was to speak to “the People” with a capital P, that makes sense of the anti-doctrinalism. It doesn't make sense of this style.

Professor Berger: Yeah, I think it depends somewhat on which opinion. I think in an opinion like *Lawrence*, for instance, I think very much he was trying to talk to the people, talk to readers of the New York Times, and things like that. I agree with the tension Mike talked about between the anti-doctrinal style and the grand philosophical style.

Mike and I had a conversation about this the other day. I think one of the reasons why he might be anti-doctrinal is it's hard to speak in doctrine if you're also making grandiose, quasi-poetic gestures, so there's a sort of tension between those.

Now, I suppose you could be rigidly and precisely doctrinal in one part of the opinion and write in grand philosophical sweeping gestures in another part of the opinion, but there is a tension between those styles, and if you try to put all of it in, the opinions would be even longer than they already are.

Professor Greene: Well, *Casey* is that. It's just that, right? It's grandiloquent for a few paragraphs, and then it's really minute and brass tacks at other points. Of course, it's written by three different people, so that makes some sense, and there's a question of whether that hangs together. I think *Casey*—the seams are very obvious in *Casey*, and it's I think a bigger challenge in a shorter opinion.

Professor Segall: Justice Scalia was able to write in the doctrinal, formalist framework—but we can debate whether he was that—but he wrote in that way, yet he was able to write in a way that most people think the style is very effective, leaving aside his big insults, and he was able to fit in his own unique style into the formalist framework. So, I'm not sure I agree that Justice Kennedy couldn't have been both a formalist and a writer with a poetic style. I think that is possible, so I'm wondering if one is driving the other, or if they are two separate things.

Professor Berger: Well, I wouldn't call Justice Scalia's style poetic. I think he was an excellent writer, and I think, actually, some of Justice Kennedy's poetic gestures probably don't qualify as very good poetry, so I guess I would disagree to the extent that I think part of what made Justice Scalia such a good communicator—and I think the same is true today, maybe to a somewhat lesser extent, of Justice Kagan and the Chief Justice—is they're good at writing very direct, snappy, to-the-point prose that is very readable. And I think that actually speaks to the public better than some of Justice Kennedy's grander language—the passage from *Casey* you quoted, for instance.

Professor Dorf: I totally agree with that. I think about news reports on NPR after the Court has decided a case—it's too bad Nina Totenberg isn't here, because I would ask her about this—but, how

you decide what to read, what to quote from the opinions? Because what'll happen typically is, I'll have read the opinion when it came down at 10:00 in the morning, and then when I'm driving home and listening to the news, I'll hear Nina read a passage.

It's true that if it were a Kagan or Scalia opinion or dissent, you might hear her quote those snippets, but she was sure to quote the grand Kennedy language, and so if your goal is to reach the public—the public are not reading the opinions. SCOTUSblog has a lot of followers, but it has a lot of followers for law. It's law famous. It's not real famous, and so people are getting it on the news, and so it may well be that you're trying to write to get quoted either on *All Things Considered*, the evening news, or however people are getting their news.

Professor Segall: This is a question I've thought about and I, to be honest, haven't figured out how to phrase it exactly, but I do wonder if we have opinions about whether Justice Kennedy to some degree—this is the critique that came at him from the right—thought himself more as a philosopher-king than a judge. More someone whose job it is to espouse broad, moral, ethical, dignitary-type principles than what we—Justice Nahmias is nodding at me, I just want to make that point—than someone who's applying law to fact and trying to do that. Any thoughts on that?

Professor Greene: Well, I think—and Justice Kennedy I assume would say the same thing—I think it begs the question to say that doing what Justice Kennedy is doing is not being a judge, or is not to say that the job of a judge in a constitutional case involving rights, and rights that are not well-specified in the Constitution, that seem to be implementing some kind of value commitment or set of values, to say that the job of a judge in that case is to mechanically or formalistically apply law to fact is to state a substantive position within the case itself. It's not to state a universal premise about judging, at least not in constitutional cases.

Constitutional judging, I think, is part of the flaw of American legal academia, that we reflexively think about constitutional judging as completely continuous with all other kinds of judging, as if it's just a contract case is just the same as deciding about abortion rights, or something like that. They're really different tasks, and we can talk about whether we think that judges should be deciding these more momentous sorts of cases, but the fact of the matter is we have a Constitution, and the Constitution is not self-explanatory. So yes, Justice Kennedy I do think thought a part of his job was to speak to the values in the Constitution in a way that wasn't particularly formalistic or mechanistic, but I think, again, I don't know that's necessarily inconsistent with judging.

Professor Dorf: One of the things that people object to when calling a particular Justice a philosopher-king is that the Justice under criticism tends to vote to strike down more laws than the critic thinks is appropriate. And so that's a particularly likely charge against Justice Kennedy, who in that sense was the least restrained Justice of anybody who sat on the Court with him—maybe any Justice ever—in that he's with the liberals in the abortion and gay rights cases, he's very strongly in favor of striking laws down under the First Amendment, he's with the conservatives in striking down laws on federalism grounds. So he has an all-of-the-above approach, and so that makes him “criticizable” on those grounds.

But again, just as we can distinguish between the anti-doctrinalism and the reach for the poetic style, we can also distinguish between both of those two and the tendency to want to strike things down. So if you do the math, there are eight possible combinations of those three things, assuming that each of them is yes or no. Justice Kennedy was (1) an anti-doctrinalist and (2) a would-be poet, who (3) tended to elevate his view of the Constitution over a more restrained view of deference to elected officials. Do the answers to all three of those questions tend to go together? I think that there's something to that. I don't think they logically must go together, but they do reinforce each other.

Professor Berger: I don't have a whole lot to add to that. I agree entirely with Mike that, of all the Justices in contemporary times, he clearly was the one who was least deferential to the government and most likely to strike things down. I also find him in a way the most inscrutable of the Justices, though I don't know if it's because he thought of himself as a philosopher-king, or because he liked to say in a close case the tiebreaker goes to liberty without providing a real sense of what that means. I don't know if he thought of himself as a philosopher-king or saw the Court's role as really protecting individuals from government overreach in all the different areas that Mike mentioned.

Professor Segall: Well, let's talk about Jamal's point a little more. This might be a little bit off the point, but it was such an interesting point. I want to talk about it. Is it possible to decide hard constitutional cases in a way that is honestly doctrinal? It turns out Justice Scalia struck down—I just researched this—131 laws during his career. That's a lot of laws for someone who claimed to be somewhat deferential to the political process. Now, Kennedy did strike down more, but the numbers aren't that different. Scalia and Thomas strike down a lot of laws in their way. But, is it possible—is constitutional law, “law?” Let me just put it that way, because I think to Justice Kennedy, I'm not sure constitutional law was law. I'm taking them by surprise. I didn't—

Professor Greene: —This is a big question.

Professor Segall: Yes. It's a big conference.

Professor Greene: Yeah, so I don't think it's possible to—so if we're going to state the terms of the claim in fairly simplistic ways—so is it possible to do constitutional law in a way that, broadly speaking, is rule oriented, which is to say the Constitution establishes a set of rules that tell you exactly how to decide a case based on some premise that can be established at the outset of the case. So, as opposed to in some qualitative sense trying to apply a set of value judgements to the facts before you, is it possible to do that? I don't

see why not. Is it possible to do it in a way that is free of reasonable criticism? No. Of course not, because we are going to reasonably disagree about which rules the Constitution actually establishes, the level of generality at which to understand those rules and so forth. So constitutional law is inherently contested. I guess what I would say, and I guess what's responsive to this, is to say I don't think it's possible to persuade reasonable people, all reasonable people, that what one is doing in constitutional law is compelled by the Constitution—by its text, by its structure, by its original understanding, or something along those lines. And so perhaps there's a sense in which Justice Kennedy's writing style and the way in which he expressed himself made that more obvious than for someone like Justice Scalia.

Justice Kennedy was, and you talked about this at the earlier panel in talking about his resistance to originalism—part of that is simply to say he resists the notion that the Constitution is necessarily determined in a way that is accessible to everyone, all at the same time. He's not a rule-oriented Justice in that sense. He is a Justice who believes in what you might call the major premises of constitutional law. He's all about saying the Constitution protects liberty, or the Constitution protects federalism, or freedom of speech means a certain thing. For him, that drove a lot of the cases. So in that sense, he shares that feature with rule-oriented Justices, so that you can state the major premise, and the minor premise is not quite as important to the decision. He wasn't formalistic in that sense, so he did believe that you can state those rules at a very broad level of generality.

Professor Dorf: I believe that conflict is more interesting than agreement, so I'm going to challenge you on this Eric. This picks up on not your most recent book, but an earlier book, where you claim that the Supreme Court is not a court. The claim is—you argue it mostly based on constitutional cases—but the claim, broadly, I think, could apply to the Supreme Court and its statutory cases. It's just the stakes are lower there, because Congress can overrule them.

As I read you, you're not a full-on critic who thinks that law isn't law. You just think that law at the Supreme Court level isn't law, or constitutional law at the Supreme Court level isn't law, and so there's an easy test for that, right? Both Justices Scalia and Kennedy were appeals court judges before they were Supreme Court Justices. Kennedy was for a longer period of time, but each of them wrote a substantial number of appeals court opinions. One way you could figure out whether the Supreme Court is just making stuff up in a way that's different from what judges do generally is to compare and contrast their opinions as Supreme Court Justices versus as appeals court judges. I haven't done that, but I would be surprised, if you focused on big cases, because there are fewer of them in the appeals court, because there's a right of appeal to the appeals court, you don't have discretion or jurisdiction, but I would be surprised if there is a very substantial difference. I think that both of them wrote more or less the way they did all along. They got more comfortable in their role as they got older. They knew that they couldn't be reversed at the Supreme Court, but I suspect that this was the way he was all along.

Professor Segall: I will say that Justice Kennedy on the Ninth Circuit had to write an opinion upholding the military's dismissal of a gay person that he would never have had to write, and would not have written, had he been on the Supreme Court. I would also say that Judge Posner, who publicly criticized the *Heller* gun decision very strongly—really criticized it—struck down an Illinois law restricting guns, and he has told me that he felt he had to do that. I think the difference between the Supreme Court and the Court of Appeals always is, always has been, the Supreme Court never has to do anything.

Professor Dorf: Kennedy did not have to do exactly that, because a majority of Ninth Circuit judges in the *Watkins* en banc case ruled against the military. But of course I agree that lower court judges are bound by Supreme Court precedent in a way that Supreme Court

Justices aren't, but if we're talking about the overall style I don't think it changes much from the appeals court to the Supreme Court.

Professor Berger: Well, so two quick points. First, a response to your back and forth, and then second to your question from several minutes ago. As to your back and forth, this is stating the obvious, but I think one major difference between the role of an appellate court judge or district court judge and the Supreme Court Justice is that at the Supreme Court most of the cases that get there, especially in the constitutional area, because they're hard. By "hard," I mean that there are good arguments on both sides and that people are going to disagree about them, whereas at the appellate court level you're more likely to have at least a substantial portion of the cases be cases that regardless of your political norms and preferences, the law is going to be pretty clear how it's going to come out. Obviously, there are exceptions to that, and some of those exceptions go up to the Supreme Court, but I do think that is the difference between the roles of different courts. And, this plays into the perception—to your argument in your book—that the Supreme Court is not a court. I think there are other reasons for that too, but one reason is the Supreme Court decides a universe of cases without obvious right answers, so you're much more likely to see the Justices' norms infused in it.

On your previous question, maybe I'm twisting it somewhat, but you asked about honesty, and one thing that I think is interesting about Justice Kennedy's opinions—maybe I'm defining honesty in a particularly narrow way here—but I think one mark of honesty is recognizing in these Supreme Court cases that there are difficult arguments on both sides of the ledger, and even if you're pretty sure you're right, there could be arguments on the other side. I think sometimes Justice Kennedy was actually pretty good at that, and sometimes he was pretty bad at it. I think that's interesting. In cases like *Obergefell* and *Masterpiece Cakeshop*, he actually did—regardless of how you think those cases came down—he did a pretty good job of recognizing the values on the other side. In *Obergefell*,

he said recognition of same sex marriage does not demean those people who disagree with it, and people disagree with it for honorable reasons, and that isn't necessarily bigotry.

But then in other cases, he seemed completely dismissive of the values on the other side. So, I think in a case like *Citizens United*, he gave really short shrift to the anti-corruption interest of the government that Justice Stevens focused on in dissent.

And in a case like *Rosenberger*, he really saw that as a case about viewpoint discrimination and brushed aside the Establishment Clause issue, so much so that Justice O'Connor in her concurrence said, "Well, I agree in the outcome, but this is a much harder case than you're making it. You're pretending this is straightforward, but platitudes shouldn't be deciding a case." So I think that's interesting. On the other one hand he sometimes goes out of his way to honestly recognize that the values on the losing side have some legitimacy, and in other cases he seems pretty myopic to those competing values.

Professor Greene: Just a follow-up on that and a follow-up on this previous discussion about whether the Supreme Court is a court. I totally agree with Eric that with Justice Kennedy there was an odd mix of being totally sure that his view was the right view—I think *Citizens United* is the best example of that—and being unusually good, I think, at recognizing the range of rights or range of interests on both sides of a question. I think *Parents Involved* he does that. I think *Masterpiece Cakeshop* he does that. I think *Obergefell* he does that, as well. And maybe this is just something about what I guess Mark talked about at the previous panel about limits of empathy, but I think in Justice Kennedy's defense, I think this is something that was good about him. I think his impulse was to say we should be clear about when there are interests and values that are in conflict that are on both sides. We should be honest and transparent about the fact that a case is a difficult case. So he wasn't a Justice who thought that he should be writing a brief, where you just pretend that the arguments all point in one direction. But I do think he was unable to

see the range of interest in certain kinds of cases. Just like we all are, but we're able to point out his particular blind spots.

Just a small point on the law and courts—whether the Supreme Court's a court—question. It might be worth bringing up and re-raising the question you asked at the previous panel about *Webster* and *Casey*. So why does Justice Kennedy go from one view in *Webster* to a different view in *Casey*? It's a concurring opinion in the first instance and the controlling opinion in the other instance. And so one of the possibilities that one has to bear in mind is Justice Kennedy thinks that his role is in fact different and that in fact he actually has an obligation to adhering to a certain set of institutional norms, a certain sense of continuity when he's in one role versus another role, even within the Court. So that, I think, is suggestive of, not conclusive—we don't know what's going through his head—but suggestive of the view that even though the Court doesn't have to do anything in the sense that someone's going to make them or overturn them, but in a sense that the court does have a certain set of obligations and commitments that I think he took very seriously.

Professor Berger: Just really quickly. Another example of that I think would be *Fisher*, which is a case where based on what he'd written, or how he wrote in the past, I would have guessed that he would have been the vote to strike down affirmative action, but when he was actually in that position, unwilling to take that step. Maybe realizing that—

Professor Segall: I just want to say very quickly because Mike brought it up—not me—that the central, one-sentence thesis of that book was one thing we expect all judges of law to do is take prior law minimally seriously, that they are not expected to engage in all-things-considered decision making, there is some minimal requirement of prior law being taken seriously, and my empirical thesis of that book was we can show the Supreme Court, as an institution, has never taken prior law minimally seriously, and in the context of—I don't want to debate that here. We can if you want, but

I will say that Justice Kennedy, I think, is a grand example of someone who maybe didn't take prior law all that seriously when deciding what result he was going to reach. Do you think that's an untrue statement?

Professor Dorf: Yes. I think you're not accounting for what Eric [Berger] talked about, which is the selection bias. You're looking at the stuff that's on the surface. The cases that make it to the Supreme Court. There's a gigantic, stable body of law—*Marbury*, *McCulloch*, et cetera—that Kennedy might have disagreed with as an initial matter. That he's not going to take—

Professor Segall: Not *Marbury*. Kennedy would not disagree with him.

Professor Dorf: One reason maybe why he's sympathetic to the other side in some cases and not in others, is that he's just being honest. I once heard about a judge who said, "When I hear a case, sometimes it's 51 to 49, but when I write the opinion it's 100 to nothing."

Let me suggest that for Kennedy, if he heard it 51 to 49, he would write it 51 to 49, but that doesn't mean he's being especially sympathetic to the other side. It means he finds it's a hard case. If he's writing at 100 to nothing, it's because he thinks it's an easy case, even though some of us might think it's a hard case, and so the real challenge would be to write the opinion that's sympathetic to the other side when you think it's a 100-to-nothing case. I'm having a hard time thinking of examples of that from him, or really from anybody.

Professor Berger: I think that, I could be wrong, but I think that anecdote is something Justice White allegedly told to Justice Blackmun. Justice Blackmun had written a waffling, on-the-one-hand, on-the-other opinion. Justice White said, "Never write it that way. Always write it as though it's 100 to nothing."

I tend to think that one of the problems with judicial rhetoric at the Supreme Court, and this alludes to something Jamal said, is that they write it, the opinions are written too much like briefs, and they leave it to the others, to the dissent, to make the other side. So I applaud Justice Kennedy in cases like *Masterpiece Cakeshop* and *Obergefell* for at least recognizing that there are competing interests on the other side. Similarly, in a case like *Boumediene* when he said, “Well, the history here isn’t determinative, so we need to look to other things.”

I think Mike’s probably right, and that helps explain Jamal’s point, that in some cases he didn’t acknowledge the other side, because he just couldn’t see it. And I think that’s part of why he’s inscrutable, is he tended to put things in particular boxes, but it was just hard to know in advance which box he’d put a case into. Like in the *Janus* case this year. You could have seen that as a case about employee speech, following the *Garcetti* line, but he didn’t see it in that box, and who knows—

Professor Segall: I want to push back strongly on the inscrutable point for Justice Kennedy. In *Boumediene*, which was the case involving habeas corpus rights for Guantanamo Bay alleged terrorists, there’s a sentence where Justice Kennedy says, “We’re trying to decide what the reach of habeas corpus is.” Justice Kennedy says, “Formalism cannot resolve this question,” and he really believed that I think, in that case. Now, he may have been also responding to Scalia’s dissent, which I think he did a lot.

Justice Kennedy much more often than not put his nonlegal, I think nonlegal, value judgements front and center. So, the same-sex marriage opinions are mostly about dignity and different ways of describing that. The term limits case of the 1990s, which the young people in this room—I can’t explain what a big issue term limit was in 1990s. This was really one of the biggest issues in American politics. Arkansas put term limits on its members of Congress, and the Court was divided, and Justice Stevens, of all people, writes a 40-page opinion going through text, history, and traditional tools,

saying they're unconstitutional. Justice Thomas writes a 40-page opinion going through history and text, saying they are constitutional, and Justice Kennedy's concurring opinion spends a couple of paragraphs on the Founding, but then he says—he puts his value judgment right there and says Congress needs to have a separate identity from the states for these reasons. And we're going to talk about that later this afternoon.

Professor Dorf: It also contains his best line of poetry in any Supreme Court opinion. Describing the system of federalism, he says, “The Framers split the atom of sovereignty,” which is, I think, a legitimately great line.

Professor Segall: Right. I agree with that, so my question is—

Professor Dorf: Eugene doesn't agree.

Professor Segall: Eugene? We'll get to him later. My question, when you said inscrutable, I think, and I've written, he is the most scrutable Justice of the last, my lifetime, because he didn't, and this gets back to the conversation we're having, he did not hide behind doctrine to mask the value judgements he thought decided the case. In that sense, I'm going to say this again, I apologize, he and Judge Posner share a great similarity. Neither one hid behind doctrine to justify their results in a case. So, two questions. Is that accurate? You can disagree, and is it a good thing, if it is accurate?

Professor Greene: I guess I would say I don't think that Justice Kennedy hid behind doctrine, so I think I agree with that. Whether that is a mark of unusual honesty or transparency, that's where I might get off the train. Insofar as, I don't think there's any particular—from the perspective of honesty or transparency, I don't think there's any particular valance to being a doctrinalist versus a non-doctrinalist. So, you can do what Justice Kennedy does, which, as I said, is state a set of major premises, and then say here's what follows from these major premises without getting too wedded to the particular details of separating yourself from doctrine in a way that is

entirely nontransparent. I think when Eric says it's inscrutable, it's because we don't know how you get from *Citizens United*, when you say, "Okay, corporations have certain speech rights, it's not good to discriminate on the basis of the speaker." Jumping from that to a restriction on electioneering in the last thirty days before an election that says you can speak through a separate PAC but can't speak from your general treasury funds is obviously unconstitutional. That's not an obvious premise at all, an obvious conclusion at all. He doesn't tell us how he gets there. In *Citizens United* there's no discussion at all of in what way are PACs burdensome to set up, for example.

That should be relevant to the decision in a way that it just isn't, because for Justice Kennedy the conclusion just follows from the premise of liberty and speech. So, I don't know that I'd describe that as particularly transparent. I do agree that he doesn't hide behind doctrine in any obvious way. I think one thing that separates him from Posner though, and this does speak to transparency a bit, and is I think, to Posner's credit, at least from the vantage of transparency, which I don't know is necessarily—it's not an obviously great value for a judge, but we can get back to that, but—

Professor Segall: Say that again, sorry.

Professor Greene: It's not obvious that judges should always be transparent. I don't know that that's—they shouldn't necessarily be maximizing transparency in writing decisions, but that's a separate point. Posner is clear that he is not bound by doctrine. He will tell you that. He says, "This is my philosophy. I don't believe in doctrine." Kennedy doesn't say that. We have to just sort of read that into his opinions. And I think that's a significant difference when we talk about transparency. Is Kennedy—sometimes he's bound to doctrine. Sometimes he isn't, and he doesn't tell us how that's driven by any set of philosophical premises. You just have to sort of figure it out by reading his cases.

Professor Segall: Posner did say that he would check to see if his result was blocked by a Supreme Court precedent. Go ahead Mike.

Professor Dorf: Or Circuit precedent. So, there have been lots and lots of Justices and judges who are not formalists, right? Indeed, it's conventional wisdom that we are all legal realists to a point, and then the question is to what point? One of the interesting questions about Justice Kennedy, with respect to the lack of doctrine in some of the cases, is why he did it, given how easy it would have been in any of those cases to write a much more straightforward opinion reaching the same result using the standard doctrinal formulations.

Indeed, after *Lawrence v. Texas*, which struck down the Texas ban on same-sex sodomy, there were a whole series of lower court cases as to whether the case made same-sex, or opposite-sex, intimate sexual relations a fundamental right. And so there was litigation over a sex-toys ban in which, I believe it was the Eleventh Circuit, said no, it wasn't a fundamental right, and they cited passages in Kennedy's opinion in *Lawrence*. If he had just said that it wasn't, it would have been easy. And, in fact, after the case, Larry Tribe wrote a piece in the *Harvard Law Review* on *Lawrence*, referring to the "fundamental right that dare not speak its name." Tribe showed how passage by passage Kennedy actually used the language that we normally associate with the doctrine of fundamental rights, but he scrambled it up like it was a word jumble, so it didn't have the exact formula. Why did he do that?

I confess, I don't know the answer to that question. One hypothesis might be that if you're an anti-doctrinalist, you preserve your freedom to decide later cases in ways that you want. Chief Justice Rehnquist was accused of doing this sort of thing. It's not that Rehnquist was an anti-doctrinalist, as somebody pointed out. I think it was Jonathan in the previous panel. He wrote these very short opinions in which there wasn't a lot that you could cite then as a future precedent. But, I don't think that's what Kennedy was up to. So, I do confess to being a little bit puzzled by some what seemed to me gratuitous anti-doctrinalism.

Professor Berger: On your first point about him being more honest in terms of admitting his value judgements. I think that's probably true, in comparison to most of the other Supreme Court Justices. I don't think it's true in comparison to Judge Posner, who I think is the paragon of candor as a judge.

What I meant when I said he was inscrutable—I guess I meant three different things. The first is what Mike just referred to, is he writes these opinions that are so un-doctrinal that it's hard to know how they apply in future cases. So, the sex-toys cases in the lower courts after *Lawrence* are an example of that. He doesn't even tell you what tier of scrutiny, so you don't know. Is he applying rational basis, or heightened rational basis, or some kind of heightened scrutiny, or is he just abandoning the tiers of scrutiny altogether, and that's part of why you have that mess. So, it's inscrutable in terms of going forward, how is this going to apply?

I think he's also inscrutable in that there are some cases that you can certainly justify them and find ways to square them with earlier decisions, but they were hard to predict, based on earlier things he did. So, I alluded to *Fisher*. I thought that was, at least to me, surprising, after *Grutter* and *Gratz*. I think *Gonzales v. Carhart* is hard to square with *Casey*. I mentioned earlier, I think there's at least an argument that *Janus* is hard to square with *Garcetti*. You can do it, but it's hard.

And then the final reason I said he's inscrutable, and Jamal alluded to this, he says these things and it's just hard to know why he thinks them or why he thinks it's doing the work he's doing. So, for instance, he makes questionable empirical assertions of two different sorts. One is he'll cite numbers, but it's unclear why he thinks they're that persuasive. So, Corinna's written quite a bit about state counting in the Eighth Amendment area. So, in the *Graham* case, for instance, about life in prison without parole for juveniles who are convicted of a non-homicide crime, he talks about how the world—public opinion—is turning against this practice, but then a significant

majority of states and the District of Columbia, I think it was 37 states, still had it. And there are ways to explain it away: it wasn't imposed that often, and the trend seems to be against it. But he seems to hang a lot on this empirical assertion, but it's not clear it's doing that much work for him.

Then in another case, he makes these empirical assertions without any evidence at all. So, in *Citizens United*, he says the populace will not lose faith in our government because of the corporate influence in our government. He cites nothing for that. In *Gonzales v. Carhart*, as mentioned in the first panel, he makes assertions about women coming to regret abortions, and that can lead to depression. I think he cites an amicus brief, but that certainly isn't strong empirics. So, I think that's inscrutable as well. He seems to be putting a lot in these assertions, but (a) why does he think they're that important, and (b) where's he getting this stuff?

Professor Segall: One way Justice Kennedy I think definitely was a true judge, in the sense of temperament, was Justice Scalia criticized him in ways that Scalia used to criticize O'Connor, but O'Connor wasn't around as long as Kennedy. And even as far back as 1992, in *Lee v. Weisman*, when the court struck down graduation prayers at high school graduations—and that really did alienate much of the right—Justice Scalia's dissenting opinion accuses Kennedy of all kinds of terrible things. And then, of course, in *Obergefell* he talks about putting a bag over his head and all that. Justice Kennedy never, to the best of my knowledge, responded to any of those criticisms—and there's many others—those criticisms in the way he could have with that kind of rhetoric, that kind of tone.

Professor Dorf: What's he going to say? No, I put a bag over *my* head.

Professor Segall: Well, right, but Scalia accused him—I forget the exact phrase—but Psychology 101 or something in *Lee v. Weisman*—

Professor Dorf: In the same footnote where Scalia says you ought to put a bag over his head, he also compares the majority opinion to the inscrutable mysteries of a fortune cookie.

Professor Segall: Right, so here's my substantive question about this though. I respect Justice Kennedy for not taking that road, on the one hand. On the other hand, would his opinions maybe have been, over the course of time, more durable, more effective in the way that Scalia's dissents turned out to be, I think, had he resorted to a little bit more taking off the gloves and responding to Scalia's attacks directly?

Professor Dorf: First of all, I challenge the idea that Scalia's dissents are durable. In his *Lawrence* dissent, Scalia says, "Well, you gay people control the media, so what do you expect?" I'm not really exaggerating that.

Now, of course everybody—no one can escape the prejudices of their age, and so there's all sorts of stuff that's not going to hold up. We teach the first Justice Harlan's dissent in *Plessy* as this great visionary thing, and we typically don't talk about the blatantly racist, anti-Chinese sentiment in there.

So, I'm not sure that's the right question. I was thinking about this conference awhile back and thinking that it's premature to be talking about Justice Kennedy's legacy. What will be his legacy? So much depends on who the next appointment is and the one after that, and then I thought, in a way, that's the wrong way to think about it. Instead, I tried thinking about this the way a historian might. If I think about the Supreme Court in some earlier period, whether it's in the 19th century, the early 20th century, et cetera, part of what I want to know is how much of the law that they decided is still good law. But even more than that, I really want to know what does this tell us about the period in which they lived?

For a period of nearly 30 years, Justice Kennedy was either one of the two most important people or the most important person for the

meaning of U.S. law across a wide range of issues. And even if all of his opinions are overruled, he'll be an important figure for that. I don't really think that answers your question, but I do want to push back a little bit on this idea that the way we measure a Justice's impact is by how many of his or her opinions continue to be good law a generation later.

Professor Segall: We have about five more minutes before we ask questions, but I want to say that's a sophisticated-law-professor way of looking at it. To gays and lesbians who want rights, how durable his four opinions are is very important, and I think how he wrote those opinions may or may not be relevant to their durability, but that durability is a very important thing.

Professor Dorf: I'm amazed to hear you say that, since you think doctrine doesn't matter at the Supreme Court.

Professor Segall: I don't think doctrine matters at the Supreme Court. I do think the way the Supreme Court is perceived by the public matters to future Supreme Court cases, and how justices write opinions can sometimes, on these big issues, matter to the public. Eric, you wanted to say something.

Professor Berger: A couple of points. I actually admire Justice Kennedy for taking the high road, and not—

Professor Segall: Me too.

Professor Berger: I think the Supreme Court does better than the vast majority of American society disagreeing with some modicum of respect, but some Justices do better than others, and I admire Justice Kennedy for not descending to Justice Scalia's level. I don't think that will affect his durability.

I think what might affect how enduring his opinions are as a matter of law is—and I'm not sure I'm right about this, just sort of throwing it out there—but because they're less doctrinal, you're more likely to have confusion in the lower courts about how to apply them, and that

might make them more likely to get up to the Supreme Court, which could rewrite it, overturn it, or rewrite it in a way different from what Justice Kennedy intended.

That said—and this is actually a point that I saw that Jamal made after Justice Kennedy announced his retirement—regardless of how many of his opinions are still good law, Jamal made the point that he wrote an incredible number of really important opinions. I think Jamal said more than anyone since Chief Justice Marshall, and I think that will probably endure regardless of how the law changes. He'll be seen as an incredibly important Justice of this period.

Professor Greene: Along those lines, I guess I also am going to dissent a little bit from the—I think I'll dissent generally from the premise that how Justices write opinions is likely to have very much effect on the durability of those opinions. I think what the particular issue is and how they decide it has an effect on durability, and how society evolves obviously has an effect on durability, but, of course, as Mike points out, you look at *Lawrence v. Texas* and Justice Scalia's opinion, and we, as law professors, read these things, and so we develop opinions about them, and Justice Scalia always has a few putdowns and a few sharp lines, but, of course, Justice Scalia was in dissent in *Lawrence*, and in *Lawrence* then makes a prediction about if we go down this road same-sex marriage is coming next. You watch out! And, lo and behold, he's right about that, and he's also in dissent in that case. We just had a panel, which Pam said and Mark said this is about as durable a precedent as you're going to get, and it was decided three years ago. So Justice Kennedy is the winner in that series notwithstanding that Justice Scalia has some better lines. He lost.

Professor Segall: That makes sense. Eric, I want to say one thing about the lower court confusion about non-doctrinal decisions. Mark Tushnet wrote a long, long time ago about the dormant commerce clause that some verbal formulations are easier to evade than other verbal formulations, and federal judges and their law clerks, at the

district court level especially, are overworked and don't have endless time. Legal realists say that how hard it is to avoid a decision you want to avoid is relevant to whether you're going to avoid it. So, I think that might make a difference in the long run for the reasons you said, that these cases are more easy to litigate in the lower courts, the more room the lower courts have. Alright. With that, let's take some questions from the audience, if we have any questions from the audience.

Professor Corinna Lain: Corinna Lain—can you hear me?

Professor Segall: Yes.

Professor Lain: Okay, so two brief reactions to that, mainly off of the last comments. The first is it occurs to me that you're right. Kennedy wrote so many of these most important decisions, and I think it's because they were 5–4, and they needed Kennedy's buy in, and there was some sense of he might not sign on to anything that the libs are going to write. And so, this comes at the same time that I'm thinking the moderate, the swing judge, it's gone. I don't think we're going to have that. I guess Roberts becomes the swing judge, but that's not much of a swing. So my question is do you think—and I've got two. Here's the first one, though: do you think that those days are over, that there won't be another great judge or Justice, that can you say wow, wrote all of these really important opinions, because at this point we don't have a middle anymore? And then my second one goes to Jamal's point, and it is you said Kennedy won on the same-sex marriage despite the fact that Scalia had some better lines. I agree with that. I also agree with the first panel, Mark Tushnet and Pam, saying this is about as stable as you get. And I think the reason that's true is because the Supreme Court was catching up, and the Supreme Court there was just lagging behind where society was. And so, I've been thinking about the Supreme Court as going down the tubes now, candidly, but maybe that's not so. I think what we're going to see again is a court that lags behind where society is. And so maybe by the time they recognize it, we will have more celebrated

decisions, because society has already passed them by. Anyway, those are my questions and comments.

Professor Greene: Can I just make two quick points on that? One is the fact that Justice Kennedy was the swing Justice, I think might plausibly have had some effect on his writing style. One thing about Justice Kennedy is, in a lot of the cases, he wasn't afraid of losing someone in the case. And so that gives you a lot of freedom to write in exactly the way you want to write, whereas if you're worried about losing some other person or losing Justice Kennedy, you might be much more careful on how you write.

Just on the point about whether we're done with swing Justices: of course, whether someone is a swing Justice depends on what else is going on in the world. So, if you would ask me, if you had told me all the things Justice Kennedy does in 1985 and said here's your swing Justice. That's not a swing justice. That's a pretty conservative Justice actually. But he becomes a swing Justice, because the rest of the court also moves over time, and I think it's quite plausible—who knows what'll happen—but quite plausible that you could see something similar happen in the future. So in the last term of the Court, the most frequent—so John Roberts was the plus one more often than Justice Kennedy was. In fact, Justice Kennedy was never the plus one in cases with the liberals. So all the cases in which the liberals won 5–4, the other Justices were someone other than Justice Kennedy. So over time, I could very easily see someone like John Roberts, who's looking out for how fast the Court moves in a certain direction, even as he's quite conservative himself, looking out for how fast the Court moves in a certain direction and ending up being a backstop simply because the rest of the Court is so much further to the right than it was even when he joined the Court.

Professor Segall: We will be discussing the median Justice idea, the swing vote idea, in the last panel today.

Professor Dorf: Just on the point of lag: people who have studied the constitutional history more closely than I have—and I'm thinking

especially of Barry Friedman's book *The Will of the People* as well as Michael Klarman's work—conclude that the basic lesson of that history is that on average the Supreme Court lags, and that makes sense given the way in which Justices are chosen. The Court occasionally gets out in front, but when it gets more than about a standard deviation away from the center of public opinion, it's brought back. This view would suggest that the Supreme Court doctrine is epiphenomenal, that is to say controlled by some other thing: namely where society as a whole is going. If that's true, broadly speaking, then it doesn't matter that much, so that's what I tell myself.

Professor Segall: Barry Friedman just said a few months ago that he thinks this new Court is going to be way, way, standard deviations away from—

Professor Dorf: If he's right about lessons of history, then eventually it'll get reined in.

Matthew Haan: Hi, I'm Matthew Haan. I'm a member of the Law Review here. Y'all took some time at the beginning talking about who you think Justice Kennedy was writing for in certain cases, and I'm wondering if you have any opinions about who Supreme Court Justices, in general, should write for, if anyone, and whether that changes based on the issue presented to them.

Professor Berger: I think in a way they're writing for lots of different people, and that's what makes it a hard job. I think they do have some role to provide instructions to lawyers and lower court judges about how to apply the doctrine in future cases. The legal realist critique that Eric makes very well might be correct, but at the end of the day there are going to be future cases, and lower courts are going to have to decide them.

On the other hand, the law is important—it's so important that you can't leave it to just lawyers. So I do think there's some sense in writing for the general public and writing in ways so that someone

who picks up a newspaper and is just reading snippets of the opinion can follow.

Professor Dorf: At a minimum I think all judges should be writing for the parties in the case and especially for the losing party. Okay, you lost this case, but I'm going to try to justify it to you. This goes to this question about graciousness and the non-response to Justice Scalia. One reason not to be too snarky, or catty, or worse, to make jokes in an opinion, is that somebody's going to lose this case, and for them, if they think it's been treated as a joke, that's pretty bad.

Professor Mark Tushnet: Mark Tushnet, Harvard Law School. I want to get back to the starting point about prose style and bring in something that Michael suggested, which is that it might be valuable to historicize the prose style issues. So one way to think—there's this great essay by Edmund Wilson about Oliver Wendell Holmes called 'The Chasing of American Prose Style,' and he tries to historicize why Holmes wrote the way he did. So this is really a shorthand version of this, but think about four Justices and how you might historicize their prose style.

This is really shorthand, so Justice Scalia is talk radio, and Chief Justice Roberts and Justice Kagan are NPR. What's weird about Justice Kennedy's prose style is that it's some author from the late 19th century. Not that in the late 19th century the way he wrote would have been strange, it's just that now it is a little. And this connects to the audience that is the people, all of us today, are located today, and we read things as contemporaries, and so if you are appealing to any body of contemporaries you have to write in a way that corresponds to one of the modes of communication available to that. And, again, this is—in some ways, it connects to the anti-doctrinalism or the opacity of the reasoning in Justice Kennedy's opinions, because they don't communicate in a way that is effective for contemporary audiences, even if you can look at them and rework them to make them effective communications. That's an observation.

Professor Dorf: Can I say one thing about this?

Professor Segall: Yes.

Professor Dorf: That strikes me as exactly right. One thing that puzzles me a little bit is why Justice David Souter never got the same level of criticism on this particular point, because he also wrote like he was living in the 19th century. I think there's an opinion in which Souter uses the word 'enquiry', which he was very fond of doing, with an E, and Scalia in dissent quotes it. I don't remember whether he writes "[sic]" next to it, but it's as if he does. But Souter got a pass on his style, perhaps because he wasn't seen as that important in terms of the Court's substantive dynamics.

Professor Segall: Last question. Yes?

Lawrence Ashe: Lawrence Ashe. Curiosity question relating to Scalia's noted snarkiness and Kennedy's fire to fire back: Scalia and Ginsburg are notoriously good friends off the bench. Their families travel together, play poker, and so forth. What was the relationship, on a personal level, between Kennedy and Scalia?

Professor Segall: Do we know?

Professor Dorf: They were neighbors. I think it's a little bit like Blackmun and Burger. That is, they were close initially, and then they kind of drifted apart.

Professor Segall: There is a story—I do not know if it's true, maybe Mike does—that Scalia did accost Kennedy verbally outside of his house after—it was either *Casey* or *Lee v. Weisman*. I don't remember which one, but we'll let that sit there.