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PANEL 6: THE MEDIAN JUSTICE

MODERATOR: ERIC SEGALL

PANELISTS: JONATHAN ADLER, LEE EPSTEIN, AND SASHA
VOLOKH

Professor Eric Segall: This panel maybe should have been the first panel, I don't know, it was a close call. It was going to be first or last, and I chose last, and it may have been a mistake. This is the panel where we're going to talk about the idea that we've been talking about all afternoon, of Justice Kennedy being "the median Justice" and being the, obviously, most important Justice of the last seventeen years and maybe the last thirty years. Lee Epstein is just a hall of famer when it comes to Supreme Court data and databases and these kinds of issues.

So, I'm going to start by just asking Lee to describe what we mean by the Median Justice, how powerful a median justice Justice Kennedy was, and how valuable is this idea at all?

Professor Lee Epstein: Sure.

Professor Segall: I'm sorry, I did not do the schools, I apologize. Sasha Volokh is from Emory, and Jonathan Adler, who you've met before, is from Case Western, and Lee's teaching at Washington University. I'm sorry.

Professor Epstein: The median Justice is the Justice in the middle of a distribution. The distribution could be anything, could be the number of children they have or their ages or—but usually, when we talk about the median Justice on the Supreme Court, we're referring to ideology. So, the median Justice—the middle Justice—half the Justices are to that Justice's left, more liberal and half to the right, more conservative. I think that's what we typically mean. We could

talk about a distribution on originalism or other methods, but that's not typically the case.

Professor Segall: And how dominant was he as a median Justice?

Professor Epstein: We did some calculations on this. We went back to 1937 to present, 2017 term. That's eighty-one terms. It turns out during that eighty-one-term period, there were nineteen median Justices, but I would say Justice Kennedy dominated. He was, of the eighty-one terms, he was median Justice eighteen times. Byron White: fifteen times; Sandra Day O'Connor: nine; Reed: six; Clark: six. When we created that list, one question—am I allowed to ask questions, or you are the only one?

Professor Segall: Please. I'd rather retire, so please.

Professor Epstein: Here's a question about that: these are the kind of the super medians, the people who held positions of power for a very long time. It's not a very distinguished list in the sense of—I don't really think of Reed, Clark, even Byron White, I don't think they have much legacies that they've left on the Court. Mike Dorf made an interesting point earlier that when he thinks about legacy, he thinks about it in a historical way. When we think about the period from 2005 to 2017, we think about a period of domination by Justice Kennedy. So, that's one way to think about it.

But another is, Eric, more what you were talking about, is today, what do we think? Have their opinions had enormous effect and they're still around and so on. Maybe being a super median, like a Justice Kennedy, is not a good thing for your legacy.

Professor Segall: You guys want to respond to that?

Professor Jonathan Adler: Well, go ahead.

Professor Sasha Volokh: I think there are many ways that you can be a median. For example, if you're a median because you have wishy-washy views—where you have no philosophy and you split

the difference between everybody—then you're the median and you determine a lot of decisions. But then, since you had nothing original and distinctive, no one thinks of you as someone distinctive. On the other hand, you could be a median Justice because you really do have something—a distinctive view—which just, by coincidence, happens to be in the middle on some particular issues.

So, I think there's no reason to inherently expect that the set of median Justices is particularly distinguished. Maybe we can compare this with parliamentary politics, where there's going to be some median, small political party that can throw its weight around. Are those median, small political parties the most brilliant politicians, the most statesmen-like, or are they just the ones that happen to be necessary for a coalition? And so, I think there's probably not much that we can say as a matter of principle about whether this should be a distinguished group.

What I found interesting is, you brought this back to the discussion earlier in the day about whose legacy is more enduring. And I think one thing I didn't really like about the earlier discussion was that there was an effort to connect who was more significant with how long it takes for their decisions to be overruled. If you take the simplest-possible political science model where any new majority can just change the decisions of an earlier majority, it's always the median Justice who dominates.

Then, if you have a Justice Kennedy, and if, as soon as he leaves, his decisions keep being around, all that means is that the new median agrees with Justice Kennedy on those issues. And so, in a sense, that makes Justice Kennedy *less* important—because it means he's less distinctive. He just happens to agree with later median Justices on what the proper rule is. In fact, if Justice Kennedy had a distinctive rule that he was pivotal to, and if immediately that rule is overruled, that actually means that Justice Kennedy was more important—not enduring—but for the time that he was Justice, he

was absolutely necessary for that rule, and he was the person without whom that rule wouldn't have existed.

So, it's not necessarily true that somebody who is more significant is going to be more enduring. It could go either way, I think.

Professor Epstein: That strikes me as a variation on Mike Dorf's earlier point.

Professor Segall: Let's bring this back to the ground just a little bit. From 2005 until June 30th, or whatever it was, of this year, in virtually every constitutional law, divided, five-four opinion, Justice Kennedy was in the majority. That's a long time. And that transcends affirmative action, abortion, campaign-finance reform, and ten other things. Doesn't that make him unbelievably important, Jonathan?

Professor Adler: Hugely important, and this comes out in Lee's data. Justice Kennedy was in the majority for 83% of the time in his entire career, but if you just look at the period of the Roberts Court, it's in the 90s. With the exception of two terms in the Roberts Court, he was in the majority more than anyone else. The Chief Justice, who you would institutionally expect to be in the majority more than any other Justice just because of his being Chief, twice was one or two percentage points ahead of Kennedy.

What that means is you can't understand this period of the Court without understanding Justice Kennedy. And the other thing that I think that you don't see as much in Lee's data, but I think is important is that while Justice Kennedy was the median Justice, he was not the middle-of-the-road, split-the-difference Justice that arguably Justice O'Connor was at least in a certain set of cases. Justice Kennedy's modal tendency as a Justice was to be a moderate conservative. That is to say, if you were to count by numbers, he was a moderate conservative in more cases than any other.

But in some of the areas we've talked about today, where he really cared about the subject matter, he might not have been particularly moderate, and he might not have been particularly conservative. And

so, in those areas of the law, he still was defining the Court's doctrine, but not in a split-the-difference way. When he cared about a particular First Amendment issue, *Citizens United*, he was arguably the farthest right Justice in that case, and he determined what the Court did, not Chief Justice Roberts.

We could argue on issues like same-sex marriage, whether or not he was the furthest. But certainly, he was the one that made aggressive opinions in those areas possible, because he was the vote that the liberals on the Court were worried about losing. And so I think that makes him a particularly distinctive type of median Justice because he stands out when you look at the list of other people Lee identifies in terms of legacy, in terms of impact, on the shape of the court's doctrine.

And whether you like it or don't like it, whether you think his opinions are going to last or not last, that means this period is defined by Justice Kennedy in a way that no period on the Court when Justice White was there is defined by Justice White, in a way that I don't even think the '80s were defined by Justice O'Connor. That's a type of significance that you can't dismiss.

Professor Epstein: Just to reinforce Jonathan's point, if you look at the data, Kennedy is the only median to have been the median for an entire Chief Justice era. Nobody else can lay claim at least going back until 1937. That is a major distinction.

Professor Segall: It's late in the day, so I have a big question that I think is not data oriented, I don't think. I agree with everything you just said, Jonathan, which is a sentence I hate uttering, but I do, I agree with everything—

Professor Adler: I hope someone got that on tape.

Professor Segall: I agree with everything you just said. So, we lived in a country from 2005 to 2017 where one person really directed almost the entire gamut of litigated constitutional law questions. Shouldn't we maybe, and I think Lee's going to say that was an

historical aberration, but shouldn't we maybe rethink this idea that one person can have that much power.

Professor Volokh: I don't know that there's anything inherently wrong with that. That is, whenever you have a bunch of decisions where you can put people on a spectrum and you have the single-peaked-ness assumption and so on, mathematically there's going to be a median, and whoever's the median will determine the rule in that case. There's going to be a median for a bunch of different cases. Now, sometimes it might turn out that coincidentally, one single person happens to be the median in a lot of areas.

Now, should we attach any significance at all to the fact that a single person happens to be the median in all the areas because he's most moderate on all things? Would it be better if we had two people, Kennedy and "Schmenny," and Kennedy happened to be the median on all of the hot button social-rights issues and "Schmenny" was the median on all of the formalism, separation-of-powers issues? Would it be better if you just happened to have two separate people?

But I think that as long as every case has a median, then that's just a mathematical property of the decision process.

Professor Segall: Jonathan.

Professor Adler: Yes and no. It's the old joke that for the last decade it's been Justice Kennedy's world, and we just live in it or just try and teach it, or whatever. I agree it's the nature of the process. And, if Lee was going to argue that it's an aberration, I think I probably agree with that. There are certain things you would expect to see in a median that we didn't see in Justice Kennedy. And there was a degree of stability, coalition stability, in that period, which I think is somewhat unusual at least as well.

And so, it's not clear to me that that is a permanent or enduring feature. We are arguably, depending on what Susan Collins is finally announcing at this moment and whatever else, entering what we

might characterize as the second Roberts Court, a Roberts Court that's going to be different in many ways than the first Roberts Court, or what we might've called the Kennedy Court. Maybe Roberts will be the median on that Court, he will be a very different median.

Is it going to matter that it's one person? I'm not so sure, especially given that in 50% of the Court's cases, it's going to still be deciding things, nine-zero or eight-one. And for much of our legal system, those cases still really matter.

Professor Volokh: I should mention that for pedagogical purposes, I do dislike—I'm going to agree with you on this pedagogical point. When I teach first-year con law, everyone comes into con law with opinions about whatever—they think it's all going to be abortion, gay rights all the time. And they also come into it with basically the attitudinal model of voting—they realize that, “Oh yes, we're all legal realists, and it all comes down to what you think about the merits of abortion.”

In a sense, they are very close to thinking the doctrine is epiphenomenal. And I don't mind that. I think legal realism is probably very true. But, I don't want them to necessarily come to it with that view and stay strongly with that view. I like to undermine it when possible. So, I always like it when I teach the separation-of-powers cases where there are cross-cutting, not left-right coalitions. That's one reason why I also like to teach admin. So, there are areas where, even if it is still attitudinal, it's attitudinal in a different way, and you have coalitions which are not left-right ones.

In fact, I have data on this because I looked back for the last ten terms: What were the five-four decisions where the winning coalition did not include Kennedy?

Professor Segall: In con law or across the board?

Professor Volokh: Across all Supreme Court cases. SCOTUSblog and *Harvard Law Review* have statistics that are exactly designed for just that thing. And so, one big area is what we've talked about, the

criminal procedure decisions, the *Apprendi-Blakely* type things, and some Fourth Amendment things, and Confrontation Clause where either Scalia or Thomas or both join liberals. And so, you've got *Carpenter* in the last term, that's a little bit different, but there's *Jardines* and *Alleyne*, there's *Bullcoming*, *Magwood*, *Melendez-Diaz* and *Gant*. So, you basically have these seven cases that are these kind of *Blakely*-style, I'm going to say—

Professor Segall: Five-four cases?

Professor Volokh: Yeah, five-four cases where it's often, for example, a typical one would be Scalia, Thomas, Stevens, Souter, Ginsburg, or Scalia, Thomas, Ginsburg, Sotomayor, Kagan—something like that. Then you have some where Kennedy has a very distinctive view, where he has a more First Amendment protective view and he just happens to be in the minority on that. So two cases in the 2014 term, *Williams-Yulee*, about judicial elections, and *Walker*, on the license plates.

And then there are some which are more along the lines of very procedural, separation-of-powers cases, where you just have different coalitions like *Hollingsworth*, the Prop. 8 standing case, or *Shady Grove Orthopedics*, which is about *Erie* and the Federal Rules of Civil Procedure, where you just have coalitions that look very different. I just like that those cases exist, and I like to stress them.

Professor Segall: Well, your data is interesting, and maybe you have the numbers for this—

Professor Epstein: I just wanted to get back to your question about the value of a median. We've talked the first few minutes here, we're talking about how distinctive Kennedy was, and one of the reasons he was so distinctive is that there was a reasonably sized gap between Kennedy and the right side of the Court and Kennedy in the left side of the Court, not so last term. And that's very, very unusual. Usually, we have a softer middle. So, the left can jump over the median to make a coalition with the right, right with the left.

You're very focused on Kennedy as the median, but he's quite unusual. We'll see a very different set of circumstances next term.

Professor Adler: I'd like to just add one thing, too, about the gap that Lee's data shows in terms of making Kennedy more of a super median and so on. Combine that with the persistence over multiple terms is really where you get the significance because any given term the mixes of cases is such that you're not getting a full cross-section of the range of cases that the Court experiences. You can imagine mixes of cases that produce lots of different Justices as medians if you don't have this characteristic that Lee just identified of the space to either side of that Justice.

And it's that space that means that in term after term with different mixes of cases, with different issues before the Court, you replicate the same phenomenon. It would be really interesting, and I think peculiar, if that dynamic were to reassert itself in the near future.

Professor Segall: I'm obviously more critical of the institution than other people, but if Hillary Clinton wins, and Merrick Garland gets on the Court, and Kennedy stays on longer or whatever, we may be entering a polarized age where any moderate, conservative or moderate, liberal Justice is going to be the median. So I agree with—your data is what your data is, and Kennedy was a historical aberration to that point. I think we live in a Merrick Garland-dominated—it's possible we live in Merrick Garland-dominated world if Hillary Clinton wins the election.

That's a hypothetical that obviously could have happened. One other question, though, Lee. I assume from your data that if a historian was writing today and looking at the Supreme Court over time, Justice Kennedy has been the most dominant Justice by far in a very long time.

Professor Epstein: On virtually any indicator I can think of. If you can think of one I haven't, then—

Professor Segall: Well, I don't understand your—I'm not a data person, but I don't understand your data because my understanding is in virtually every year of the Roberts Court, Kennedy was in the majority in over 90% of the five-four decisions.

Professor Volokh: Yes. I am not making a point that these cases are dominant or anything. I totally agree. It's interesting when we talk about median Justices, I find it interesting to stress that—let me put it this way: merely talking about Kennedy as the median Justice, I think, gives a lot of emphasis to a strict, not just attitudinal model of voting, but a strict left-right attitudinal model of voting.

And I just think it's useful to point out to people, and in particular to point out to beginning students, that it's not all like that—that much of it is like that, and the attitudinal model is not wrong, and legal realism is not wrong. But it's useful to look at areas where either there might not be a median, or the median is something different, or the coalition is different. Just by way of comparison, my total list of all the cases for the last ten terms where there was a five-four majority that didn't include Kennedy—there are twenty-six of them, so it's not a large set, but I just find it's useful to talk about them.

Professor Segall: I mean, twenty-six out of seven hundred—not seven hundred, this is just five-four cases.

Professor Volokh: Only five-four cases.

Professor Segall: I do want to make one comment about your—well, Jonathan, this is a recurrent theme of our Twitter wars. Jonathan likes to point out that 50% of the Court's cases are nine-nothing or eight-one or seven-two, whatever, or some high percentage. And there's an important point about that, which is, they select their own cases, and they're not going to take seventy-five cases, or seventy cases out of seventy-five, that raise ideological issues that will divide them because they know—at least in the current seventeen years—they knew if they did that, if they were five-four 80% of the time,

90% of the time, the American people would view that institution very differently than when they are unanimous 50% of the time. And they control that.

Professor Adler: I don't think that's the dynamic at all. This Court more than any Court, certainly in my lifetime, but in a long time. Yes, it's a discretionary docket. The mandatory appeals docket has shrunk to almost nothing. It's almost a pure certiorari docket. It's also a Court that applies what you may characterize as traditional criteria for certiorari very strictly. That is to say this Court is really looking heavily for Circuit splits or other things that are distinct reasons to grant, such as the striking down of a federal statute.

It's rare that they take a case that doesn't fall into one of those two categories. There are a handful a year, really not very many, and the vast majority are Circuit splits. So what that means is that they are only taking cases in which really smart, really thoughtful lower court judges have already disagreed with each other. You can argue that they don't take every Circuit-split case every year, but if you look at the ones that they deny, there often are obvious vehicle problems, or they're cases where there's at least a plausible argument that they want things to percolate.

And so, to me at least, when you look at that, the fact that they're not five to four in virtually all of those cases is the remarkable thing because they are picking cases that lower courts have already shown people operating in good faith are going to split on. And the fact that they can be 9-0 in even 30% of those cases is notable. They are taking the hardest cases about which we would least expect unanimity and finding unanimity a decent number of times. And when they split five-four, I forget the exact number, I think it's about two thirds of the time it's on ideological lines or about that amount during the Roberts Court. And you'd expect that of the five-four cases. But I look at the data, and I say, "It's surprising they're not splitting that way more often within the nature of the docket now."

Professor Epstein: Isn't your only point really that they can use docket control to look more or less political?

Professor Segall: I have two points. That's one of them. And I think they—I'm not saying they sit in a room and say, "We're not going to take," but I think it does happen. Justice O'Connor at this law school, albeit after her retirement, was asked about her favorite cases, least favorite cases. And she gave a remarkable answer that in some ways wasn't a very nice answer. But she said two things. She said, "I just never—Native American cases just drove me nuts, and, of course, nobody ever wants an ERISA case." That's a direct quote. "Nobody ever wants an ERISA case." It's pretty much a direct quote.

Professor Volokh: It's not wrong.

Professor Segall: It's not wrong. I wouldn't know, but yeah, I think it's not wrong. I think, Jonathan, one of the points that you are overlooking is there are a lot—we have clerks here, all kinds of Supreme Court clerks here, and I did not clerk for the Supreme Court. But it is my impression, talking to people and observing, that there are many cases they don't care that much about, and when they don't care that much about it, they will join a unanimous or eight-one or seven-two decision without spending a lot of time and angst on it. And Justice O'Connor implied that pretty strongly when she was here.

Professor Adler: That might be true, but if I'm the Chief Justice--and remember,—if we're going to identify a single member of the Court who's responsible for this shrinking docket, Rehnquist clearly had a role in that when he was Chief and Roberts does now, but if his goal is to make the Court look less political by having more unanimous decisions, you don't have a sixty-five-case term.

If your goal is to have a Court that looks less political by having more unanimous opinions, you would grant an additional forty cases that you know are all going to come out nine-zero, and then your numbers look great. So, if that's what we think is going on, that

doesn't explain the behavior that we see. It may be that when it comes to ERISA, no one's going to go to the mat fighting over how to interpret the third comma in a sentence or something.

I'd accept that. But if cert. is being used to make the Court look less political, they're doing the exact opposite of what they would be doing if that was their goal.

Professor Epstein: Take sixty-five ERISA cases.

Professor Adler: Well, they could do that too.

Professor Volokh: By the way, I suspect that if we looked at some term where the conference notes were available, then there will be a lot of cases where it's not that there was some initial division at conference, but then, because it was a very low-stakes case, everyone decided to join what was initially a five-four vote. I think at conference you would even find that it was nine-zero in the voting, so it actually probably even looked easy to the law clerks and in the initial discussions in chambers.

Professor Segall: The docket has shrunk significantly. That's clearly true. There may be different theories about that. Certainly, Judge Posner would have some interesting theories about that. One of which is, it has nothing to do with what you were mentioning, but they just want to do less work with their four law clerks. Do you think the Court uses docket control to appear less ideological?

Professor Epstein: I think it certainly did in the 2016 term. It was a very low-key term. There were no big constitutional cases on the docket. They had their most consensual term in about fifty years.

Professor Segall: You're baiting me here. You mean the term they were four-four? That evenly divided four-four term?

Professor Epstein: But it was a lot of other things going on. There was the Merrick Garland fight. There was an election. It's overdetermined why they did it, but they did it.

Professor Adler: And they are behind now. The long conference this year produced I think only five grants or something. And we can understand that. I think if you want to tie Kennedy into this, I think the Chief Justice's vision of a Court that is less political or that is more like the umpire --you can ignore and not the fret about the balls and strikes part. Think about his comment—about Roberts's comment—about how(I'm going to paraphrase it), you don't go to the game to watch the umpire. If you're talking about the behavior of the umpire after the game, that wasn't a good game. You want to be talking about the players.

So, for that vision of the Court, docket control, taking fewer cases means fewer calls the umpire has to make. And when you look at the Chief Justice's approach to questions of justiciability, you see that. And what's interesting about Justice Kennedy is Justice Kennedy, for a variety of reasons, wasn't on board with that broader project of reducing the number of cases. He had a tendency to often vote on the margin with conservatives on whether there are implied rights of action and standing on lots of things, but often in ways that would not fully close the door, *Vieth* being a good example of that.

But even in standing cases. In *Lujan*, he joins Scalia's opinion, but he has to write the separate opinion. "You know what, if Joyce Kelly had bought a plane ticket, maybe she'd have standing," which meant—

Professor Segall: Or if Congress defined the law better.

Professor Adler: Right. And then so *Massachusetts v. EPA* comes along. My view of that case is, is that the standing arguments, which you know I was sympathetic to, but the arguments that there weren't standing were very strong arguments. If Massachusetts didn't have standing, then it was possible that no climate-change plaintiff had standing. And for someone like Justice Kennedy, that would mean closing the door completely. He wasn't willing to do that. He was willing to kind of push it partially closed, the way Chief Justice Roberts would like to do, but he wouldn't go that full distance.

And then again, for Chief Justice Roberts, that's, "Let's take the Court out of the game." Justice Kennedy wanted to at least the option of being in the game.

Professor Segall: On that point, in *Massachusetts v. EPA*, where the Court granted standing kind of surprisingly, I think, to Massachusetts to challenge an administrative rule that affects global warming maybe, Justice Rehnquist had said several times in the 1970s, and this is almost a direct quote, "The fact that no one would have standing does not mean that's a reason to find standing," and I think Justice Kennedy thought the fact that no one would have standing would be the exact reason to find standing consistent with the judicial supremacy Steve Griffin talked about.

Professor Epstein: I think Jonathan makes an excellent point. I agree with his analysis that this is one of the bigger changes as the median moves, there's others, of course, but as the median moves from Kennedy to Roberts.

Professor Segall: Yes. And my question about that is do we think—Erwin Chemerinsky has been going around the country giving speeches saying this will be the first Court since, I don't know, mid '70s or early '70s without a moderate, a true moderate median Justice if we think Kennedy's a moderate. How is this lack of a median—unless Chief Justice Roberts changes his spots, he's not going to be anywhere near as left as Kennedy. How is this going to affect the future of the Court?

Professor Epstein: Well, it's a median in name only, in a sense. If all these hot-button cases, closely divided cases, are simply five-four, with the Democrats on one side and all the Republicans on the other, it doesn't look the same. It's a very different kind of Court. But, I take Jonathan's points very seriously on how Roberts can play that median role.

Professor Adler: We talked already about how you can define medians along different dimensions, and the way Roberts is a median

Justice in some respects is his minimalism, not necessarily a left-right thing. And we know that there are reasons to suspect that Justice Thomas and Justice Gorsuch aren't really sympathetic to the minimalist approach the way Scalia wasn't either. There are all these opinions where Scalia would—with Roberts, but also even in the Rehnquist Court, we talked about *Webster* earlier—where Scalia would criticize the Court for not going where he thought the logic of the analysis needed to go.

And so, there will be an interesting dynamic where Roberts, for a different set of reasons, if he follows what we've seen from him over the last ten years, will often be trying to get majority opinions that do a little bit in most cases. There are obviously a handful of issues where Roberts is willing to set aside his minimalist tendencies for other things that matter to him. But this will create a very different dynamic. He will be looking for ways in which we can split the difference a little bit in a way that Kennedy, especially when Kennedy was writing, he wasn't as interested in.

And that's very different—

Professor Segall: And that's a big difference, I think, between Justice Kennedy and Justice O'Connor. Justice O'Connor was very much a "this day only"—is that a fair description of the type of Justice she was? Whereas Kennedy was not a one-day-only guy. Kennedy was a "let's resolve this issue." In many cases like *Citizens United* and other cases. Are there benefits to having a strong median Justice when the country is so polarized?

Professor Adler: I hope so.

Professor Volokh: I think my answer to that, actually, it goes along with my gut reaction to what you said Chemerinsky was saying. Often, when Justices are characterized as being conservative, liberal, moderate, or whatever, it may be somewhat tendentious. I know that, for example, the late Judge Reinhardt used to say that there were conservatives and there were moderates on the Court. But if you

talked to some other subset of my friends, they would say, “Yeah, there are liberals on the Court and there are moderates.”

So, when you say that this is going to be the first time that we don’t have a moderate because Roberts is no moderate or something, that doesn’t really have an objective meaning, but there is, mathematically, a median. And in fact, one consequence of having a median where there’s a lot of empty space on the left and right of that median is then you can define that median as having a lot of power. If you have a median that clusters together with others, that median Justice actually has less power, especially if they’re close to someone else. They might switch around, and you might have many Justices playing the role of a median.

Now, I’ve said earlier, I don’t know if that’s particularly meaningful, but if you think that there is something problematic with someone really being so in the middle and actually being moderate when others are not, and then there’s a lot of room for them to move around, then you do have one individual having a lot more power.

Professor Segall: Lee, do you agree with Sasha’s skepticism about characterizing judges as liberal, conservative, and that data being—

Professor Epstein: After sitting here all day, absolutely not. Even the most doctrinal among you are characterizing either the left side of the court, the right side of the court, the liberals, the Democrats. So, no.

Professor Segall: You don’t agree, or you do agree?

Professor Epstein: I don’t agree with—I’m not skeptical about it, especially, as I said, after sitting here and listening to people who think that there’s some doctrine left on the courts talking about the Court in political terms.

Professor Segall: I think most political scientists think that data about liberal, conservative judges is very valuable and tells a real story. Assuming that’s true for a moment, how do we fairly

characterize Justice Kennedy's career? Do we characterize him as a liberal? Obviously not. As a conservative? I don't think so, but maybe. Moderate conservative? Where does he fall?

Professor Epstein: Well, in terms of the data, he generally voted with the conservative side of the Court. There were a few areas we've talked about today where he moved over and joined liberals, and that's why, when you look at the data, the probability that he was the median Justice is so high because he occasionally made that move over, but not all that often.

Professor Segall: Is it just a function of numbers?

Professor Epstein: You're looking at the wrong person.

Professor Segall: This might be the most serious question I've asked today, I don't know. It turns out that if Justice Kennedy had different views on abortion, gay rights, and term limits, and maybe, like, *Citizens United*. Those four cases. If one person had different views on those four cases, this country is so different. Millions of gays and lesbians wouldn't be able to get married today. I think *Citizens United* has had an effect on our politics, even if it didn't directly affect our politics. Obviously, without Kennedy, *Roe v. Wade* gets overturned in 1992. How can lay people understand how important that is?

Abortion can be illegal in twenty-six states. Gays may not have the right to get married. *Citizens United* could never have happened, and we can keep going on. What does that tell us about either Justice Kennedy, the Court, or the system of judicial review that we have in this country?

Professor Volokh: I'm still going to push back on the idea that it's meaningful that all of those four points coincide in a single person. If people's views were less correlated among issues, you would have four separate people, and then you would say, "Well, if Kennedy had a different view on gay rights and if Breyer had a different view on abortion and if Sotomayor had a different view on *Citizens United*,"

and so you imagine a different world where you change one person in one dimension, then that's the identical different world. So, is it meaningful that those dimensions are sufficiently correlated, that they're all combined in one person?

Professor Segall: That's the question I'm asking because from 2005 to 2017, and even before 2005 on some very important issues, Justice Kennedy went to his—I'm asking very human question here. Justice Kennedy went to his chambers, and he knew how he voted mattered. That's not true for Sotomayor, and it's not true for Scalia in many cases. It is only true, in most cases that we care about and that we're talking about, for Justice Kennedy for a very long period of time, which is why we're having this symposium today. We didn't have—Justice O'Connor was a very important Justice, and there should've been symposiums about her, but Justice Kennedy was the most important. So, I'm not sure I understand your point.

Professor Volokh: Well, I will agree with you in one sense, which is that Kennedy's vote really mattered in a very specific way. Now, while I definitely agree with the idea of the median Justice, I think we should also not lose sight of the different other types of power that are wielded on the Court. For example, if I'm Justice Thomas, my vote doesn't matter in the sense that my view actually determines the rule, but my view determines who the median is—I have to be there voting so that this particular person is median, and if you take me off and you put Justice Marshall back, then someone else is the median. So, my vote matters in the sense that everyone's vote matters—in the sense that they determine who the median is.

Also, there's a lot of very interesting literature, which one ought to read in conjunction with all of Lee's papers. For example, who is the median in the distribution matters, but now my colleague at Emory in the political science department, Cliff Carrubba, has a recent article where he says: what the majority is depends on people's views about who wins the case, but if they also have different views on what is

the optimal legal rule, then once the majority of five Justices is determined, there's also a median of that winning coalition.

And the median Justice of the winning coalition has a more limited median Justice power to decide what the rule is going to be—out of the many rules that that coalition could sign onto. Then, in addition, Lax and Cameron have a view that the opinion author has power when they're writing opinions. So, if you've got a five-four majority and the Chief feels that Kennedy is squishy, he can assign that to Kennedy—because that way, Kennedy will write an opinion that he agrees with. But if Kennedy is solid, then the Chief can assign the opinion to Scalia, and then Scalia has a certain ability to choose what the rule is, just constrained by the constraint that Kennedy shouldn't defect from it—but if Kennedy is solid, that gives Scalia a lot of maneuvering room.

There actually are a lot of different kinds of power that different Justices have, and it's not just the single one power that is wielded by the median. In the simplest political science model, yes, the one median Justice would have all the power, but because of the institutional features and dynamics of the Supreme Court, you actually have a lot of centers of power in lots of different cases.

Professor Epstein: I will make you happy, and I will say that yes, Justice Kennedy was a very, very powerful Justice in some very important cases. How's that? And everybody knew it. All the other Justices understood that they were living in Justice Kennedy's world. The only thing I would add is, and I guess we'll find out soon enough, is the effect that Justice Kennedy had on the docket. Were there areas of the law that both sides of the Court avoided because they were uncertain on how Justice Kennedy would vote in those cases? And just a caveat to you, the median Justice model in my little report, it's a voting model. It doesn't say anything about the doctrine or the law. That's not the concern. It's all about outcomes and votes.

Professor Segall: And certainly, Adam Winkler, who is a pretty foremost gun, Second Amendment expert, he's written some articles,

and I've written some, too, suggesting we've not seen a gun case since *McDonald* because no one knew how Justice Kennedy was going to vote.

Professor Epstein: We'll find out soon enough if that's the explanation for the decline in the docket.

Professor Segall: Anyone else have any comments?

Professor Adler: I agree with that. I think what's interesting is that in different periods in the Supreme Court's history, we often identify one or two Justices that we think had a particular influence on the course of doctrine in the course of the Court. It's usually been the Chief, not always, but there are institutional reasons we would expect that to be the case. And, to underline the point—in part the point of this conference—it is the combination of being the Justice that had such a dominant role on the doctrine in high profile areas while being the median Justice but not necessarily being a moderate, that constellation of factors is distinct.

And so, when we talk about the Kennedy Court, we're talking about a different type of influence over the Court than when we talk about periods of the Court that are, say, defined by particular Chief Justices who, using various forms of power within the Court had a very big effect on the shape of doctrine and the types of cases the Court would take and so on. And so that's why this day has been a worthwhile day because he was having an effect on the Court that was significant and distinct and worthy of trying to understand.

Professor Epstein: But Eric, it really brings me back to my earlier question, is fame fleeting for him? You point out abortion, you point out affirmative action. Okay, not *Obergefell*, but the *Obergefell* progeny that Pam Karlan talked about. Does this all just vanish within a decade?

Professor Segall: When Jonathan was talking, I was thinking Holmes and Frankfurter and Marshall. I don't know—I'd be very surprised if 50 years from now Kennedy is viewed in that way,

though he was more dominant certainly than any of—maybe not Marshall—but certainly, more than the other Justices.

Professor Epstein: So was Clark in the ‘50s. So was Reed in the ‘40s.

Professor Adler: I think the gay-rights decisions, and *Obergefell* in particular—I don’t think they’re going away. How broadly they extend is a separate issue, but they’re not going to go away, and they’re always going to be tied to him. And I think what’s more likely to happen is that fifty years from now, the cultural understanding of Justice Kennedy will just be about those cases and that the other aspects of his jurisprudence, that for right now are so significant and meaningful in terms of the doctrine that we deal with today, that might be what we forget. And so, Justice Kennedy, as we noted, was conservative most of the time in five-four cases in the Roberts Court. He voted with the conservatives close to two-thirds of the time in those cases where the Court split along left-right lines.

That may well be forgotten. His role in abortion jurisprudence might be somewhat forgotten depending on what happens, but I do think that his legacy on gay rights is something that—it’s hard for me to imagine a course of history in which that gets forgotten. That’s going to be in high-school textbooks.

Professor Segall: Anytime someone starts a sentence with, “It’s hard to imagine in the course of history,” I think, “Donald Trump is President,” and I—you know.

Professor Volokh: I think when we talk about whose legacy is going to be enduring—earlier on the panel, I said that if you take the simplest model where any decision can just be overruled, then everything is just determined by who is the median tomorrow. Whereas, if you have a model where opinions are somehow costly to overrule, then you get something different. And so, I think that gets us to a way of distinguishing what kind of opinions are likely to be more enduring than others.

One is just a pure doctrinalism point: if you write an opinion which is so mushy that anyone can make anything of it, then that's great. That opinion is going to be precedent forever, but the content of that opinion is going to constantly change because it can be reinterpreted. That's why the abortion right can be radically reduced without ever overruling *Roe* and *Casey*, or gun rights can be dramatically reduced without ever overruling *Heller* and *McDonald*. And on the other hand, if you have a rule that's easy to state and hard to misapply, then as long as it doesn't get outright overruled, which itself is costly, then that might have more staying power.

And then another type of doctrinal innovation that might have more staying power is one that actually changes facts on the ground. If you have an opinion that imposes gay marriage on places in the country where it wouldn't otherwise have existed politically, then you have people actually getting married and actually making lives for themselves. And that creates a different reality on the ground, which will be very difficult for later legislative majorities to undo, and it will be difficult for later judges to undo. On the other hand, probably the legal availability of abortion is not something that has engendered those kinds of reliance interests. So, I would say that abortion and gay marriage are kind of different in that sense.

Professor Segall: I agree with that. Why don't we take some questions and then we will call this day to an end. Anybody? Go ahead. Don't be shy. Speak in the microphone.

Professor Ilya Somin: I was going to let other people go because I had asked questions on previous panels, but since they're not going yet, I guess I'll ask one on this one. I guess my question is primarily for Eric, though others can jump in. I'm trying to understand the nature of your objection to Kennedy's role. Is it simply that you disliked the fact that one person casts a pivotal vote because it's a close five-four decision or that you dislike the fact that it's the same person in a bunch of issue areas, or is it some combination of the two? And if it is really that it's ultimately about one person, does that

suggest maybe we shouldn't have other aspects of our political system where one person makes huge decisions?

Obviously, the President, for example, can make huge decisions even about war and peace in many cases. They can ruin the lives of many people, and that has happened. So, does that suggest that maybe we should have a plural executive, where it's legitimate or fundamentally wrong for one person to make those decisions? Or, if it's only wrong on the Supreme Court, should there be a rule that Supreme Court decisions must be at least six-three or seven-two or something? So how would you resolve these matters? What's the principle that actually concerns you here?

Professor Segall: Well, first of all, I am on record many times over as saying Justice Kennedy was our most transparent Justice and so just within the system we currently have, I think justice—I disagreed with him probably 75% of the time because I'm a progressive. But, I think the way he did it was the best we can hope for because he did it honestly and transparently and didn't care very much about hiding behind doctrines and legal rules. I think his median Justice importance for seventeen years, and really before that, because other than affirmative action when Justice O'Connor was the median, I think he was the median before that too.

I think it is lunacy for a democracy to have a highest court in the land staffed by death, illness, or politically timed retirements. And because our Supreme Court is a roll of the dice in many regards, if Justice Marshall stays on six more months, American history is changed forever because there's no Clarence Thomas on the Supreme Court. There is no *Citizens United*. There is no *Heller*. There is no *Adarand*. There is no any of those cases. So, Justice Kennedy is just kind of the logical conclusion to an illogical system that gives an unelected, life-tenured, government official this much power.

This human being knew for seventeen years that on virtually every issue of constitutional law, what he said would be the rule of law for the United States. A system that leads to that result, I think is a little

bit loony, which is why I'm in favor of four-four, evenly divided court. But leaving that aside, the President is elected, and the Congress is elected, and we can be cynical about that and public-choice theory and all, but there is a difference between the role the President is supposed to play and the role the median Justice is supposed to play.

My objection isn't to Kennedy per se. I do object to a system that gave rise—and by the way, lay, smart, informed, non-lawyer-type people understand this very, very well. Why would we as country cede to one person, for seventeen years, pretty much unique responsibility over all of these social and cultural issues that divide us as a country? That's my answer.

Professor Volokh: But it seems to me that what you're saying really would apply with equal force if every five-four decision were decided by a different five-four majority?

Professor Segall: No, I don't think so because it's—

Professor Volokh: It's the fact that there are these five-four decisions—

Professor Segall: You're ignoring human dynamics. You're ignoring the idea that one person—the Showtime Lakers, I do think, would have beaten Michael Jordan's Bulls because they had two or three more weapons and tools, and the dynamic changes when people have multiple responsibilities. And I think putting all this responsibility on one person, who loved it, obviously, I think, is not the same as having a revolving door of Justices who matter.

Professor Adler: Let me suggest that in one sense, your complaint actually agrees with an argument made by Justice Scalia, although I think he would've formulated it a little differently. His formulation is that the more aggressive the Court gets with judicial review, the more the consequence of who is on the Court is. Now, he would argue that had implications for what sorts of doctrines you wanted and so on. Let's just set that aside, but one way of viewing that is the structure

of the Court: Is it an odd number or an even number of Justices? What their decision rule is in terms of majority votes, who are majority vote, and so on? That's one way of thinking about it.

The other way of thinking about it might be, well, what sorts of questions does the Court get to decide? And while Scalia didn't always exhibit this in his own jurisprudence, but one answer would be, well, have the Court decide less, and just leave a lot more to the political process. And then when Justice Kennedy retires and the President nominates his replacement, we don't have what we've witnessed the last several weeks, which is political trench warfare over the replacement because of our beliefs and predictions about what that replacement will or won't mean.

That would be an alternative. It would be radically restricting judicial review, which you might be in favor of or sympathetic to. I think the Chief Justice is.

Professor Segall: Scalia's dissent in *Casey*—one quick point—Scalia's dissent in *Casey* is perfect, except that he didn't abide by it in 131 cases where he struck down state and federal laws. Go ahead, Lee, sorry.

Professor Epstein: I was just going to say Robert Bork originally made that argument, and there is a reasonable amount of empirical data to support it.

Professor Segall: I am making that argument today in my new book for the record. All right, go ahead.

Joyce Lewis: Hi, Joyce Lewis, and I just dropped the microphone, not on purpose. My question kind of goes to what Professor Segall was saying and kind of goes to what Professor Volokh was saying. Don't we want the Justices on the Supreme Court to have to persuade each other and to bring each other together into some sort of a consensus opinion that provides clarity? And if we want that, to your point, it can be a different Justice for each important decision. Isn't that what our system has historically? And then Dr. Epstein, please

chime in if I'm wrong about that, but historically, isn't that where we have wanted our Supreme Court to be?

Haven't we wanted there to be collegiality, discussion, persuasion in order to come up with the best answer as opposed to vesting all of the decision making, as you're describing it, in one person who is sort of anointed or everyone has decided is the median Justice and the person who's ultimately going to control the decision making?

Professor Volokh: I would say no one anointed Justice Kennedy. I'm imagining that there's some guy in Ohio, maybe it might be an actual really moderate person in Ohio who says, "You know, I somehow find myself agreeing with every decision that's made in America because though America sometimes makes left decisions and sometimes right decisions, I always agree with them. It must be that exactly 150 million people are more left than me and exactly 150 million people are more right than me. And I am this median guy." Now, no one anointed this person. So, there's no reason, by definition, that this person's views hold. It's just that, mathematically, someone's going to be the median.

And so that's just the way, mathematically, that decisions get made. So, I don't find it problematic that someone's the median. And then if it turns out that people's views are highly correlated, so the same person's the median on lots of issues, it's just the contingency that that person happens to agree with everything that's being done. And it's not his fault. It's not to his credit. It just so happens that some rule has to be chosen, and it happens to be the rule that person agrees with. Now, as a matter of "Do we want there to be deliberation and winning people over to consensus" and so on? Quite frankly, I don't know whether that's good.

If people come to the Supreme Court with their deeply felt views, they're not really persuadable because they've thought about these views for twenty years, and those are their views. And the same goes for Congress. Do I want people in Congress to persuade each other or rather to just vote their view? I don't have a strong belief about that. I

think if just everyone went to Congress and voted their view that they were totally unpersuadable about and that would be the result, I think that would be a fine way to run a democracy too. I've never been a big devotee of the deliberative model of democracy rather than just the attitudinal model of democracy. So, I don't know that that's so great.

But regardless, someone's going to be the median because that's just, mathematically, how things shake out, and it just turns out that Kennedy was the one. So, I don't find that problematic.

Professor Adler: I would say in terms of the question as a historical matter, I don't think the Court was necessarily created with this idea in mind. In fact, if you look at the early fights over populating the Court, we certainly saw a lot of what we would characterize today as partisan infighting. But, certainly, Chief Justice Marshall felt that ending the practice of seriatim opinions, making the Court speak with one voice was important. You can find lots of very significant cases in the 19th century where Justices would dissent and didn't feel the need to write an opinion, which would be unheard of now. There was some where Justice Chase was, I guess, too ill to write his dissent in *Bradwell*.

But a lot of times it's just, "You know, yeah, I disagree, but this is the opinion of the Court," and we certainly know on the Warren Court that Earl Warren felt very strongly that when the Court used its institutional capital in certain sorts of cases, it was important to be able to speak as the Court. And I think Chief Justice Roberts aspires to that. We can argue whether or not it's too late in the game for that. So, I think that that's worthwhile and whether or not we've gotten to a point where there's too much focus on the individual personalities to restore that sort of thing, I think it's an interesting question.

But certainly, looking at the history, I think it's hard to dismiss the idea that there is value in the Court having an institutional voice that can be seen as bridging other political divides. And again, that may

be a historical artifact that we will never have again. It may be something that we could aspire to. I don't know.

Professor Epstein: For a very long time we had a pretty strong norm of consensus on the Supreme Court. If you go back to docket books in the 1870s, you'll see that the Justices disagreed as much as they do today, but they didn't make those disagreements public. That norm exists on many European courts. They don't make disagreements public. They try to work it out, try to reach consensus. I've sat through entire political science conferences where we've debated, "Is a norm of consensus good?" I know no one single answer.

Professor Segall: Justice Kagan has made it a point in the last year to repeatedly say more than three or four times that the four-four Court had the advantage of exactly what you were talking about, they had to persuade each other more, they had to write narrower opinions. Now, she's very clear, she doesn't want that forever, but she is saying that a lot for the reasons you talked about. So, I just wanted to mention that. Go ahead.

Professor Corinna Lain: Corinna Lain, Richmond. One thing that I have not been able to get my head around with this—and I thought maybe we would talk about it, we're at the end of the conference, I thought I would raise it now—and it is that Kennedy chose to retire now, and I just think, "Wow, for the guy who's so much about dignity and the civilized conversation, it's surprising to me." I would have guessed, not this President, doesn't get to—and especially knowing, because he did know how much power he had for seventeen years, so it's bizarre to me that he chose now. And I even thought, "Okay, if you can't hang on, would you hang on past the midterms?" Because frankly, if you thought—

Then at least it's up to the people, and it's like they either change the Senate or they don't, but then it forces a compromise, or it doesn't. But democracy sort of had its way. I'm wondering what your thoughts are on that.

Professor Adler: I'm not surprised he decided now. If you think about what are the cases that Justice Kennedy's written that I think he cares about that are most likely at risk, I think it'd be reasonable for him to say that *Citizens United* was more at risk were he replaced by a Democratic president than *Obergefell* is if he's replaced by Republican, if for no other reason than public opinion; both Sanders and Clinton said in the campaign that *Citizens United* would be a litmus test.

On abortion, his opinion is kind of in the middle. He doesn't want the outcome that a likely Democratic nominee would want, which would be kind of elimination of *Casey* to a more permissive regime, just as he might not want the elimination of the right altogether. And he did vote with the Right more often with the Left in five-four cases. It's about two thirds of the time. He did see himself as a Republican. If you listened to the oral argument in cases like *Janus*, it's clear that insofar as we're on teams or whatever else, that was what he thought was his team. And so, I think there's a certain logic to it.

Professor Segall: Are you suggesting his retirement was politically timed? Is that what you're suggesting?

Professor Adler: I'm saying that if you try and think about what mattered to Kennedy, as opposed to what might matter to us about Kennedy, I think it actually makes a lot of sense. And I think there's some other things you can add to the picture. I think, and one day we may see conference notes that confirm this, I think there are issues that we don't associate with him that were important to him, even though he didn't write on them. One data point: One of his last opinions is a concurrence in this case called *Pereira*. It's an administrative law case, and he writes this concurrence about how lower courts are not applying *Chevron* sufficiently stringently enough, that quotes Gorsuch's lower court's opinions challenging *Chevron*, that quotes Thomas, that's very much in line with his vote in the *Arlington* case, very much in line with his opinion in *Gonzales v. Oregon*.

And if he's thinking about what is a Justice that's appointed by Donald Trump with the advice of Don McGahn likely to think about this issue? And again, if you look at Justice Kennedy's opinion, if you look at his voting, it's hard to not see this issue mattering to him. So I think when you look at this together, it would make some sense. I also suspect that the Gorsuch nomination, the partisan aspect of how that confirmation played out, and the appellate nominations of the Trump administration, all reinforced that decision.

I think he liked the Gorsuch nomination. He liked the overall caliber, in his view, of this administration's appellate nominees and saw someone who he thought was a strong nominee replacing Justice Scalia. So not someone that wouldn't really affect the balance of the Court, nonetheless produce a virtually purely partisan vote, which would be, "I can't wait for the midterms if I want to be replaced at all." And so, I think there's a logic there. And whether that was a good judgment or not is a separate matter, but this is prescriptive man. I think the logic is there.

Professor Segall: And his son was Donald Trump's banker. Go ahead.

Professor Volokh: I assumed the subtext of your question was it may not be that surprising that he retires while a Republican is president, but here the Republican happens to be Trump and you would think he's the sort of Republican that wouldn't be wild about Trump. So, if I'm getting that subtext right, and look, I am really, really against Trump, and so I see where you're coming from, it's just that—although everything Trump touches turns to garbage—it turns out that Trump seems to care not at all about the judicial appointments. And so, the Supreme Court and most appellate court nominations seem to have just been run by the same sort of group of standard Federalist Society lawyers who would have been in control under a Rubio administration or a Cruz administration.

If I were Kennedy and I'm seeing Trump and I'm kind of iffy about this, but then seeing—it was like Jonathan said—seeing a

bunch of the recent appointments would, I think, make me super confident. It would allay a lot of my concerns just seeing the kinds of people who were being nominated.

Professor Segall: Lee, do you want to add anything?

Professor Epstein: No.

Professor Segall: Okay. I want to say, and it's the last question of the day, Eugene. I want to say that there should be a surreal quality to the idea that we are the only democracy in the world that allows its high court Justices, the highest court Justices, to retire when they want, how they want, or never, which is the case with some Justices. And to the extent—I was surprised by these answers to your questions, great question. I was surprised by these answers because I think they're probably right. And that means that he made a political calculation about when to retire. We shouldn't put up with that as a country. Go ahead, Eugene.

Professor Volokh: I'm shocked, shocked.

Professor Eugene Volokh: As I understand it, Justice Kennedy was about in the majority in about 90%, is that right, on the five-four cases over this—let's assume, let's just assume.

Professor Segall: Something like that.

Professor Epstein: It's close.

Professor Segall: I think it's five.

Professor Epstein: No, no. Not five to four.

Professor Eugene Volokh: Not five to four. Let's say 70% of the five-four decisions, but most of those were conservative. So presumably, Justice Thomas was in the majority, not in 70% but not in 10%, maybe 55%. If Justice Thomas just decided, "You know, I've changed my way of thinking," and he decided to vote the other way in *Citizens United*, in *Heller*, and all those cases, we would also

have had the opposite results. It's just we would have had it in a smaller range of cases, but I think what was driving it is nobody expects it from Justice Thomas. So, he's just predictable. It's not that he lacks the power. It's that we're pretty confident how he's going to use it.

So as a result, that lacks drama. But if I'm right, then that may be the gulf. It may be that Justice Kennedy had power at the level of 70% and Justice Thomas at the level of 55%, not a huge gulf. It's just we weren't quite sure in a lot of those cases where Justice Kennedy would go. Incidentally, you can imagine, and this may be a version of what Sasha was saying, you can imagine a situation where Justice Kennedy was also a swing voter but completely predictable just because we happened to know where he would go on everything just because he had spoken so clearly about it.

Then again, he'd be a swing voter, he'd be more often the deciding factor than the others, but it still would be that the gulf would be at a seventy to fifty-five level. So, I'm wondering if we may be exaggerating as a result of that.

Professor Volokh: Well, I think there are two separate issues. One of them is whether someone's the median, and another is whether they're unpredictable. So, for example, sometimes someone's the median, but you're not sure who it is. Sometimes you have a median voter, you know that they're the median, but you know that they're somewhere in the middle, but they could be here or here—or someone could be the median and you know exactly where they are. I think when we talk about how much power a person has, I always think of it in terms of perturbations of the world. Like you can imagine nearby universes where Kennedy is here or here, and those are close universes. So, in all those close universes, the change of Kennedy changes the rule, but in all of the close universes where Thomas changes, it doesn't change the rule because that rule is determined by Kennedy.

Professor Eugene Volokh: Thomas voted the other way in *Citizens United*.

Professor Adler: But Thomas would have to move—I think part of the idea is that in a lot of those cases, Thomas also has to move further.

Professor Volokh: If you imagine ideal points, then moving the ideal point from here to here is a bigger perturbation of the world.

Professor Segall: But there is one thing no one today has suggested, and Mike, forgive me in the back row when I suggest this. It is possible. These are human beings. This country has a tendency to not see Supreme Court Justices as—I'm lecturing now—as human beings. These are human beings. It is possible that one of the reasons Justice Kennedy was the swing Justice for seventeen years was because he wanted to be. In other words, it is absolute—Rick Garnett of Notre Dame, I think, believes this. If I'm wrong, I apologize to Rick, but part of what's going on here is a non-legal, non-ideological, non-partisan personality trait that this person liked to have control.

And if there is any truth in that or some truth—I'm sure there's a little bit of truth in that. If there's enough truth to matter in that description, it again goes to, I think—what I hope this whole day was about to some degree—was what kind of institution this Supreme Court is. I can't believe Sasha demeaned, ten minutes ago, the idea that you asked that we should have deliberation and persuasion and try to—on these incredibly hard issues, the 40%, Jonathan, 30% of cases that are really hard, wouldn't we want them to go into a room and fight it out, and they don't do that. They do not do that. And maybe they didn't do that because they knew it didn't matter. Justice Kennedy was going to take it over anyway. Any of you guys want the last word on this? All right. Jonathan, go ahead. I'll give it to you.

Professor Adler: I would agree with you, they don't do that enough, but we do know of cases in which Justices flip, cases in which Scalia lost a majority because he wouldn't tone down his rhetoric, cases in

which it appears that whoever was assigned the majority opinion couldn't write—it just wouldn't write and wouldn't work the way they thought it was going to—and that matters. It's not as if they just kind of say, "Okay, my team is on this side, and we're done." They still have to be able to write the opinions and justify their opinions. And, yes, sometimes they do that more convincingly than others, but I think we're not being fair to the way the institution operates if we assume that that's all that's occurring. There are too many data points that suggest people are movable, at least in some set of cases.

Professor Segall: I think it would take a person of great character to refuse the temptation to have the career that Justice Kennedy had. Those people may exist, but it would take a person of great character. On that note, thank you everybody for coming. Thanks for this panel. I hope you have enjoyed today.