

January 2020

Discussion Transcript: The Road to Kavanaugh

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Recommended Citation

Paul Stanton Kibel and Caroline Fredrickson, *Discussion Transcript: The Road to Kavanaugh*, 50 Golden Gate U. L. Rev. 73 (2020).

<https://digitalcommons.law.ggu.edu/ggulrev/vol50/iss2/4>

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DISCUSSION TRANSCRIPT

THE ROAD TO KAVANAUGH, MARCH 15, 2019, GOLDEN GATE UNIVERSITY SCHOOL OF LAW

INTRODUCTORY REMARKS:

ANTHONY NIEDWIECKI: Dean of the School of Law, Professor of Law,
Golden Gate University School of Law.

DISCUSSION PARTICIPANTS:

PAUL KIBEL, Professor of Law; Co-Director of the Environmental Law
Program, Golden Gate University School of Law.

CAROLINE FREDRICKSON, President of the American Constitution
Society.

DEAN NIEDWIECKI: For those that don't know, I'm Anthony Niedwiecki. I'm the Dean of the Golden Gate University School of Law. I want to welcome you to this exciting presentation. This idea grew out of the actual confirmation process that maybe, we need to do something and have a discussion about this particular process.

I'm an employment discrimination lawyer. So watching those hearings [was] very reminiscent of the Anita Hill hearings back many, many years ago, but what I use as an example of sexual harassment and the treatment of sexual harassment law at the time. So this was a very interesting period for us. And I know around the school, all the TVs were on and everybody was watching very closely.

And so, we have a lot of interest here on the confirmation process, but also a lot of interest with what the Supreme Court is going to look like now that Kavanaugh's joined the bench.

And so today, we're really, really happy to be able to welcome the President from ACS to join our discussion with one of our professors

about the Kavanaugh confirmation process and the impact that he will have on the court. I have a really deep interest, and I'm very proud to say, I've been with ACS and supported ACS from the very beginning.

I've been a faculty advisor at two previous schools that I worked at. And I was sharing that I have a couple of my best memories as a professor related to ACS. I went to their national conference in 2003. And this was right after *Lawrence v. Texas* was decided. And Ruth Bader Ginsburg, as most the students here know is a big idol of mine, spoke at lunch that day and talked a lot about the influence of international precedent and international materials in Supreme Court cases.

And that was a heated issue at the time. And it seeped its way into the *Lawrence* decision. That was a very, very interesting discussion and the first time I saw her actually speak. But the more interesting and funn[ier] thing for me was later that night at the convention, they had a Janet Reno dance party. And I got to dance with Janet Reno. So I have very fond memories of ACS.

[Laughter]

ACS has done a lot of great things and really has moved law schools and the legal profession to look at things from a progressive bent. The Federal Society has been very good over the history in terms of building up a strong bench. And ACS came in to do the same thing. I know that [at] one of my former schools I was enemy number one for the Federal Society, because we started the ACS. Because I think they knew the possibilities, and that's been realized.

So, let me introduce our two guests today. President Fredrickson joined ACS in 2009 as their President. During her tenure, ACS has grown significantly. They have chapters in almost every law school. They've got thousands of members across the county. And they've got chapters in almost all the states.

Before she joined the ACS, she was a director of ACLU's Washington Legislative Office; General Counsel and Legal Director of [Unintelligible] Pro-Choice America. She served as Chief of Staff to Senator Maria Cantwell of Washington and Deputy Chief of Staff to Senate Democratic Leader, at the time, Tom Daschle of South Dakota.

She worked in the Clinton Administration. She served as Special Assistant to the President for Legislative Affairs. She has her JD from Columbia and her BA from Yale in Russian and Eastern European Studies. She also clerked for the Honorable James Oaks of the United States Court of Appeals for the 2nd Circuit. So, with this wide range of experiences, you know she's going to bring a lot to the discussion today.

She's joined by our own professor, Paul Kibel. I really want to thank him. He took the lead in organizing this. And he saw the value of this discussion. But I do want to note one thing. We did invite members from the Federalist Society. And nobody took our offer. So, you can interpret that however you want to about today's discussion.

Professor Kibel, who organized this, is a prolific scholar. He teaches environmental law and water law. He is the Director of our Center for Urban Environmental Law. Our environmental law program is, as you know, consistently ranked as one of the top environmental law programs across the country and a lot due to the work that he does. He's been a wonderful faculty member. And I know he's going to bring a lot to the table for the discussion.

Before I bring them up on the stage, I want to say thank you to the Bar Association of San Francisco and all the people at GGU who have made this happen today. So, without further ado, let's bring up our guests: Paul Kibel and Caroline Fredrickson.

PROFESSOR KIBEL: We're not going to wear our microphones.

FREDRICKSON: We'll project.

PROFESSOR KIBEL: Thank you for those introductory remarks, Dean. I want to say a couple things at the outset. Thank you so much for coming out today. We're really excited for this conversation. We are going to be recording it for two reasons. One, the plan is to propose the video of the dialogue in conjunction with Golden Gate's Law Review.

We're also going to be preparing a transcription of the proceedings with an idea towards actually publishing the exchange that we have here, as well. And my understand is also that you are working with the law review on a piece related to the Kavanaugh [unintelligible] for the law review, as well. So there will be some scholarly outputs.

I want to begin to explain the format that we've settled on, which I hope should work well. We've divided the dialogue into part one and part two. Part one is going to be about the confirmation and appointment process that took place related to Brett Kavanaugh. And we're going to spend about 30 minutes.

We've worked up some question and discussion topics about that. After we have that dialogue, we're going to open it up to questions on that part of it to the audience for about 10 minutes or so, for questions and discussion with all of you related to that.

For part two, we're going to shift gears and talk about jurisprudence and talk about issues relating to how having Brett Kavanaugh on the Court may change the Court's decision making, looking at issues such as

originalism, federalism, executive authority, abortion, women's reproductive rights, and views of deference to federal agencies; issues that are related to what he will bring as a justice on the court, as opposed to the appointment process.

And the last thing I'll mention — just to elaborate — when this began, the idea was to have three chairs up here. I don't know about three tables, but certainly three chairs. And the other chair was going to be occupied by a representative from the Federalist Society. We thought it would be very productive in a dialogue format, as opposed to speech format, to have that type of discussion.

We contacted a number of prominent people: Steve Calabresi, professor at Northwestern, one of the co-founders of the Federalist Society; Professor Oren Currey at USC Law School; and Professor Jonathan Hadler at Case Western. We even contacted George Conway III. George Conway III — Kelly Conway's husband, but also prominent legal thinker on the conservative side and helped co-found [unintelligible] Checks and Balances recently.

I'm not going to speculate about the reasons. But we did not have any takers for that. So we were left with the decision about whether or not to proceed with the dialogue or proceed with the dialogue with just Carolyn. And we felt like the fact that we didn't get a response from the people we approached was not a reason not to proceed, at least [unintelligible].

FREDRICKSON: We got a response. It was just, "No."

PROFESSOR KIBEL: Well, the only real "no" we got was from Calabresi. I think the others were more nuanced. "We'd love to. But we're so busy" type responses. But before we get into the format, I wanted to give you time to talk about how you view the role of ACS in terms of its formation in particular, as the Dean mentioned, in some sense its relationship or maybe, a leftist counterpart to the Federalist Society. I wanted to give you a chance to talk.

FREDRICKSON: Sure. First, let me thank you, the law school, the Dean, and all of you for hosting me here and for our ACS chapters that have been involved. I know we have a great, strong chapter here at Golden Gate. I hope you're all members. If not, you can sign up immediately after this discussion. But I also wanted to wish a happy birthday to Ruth Bader Ginsburg, whose birthday is today and also, the Dean, who I know is celebrating his birthday this weekend.

I think that's auspicious. to be sharing a birthday with Ruth Bader Ginsburg, may she live forever. And I think she is. I actually had a

chance, on the plane out here, I finally caught up with the documentary. And to see her working out with her trainer and looking quite robust and fit. And I know she's back in full action after her . . .

You know, she is really, absolutely a board. This is her third bout with cancer. She's still doing all her pushups and workouts and so forth. And she's really indestructible. It's so impressive.

So ACS. I'd also like to think we're indestructible. But we're a nation-wide network committed to the fundamental values of the constitution. "We the people in order to form a more perfect union," the preamble to the Constitution lays out, in such beautiful and empowering and inspirational language, what this nation is dedicated to achieving: effective government, democracy, liberty, and justice for all.

And with the Post-Reconstruction Amendments, we add equality to that list of core values that we believe in; that absolutely infiltrate everything we believe about the law and Constitution values.

So I would encourage you — and we have a constitutional law professor in the room — next time you're thinking about the Constitution and questions, go back and read the Preamble. It's not there just to look pretty at the beginning and have the big W, you know. They wrote beautifully back then. It's actually there to tell you how to understand the document that follows.

So that's what we are deeply committed to. We've been building a network across this country of lawyers, law professors, law students, judges, elected officials, and concerned Americans who are committed to ensuring that those values are how our constitution and our justice system operate. So it's very important to us to build the next generation, which is why the law students are such a critical part of ACS. You're the ones who are going to transform this nation for the better.

And we're in a moment where certainly most of us—even George Conway, many people on the Right—understand that we're in a pivotal, dangerous moment for our democracy. We have real stresses in our constitutional system, our system of separation of powers and checks and balances.

I know this is why George Conway has founded this group called Checks and Balances. Because the presidential power has become so great and the congressional power has been withering. But that's just to say we're here, we exist, because of you. Because we want to work with the students as well as their mentors, the wonderful law professors you have here, and the lawyers you work with along the way, to make sure you succeed even where we might not.

And that is to make sure that those enduring values in the Constitution really do see themselves expressed in legal decisions in judges —

and a few of you might become judges. I'd encourage you to think about it — in cases brought by the others of you who are going to be practicing lawyers; or carrying out the ideas expressed by the law professors that you may become or the civil rights lawyers, the environmental lawyers. Or you could be a corporate lawyer and do pro bono work.

But there are so many ways in which you are going to be responsible for making this world a better place. And not to put all the burden on you, but that is really what ACS is all about.

PROFESSOR KIBEL: So, we're going to dive into part one. And in preparation for this, we discussed and came up with five sub-topics for part one and part two. And we're going to proceed with the dialogue. So, I'm going to start with topic number one. This is related to matters of confirmation. I'll just lay it out for you.

Very late in the Senate confirmation process for Brett Kavanaugh, California Senator Dianne Feinstein went public with certain allegations by Dr. Christine Blasey Ford related to alleged sexual misconduct that occurred at an earlier period of her life by Brett Kavanaugh. And after the disclosure of the allegations by Dr. Ford, several other women came forward with allegations of sexual misconduct.

And there were also related allegations related to excessive drinking by Brett Kavanaugh that tied in with some of those allegations regarding the sexual conduct. And then in the context of the actual Senate confirmation hearing, both Dr. Ford and Brett Kavanaugh testified to questions related to those allegations. I'm just sort of framing that.

So, my question to you is what are your thoughts about the extent to which the process in the senate confirmation hearing was fair? And in using that word fair, I'm saying both in terms of being fair to Dr. Christine Blasey Ford, but also being fair to Brett Kavanaugh, as well. And do you think there are ways that it could have been handled better?

FREDRICKSON: Before I get into the specifics of the Kavanaugh process, I do think it's really important to put this in a bigger context. And that is the process by which this White House and the Senate Republicans have approached judicial nominations generally and looking back to President Obama's final year in office, when Justice Scalia died.

And there was a vacancy created on the Supreme Court, which, in every other presidency, would have enabled the President to fill that vacancy. But because Senator McConnell, who is the Republican leader, had been basically obstructing every opportunity that President Obama had to fill any judicial vacancy for two years, they declared immediately after Justice Scalia passed away that President Obama would not be able to fill that vacancy, no matter whom he nominated.

And President Obama, being President Obama, a great conciliator, somebody who tried to reach across the aisle frequently — some people might think too frequently or naively; and perhaps particularly so in this case — nominated a wonderful judge named Merrick Garland, who is a wonderful judge, but is definitely one of the more moderate members of the DC Circuit on the older side — a white male — and really trying very hard to bring along the Republicans, all of whom had served in the Senate when Merrick Garland was nominated to the DC Circuit. Who had supported him, and in fact, had even said very affirmatively before Barack Obama nominated Merrick Garland, that if he were to nominate somebody like Merrick Garland, well, of course, we would support him.

But once it was, in fact, Merrick Garland, they couldn't support Merrick Garland. So, I'm giving you a little of this context. Because I think it's important to understand how bitter the Democrats were; how very much the Democrats felt and many people feel, that the Gorsuch seat was a stolen seat and that the Supreme Court's makeup is illegitimate.

Because the person who should have been on that Court should have been Merrick Garland. And yet, it wasn't. So, there's a lot of anger and distrust that permeates this whole process. So then when you get to Kavanaugh, the system had really broken down even further. Because the President had been told by McConnell, "Don't nominate Kavanaugh." Kavanaugh was not on the original list.

Because Brett Kavanaugh has a record that included millions of pages of documents that were at the National Archives. Because he served in government for so long and had been in the White House Counsel's office in the Bush Administration in a time when the President had expressed an incredibly extreme view of presidential authority, which involved signing statements that suggested that over 1,000 provisions of federal statutes that Congress had passed were unconstitutional, and basically saying, "I don't have to abide by these."

Brett Kavanaugh was involved in all of that. He also worked on the impeachment of President Clinton, the Starr Report, and so forth. So there was just an incredible, massive amount of documentation that, in any other circumstance would have been produced to the Senate, would have been object for the Senate to spend a lot of time researching to get a better sense of who is Brett Kavanaugh, what he's been involved in.

That was not produced. So let me just say how illegitimate this was that, not only did the Republicans not allow those documents to be produced—the National Archives said they could do it, it just was going to take them a little bit of time; they said, "We can get this smaller amount

of documents for you by six weeks from now.” But even that, Senate Republicans refused—and the White House.

And instead, they put in charge of the process a White House operative named Bill Burke, who in the Bush White House, had actually worked for Brett Kavanaugh. He worked for Brett Kavanaugh, so was involved, most likely, in a lot of the most controversial decision making that Brett Kavanaugh was involved in.

So think about somebody who is very self-interested in making sure that the documents that might implicate Brett Kavanaugh in any type of illegal actions by the Bush Administration—remember the torture issues; detainees; illegal, warrantless wiretapping—this was all the kinds of things that Brett Kavanaugh was likely involved in and Bill Burke, as a result, was also involved in.

So they called out of this much, much, much more massive trove of documents a very, very, very limited set of documents, pre-approved by Bill Burke and the White House and given to the Senate. And the Democrats barely got to see those. I know this is a long answer.

But I think it’s just a sort of—we haven’t even gotten to the sexual assault issues—but we’re already at a place where building on all the anger and distrust about the Merrick Garland process—but now you have a situation where the nominee is shrouded in mystery. So that produces even more doubt. Because people were wondering, “Well, what’s there? What are you so afraid of?”

PROFESSOR KIBEL: So I think the comments you are setting up are completely relevant. And I appreciate it. I guess, if you can speak directly. Both across the political spectrum, there were people who felt that the way the Senate confirmation hearings proceeded were unfair or maybe, disrespectful to Dr. Blasey Ford. There were also people on the Right who felt that it was unfair in some ways—the timing of it, the nature of it—to Brett Kavanaugh.

I’m just interested in hearing your thoughts—in light of what you just explained—about the process itself and what your views are of it in ways, given the allegations that were made, how it might have been handled better?

FREDRICKSON: Right. I think most of you probably recall — I mean, we’re all kind of riveted on it—there were actually several women who came forward and in support of Dr. Ford or with their own allegations. And it seemed like a critical matter to get to the bottom of. And Senator Flake, Republican from Arizona, asked for an FBI investigation.

However, again, it was in form, but not substance. Because they also imposed great limits on the FBI. They did not actually talk to most of the

people who were named to support the statements of these women, just a very small portion of the people that Dr. Christine Blasey Ford mentioned, and then not exploring the charges brought by any of these other women, and done in a very short fashion — produced to the Senate, I believe, the day before the vote in a single copy for all the Senators to see.

They have to go to a secure location one by one to read it. So is this process fair? I think it was a circus. It was so obvious—the more I talk about it, brings back so many bad memories. I just, you know, I would love for a moment, if we could change this whole process, and have a system where our judges were chosen in a rational way to be people who were committed to upholding the values of the Constitution and interpreting the law in a way consistent with the core understandings of legal interpretation, and that it wasn't this terrible system.

But I have never seen anything like this. And I have been involved in a lot of judicial nomination battles. But I think what happened with Brett Kavanaugh—one of the reasons I think he's going to bear a stain for however long he serves on the Court—is that no one—very few people—are going to think that he's there entirely legitimately. Because there's so much we don't know. And yet, and it may still be, and is very likely to happen, that the documents that were not produced will be made public at some point in time.

And we will start to actually know what Brett Kavanaugh was involved in. And when you have a Supreme Court who then—when one finds out who has had his fingerprints on all of these kinds of decisions—I think that's going to be a profound moment for us to think through whether we have a process of selecting Justices that is rational or appropriate.

PROFESSOR KIBEL: So to segue from that, I'm going to skip over one of the comments. Because you already hit on it in terms of the FBI investigation. But after Brett Kavanaugh testified, there were certain statements that were made and, sort of in the context of Dr. Ford's allegations, that he viewed the whole presentation of the allegations as part of a larger Clinton-inspired conspiracy and listed a number of people that he thought were associated with this conspiracy to attack and discredit him personally.

And after watching this, retired former United States Supreme Court Justice John Paul Stevens issued a public comment, which was somewhat controversial, which was that having watching Kavanaugh's response to the allegations—particularly laying out this conspiracy theory—that he thought that Kavanaugh lacked the temperament and im-

partiality to serve on the U.S. Supreme Court; this coming from a former U.S. Supreme Court Justice that was appointed by a Republican president.

So I guess my question for you, and it's a pretty open one: Essentially what do you make of Justice John Paul Stevens's comments? Do you think that they were appropriate under the circumstances? And how do those types of comments speak to the point you just mentioned, which is, you just called it a, "stain"? But do statements like that during the confirmation process really go to the credibility of Kavanaugh as a Justice, and maybe more importantly, the Supreme Court and the judiciary as an institution? Is that a narrow question?

FREDRICKSON: It is. And I think what Justice Stevens put his finger on was something that was very troubling to people who watched the hearings. And did all of you watch the hearings? Yeah. So it was deeply upsetting in so many ways to see Dr. Ford testify—the trauma. And to have Brett Kavanaugh react in a way like he was a victim and his tirade, I think, was very off-putting to people who don't expect that.

If you've watched judicial nomination hearings, particularly Supreme Court hearings, the nominees make an enormous effort to be very calm, to exude judicial temperament in the process, and not to be petulant or angry or indulge in a tirade. And so I think it was just—for people whose expectations were really upset—and I think what Justice Stevens was reflecting was, "We're not comfortable with somebody who is going to sit on the Supreme Court who behaves this way in front of a nominations hearing.

What does that bode considering what we are used to? So I think a lot of it was just expectations about how judges behave and even if subject to questioning that, some people might feel, was unfair or, you know, the allegations—perhaps not everybody thought that it was appropriate to bring those forward. Even so, I think just the demeanor was deeply upsetting to people across the spectrum.

PROFESSOR KIBEL: A final question I have and then we'll open it up, as a result of the November 2018 elections, the Democrats are now in control of the House of Representatives. And some of the Democratic members of the House have indicated their intentions to hold hearings related to Justice Kavanaugh—in particular, hearings possibly related to whether he perjured himself as part of the Senate confirmation process. And that may be separate from what you mentioned about using the hearing process possibly to get in some of the documents that weren't disclosed.

But what I was interested in hearing from you about is: What do you make of the prospect of the House holding hearings on a sitting Justice

on the Supreme Court about whether he perjured himself during his confirmation process? And it's sort of two-part. One is: Do you see any precedent for that type of hearing by Congress or the House? And how might that hearing speak to the issues that you said about the legitimacy of Kavanaugh as a Justice or the institution of the U.S. Supreme Court?

FREDRICKSON: Well, I'm not laughing because it's a funny topic. I'm just thinking about all the investigations that the House is doing right now. I'm not sure when they're going to get to Kavanaugh. And they may have bigger fish to fry. I'm actually testifying myself a week after next for the House Judiciary Committee on the pardon power.

So their focus right now is on other issues: the role of whether tax returns should be produced by the President or other matters. So I think it's an interesting question. It's rather unprecedented. Although there was a process of impeachment against a Supreme Court justice very early in the new republic. The justice was actually acquitted and stayed on the Supreme Court.

I think it's troubling that Kavanaugh may have perjured himself. Whether or not this is the appropriate way to remedy it, I don't know. I think it raises a lot of questions about how politicized do we want our court system to be. Do we want to open that Pandora's box of impeachment for justices? Where will it go?

I can certainly see people on the Right who want to impeach justices who support women's access to reproductive care. Will it become a substantive process? I don't know. I think it has not been indulged by Jerry Nadler, the Chair of the Committee, I don't believe. But he's laid out a whole list of priorities. I don't think this is up there or in there at all.

So if the Democratic president wins in the next election and the House remains in Democratic hands, would they have hearings? They may well have hearings. Would they start an impeachment process? I'm still thinking it's pretty unlikely.

PROFESSOR KIBEL: We'll open it up to questions. But I wanted to make one comment. Because it links part one to part two. One of the things that I find interesting is, if the House Democrats were to call for these hearings and potentially proceed with impeachment, that would potentially provide precedent for a Republican-controlled House to do that against appointees by a Democratic president.

So when you switch the roles the question you have is: Is this a precedent? And I think it relates to some of the discussion we'll have in part two about executive authority and why some traditional conservative voices are somewhat concerned about President Trump's expansive view

of presidential authority. Because they recognize at some point in time, you're going to have a Democratic president back.

And any precedent that you establish for expansive presidential authority is not going to be limited to conservative presidents. It's going to apply. So there are some complex issues. But with that, looking at where we are timewise, let's spend about ten minutes opening it up.

And I ask for right now, if you could focus your questions about the confirmation and appointment process. We're going to have a second opportunity for questions related to matters of jurisprudence related to Justice Kavanaugh. So let me open it up now. If you can identify yourself.

JOHN GALLENGER: I'm John Gallenger. I'm an alum here. And I teach election law. I think it's unlikely this president would call you for advice. But the next president might, as Professor Kibel alluded to.

So in a scenario where the next president has made an appointment that he [unintelligible] is a good appointment on all the issues—one of our Supreme Court Justices from California perhaps—and something similar emerges during the confirmation process; someone comes forward, whether it's a sexual assault allegation or something else that's [unintelligible], and the President called you the day after that. Would you advise the President to immediately withdraw or stand behind the nominee? What would your advice be?

FREDRICKSON: You know, I think it's really important to make sure that we take allegations seriously. I think we're all reeling somewhat from what's been happening in Virginia. And I don't think Progressives want to be hypocritical. We can't be. It shouldn't be hypocritical on these really important issues on whether there has been behavior that violates someone else's liberty, personal autonomy.

And so they have to be taken very seriously. Whether that means absolutely the minute somebody says something, withdrawing. That seems like the wrong response. Because it would offer too easy a target for people who oppose the nominee for substantive reasons to dredge up somebody who might say anything. However, saying that, I do think there has to be a real investigation.

And I think what we saw with Dr. Ford was that her allegations did not get taken seriously by this White House and were not explored. If they had explored them, if there had been a real investigation, and it had been shown that no such thing has happened, then I think, the stain would have been removed on Brett Kavanaugh. But I think we have to live our values.

And I would never recommend to a president to ignore allegations of sexual assault against a nominee. I was actually, like the Dean, an employment and labor lawyer before I went to work on the Hill. These issues are very important to me. And some of you may have been at a book talk I did a couple of years ago on my book, “Under the Bus: How Working Women Are Being Run Over,” which explores a lot of issues around race and gender in employment, particularly.

And I was the General Counsel and Legal Director of NARAL Pro-Choice America. I’m absolutely committed to gender equity. And I would certainly hope that any president who would call me for advice would be similarly committed. So I hope that answers your question.

STEPHANIE: My name is Stephanie. I’m a 1L here. You had mentioned that if documents were released in regards to [unintelligible] what Kavanaugh has been involved in that that would lead to more initiation for the Senate or for the courts to change the process of selecting justices. Why is it that numerous sexual allegations haven’t been able to do that? Why is it that we need those documents to come out?

FREDRICKSON: Well, I think, maybe, not quite exactly what I said. Number one, it’s important to have a thorough review. For somebody who has a lifetime appointment—where we’ve never impeached a justice—sitting on a court that, I think, is so enormously powerful—perhaps more powerful than it has ever been in terms of the impact on the American system of government, democracy, and personal autonomy. So the idea that we confirm somebody with having less than a tenth of the documents that were available is extremely troubling for any normal process and has not been allowed to happen in the past.

The issue with Kavanaugh was just that the volume of documents was enormous. . That was their problem; they picked him. And they shouldn’t have denied Senators the ability to review his record. It’s his record. Just because it was big, they shouldn’t take it off the table. The issues of his personal conduct are separate and a separate reason to raise concerns about him.

Again, it might have been that they went through all the documents and found out that he never worked on any of the troubling issues. Or he never perjured himself, which is one of the allegations about when he was nominated to sit on the DC Circuit. He was asked about his involvement in decisions by the Bush Administration. And it seemed like he actually said things that were not true.

And so there were concerns that he already perjured himself in his prior hearing. And so without all those documents, it was hard to know what he’d been involved in and whether he had already lied about it.

The personal allegations were a totally different set of issues. They're separate problems for him. And you can't just sort of say one didn't work, and so therefore, the other.

I think you have to remember that these are two very different areas of concern that were raised about Brett Kavanaugh.

JOE HUTCHINSON: Joe Hutchinson. I'm a 1L. In light of Justice Kavanaugh's accusations that there was some kind of conspiracy going on, did you find it alarming at all that all of the sexual allegations against him were dropped?

FREDRICKSON: No, actually; not at all. What I find alarming is that Dr. Ford is still in hiding. She's actually still under personal death threats; has not been able to get back to teaching. And I'm very close to somebody who has been regularly in touch with her who also had worked with Anita Hill.

So I think if you look at what happens generally, very few allegations of sexual assault are actually brought forward by women particularly, but by all who were assaulted. They're not necessarily actionable legally at the point they were brought forward. These women weren't expecting him to go to jail. I think they were really concerned about the idea that he might be on the Supreme Court for the rest of his life and have the ability to affect all of us in ways that are very hard to remedy.

Apart from a constitutional Amendment, Congress can do very little. And even if it's a statutory decision, it's very rare for Congress to overturn the Supreme Court. So actually, no. I think the legal process versus whether he should be a justice—we weren't engaged in a courtroom. He wasn't on trial for rape or sexual assault. The question was: Should he have this incredibly privileged office of being a Supreme Court justice when there are these blemishes on his character? I think it's a totally different set of questions and a totally different standard.

PROFESSOR KIBEL: We'll take one more.

GABE: I'm Gabe. I'm also a 1L at Golden Gate. And my question is with regard to the nomination process itself and appointment of justices. In an area where we hope to minimize politics and have a review of our laws, is there a way that you see, absent a constitutional Amendment, to make that happen and avoid situations like we had with Garland, and now with perhaps Gorsuch and Kavanaugh, to where their presence or lack of presence on the Court is a direct result of politics?

FREDRICKSON: Thank you. That's a great question. Actually, there is a lot of discussion about possible reform ideas for appointment of judges and justices. There are many who would argue that there should be term limits for Supreme Court justices, some for all of the federal judges, including Steve Calabresi, who wrote a law review article with a more liberal scholar about term limits.

And one of the reasons is that in past times, serving on the Supreme Court was sort of the capstone of a career. It wasn't your career. You don't get nominated fairly young to serve on the Supreme Court. Like Earl Warren, he had already been governor of California. He'd had this incredible record of achievement. And he went up to the Supreme Court as sort of an elder statesman. Then, the average time of service was eighteen years.

It's now become such a long period of time that justices serve really out of whack with the way it has been traditionally. So Steven Calabresi and another law professor had proposed these 18-year terms. He thinks it should be, or needs to be, a constitutional Amendment. But many others argue that it doesn't need to be—a lot of constitutional law professors; and you're probably familiar with all this discussion—who think that actually, there is no reason that you couldn't create a senior status for Supreme Court justices, just as there is on the courts of appeal—on the trial courts in the federal system.

And you could keep the nine—nine by the way, not in the constitution; just FYI, it's just a statute that sets the number—so you could have your group of nine refreshed regularly. And then the ones who go onto senior status after a period of eighteen years could go off and ride the circuits. So there's a whole literature about different ways to depoliticize the process.

You could take the decisions about which cases the Court hears away from the justices and their clerks who have become more and more political over years and make that a decision of a group of judges drawn from the circuit courts or a group of law professors and judges. There are lots of different ideas about how to approach this.

But I think there are many people, certainly among those that we work with—many academics—who are thinking really that the system [Laughs] is not functioning very well. Progressives don't want to just do the mirror of what the Right did and jam somebody down, somebody who doesn't have the respect or support of many. Ruth Bader Ginsburg, for those of you who watched RBG, you know she got ninety-three votes in favor.

As Oren Hatch said in the documentary, "I didn't agree with her on many things. But she was certainly qualified. And that's the President's

prerogative.” And so she serves on the Court without this cloud hanging over her head—that she shouldn’t be there because the process was warped. And I think it’s very unfortunate. And you see the stature of the Court going down and down in the views of the American people. Because they see this process.

And they see the nominees as not being exactly legitimate or being just as much political players as Senators and House members and the President. So it’s something I’m very interested in. We have a lot of literature on it. I would encourage you to look at it. I’m very hopeful. Because as I said, I find the process pretty sickening. I would rather spend my time on other things than an increasingly politicized, nasty, partisan process to choose people who are supposed to be impartial and neutral. [Laughs] It really is not the best way to do business.

PROFESSOR KIBEL: We are going to move onto part two. We are going to leave matters of confirmation behind and move onto matters of jurisprudence. We have a pretty meaty list of topics. I’m not sure we’re going to be able to get to all of them. But we will start.

Matter of jurisprudence number one: originalism. Without getting too far into the jurisprudential weeds, originalism is a school of jurisprudence that was certainly embraced by former Justice Antonin Scalia, also embraced by current Justice Clarence Thomas.

It’s an approach that holds, in general, that where you have constitutional language that is fairly open and is susceptible to multiple interpretations, and you are a judge reviewing or interpreting that language, the judge should select the interpretation that is most consistent with the understanding of the people that initially adopted it. That you go back to that period of time, and that’s the interpretation.

So the question that I have for you—and I’ll start with a fairly open question, and maybe we can get more specific—is: What are the indications that Justice Kavanaugh will embrace an Originalist approach? And how might this affect some of his decision making?

Before we get into it though, I want to bring in the discussion that we had on the phone as we were preparing for this, which I think is somewhat relevant. One of the things that Caroline talked about when we were planning this was an interesting question—and I’ll pose it to all of you; and maybe you’ll pick up on it, if you want—is: Were the Founding Fathers Originalists?

Or framed another way: Did the Founding Fathers desire or expect that their particular notions of what the constitutional language meant should be controlling on future justices? And I think where this conversation came up is [that] there are certain provisions in the Constitution

that are very precise, right? Federal courts have subject matter jurisdiction over diversity and federal question.

They weren't vague about that. They were very specific. Issues of how many representatives each state gets, or how many Senators each state gets, or the way the veto process works—the drafters of the Constitution were very clear and precise in those areas.

And yet, in other areas, they chose language like “due process, right to bear arms, freedom of the press”—much more open language. And I think what this raises a question of is: Was the choice of using that more open language that was not defined in a precise way an indication to provide latitude to future judges to interpret those terms as they deemed appropriate in the context of their times?

Because if they had wanted to lock in a particular meaning, they could have done so. And they didn't. So I'll let you answer this question with one last comment. I was with my daughter who just turned fourteen. And she's reading *Romeo and Juliet*. And we were noticing as we were talking about it, that Shakespeare in general, as a playwright, provides very little direction in terms of stage direction or costume.

He cares about his words a great deal. But in terms of how you produce it, no. So when people say, “Well, are you putting on the play in a way that is true to Shakespeare?” Shakespeare didn't have any particular notion of how you were supposed to produce his plays. That's sort of reflected from the way he wrote his plays. So with that question hovering out there

FREDRICKSON: I seem to remember one very famous stage direction was something like, “Exit, chased by a bear.”

[LAUGHTER]

PROFESSOR KIBEL: What type of bear?

FREDRICKSON: I don't know. [Laughs] It was in *The Winter's Tale* or something. Anyway, great question. As you said, there's no real indication that the Founders were Originalists. In fact, to the contrary, Thomas Jefferson said something exactly to the opposite: that we basically shouldn't have the dead hand of history determining what we should do in the future. And that we should be renewing our Constitution at regular intervals; I think he said every twenty years.

And in fact, it's instructive to think about what Chief Justice Marshall said. “It is a Constitution we are expounding.” Meaning very much, that it's the role of judges to—certainly judicial review—that it's not a statute book. It is an inspirational document meant to set the general

values to guide judges in our nation in how the laws would be adopted and implemented, but very imprecise on a lot of issues.

And the irony with those who call themselves, “Originalists,” is that they attempt to lock down this vague meaning; meaning in areas where it’s convenient—say the Second Amendment; the right to bear arms—while ignoring the language at the beginning of the Amendment. And Justice Scalia actually said, “Well, it’s just whatever—verbiage.” You know, “The militia clause—surplusage.” I can’t remember the exact word he used. But basically, ignore the man behind the curtain. Just pretend that didn’t exist.

And yet, historians could tell you that the states were very concerned about their militias being disbanded. And therefore, that language was really important to them. Because the Second Amendment was about their militias and the preservation of the independent militias against what they feared was an overly strong federal government. And so you could spend a lot of time—and I can find my historian, and you can find your historian—and we can debate without ever finding evidence that James Madison said, “My dictionary is better than your dictionary.”

And therefore, we should append that to the Constitution. “I’ll only look at Webster’s, as opposed to the Oxford.” Whatever. So anyway, that all being said, Kavanaugh is sort of originally, an Originalist-ish. He’s not given lots and lots of speeches about it. But I think you could say he’s generally a follower of that approach. But again, it’s something of convenience. And when it works, you use it. When it doesn’t work, you abandon it.

And I think the Fourth Amendment is a great example of how this plays out generally with Originalists. So Randy Barnett, who is a well-known law professor—expounder of the Originalist approach — does say that it’s actually kind of hard to apply Originalism to contemporary questions. [Laughs] Well, okay, except the ones that you think we can apply them too, right?

So in the Fourth Amendment context, somehow, you can draw out of the protections that existed in the Fourth Amendment—your house and personal effects—from government intrusion. And we can say in the modern times, “Well, it’s logical to extend that to your cell phone or GPS tracking, or if you grow marijuana in your basement, when the cops come by with their thermal imaging systems and determine whether you have a heat lamp in your basement.”

It’s probably not a problem anymore in California. [Laughs] It’s all legal here. But just to say the conservative justices thought that was fine. And somehow that’s not living constitutionalism? That seems to me that is exactly what the more progressive constitutional law scholars would

say, which is [that] you look at the principals behind these provisions: protection of your personal autonomy from government intrusion and that should protect what's on your computer and maybe your body and so forth.

I think that's one of the reasons that Originalism is critiqued so easily as being very outcome-oriented and basically, only ever produces conservative outcomes.

PROFESSOR KIBEL: So apart from general critiques of Originalism, given what you know about how Brett Kavanaugh approaches it, do you see certain types of issues—constitutional or otherwise—where you see him (whether you agree with it or not is a separate question) but where you anticipate or see him applying an Originalist approach to those issues or constitutional questions?

FREDRICKSON: You know, I think it's sort of an ad hoc — he's not been extremely doctrinaire. And so I think he is going to be in the same camp that Gorsuch is in, that Scalia was in—that when it works, it works, and when it doesn't, you abandon it. Not like Clarence Thomas, who is sort of uniquely almost consistent in his approach to—he wants to throw out every precedent that he believes is inconsistent with his view of the Constitution. It's a very radical idea.

A lot of you are 1Ls? Any 2Ls or 3Ls? So you've spent some time talking and thinking about stare decisis and sort of the way that the common law develops. One of the things I think is very frightening about the kind of people who consider themselves, or call themselves, "Extreme Originalists," is their willingness to abandon that approach to the evolutionary process of the law; something that gives our legal system stability, gives litigants some idea of what the law says.

It is profoundly an element of rule of law. People know when they go into a courtroom, the law that the courts will apply, and somebody like Clarence Thomas will just throw that out the window; and it doesn't matter how old the precedent is or how long it's been relied on by courts subsequently. If he thinks it's not consistent with his view of the Constitution, it's got to go no matter what impact that has on the legal system.

Kavanaugh is not like that. I mean, he's more consistent in wanting a conservative outcome. If originalism works, he'll use it. If it doesn't, he won't.

PROFESSOR KIBEL: We've got a couple questions here. I'm going to turn to one about presidential authority, just to make sure we get into that. Another important constitutional question that comes up is the issue of the scope and limits of presidential authority. In terms of Neil Gorsuch,

who also at times is an Originalist, my understanding — you can correct me here — one of the tenants of Gorsuch’s originalism is that he thinks the Founding Fathers were particularly concerned about excessive presidential authority; essentially, the prospect of the president becoming a king that was above the law.

So Gorsuch is an originalist that ends up, at least in some of his scholarship, taking a somewhat limited view of executive branch authority. Because he thinks that’s consistent with the Founding Fathers. My understanding is that—at least in his legal career, some of his opinions, but also some of the work he did in the Bush Administration—Kavanaugh is an Originalist that has not come to the same conclusion as Gorsuch and actually used executive authority very expansively.

We’ll talk a little later about the border and more specifics. But to open it up more generally, do you see potential tension or clashes between Gorsuch and Kavanaugh on this issue of executive branch presidential authority—a rift within the conservative wing of the Court?

FREDRICKSON: Yeah. Well, I certainly hope so in part, because I think there’s so much at stake. The Supreme Court may have cases in front of it that deal with the Mueller investigation. And I think this is going to be a very important question to see if the conservative justices all step up to protect the President at the expense of checks and balances, at the expense of rule of law.

Will Gorsuch break? I don’t know. I hope so. But I think it’s really important to note what tradition Brett Kavanaugh comes out of. There’s something called the “Unitary Executive.” Have any of you encountered this? I see you have. So you know this is a view, as expounded by Steve Calabarasi, that all executive power resides in the president.

And therefore, everything that happens in the executive branch must be determined by the president; that is, he can hire and fire everybody. Congress has no ability to delegate to these administrative agencies. There’s a whole set up building up of the presidential power in an extreme way that is very controversial, especially because the Constitution does not say all executive power shall be vested in the president.

And even the original Constitution separates power, not just between executive, judiciary, and legislative, but also among the branches there are different—and at the time the Constitution was created, there were prosecutors that were run by judges— that were appointed by judges. There was a whole array of ways that things were mixed constitutionally.

But this vision means that the Congress can’t put any limits on the President’s ability to fire somebody. So creating an independent prosecutorial model, like a special counsel, is very illegitimate under that

view. And so that's where sort of this tension will come up. Is the investigation legitimate? Could the President simply terminate Mueller or any of those others without process?

And I think that case may well be coming. Does the President have to respond to a subpoena? Is the President, in fact, above the law? I think, as you said, the possibility that Gorsuch—and I think it's self-evident, personally—that one of the reasons we had a revolution was to not have a king, was to not have somebody with absolute power, but in fact, have a democracy subject to checks and balances.

I think Kavanaugh's view is very frightening and is not just a-historical, but is actually contrary to a fundamental understanding of what gave rise to the American republic.

PROFESSOR KIBEL: So I'm going to segue from that more general discussion about executive authority to some more current events dealing specifically with the fall. And I may encourage you to speculate a little about what you know about how Kavanaugh might approach this. As many of you know, last month, Congress did not provide full funding for the border wall with Mexico.

President Trump issued a national emergency declaration where he indicated that he was going to reallocate certain funds from the military and the Defense Department to make up for the shortfall to complete the border wall. What is interesting to note—and I will welcome your thoughts on this Caroline—in connection with Trump's declaration of the national emergency to complete the border wall, many leading conservative voices, not ACS, have taken the position that the President's use of a national emergency declaration to complete the wall is inappropriate.

And the two that I wanted to mention specifically are the magazine *The National Review* and the Cato Institute in Washington DC. In February 15, *The National Review* wrote that President Trump's national emergency declaration, "Is the proclamation of the monarch, not an argument by a president." This gets back to King George III. "And that it should fail in court."

The National Review article went on to state, "A border wall is a civilian structure to be manned by civilian authorities to perform a civilian mission. The troops would not be creating a military fortification for military Use. Not only is the wall not military construction, it's also not necessary to support the Use of armed forces, unless one wants to make the fantastical argument that the wall somehow protects the troops who are building the wall."

The Cato Institute, a well-established conservative voice, wrote also on February 19, 2019, an article on it at the Cato At Liberty blog: “No reasonable person can look at the southern border and agree that it rises to the level of a national emergency.” The Cato Institute article continued, “The most common argument in favor of the national emergency is that there is an epidemic of immigration-induced crime and death on the border. This is simply not the case. The crime rate in the twenty-three counties along the U.S. border with Mexico is below that of the counties in the United States that do not lie on the border.”

“Violent and property crime rates are both slightly lower along the border. And the homicide rate along the border is 35 percent below the homicide rate in non-border counties. Resident illegal immigrants are less likely to be incarcerated or convicted of crimes than native-born Americans. The estimated illegal incarceration rate in 2016 was 47 percent below that of native-born Americans.”

Where I’m going with this is, one, I’m curious to hear about the extent to which ACS as an organization is actually collaborating, or in discussions with, groups like the Cato Institute and *The National Review*, with whom you often don’t align.

And two, as you think about a case coming before the Supreme Court over, essentially, whether this national emergency using these funds in this way is constitutional. And Justice Kavanaugh—how does information like this coming from the Right, *The National Review*, the Cato Institute affect—we’re obviously speculating—the way a justice like Kavanaugh would approach this question?

FREDRICKSON: Well, it’s a very good question. And it is important to understand that these public expressions of concern are really rather new for many on the Right, particularly *The National Review*. Cato is a little bit different. And if you’re not familiar with Cato, it’s a Libertarian organization. It has always stood a little bit apart from the Republican Party. It was outspoken in favor of gay marriage.

And immigration is another place where it’s an organization that we’ve been able to work with. *The National Review*, however, is generally extremely conservative on pretty much everything. So that was very interesting to see expressions of concern coming out of that quarter.

But I think what we’re seeing is that, for these conservative organizations that have been identified with the idea that we should have a small government, that we’re worrying about overweening power—even if they think that perhaps, in the constitutional structure, the President is stronger than we might think the President should be—the federal government still should not be that enormous and powerful.

And I think looking at a president able to override traditional separation of powers—that the Congress is the body that appropriates and determines where money goes; it's the classic determination of what the Congress does is the budget, and that the President can simply ignore—I think is very troubling to them.

So I think it may give some ability for the conservative justices to feel a little bit more empowered to start to question the President. In the travel ban case, they didn't do that so much. So we'll see. But even if the justices don't, there's a lot of unease among those on the Right who are really worried about where this could be going.

The idea that a president could redo the appropriations process and ignoring—in this situation we have here is that Congress was in the Republican control for two years of Trump's presidency and never funded this wall, despite Donald Trump asking them to; so basically, rejection of that funding demand. So we have a direct clash here. It remains to be seen.

I think Kavanaugh himself has expressed extreme deference to presidential authority and this idea of the Unitary Executive. Whether Gorsuch or John Roberts is willing to go along with that, that's where your questions are.

PROFESSOR KIBEL: We don't know. And obviously, some of the concerns that we're seeing here are related to any precedent that would be established by upholding President Trump's ability to do this with the national wall could be relied on by a Democratic President for other national emergencies. I think Nancy Pelosi hinted at nation gun violence — we think that's a national emergency.

FREDRICKSON: Climate change.

PROFESSOR KIBEL: Climate change. So there's some recognition that the argument, while it may support a Republican president now, could establish a precedent that would run.

FREDRICKSON: And in areas where you actually show there was an emergency.

PROFESSOR KIBEL: Yeah. So I'm going to skip ahead to our fifth topic, partially because of time. But partially because I think it relates to the executive. And this relates to the issue of judicial review of administrative agencies. And this is actually a little more in my wheelhouse. Because I deal with natural resources and environmental agencies and the relationship of judicial review of agency actions and being part of that.

So as some of you may know, particularly those of you who've taken environmental law or some courses involving administrative law, about three decades ago there was a decision, *Chevron v U.S. Supreme Court*, which focused on when federal agencies are interpreting statutes where the language is arguably somewhat ambiguous or susceptible to multiple interpretations, what should be the role of judicial review in reviewing those agency interpretations.

And what came out of the *Chevron* case is what's known as the *Chevron* doctrine or *Chevron* deference, which is essentially this: that if the agency's interpretation of an arguably ambiguous or open statute is a reasonable one, the reviewing court should not substitute its own view for the agency's. That is the deference part of it. And in some sense, because these are executive agencies, especially if you adopt a Unitarian view, this is the executive branch interpreting it.

Sorry to keep pitting Gorsuch against Kavanaugh. But it's very convenient. Justice Gorsuch has done a fair amount of scholarship and some concurring and dissenting opinions indicating that he is somewhat uncomfortable with *Chevron* deference. And he questions whether it's appropriate for courts—judges—to delegate to agencies the task of interpreting statutes. He's gone so far as to suggest it may actually be an unconstitutional abdication. Not quite sure where he is on that.

But I guess my question on that in terms of Justice Kavanaugh Obviously, a lot of the work of the government is undertaken not by Congress; it's undertaken by the agencies that implement these statutes. What do we know or what do you think might be Kavanaugh's approach to this issue of judicial review of agency actions and interpretation and the viability of *Chevron* deference?

FREDRICKSON: It's an important question. And actually, they are very aligned. Kavanaugh has been extremely critical of *Chevron* deference. I actually have a quote from him. He wrote an article in the *Harvard Law Review* where he critiqued explicitly the *Chevron* doctrine. He gave a speech at Notre Dame. He said, "The *Chevron* doctrine encourages agency aggressiveness on a large scale." So the Unitary Executive theory is inconsistent with deference to agency decision making.

Because agencies were given this role by statute to be able to flesh out—you don't want Congress to write statutes that are going to lay out every single provision in terms of what the EPA should do to understand how many parts per billion of some kind of a chemical you can have in the water, and you can still meet the Clean Water Act tests.

So Congress writes the statutes and leaves to the agencies to draft regulations based on their expertise and understanding of what Congress

was intending. So the critique of *Chevron* is that it was inappropriate. Congress cannot create this system where the agencies have the power to interpret statutes apart from what the President wants them to do, right? So it is sort of the flipside of the same understanding of the strong role of the presidency and that can't be divided and undermined by this kind of independence of these executive branch agencies.

So the two of them are quite consistent together on this. And I think for those of us who believe that many of these statutes that have been interpreted by the agencies, including the Clean Water Act and the Clean Air Act, worker protection areas like the OSHA Act—Occupational Safety And Health—that it's critical that you have this expertise in the agencies to be able to determine, and with greater specificity than Congress can, how to protect people to make sure that children aren't going to school with lead in the water system, that the air we breathe is relatively clean, and that workers aren't working in incredibly dangerous conditions in a factory.

So this is an area where these extreme views are going to clash with what the vast majority of Americans expect their government to do. We've benefitted so much from these vital statutes—you know better than anybody—the Clean Water Act. It used to be that rivers would burst into flames in this country, before the Clean Water Act was passed, from industrial waste. We've done a lot to repair that. And this extreme view would undermine the agency's ability to do that.

PROFESSOR KIBEL: I think, based on my experience with the *Chevron* doctrine, one of the interesting aspects is the way it cuts both ways politically. So when I was in law school, learning about the *Chevron* doctrine, it was the case *Chevron—Natural Resources Defense Council v. Chevron*—was a situation where the agency had interpreted—this was in the Bush—I—Reagan Administration—the statute such that it limited environmental protection.

So the view was that *Chevron* enabled a Republican administration to interpret environmental statutes narrowly to undercut environmental protection. But what was interesting to watch under *Chevron* is that the Clinton Administration came in. And they issued regulations. And *Chevron* deference actually upheld those. So it actually didn't really end up being a Left-Right issue.

And what I think is interesting is that if you think, “Okay, you're opposed to *Chevron* deference,” well, the Trump Administration right now is busy issuing interpretations of statutes to which a court should have no deference. It should substitute its own view. So regardless of which side you—you may have different views.

FREDRICKSON: I disagree with that, actually, and fundamentally. Because I think that the role of government is seen so differently by Democratic presidents and Republican presidents. And to have an effective administrative state that actually was able to provide these protections for the environment and so forth, certainly there are going to be some examples where *Chevron* cuts the other way.

But I think that the construct of deference to the expertise in the agencies generally is protective, as opposed to—and I'll say this, because the way that the courts have approached Donald Trump's efforts to undo regulations has actually been very critical in most places. Because what they're just tried to do is ignore the facts and just repeal the regulations.

You actually have to go through a whole process. You have to have data under the Administrative Procedures Act that has some rational basis for why you're making the changes. And they haven't bothered to do that. So they've gotten caught up thinking—again, sort of the imperial presidency at work—but this Administration has not felt that it needs to abide by that kind of rule making process.

And so for those of you who are ACS members, which I hope means is all of you, we've actually been engaging our chapters, our members, and a lot of students particularly to participate in the rule making process by filing comments as this Administration has tried to change the rules around a whole variety of issues and women's healthcare, and particularly Title IX, Title X regulations, for family planning and so forth.

Because it's really important to express the views of how these statutes should be understood, what the regulations should look like. Because they actually have to look at these comments. And they have to account for them. Even if they are going to say, "I disagree with it," they can't just say, "I disagree with it," and that's the end of it. They have to say, "I disagree with it. And here's why."

It might be that their arguments aren't very persuasive. But they actually have to put some data in there. So it's sort of a long answer. But I think that's why the *Chevron* case has elicited much more critique on the Right than on the Left.

PROFESSOR KIBEL: So, we have five topics. But I'm looking at the time. And I'm going to cut to the last one so we have time for questions. And it returns to some of your earlier work before coming to ACS.

I wanted to ask you some questions about abortion and women's reproductive rights. So February 2019 US Supreme Court decision in *June Medical Services vs. Gee*, Justice Kavanaugh, in one of his first opinions on the Court, issued a dissenting opinion that advocated for

upholding the Louisiana law that imposed limits on when abortions could be performed.

So, I guess my question for you, using the *June Medical Services* case as a starting point, is: What does his dissenting opinion in *June Medical Services*, as well as his other opinions on the DC Court of Appeals, tell us about how he approaches the issues of abortion and women's reproductive rights?

FREDRICKSON: I think he gave us a very strong indication of how he's approaching it. For those of you who haven't followed this case, this is an exact repeat of a case called *Whole Women's Health*. It dealt with the same kind of limitations of the state trying to impose additional requirements on clinics that serve women that are unrelated to medical need—in fact, contrary—made it much more expensive to run these clinics; made it harder to find doctors that had admitting privileges at the local hospital; turning the center into basically a full-fledged hospital; and making it result in these places shutting down most of the clinics and eliminating the ability of women to get reproductive care, including abortion.

And so *Whole Women's Health* was decided. And they found that it was an undue burden under the *Casey* standard to impose these new requirements. Well, this case presents the exact same issue. And we see where this court will go with one more vote. And it was actually surprising that they didn't flip *Whole Women's Health* so quickly.

It was just with Justice Kennedy stepping off the court. We're very close to seeing those kinds of cases starting to go the other way. But I think Kavanaugh has announced where he is. And I think we've got a lot to worry about.

PROFESSOR KIBEL: Can you tell, for those of us who haven't read his dissenting opinion, a little about what he announced in terms of what his position is?

FREDRICKSON: I think what he said was they have to go back and prove that this would actually—in much more detail—how this would actually limit the clinic's ability to function. They already had all that data. It was just a way of giving the state another bite at the apple.

PROFESSOR KIBEL: I had some questions in here also about federalism. But I think looking at where we are time-wise, maybe we'll get to them in question and answer. But I want to leave some time for all of you. So let's open it up. And once again, part two is really focused on what we're calling matters of jurisprudence rather than the appointment process. So

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if you could try to focus your questions there, that would be great. Yes, Professor Christensen in the back.

PROFESSOR CHRISTIANSEN: This relates directly to the question you just answered about the *Whole Women's Health* transition. It seems to me that the person it's hard to be right now is Chief Justice Roberts. With the Court as it's aligned now, there are going to be so many issues. And we already saw that [unintelligible].

When [unintelligible] the Court is ready to radically reverse itself from a decision that happened in the last 10 years? [Unintelligible] transition from a conservative Court with some moderates in the middle to a conservative Court without moderates in the middle. What do you think is going to happen? Are we going to see decisions where we [unintelligible], more radical option [unintelligible]?

Or are we going to see a lot of decisions where we just redefine [unintelligible]? Are we going to see an overturning of [Unintelligible] and marriage equality? Are we just going to see increased religious exemptions? And I want you to answer that question. But also, in the context of—I'm a constitutional law professor; I like to [unintelligible]. And when I look for the fifth vote to uphold marriage equality on the current or to uphold *Casey*, I [unintelligible].

FREDRICKSON: Well, I think that's math. It's not much you can do about that. So math matters. I am extremely frightened about what this means. I think the Chief Justice does have concerns about the legitimacy of the Court and what it looks like to reverse. It's not just reversing a precedent that you could say, "Well, it was forty years ago. Times have changed." But to reverse a precedent from two years ago, because one justice has changed.

I think it's very unsettling; the idea that it's so easy to manipulate that way and on such profound matters. So I think he'll be concerned about the optics of that. That being said, he'd like to overturn *Casey*, and he wasn't with the majority on *Whole Women's Health*. So he does not agree. And in this case, he simply was saying, "The Court shouldn't be doing this, this way."

I think *Obergefell* is another one where he may try and moderate where the Court goes. You'll see Thomas and Gorsuch and Kavanaugh and Alito saying, "It was wrong. Throw it out, whatever the consequences." I think Roberts will try and do the religious exemptions instead, and say, "Okay, you can get married."

"But if a photographer doesn't want to come to your wedding, that's okay, no matter what the state's statutes say—the human rights statutes

say—the florist, the baker, and the dressmaker, the whatever.” And then all of the sudden you’d see LGBTQ people can get married, but they actually can’t get married in a church. And they can’t get married in a restaurant.

And they can be excluded from . . . It’s very contrary to the way we understand our Constitution under the Fourteenth Amendment and the implications that religious exemptions can trump these basic fundamental human rights. Where does it stop? Does it stop with race? Is race different? Is religion different? Do you do it to Muslims, Jews? I mean, these are really profound questions.

I think it’s scary enough in the religious exemption. I don’t think he wants them to go and overturn *Obergefell* and *Roe* in an explicit way. Because that gets everybody’s attention in a way that these other decisions don’t.

So I think five is the magic number. And I think for anybody who didn’t vote in the presidential election—and I’m not endorsing a candidate and I’m not partisan—but I tell you if any of these things matter to you, I certainly hope you participate and get everybody you know to participate in the upcoming elections. Because these are all choices that are going to be determined by who sits on the Supreme Court. And there will be other vacancies shortly, no doubt.

MATTHEW BASANT: I’m Matthew Basant. I’m a 3L here and I’m also the Golden Gate University ACS President. My question is: With the way the First Amendment has blossomed to the forefront in the last few years, do you think that the current makeup is likely to take any large stance about free speech, particularly, free political speech? There’s one case in particular that’s originating out of Pennsylvania where a rapper was convicted. And that was upheld by the Supreme Court of Pennsylvania for terrorist threats in a song. So I was just wondering if you have any thoughts about how free speech might transform under this current [unintelligible]?

FREDRICKSON: It’s a great question. One of the things that is of great concern is in the area of money in politics. The whole line of cases starting with *Buckley*, *Citizens United*—there are still a few provisions of that original post-Watergate campaign finance reform legislation still standing. I think the Court may find that spending limits—they’re gone; contribution limits . . .

Billionaires can spend as much money as they want on independent expenditures. Corporations—there are very little limits on coordination between independent expenditures and campaign funds. I think that under the view of the majority of this Court, it may all come tumbling

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down. And we will just have a free-for-all where money is free to do anything in politics. It's very dismaying.

I think some of the issues about hate speech and violent speech are more difficult to see exactly how the court comes out; how they dealt with the patent case with *The Slants*. And there's no coherence in it. So it's hard for me to exactly And if you have any thoughts

PROFESSOR CHRISTIANSEN: It just doesn't break down on that traditional liberal-conservative And [unintelligible].

FREDRICKSON: They tend to sort of have their own—bring their own—personal views into this. Think about the *Crush* videos. You read those cases with the—gross, I won't even describe them. But I think Alito in that one—even though he wants to dismantle every remaining piece of campaign finance legislation—he really thought it was terrible that these videos showed little animals being crushed. And you can limit the First Amendment rights of people watching these terrible videos.

But you can't limit the rights of the Koch brothers to intervene in politics in any way they want to. So I think the First Amendment is a mess. This court has completely destroyed any coherent understanding. I actually have to recommend a book called, "Madison's Music," which is a wonderful First Amendment book.

And it talks about the First Amendment as being a democracy-enhancing Amendment and how each provision is sort of about your own personal protection of conscience, protection of speech, protection of advocacy—basically, your ability to petition the government. It moves from the personal and individual conscience level to the participation in the political process.

I think it's a very compelling argument for how the First Amendment should be understood, which then leads you to: *Buckley v. Vallejo* is wrongly decided; *Citizens United*, wrongly decided; *Free Speech Now*, wrongly decided—all of those. Because they don't understand that the First Amendment is actually about enhancing democracy, as opposed to allowing rich people to buy it.

GABE FLEISCHER: Gabe Fleischer; 1L. In looking at gay marriage, the right to choose, how do we balance out in a constitutional aspect women's right to choose, while in the instance of gay marriage, looking a different direction when we look at say a baker's right to choose or a dress maker's right to choose who they provide services to? How do you balance out those choice factors and [unintelligible]?

FREDRICKSON: I would say that's a bit of a confusion, I think, in how you pose the question. The Fourteenth Amendment guarantees equal protection of the law to all people. And that means that you can't be denied services. And under the civil rights laws, which were Congress interpreting the meanings of those constitutional Amendments, they understood that when you are actually running a business, and you are accredited by the government—you have the license and all that—you have to serve everybody. Have you taken con law yet?

GABE FLEISCHER: I have.

FREDRICKSON: So the famous cases involving public accommodations, the—*Heart of Atlanta Hotel*, thank you; it's been a long time since I've been in law school—people were saying it violates our religious right. We don't want to have African Americans staying here. Or if they didn't want to serve them in the restaurants, at the lunch counters. It's exactly the same argument they made.

There's been very consistent understanding that, under our civil rights statutes, there are an appropriate understanding of the Constitution that services cannot be denied to people for illegitimate reasons. And that is based on who you are. And so the same argument has got to apply, in my mind and I think in the minds of people who understand the constitution as expressing those core values. You can't deny people services in this country based on the color of their skin, their gender, their sexual orientation, their religion, and their national origin.

So, if you're practicing your business, just as though you can't deny African Americans the right to stay in your hotel, you can't deny gay Americans the right to stay in your hotel. It's the exact same principal. So, I think where it gets distorted is the argument that you're making—the way the other side; the people who want to deny LGBTQ people their full autonomy as human beings—they set that up as the choice, right? It's like it's an equivalent choice. It's not.

If you're doing business, it's like any other business you have to have access for people with disabilities, right? You could say, “I raise a constitutional objection to putting a ramp to come up the stairs into my building. Because my religion says I don't have to serve people in a wheelchair.” We reject that argument. Because it's not a good one. We're not allowing people to discriminate based on who you are as a human being, an immutable characteristic.

PROFESSOR KIBEL: So, I'm going to exercise a prerogative and ask the final question, since it was in our list anyway. And we didn't get to it, because we're getting near the end of our time. The topic or question we

had discussed related to federalism: the relationship between the federal government and federal law and state governments and state law. And there are a number of issues related to this.

But two of them that we had flagged. One is the issue of federal preemption of state law. And the other is that we do have certain federal laws that, in the statute, preserve a particular place for state law. And I'll mention two of those. And then I'll propose it as a question related to Kavanaugh. The United States Bureau of Reclamation runs a lot of large water projects in the western United States, including the Central Valley Project here in California.

Section 8 of the Reclamation Act says that the Bureau of Reclamation has to comply with state water law in operating its projects, which is very relevant in California where we're dealing with fisheries and releases from dams and issues of how they operate those structures.

Another example would be something called the Coastal Zone Management Act—the CZMA. The CZMA provides the federal government with authority to approve certain off-shore activities like oil drilling. But it says that they need to make a consistency determination; that it's consistent with state coastal policy, which provides our state Coastal Commission with the opportunity to adopt policies that the federal government has to act consistently with.

So, to frame this as a question: If I can bring that back to Kavanaugh, kind of like with *Chevron* deference, in the past thirty or forty years, the issue of state's rights has been framed primarily as a conservative effort to restrict overreaching preemption by the federal government. Certainly, that's been the case in the areas that I work in: environment and natural resources.

Yet, now, we're seeing what ACS and others have described as progressive federalism, where states like California are looking for a restrictive view of federal preemption and expansive view of state's rights to protect themselves from what the federal government is doing. What is your sense of Kavanaugh's position on the issue of state's rights and federalism, and more particularly, how it might relate to progressive federalism and the use of state law with positions that are maybe more often associated with the political Left?

FREDRICKSON: It's interesting. I think federalism and preemption are somewhat akin to originalism and textualism with Kavanaugh.

PROFESSOR KIBEL: Convenient?

FREDRICKSON: Convenient, yeah. And you can see in a range of issues, he's had some rulings in the First Amendment where efforts at the local

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level to provide net neutrality are preempted. Those internet companies' First Amendment rights are prevalent. So preemption, he believes in, there. Gun regulation—another area where one expects him to be favorable to efforts to preempt, to challenge, local restrictions.

But when it came to abortion, he's got a different approach. So it's kind of a mixed bag. It's rather outcome-driven. He's certainly very deferential to the state—to Louisiana—when it comes to restrictions on women's access to the clinics. So I think federalism is one of those where we'll figure it out after we get the outcome; work your way backwards.

PROFESSOR KIBEL: I'm sure you're familiar with the Dean at Yale Law School. Heather Gerken has written a lot about federalism and progressive federalism. And she coined a phrase which I really think is spot on, which is, "Fair-weather federalism."

FREDRICKSON: [Laughs]

PROFESSOR KIBEL: And she said it applies to the Right and the Left, that people are really not as intellectually or ideologically committed to state's rights or the federal government as they often proclaim. They're more committed to the issues that they care about. And if state law will allow them to get there, they'll argue for state's rights in federal law.

And I think her point was simply that both on the political Left and political Right, many of us are actually fair-weather federalists. [Laughs] And I think there's a fair amount of truth to that. So with that, I would like to once again thank you for making the journey and sharing your thoughts with us.

FREDRICKSON: Thank you very much.

[Applause]

PROFESSOR KIBEL: Any closing thoughts, pitches, insights for us?

FREDRICKSON: No, I just encourage you all to join ACS. You've got the President here who can sign you up right now. Participate in the process; run for office; vote for people; become a judge. But just participate however you can to make this country a better place. I want to thank you in advance for all you're going to do.

PROFESSOR KIBEL: Okay, great.

[Applause]

[End of recorded material]

