PANEL 2: THE BALLOT, THE BENCH, AND THE BEDROOM

MR. EDWARD STEIN: Thank you, Colin, and the other members of the Journal for getting these panels together, and we have a limited amount of time so I'm not going to talk much right now and introduce the panelists that are going to speak. I'm going to introduce folks before they, introduce them before they speak and then each person will speak for between 10 and 12 minutes and that should leave us sufficient time for questions and conversation.

So our first speaker is Praveen Fernandes. He is the Director of Federal Affairs & Diversity Initiatives at Justice at Stake. Before that he had a variety of positions including working at two law firms, Boggs and Ropes & Gray, and also was working at the American Constitution Society for Law & Policy and Human Rights Campaign. And he graduated from the University of North Carolina School of Law and he also has a Master's degree in Public Health. So for now let's hear from Praveen.

MR. PRAVEEN FERNANDES: Thank you so much, Dean Stein. Thanks to Cardozo. Thanks to the Journal. Thanks also to the students who put this together: Rachel, Colin, Carl and others whose names I'm sure I'm forgetting. I'm sorry. And thanks, of course, to all of you for being here.

I'm going to start, and I'm hoping to cede some of my 10 minutes. I'll hopefully speak for eight minutes and then we can have some discussion time later, but I'm starting with some initial propositions or points that I plan to discuss in greater depth. As a disclaimer, you should know that Justice at Stake is a partnership of fair courts groups that protects the fair and impartial nature of our federal and state courts. And as with any partnership, our individual partner groups have a diversity of opinions and so I'm here to speak as just Praveen Fernandes, director of federal affairs, not on behalf of the entire partnership.

I'll start with my first point, which is that those who care about the health, safety, and vigor of the LGBT movement should care about the health and safety of the judiciary and its vigor. The second point is that while by no means the only way of protecting our equality, the courts have been uniquely and strongly positioned to protect our rights, and we run away from the courts at our peril. And then third, we diminish the strength of our movement and the equality struggle anytime we inject any unnecessary tension between legislative, executive branch and judicial strategies for achieving equality. I'll explain all those points in greater detail but I'll start with the first one, which is that those who care about the health,

safety and vigor of the movement should care about the health, safety and vigor of the courts.

For those of you who have taken constitutional law, and that should be all of you who are 2Ls and 3Ls, you know that the judicial branch was intended to be the branch that was most politically insulated. So you have features that by design were put in, such as lifetime appointments of judges to allow them to take what were politically unpopular stances and to protect political minorities, which I argue is still the LGBT community. While there have been unquestionable gains in the legislatures, both state and federal, I would argue forcefully that we are still political minorities and still absolutely deserving of some sort of heightened scrutiny. I'll get to that later.

I would say that we're better off when we have a strong judiciary because it's uniquely positioned to protect us in a more comprehensive way. Given the importance of a strong judiciary, I'm going to talk about some of the attacks on the judiciary. There are the overt attacks on the judiciary ; those are things like the efforts to impeach judges for their decisions or the attempts to pass court-stripping legislation. In the LGBT context, the clearest example of that is the Marriage Protection Act, which was considered and actually passed the House of Representatives in 2004. It was a piece of legislation that purported to strip the federal courts of the ability to review the constitutionality of the Defense of Marriage Act, DOMA. The frightening thing is that the Federal Marriage Act passed the House. It was stopped in the Senate, but this shows you that these are pieces of legislation that don't just exist in the theoretical space. They actually have a political currency that emboldens others into attempting other overt attacks on the courts.

Another attack on the independence of judges in the courts are the pieces of legislation that we've seen from time to time that attack the ability of judges to take foreign law sources into account. And you've seen this on both the state and federal level. The most recent one was H.R. 973, which was to prevent the purported misuse of foreign law in federal courts. You've seen these attacks on the abilities of judges to take a rich array of sources into account when they make their decisions. A surprising number of times these attacks arise in the context of LGBT cases. One of the big spikes of criticism occurred after *Lawrence v. Texas*, which was an opinion that looked to other sources not as binding, but as persuasive precedent, and looked at other traditions in order to examine these issues in a way that was not insular.

In addition to the overt attacks, fair-courts opponents engage in more subtle attacks. If those are the overt attacks on the judiciary, there are also subtle ones, such as keeping our courts only partially staffed. As you know, we have a judicial nominations and confirmation crisis and only one in 10 judgeships are currently filled; this obstruction ensures that a new presidency isn't allowed to fill the bench

with judges that reflect the philosophy of presumably the people who elected the president.

And then court funding . . . As you know, there's a huge battle right now about court funding and federal funding in general, and with the March 1st sequester deadline approaching, it's very possible that we'll see approximately an 8%, cut to the budget for the courts. And again, when those kinds of things happen, the ability of litigants to get protection from this branch of government that's been best suited to protect political minorities is obviously harmed.

So there are also philosophies that have gained currency in the academy that I think in some soft way erode the power of the courts. I hope we can converse about this later if it ends up being relevant to the panel, and if it doesn't then we can just discard it, but what I'm talking about is philosophies like popular constitutionalism. Larry Kramer, who was the Dean of Stanford Law School was one of its most visible and prominent proponents. He's obviously a very smart man, and there were some lovely parts of that philosophy, but popular constitutionalism talks about having the people—-you know, capital T, capital P—-be more in charge of the formation of constitutional meaning and the formation of constitutional norms.

And so on one level that's very appealing, but on another level what does that really mean? And so I think we can talk in greater detail about the ways that this might play out; what does it mean to cede power to the people on constitutional meaning and what does it mean for the centrality of the judiciary as an interpreter of the Constitution. Arguably, the latest LGBT context is provided in Iowa when the *Varnum v. Brien* decision came down, which was a state court decision, interpreting the state Constitution. It was a unanimous decision that effectuated marriage equality in Iowa. And since I said that it was unanimous, it's hard to pin that on any one judge as being the person who brought that into being. Nonetheless, when these judges faced retention elections, the National Organization for Marriage targeted these judges and brought in a huge national campaign to target these judges, and the voters voted them out. And there was this campaign about "activist judges" taking power away from the people. In some sense that's a cautionary tale not only for those judges but also for future judges and their independence when they draft their decisions to protect any minorities who might not enjoy popular backing. When judges are harmed in that way, it threatens to have consequences for the ability of future judges to protect political minorities in the face of majoritarian hostility.

So I'm going to go to my second point—which I believe will be shorter and the third point will be shorter still—which is that while courts are not the only place to protect our equality and not the only way to achieve equality for the LGBT movement, the courts have been our strongest avenue and in some interesting ways have real promise way beyond marriage equality or family recognition. In the post-*Lawrence v. Texas* terrain, the LGBT community has seen a string of federal court decisions that have given them great hope that the lives of LGBT individuals will

be treated in a way that in a *Bowers v. Hardwick* era seemed impossible to imagine. To give you a sense of the pace of that progress, *Bowers v. Hardwick* was decided less than 30 years ago.

And so one of the more fascinating threads of conversation is about the proper scrutiny level afforded to classifications involving sexual orientation, and you see this in the Prop 8 litigation . In that litigation, Judge Vaughn Walker's district court opinion goes through all of the discrete and insular minority factors and says that sexual orientation should be entitled to some sort of heightened scrutiny, whether it's intermediate or strict scrutiny. Judge Walker skates all the way to the precipice and then comes back, since his opinion then goes on to say that we don't need to decide that today because the truth is Prop 8 fails even rational basis review. And so it's technically dicta, but he spent pages discussing and analyzing why the discrete insular minority formulation in Caroline Product's Footnote Four applies to the LGBT community. You see that also in the memo that Attorney General Holder sent to members of Congress after the Department of Justice decided not to defend in court any longer the Defense of Marriage Act. Attorney General Holder put forth an argument for why sexual orientation classifications should be given some sort of heightened scrutiny by the courts.

You also saw that I believe in Judge Boudin's[phonetic] opinion which was the second, no, I'm sorry, the First Circuit opinion in the Section 3 DOMA challenge. Of course, Judge Boudin did not apply heightened scrutiny, but he applied a review that seemed more searching and rigorous than classic rational basis review. And then finally you saw it in December in the Windsor decision, which is the Section 3 DOMA challenge that happened in the Second Circuit. And that case was the federal decision that said that sexual orientation should be afforded heightened scrutiny, and in that case they settled on intermediate scrutiny, which as you know is the scrutiny level that's given to sex classifications, or gender classifications, if you prefer that term.

And this is interesting because it obviously goes beyond marriage equality or any one sort of strata of the LGBT movement and really gets to the sorts of searching look that the judiciary might give to legislative classifications relating to the LGBT community. I think it is also interesting jurisprudentially because it tries to situate the LGBT movement in the larger context of other movements. It tries to say well, is discrimination on the basis of sexual orientation more similar or dissimilar to sex discrimination? Or is it similar or more dissimilar to racial discrimination? And so I think that sort of jurisprudential grappling with how this movement sort of is situated within a larger sort of equality struggle, I think is useful, regardless of where the decisions ultimately come down.

So finally, as you know, the Supreme Court has granted cert in the Section 3 DOMA challenge, the Windsor case, and then in the Prop 8 challenge, and already you see the saber rattling about scrutiny levels. The bipartisan legal advisory group, which is the group that took over defense of DOMA after the Department of

Justice declined to defend it further, has submitted its briefs. And the brief is larded up with references to the gains of the LGBT community. In some sense it's sort of a perverse twist on the old Virginia Slims logo which was, "You've come a long way, baby." This one is sort of "you've come too far, baby," because it goes through the recent wins in Maryland, in Minnesota, in Washington State, and in a variety of different states obviously in the marriage equality context as well and says these are the indicia of a group that has political power and shouldn't, therefore, be considered for heightened scrutiny.

And so that brings me to my last point, which is that I think our movement ultimately is diminished when we inject any unnecessary tension between executive, legislative, and judicial branch strategies for achieving equality under the law. And I think the strategic question is often asked, "Are we better off pursuing our cause in the legislatures rather than in the courtrooms?" And I think that question has always troubled me, not because it's an unfair question, but rather because I think it's either/or formulation leaves a lot to be desired. I think the truth is that if you look at any of our equality wins, they have been the product of an inter-branch conversation. By that, I mean conversation between the judiciary and the legislature and the executive branch about what equality demands.

And when I say Equality, I mean full capital E equality. What is it that our constitutional traditions demand? I argue that these equality gains have been the product of this inter-branch dynamic conversation, and that's true all the way as far back as *Baker v. State* in Vermont, where the state Supreme Court looked at the state Constitution and said that based our equal protection guarantees, it's unconstitutional to deny same-sex couples these rights. And then they punted it to the legislature to say, "all right, well, how would you remedy this unconstitutional denial of rights?"And of course, the legislature felt that either they had to rewrite their marriage laws or provide another vehicle for the delivery of these rights. Ultimately, after much grappling, the legislature decided to have this other vehicle, civil unions. And then you had the agitation over time as civil unions became normalized and agitation for a more full-throated, full-fleshed equality model.

And then you had this movement in the legislature for marriage equality legislation. So you saw the struggle for legislative advancement of these rights and the Vermont legislature passed a marriage equality bill which was then vetoed by the governor and then the legislature reconsidered it like a half session later and then overrode the veto. The same legislature that was nowhere close to even considering marriage equality, ages later overrode a gubernatorial veto! I think Bill Eskridge writes about this very meaningfully as equality practice . . . you know, these sort of half measures and proxies, these proxies for full-throated equality. And this conversation was going on, but was first prompted by the courts. A more recent example is the "Don't Ask, Don't Tell" example. Many people say, "oh, look, that's the way we should achieve equality, through legislation." And it's a

fantastic victory. I know some of the people who worked on the Senate side who engineered that, and I'm so proud of them.

But the truth is that decision by legislators and the federal government and those fevered conversations occurred in the context of the government being under the gun of a Ninth Circuit Court order. And, you know, that court order had just been temporarily stayed. So you see that the sorts of decisions that are made by the executive branch and legislative branch don't happen in a vacuum. Often, the courts are there to point out the holes in our equality promises; And the legislature fills the breach and the void and tries to fashion those remedies. These conversations happen in tandem and so I think that's the reason I get a little agitated when I hear the sort of "either/or" formulations.

And so with that I'll pass it on, and hopefully we'll come back to some of these points. Thank you.

MR. STEIN: Thank you, Praveen. Our next speaker is Jeremy Kessler. Jeremy is a Legal History Fellow and a JD/PhD candidate at Yale Law School and Yale's Department of History. His work focuses on the relationship between civil liberties law and the rise of the administrative state.

MR. JEREMY KESSLER: Thanks so much. I'll try not to slam into my microphone anymore over the next 10 minutes. So first let me thank the Journal of Law and Gender for organizing this great conference and for inviting me here today, and Dean Stein for agreeing to host this panel.

I'd like to talk today about three words that both advocates and critics of reproductive rights have long invoked in their legal arguments. The three words are equality, conscience and privacy. Now, I don't think my selection of these three words will be too surprising especially to the folks who work on this Journal, but I am self-consciously leaving out life and choice, the words that we most commonly use to describe the two sides in the reproductive rights debate.

I want to focus on equality, conscience and privacy because they have played particularly ambiguous roles in the reproductive rights debate, especially in the years immediately surrounding *Roe v. Wade*. So what I want to argue for the next 10 minutes or so is that the reception of Roe was shaped by a struggle that had begun years earlier. A struggle over whose equality, whose conscience and whose privacy should govern the regulation of reproduction? We are obviously still living through this struggle today.

First, equality. In 1973, *Roe* famously derived a right to an abortion from the privacy right that had been declared in *Griswold*. But throughout the period between 1965 and *Roe*, critics of abortion restrictions made both privacy and sex equality arguments. The sex equality argument was that criminalization of abortion relegated women to particular kinds of labor and denied them opportunities available to men. This argument appeared in amicus briefs in *Roe*, and the worldview behind it was already fueling legal efforts in the sixties and seventies to get courts to apply 14th Amendment apply strict or at least intermediate scrutiny to

gender-specific classifications. The sex egalitarian worldview was also fueling political efforts to pass the Equal Rights Amendment. And yet sex egalitarianism has not been the only kind of egalitarianism that we've seen in the reproductive rights debate. As early as the mid-1960s a group of Catholic clergy and lawyers began to argue that abortion and contraception liberalization risked discriminating against the religious beliefs of those opposed to abortion and contraception.

These clergymen and lawyers argued that efforts to create a more pro-choice legal regime were uniquely anti-Catholic. This egalitarian anxiety about abortion and contraception reform was part of a larger concern among church leaders that Catholic Americans were being targeted for discrimination.

At the time, the Catholic community was particularly disturbed by constitutional attacks on the public funding of parochial schools. I'm talking about the period between the early sixties school prayer cases and then 1971's *Lemon v. Kurtzman*, which would going to severely limit public funding of religious education. So it's right in that moment that that anxiety is percolating.

In the wake of *Roe*, these egalitarian anxieties only intensified. By 1975, Stuart Hubbell, who was one of the founders of the Catholic League for Religious and Civil Rights, remarked to a meeting of fellow Catholic lawyers that "Catholics and Catholic institutions today perhaps more than ever before in the history of this country, are under very concerted pressures and even to some degree attacked by private agencies and individuals, government agencies and the courts." Hubbell called his colleagues to arms, reminding them that "every other minority in the past history of this country has risen to its own defense. We have yet to do so adequately or with determination. Surely we should try."That was in 1975, and clearly the Catholic League is still pursuing this agenda today.

Sex egalitarian and religious egalitarian interpretations of abortion reform came together in a fascinating set of early 1970s cases involving Roman Catholic soldiers. Ruth Bader Ginsburg, who as then lead litigator at the ACLU Women's Rights Project, argued two of these cases. In them female Air Force officers challenged military regulations that ordered the discharge of women who became pregnant or gave birth in the line of duty. The pregnant officers attacked these regulations on sex equality grounds, arguing that the military did not similarly discharge new fathers. But these women, both of whom were Catholic, also argued that the regulations were a form of religious discrimination as they attached a unique disability to women with conscientious objections to abortion.

Ginsberg explained that while other women who became pregnant could receive an abortion and retain their jobs, her Catholic clients could not do so in good conscience. This was 1971, 1972.

So we've thus gotten to our next word, conscience. Throughout the sixties and seventies, both opponents and supporters of reproductive rights deployed the language of conscience in aid of their cause. In the case of the Catholic Air Force officers, the litigants invoked freedom of conscience as well as religious equality

arguments in challenging the military regulations. More famously, Roe and its companion case Doe against Bolton inspired a raft of conscience clause legislation both at the state and federal levels in the years immediately following 1973. These conscience clauses sought to protect from litigation, loss of employment and loss of public funding those doctors, nurses and hospitals that refused to provide reproductive health care services in violation of their religious or moral beliefs.

In recent years, as most of the folks who are here know, we have witnessed a new explosion of conscience clause legislation as well as a variety of conscience-based challenges to federal and state health care regulations. For instance, there have been at least 44 lawsuits challenging the federal regulation under the Affordable Care Act that requires employers to provide contraception coverage in their insurance plans.

In these lawsuits the plaintiffs argue that compliance with the regulation would violate their conscience and that such violation is prohibited under the First Amendment and the Religious Freedom Restoration Act. Just a month ago, on December 20th, a Federal District Court enjoined the enforcement of the contraception coverage mandate holding that there was a substantial likelihood that a scrap metal recycling company would be able to show that the regulation substantially burdens its religious exercise. Keep in mind that the plaintiff in this case is a private for-profit business unaffiliated with any religious institution.

And yet, conscience was not always so clearly on the side of the opponents of reproductive rights. During the 1960s when abortion was illegal or severely restricted in most states, many doctors in favor of abortion reform argued that failure to provide medically indicated abortions would violate their consciences, which had been sworn to protect the life of mothers. As for contraception, the mainstream Catholic press embraced Griswold in the mid-1960s as vindicating the right of married couples to exercise their conscience in making decisions about family planning.

The language of conscience was so ambivalent during this period that Jimmye Kimmye, an early leader of the abortion rights movement, was debating as late as 1972 whether to oppose the right to life slogan with the slogan right to choose or with the slogan freedom of conscience. Today, some are seeking to recover the language of conscience in defense of reproductive rights, arguing that the law should protect the conscience of doctors who wish to perform medically indicated abortions in health facilities that would otherwise prohibit the procedure.

Finally, I want to talk about privacy and its ambiguous role in this debate. As we all know, since 1965 the Constitutional right to privacy has offered some protection for those seeking access to reproductive health services. But opponents of reproductive rights have also used the language of privacy to their advantage. At the time Griswold was decided, for instance, the Johnson Administration was pushing for federal funds to support family planning as part of its war on poverty.

Supporters of federal funding argued that a right to contraception would be empty if more couples did not know about or could not afford contraception.

By 1967 the Office of Economic Opportunity had approved the use of federal funds for sex education and the provision of birth control. The American Catholic Bishops, however, assailed these new federally funded family planning initiatives. They did so by invoking Griswold's own defense of marital privacy. For instance, on August 26, 1965 Archbishop Patrick O'Boyle, the leader of the National Catholic Welfare Conference, gave an address on family planning in Washington in which he argued that since Griswold prevented the government from prohibiting the use of birth control, "it logically follows that the government should be forbidden to promote it."

The New York Times summarized the Archbishop's conclusion in the following way, "Government cannot involve itself in a birth control program without endangering the right of privacy." Similar arguments about the inherently private nature of reproductive decisions were used in the wake of Roe to prevent the use of Medicaid to fund abortion, the Hyde Amendment and its progeny. If the decision to have an abortion was protected by a zone of privacy, the argument went, then public funding of abortion was not just unnecessary but constitutionally suspect.

I recall these arguments not to commend them, but to highlight the inherently ambiguous and historical nature of a legal concept like privacy. In this brief talk I've tried to show that arguments about equality, conscience and privacy have all served both sides of the reproductive rights debate. The success of failure of any particular argument largely depended on the political strength of the social movement making it, rather than the inherent meaning of the legal concept involved. Thanks.

MR. STEIN: Our next speaker is Anna Franzonello from Americans United for Life where, among other things, she consults with state legislators on legislation related to the right to life. Anna received her law degree from Notre Dame Law School in 2009.

MS. ANNA FRANZONELLO: Thank you. And I want to thank the Journal for inviting me and for all your work that you put into this event today. I wasn't in law school that long ago I remember how annoying speakers like me who become very high maintenance can be. And I also am impressed that you said you wanted to keep yours to eight minutes because I usually start every talk with I'm a woman and a lawyer so brevity is kind of beyond my grasp. So I did print my remarks so hopefully I'll keep around the time limit.

In 1917 the prolific English writer G.K. Chesterton wrote, "Missing the point is a fine art and it has been carried to something like perfection by politicians and pressmen today." Nearly 100 years later, those words continue to ring true. Missing the point continues to be a fine art mastered by politicians and pressmen,

particularly, I think, when it comes to the law surrounding abortion. The rhetoric of the 2012 presidential election I think serves as a good example of this.

During the Vice Presidential debate in October, Vice president Joe Biden and Paul Ryan, both Catholics, were asked how religion has influenced their opinions on abortion. In response, Vice President Biden delivered a very passionate but substantively wrong answer about what the Romney Administration would mean for the U.S. Supreme Court and abortion.

Vice President Biden said, "Do you think Romney's likely to appoint someone like Scalia or someone else on the Court, far right that would outlaw abortion. I suspect that would happen." What Romney had in fact promised was that he would nominate judges who know the difference between personal opinion and the law, stating that "It is long past time for the Supreme Court to return the issue of abortion back to the states by overturning *Roe v. Wade*." Returning the issue of abortion back to the state legislative process happens to be the opinion of Biden's far right bogeyman Justice Scalia as well.

Scalia and the other three dissenters who would have overturned *Roe* in the 1992 case *Planned Parenthood v. Casey*, agreed that overturning *Roe* would not outlaw abortion. In fact, they wrote, "The states may, if they wish, permit abortion on demand, but the Constitution does not require them to do so." Those justices simply held that the abortion policies should be returned to the states.

Now four decades after it was decided, *Roe v. Wade* continues to remain controversial. Last week there were about 650,000 people who participated in what was called the March for Life, but while it remains controversial polling demonstrates that most Americans do not actually understand the extent of what the Court held in *Roe*. Now, a room full of law students and lawyers I'm sure you do know, but I'm going to explain it anyway. In *Roe*, the Court struck down a Texas law that prohibited abortion except where necessary to save the life of the mother. The opinion written by Justice Blackmun, held that the right to privacy supposedly found in the penumbras of the 14th Amendment's liberty interests, includes the right of a woman to decide whether or not to terminate her pregnancy.

In *Doe v. Bolton*, decided the same day as *Roe*, and also written by Justice Blackmun, the Court invalidated a Georgia abortion law. Significantly, the *Doe* opinion created an unlimited definition of maternal health. In *Doe* the Court said all factors, physical, emotional, psychological constituted this term health, and the Court held that the abortionist alone was allowed to make that determination.

So that's all that the majority opinion in *Roe* claimed that it did not agree that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time in whatever way and for whatever reason she alone chooses, because *Roe* constitutionalized abortion even after fetal viability for the life or health of the mother and *Doe*'s expansive definition of health in effect made abortion on demand available through all nine months of pregnancy.

Now, Harvard Law School Professor Mary Ann Glendon, who conducted a landmark study in 1987 on abortion and Western law, has written about *Doe*'s significance in creating a more radical abortion policy in the United States than in most other liberal democracies. Subsequent Supreme Court decisions touching on abortion have modified aspects of *Roe*, but they have not explicitly changed its abortion on demand policy. As a result, the United States is currently one of only nine nations that allows abortion after 14 weeks. Even among this group, however, the United States is one of the most permissive in its treatment of abortion, placing it in the company of Canada, North Korea, and China, the only countries in the world that permit abortion for any reason after fetal viability.

Now, while many Americans, pro-life and pro-choice alike, don't understand the scope of *Roe*, they're equally ignorant on what overturning that decision would do. In fact, if *Roe* were overturned abortion would still be legal in 42 or 43 states, but sensationalizing the overturning of *Roe* was a key tactic in the Obama-Biden re-election campaign. In Virginia where I live, for example, the Obama-Biden campaign ran an ad proclaiming Romney's support for overturning *Roe* makes him, "too extreme for Virginia." But that's an absurd statement considering that overturning *Roe* would simply return the determination of Virginia's abortion policy back to Virginians.

Of course, in the 40 years of constitutionalized abortion there have been some regulations of abortion. That's because in 1992 the plurality decision of three Justices in *Planned Parenthood v. Casey* did shift the Court's rationale and framework for assessing abortion legislation, creating what's known as the undue burden standard. Now, in 2000 Justice Kennedy, a co-author of the *Casey* plurality opinion, wrote a scathing dissent in the *Stenberg v. Carhart* case in which the Supreme Court struck down a state ban on partial birth abortion. Kennedy's dissent could be paraphrased, I think, in all caps and with, like, seven exclamation points after it, "This is not what I signed up for in *Casey*." Seven years later the Court would again evaluate the constitutionality of a partial birth abortion ban. And in *Gonzales v. Carhart* in an opinion authored by Justice Kennedy, he noted that "a central premise of *Casey*'s holding was that the government has a legitimate and substantial interest in preserving and promoting fetal life."The Court held that the government may use its voice and its regulatory authority to show its profound respect for life within the woman. Taken at its word, Gonzales did not alter Casey but clarified that it did in fact mean to give some authority to the states to regulate abortion.

Forty years' experience with constitutionalized abortion has proven the need for such regulation.

The uncovering of Kermit Gosnell's abortion clinic in Philadelphia in 2011, a clinic that has been dubbed the house of horrors, brought some national attention to the fact that legal abortion is not coterminous with safe abortion for women. However, the harm to women at Kermit Gosnell's hands is not an isolated incident.

There are, unfortunately, several horrifying recent examples. to help remedy the epidemic of substandard conditions in abortion clinics, AUL has dealt, where I work, Americans United for Life, has developed model legislation for example the abortion patients enhanced safety act, which requires abortion clinics to meet the same health, safety, staffing and other standards as ambulatory surgical centers. Health care facilities that specialize in providing outpatient surgeries. And AUL has been there to defend these common sense regulations in the courts.

For example, in 2000 AUL joined Arizona officials to defend clinic regulations which were enacted after a young mother, Luanne Herron, was left to bleed to death while an abortionist who botched the procedure ignored requests to help, ate his lunch in the break room and then left to visit his tailor. After being held up in the courts by repeated challenges, finally, 10 years later, the regulations have gone into effect. Arizona women now have more protection against the all-too-frequent substandard conditions and practices at abortion clinics. But substandard clinic conditions are not the only cause for abortion-related injury and death. Abortion itself carries inherent risks. The undisputed risks of immediate complications from abortion include blood clots, hemorrhage, incomplete abortions, infection, and injury to the cervix and other organs. Abortion can also cause missed ectopic pregnancy, cardiac arrest, respiratory arrest, renal failure, metabolic disorder, or shock. Immediate complications affect approximately 10% of women undergoing abortions and approximately one-fifth of these complications are life-threatening. Studies also document the long-term physical and psychological consequences of abortion.

AUL has worked on several pieces of informed consent legislation, full information of these risks after all is the lynchpin of true choice. Other legislation has responded to the changing nature of the abortion industry. In 2000 the abortion drug RU-486 was fast-tracked for approval by the Food and Drug Administration. In the last 10 years, we have witnesses what I would call a chemical abortion revolution. The Guttmacher Institute has reported a significant increase in the percentage of abortions that are chemical as opposed to surgical. The FDA notes that they have received thousands of reports of serious adverse events including several deaths from chemical abortions.

AUL has worked on legislation to ensure that abortionists do not place profit, lower overhead and the convenience of chemical abortions above women's health and safety. Regulations of RU-486 aim to prevent deaths like that of Holly Patterson, who died after taking the abortion drug in accord with not the FDA's regulations but Planned Parenthood's off label use, an experimental use that Planned Parenthood only stopped after its abortion patients suffered in Planned Parenthood's own words, "A higher than expected rate of serious infection."

Now, it's not clear, returning to the initial topic, it's not clear that the abortion rhetoric of the 2012 election was responsible for winning a second term for President Obama. Polling shows that while there was still a gender gap, it was

narrower than in the 2008 election, even among single women the demographic this messaging particularly sought to reach. But whether or not the mischaracterization of *Roe* influenced voters with a closely divided Court and several aging Justices, the confirmation of any new Justices could ensure that *Roe* remains insulated from fair review for the foreseeable future. However, AUL is not despairing. As a recent Time Magazine cover read, "40 years ago abortion rights activists won an epic victory with *Roe v. Wade*. They've been losing ever since."

The overall trend in legislation on abortion, because it's not all life-affirming regulations on abortion, there's obviously in the State of New York you probably are familiar with so-called Freedom of Choice Act that's being introduced. There's a lot of regulations that pro-abortion, pro-life, pro-choice, pro-life, whatever monikers we're using, but the overall trend is towards more life-affirming legislation and meaningful restrictions on abortion. And this reflects the view of the overwhelming majority of Americans who though perhaps unfamiliar with the extent of *Roe*'s holding, when polled on specific questions about specific restrictions and specific regulations on abortion, clearly reject the abortion on demand regime that *Roe* created.

Thank you.

MR. STEIN: Our next speaker is Farah Diaz-Tello who is staff attorney for the National Advocates for Pregnant Women, and she's a graduate of the City University New York School of Law School where she was a Haywood Burns Fellow in Civil and Human Rights. Her work at NAPW focuses on the right to medical decisionmaking and birthing with dignity.

MS. FARAH DIAZ-TELLO: Thank you, and thank you all so much for having me here. So initially we were asked to reflect upon how the political rhetoric of the last election and the expected policies of the incoming administration will affect the work of our organization and the needs of the clients we serve.

National Advocates For Pregnant Women is a reproductive justice organization that protects the health, rights and dignity of pregnant and parenting women. The big story of the 2012 election that everybody knows is the "War on Women," when in the midst of an election that was supposed to be a referendum on the economic recovery, suddenly everyone is fighting over contraception, which has been largely uncontroversial for decades, a nice law student gets called a slut for essentially arguing that some people need hormonal birth control for medical reasons, and some legislators make shockingly ignorant statements about women's health and rape.

These things, of course, matter. But they're not the primary issues that matter to the women we serve. The women we serve worry about whether or not they're going to be able to access safe, respectful maternity care or be punished for trying to have a vaginal birth after caesarean section. They're the ones who struggle to find drug treatment, and wonder whether they should have an abortion because they

will be arrested for giving birth to the babies they carry. They wonder whether they will be able to parent the children they birth because they're in Methadone maintenance treatment or they're medical Marijuana users. They're the ones who are being subjected to a separate and unequal system of law that threatens their very personhood under the Constitution, and their fates are largely decided on a state by state basis.

In Mississippi, a 16-year-old girl named Rennie Gibbs suffered a stillbirth. This is all too common in Mississippi, which leads the nation in infant mortality and where black babies like Rennie's die at about twice the rate of white babies. But Rennie had tested positive for Cocaine during her pregnancy. So in spite of the fact that science has failed to prove effects from Cocaine that are distinguishable from or worse than legal substances like tobacco or alcohol or even poverty or environmental toxins, Rennie Gibbs was charged with depraved heart homicide. This was based on the theory that the baby that she tried to carry to term should be treated as though it were legally and physically separate from hermit was based on the premise that she is legally indistinguishable from a third-party who would attack her and cause her to miscarry. And it was based on the report of a medical examiner whose findings have been seriously called into question.

At the time he was doing about 85 to 90% of the autopsies in Mississippi, which came up to about 1,500 a year when doing over 325 will prevent an office from being accredited by the National Association of Medical Examiners. Among his cases were one where a 13-year-old was sent to jail for life based on testimony that the medical examiner could tell from a bullet hole trajectory that two people had pulled the trigger of a gun at the same time. This young man was later exonerated, but Rennie goes to trial for murder in the spring.

Next door in Alabama, over 75 women have been arrested under a chemical endangerment statute which was passed in 2006 to prevent people from bringing people into Meth labs. This law was passed to keep children who are born and alive in the world from being in environments where they might touch or ingest the chemical byproducts of Meth production. But a prosecutor decided that if a fetus is like a child then a woman's body itself is like a Meth lab and started locking up women who gave birth to babies who tested positive for a controlled substance.

The cases of two women were appealed to the State Supreme Court, one of whom gave birth to a healthy baby and one of whom suffered the loss of a child that she chose to carry to term knowing that he may have Down Syndrome. That court ignored amicus briefs by 47 medical and public health experts stating that criminalization is actually worse for maternal fetal and child health. These groups include the American Medical Association and the American College of Obstetricians and Gynecologists.

That court ignored the fact the legislature refused four separate times to extend the law to make it applicable to pregnant women in relationship to the fetuses they carry. Instead the court held that the plain meaning of the word "child"

in that statute included fertilized eggs, embryos, and fetuses at every point in gestation, overnight creating law that threatens every pregnant woman in Alabama who ingests a controlled substance, whether or not it's prescribed and whether or not it has an effect on the fetus.

The court also ignored the due process notice, vagueness, and gender equality issues raised by the reinterpretation of the law. Unfortunately, one of the two Justices who wrote a dissenting opinion was replaced by Roy Moore. This is the same Roy Moore who famously was removed from office after he refused to remove a Ten Commandments monument at the courthouse under federal order, and who issued a concurring opinion in a case in which child custody was granted to an abusive father over a lesbian mother, calling homosexuality "a crime against nature, an inherent evil and an act so heinous that it defies one's ability to describe it. That is enough under the law to allow the court to consider such activity harmful to a child."So we're not expecting a favorable ruling on the constitutional issues.

And lastly, in Indiana, Bei Bei Shuai faces a murder trial in April because she attempted suicide while pregnant. Doctors managed to save her life, but her baby died several days later, and now she's charged with murder and attempted feticide under laws that were passed in response to violent acts against pregnant women.

These cases unfortunately are not aberrations. Our Executive Director Lynn Paltrow and our Board President, Fordham Sociology Professor Jeanne Flavin, recently published a study in the Journal of Health, Politics, Policy and Law which documented 413 cases between 1973 and 2005 in which women were deprived of their physical liberty through arrests, detentions and forced medical interventions based on arguments that fertilized eggs, embryos, and fetuses should be treated as though they are juridical persons separate from the pregnant women who carry them.

This includes women who were civilly committed, for failing to show up for gestational diabetes testing, women who were detained by police officers and held in hospitals under armed guard because they wanted to have a home birth, and women who were kept in jail to prevent them from having abortions. These deprivations of liberty were base directly or indirectly on anti-abortion measure that included general declarations of fetal personhood, feticide laws intended to prevent violence against pregnant women, and on a misinterpretation of *Roe v. Wade* as justifying state actions against pregnant women on behalf of fetuses.

But the story didn't end in 2005 and these cases continue apace with at least 250 more up to the present day.

What these cases teach us is that when the state can legally separate the pregnant woman from the fetus that she carries, she becomes a separate sort of person. She becomes a person whose health problems can make her criminally suspect and whose medical records can be used against her. She becomes a person who can be forced to undergo medical testing and surgery. She becomes a person whose very pregnancy is considered an act of child abuse.

This creates a separate and unequal system of law that we call the New Jane Crow, a permanent second-class status affecting all pregnant women, disproportionately punishing African American and low income women, and justifying all manner of deprivation of women's constitutional and human rights.

So regardless of who's in the White House, our work will continue. Because what's at stake—as long as families are being destroyed and women are being punished for the circumstances or outcomes of their pregnancies—is women's very personhood. Thank you.

MR. STEIN: And our final speaker is Gigi Parris, a family defense attorney at The Bronx Defenders. She received her JD from University of Virginia School of Law and then worked at the law firm of Paul Weiss.

MS. GIGI PARRIS: Hi. Hi, everyone. I also want to thank everyone for having us here and the Journal in particular. I'm happy to be here and share my thoughts with you. So as Farah stated, the debate that we should be focusing on with respect to reproductive rights should be generally centered around dignity. It should be focused around dignity and respect and I want to focus more so on what happens if and when a woman chooses to carry a child to term and how, and some of the ways in which the state steps in and interferes with that person's right to actually parent their child or children, I should say.

And so I work at The Bronx Defenders and we represent indigent parents who are charged with child abuse and neglect, particularly in the Bronx but that happens throughout the country. And these types of charges come in a variety of forms such as educational neglect, medical neglect, neglect based on use of drugs and alcohol and sexual abuse and cases of excessive corporal punishment just to name a few. So the child welfare system is where you have government intervention into and regulation of the family. And it's actually, I would say, the least politically divisive of perspectives that we've discussed today if I may say. As a legal advocate for parents we confront, I would say, both the government's encroachment on individual privacy and defend the parents' decision to bear and raise their children the way they see fit.

So and that's despite, I would say, the challenges that they might face such as poverty, mental illness, we have a lot of clients who have mental illness, drug addiction or parents who have development delays. And so one thing, I guess the first thing I want to focus on is that the child welfare system, as I see it, meaning abuse and neglect, is very mischaracterized in the public's eye. You hear stories such as Nixzmary Brown. I know that was an older one. There was a more recent story. I forgot the child's name already, but it was the Brooklyn case, but you see those type of front page stories that are very horrific and you think, oh, my God. This is horrible. Like, of course we want to save the children. Of course you do. There are those types of horrific cases, but that's not the majority of cases that are out there. Most of the cases that we deal with are the types of cases where you

have poor, struggling parents who are just trying to raise their children the best way that they see fit despite the adversity that they face.

And oftentimes that adversity is worsened when ACS, which is the Administration for Children's Services, becomes involved in the lives of these families. You have other systems that don't make it easy to raise your children. There's what I've already mentioned ACS involvement could make the situation more complex, but you also have the adversities with the shelter system, getting kicked out if you can't basically prove your residency. There's like a cycle where they kick you out and you have to keep going back to get housing. There's the public assistance system which, oh, my gosh, it's crazy the public assistance system just in terms of going and always having them verify things, not getting mail. I mean it's the communication is really difficult to deal with. There's the Medicaid system which is also another complex system to deal with and the public hospital system as well in dealing with physicians sometimes who might not communicate properly with the parents and that might lead to problems as well.

So we have also the disproportionate impact, I know she touched upon it a little bit, but this system also has a disproportionate impact on families of color and poor families nationwide actually. In our experience, we deal with the urban poor and most of my clients are black and Latino. It's very rare when I get a white client. I've had a few, but it's very rare and I actually just picked up an Asian client. We have very few, but the majority they are all poor if I'm representing them honestly, but and they're all minority for the most part.

What I wanted to speak on is the double standard that I see in this country, and I think it transcends political parties. Government intervention into families is done via a double standard and we see wealthy families that live in private homes in suburban or rural areas don't get scrutinized the way that poor families get scrutinized or families in more urban areas do, I should say. And for example, let's say, a child, you know, within a wealthy family gets an unexplained welt or a bruise even though there's mandatory reporting, you know, you're more likely to go to the doctor. You explain to your doctor this is what happened, doctor, and the doctor's like, okay, and then they just treat you the way they normally would or should, I should say. But in the Bronx, for example, that same accident would occur and you go to the hospital and there's just much more scrutiny and they call in reports and then ACS gets involved and it's just I don't know what leads to that disparity but it's definitely there. The majority of children that are involved in the foster care system are children of color and so the clients we serve, I would say they don't enjoy the same types of constitutional protections in reality that everyone should enjoy.

And we say due process is dispensed with very easily. for example, cases are called in disproportionately people are denied hearings, their children might be taken away and then they don't get their cases filed in court until a few days later so we, you know, we're trying to deal with all of those disparities, illegal removals.

So those are some examples. And I would say in terms of bringing in the election and whatnot, I would say that that has very little impact on the realities that our clients face. And even with the liberal faction of the Democratic Party I don't think that, and this is just my opinion, but I don't believe that a lot of people are even aware of the things that our clients face. Like I said earlier, you have, you know, the prototypical type of abuse case or a neglect case that you think of are the ones you read on the front page, those horrific stories, but for the most part I don't believe that most of America sees the types of cases that we deal with because it doesn't necessarily impact them directly.

Lastly I would say, ironically, I think children and their welfare it's such a unifying rallying cry for politicians and everybody wants to protect children. You know, they are a very vulnerable group. It's understandable. And everyone wants the children to thrive yet thousands and thousands of children are already facing challenges by living in poverty and often they have chronic illnesses which they need help with. And they're thrust into a system when once child welfare becomes involved they're thrust into this system for, I guess, their own good, but it nonetheless compounds the challenges that they face. And it leads to interruptions in school, displacement from their home, psychological damage from being separated from their family, even if it's a family that is viewed as dangerous per se. These children are still harmed by removal, and that often does more harm than good.

So I know, I'll just leave my comments like this. I'll say we work in the child welfare system. I would love to see us shift toward working in a family welfare system where we are aiming to keep the family together, provide dignity and respect and treat these families with dignity, excuse me, and respect and trying our best to keep the families together to provide services to families who don't necessarily have the resources to actually stay together. And I will leave it at that.

MR. STEIN: Thanks to the panelists for their insightful comments. We now have time for some questions for the panelists.

FEMALE VOICE: - -.

MS. PARRIS: I think you mentioned a very important point. I mean it is very important to change the stories that are out there in the public eye. I know that a few years, about a year ago, maybe a little over a year, there was an article that came out in the New York Times that discussed parents. It only focused on marijuana, but it discussed parents who got caught up in the child welfare system because of marijuana use and the disproportionate treatment of parents. I'm sure we could all think that shortly it's not just poor black and Latino parents who are smoking marijuana. There are parents throughout Brooklyn and Soho and Tribeca who do the same thing yet the parents that we see, and I'm sure this is not just in the Bronx, probably in Manhattan as well or Brooklyn and Queens and Staten Island, you're not going to see the wealthy and affluent parents come in. And we

had an article that discussed some of the disproportionate ways in which minority parents are drug tested when they are in hospitals giving birth.

I just actually read, I forgot what, I want to say it's the Daily Times. I can't recall the paper, but there was just an article out about that. There's Lenox Hill Hospital which they said they only test their parents, you know, or the mothers I should say, they only test the mothers if they are obviously under the influence of something or they've, you know, said, you know, I use drugs. If there was some really concrete reason to do so, but it seems up in the Bronx that every parent gets drug tested. And you know, I don't know. That's just my belief. I believe, I'm pretty sure actually, that they do get drug tested more frequently as just a normal screening process. But you know, downtown that doesn't happen. So it's about trying to get the stories out there to see how people are treated differently and to change that, make it uniform or don't do it, you know? Or that's just one example, but you're right. It's important to try and get out, and we do have, or we try and connect with media resources to try to get the stories of our clients out there to show what parents are actually dealing with.

MS. DIAZ-TELLO: I just wanted to add to that. I think that it's really important for us as advocates to fight junk science, misinformation and stigma at every possible opportunity we have. We know now that the crack baby was a media phenomenon, not a medical phenomenon, and that's something that is not a secret to the people who are involved in the care and treatment of these children. And so when we see coming down the road, or rather barreling down the tracks, a new phenomenon of so-called "pill babies" and media hysteria about babies who are born addicted to prescription pain medication, we have to call upon medical experts and people who actually are involved in treatment to speak out against these overblown media images. And, in fact, recently there was a meeting that was held by the Office of National Drug Control Policy that was specifically about maternal opiate addiction. And these experts, who reside mostly in the ivory tower, are physicians and researchers and were all distressed about the fact that we can see the story of the crack baby recapitulating itself.

And so one of the things that we're working to do is to organize a sign-on letter by people who are experts in opiate treatments, in Methadone maintenance of pregnant women— people who actually know what's going on—to write sign-on letters in the media to say stop, you need to stop relying on junk science and stigma because the truth is it's not just problematic per se because there's bad information out there. That information out there in the media is used to stigmatize children, and in fact the stigma that is placed upon children for being labeled a "crack baby" or a "pill baby" is worse than the effects of the drug itself.

FEMALE VOICE: - - .

MS. DIAZ-TELLO: So, actually, a couple of years ago there was a big article in the New York Times called "The Epidemic That Wasn't," basically, "in fact we were complicit in the so-called 'crack baby' epidemic." And a story along the same

lines was run by the Washington Post. People can change. The media can surprise you. It was the New York Daily News that ran the big exposé of the clandestine drug testing of pregnant women and their babies, not an outlet that you'd really expect. But they really lambasted the policies and ACS, the Administration for Children's Services, as being destructive to families and harmful to women and children's health.

MR. FERNANDES: I'll just jump in briefly just to say that sometimes litigation and the courts can serve as mini symposia for the exploring of data. As you know, trial courts, in the process of litigation, establish huge factual records and they accomplish this within the adversarial system. Parties to LGBT marriage litigation, for instance, present and amass evidence that same-sex households can raise children just fine. You have these propositions that otherwise in media narratives exist unchallenged, but in litigation must survive the rigor of an adversarial process in which the other side is also amassing evidence and data. When you're defending against the denial of family status in California, for instance at the trial court stage, you saw an extensive factual record that was compiled in an adversarial way with experts on both sides hashing it out. Regardless of what the courts decide, I think on balance, society is better off because of these moments of rigorous exploration, contestation of junk science, and interrogation of some of the assumptions that are embedded in public narratives.

MS. DIAZ-TELLO: To follow up on that, I completely agree that litigation is a useful tool in this way. But in the cases that I deal with, and that Ms. Parris deals with, our clients are seen as not being entitled to the benefit of scientific evidence.

MR. KESSLER: Just to say one thing that I'm just very kind of impressed and moved by the focus on class that we've just gotten from both of these practitioners just in the sense that I am amazed looking at the history of the way the reproductive rights debate gets kicked off in the sixties and seventies, how much of it is I think really about a debate about the welfare state, the size and shape of the welfare state and what the role of government will be in adjudicating class conflict. And I don't think the kind of academic discussion has gotten caught up to how embrocated political economy issues are with these issues of sex and gender. And so I mean just hearing these stories it's so clear that these are really the issues. It's how does the welfare state fit into these discussions that are often discussed in a very kind of abstract and almost metaphysical way about values or identities, that these are really concrete political economic problems. So it was just great to learn about that.

MS. FRANZONELLO: May I respond briefly to Praveen's point? So I think you had an excellent point about the power of litigation to sort of find out what the truth is, but I really want to highlight the fact, and I think Gigi can speak to this more eloquently than I could that people, you know, our respective clients are not seen as entitled to that type of, like, you know, actual level of evidence. I mean I

don't know how often you've tried to present social and scientific evidence in your courtroom, but. . .

MS. PARRIS: No, we try. We definitely try to break those, you know, barriers, but unfortunately I work in the court, a civil court where the standard is - - preponderance of the evidence and I mean it's kind of a joke sadly. No matter how hard we fight, you know, we'll put up our medical witnesses and sometimes, you know, it falls upon deaf ears. But sometimes we're lucky and it's heard and the cases get dismissed and there have been some victories. But it's a slow forward progression so I mean I do agree. It does help and if you get a good case to take it up to an appellate division, appellate level if you happen to lose at the trial level. That is handy to try to fight, but it's definitely a slower process. So I think doing it through the courts as well as doing it in the public arena is helpful as well.

MS. FRANZONELLO: Actually, can I just ask, in your remarks you had said something like about a high rate of dismissal and illegal removals. Is that do you think because of, in your experience, is it mostly because of a limitation on resources to judges don't seem to care as much? Is there bias? Is it just kind of like a combination of it? What's leading to that high level?

MS. PARRIS: To illegal removals?

MS. FRANZONELLO: Well, illegal removals and you also were mentioning, like, dismissals that, I think that was the word. I forgot which word you used, but you were talking about how cases, kind of they're not moving forward the way that they should be. Is it, I mean is it kind of, I'm assuming probably a combination of things, but what are the over, like, what are the big obstacles?

MS. PARRIS: To the slow progression of cases?

MS. FRANZONELLO: Right.

MS. PARRIS: Well, with illegal removals I would say we put a lot of the spotlight on those hills. I'm hoping it gets reduced but they still occur, and that's really more so on ACS' part removing children. They have these conferences that they call child safety conferences and sometimes end up filing late. They've gotten better at it but, you know, they'll file a case in court late. They're supposed to file it within 24 hours of removing a child and it doesn't always happen so that could lead to an,

MS. FRANZONELLO: Oh, so you're saying, I thought you were saying the cases will illegally removed-

MS. PARRIS: [Interposing] Oh, no.

MS. FRANZONELLO: -because you followed with, like, dismissals so okay. Never mind. That makes more sense.

MS. PARRIS: In terms of cases moving slowly-

MS. FRANZONELLO: [Interposing] Got it.

MS. PARRIS: -I just think that there's a lot, there are a lot of roadblocks and hurdles and hoops put up for parents to jump through if their child is removed to

just even get them back. And it's, well, how can I put it? It's just, what's the word? There's a word that I had and I just wanted to use it. I can't remember right now, but they just put a lot of hurdles up and, you know, it's like you have to prove how far will you go to get your child back even when the risk that they deem to be in place is really not that big of a risk. But I'm sorry, I'm,

MS. FRANZONELLO: That's okay. So I guess my question is, is it the standards that need to be changed or is there some, are you experiencing more of a bias in the courts in not applying the right standard but being biased against your clients more?

MS. PARRIS: I think it's a little bit of both.

MS. FRANZONELLO: Okay.

MS. PARRIS: But I would say, I mean, there's definitely the bias left in place and I think that plays a huge, huge factor and I think it's also in application as well. But I would argue that it's more so the bias and I think if that bias didn't exist we'd have fewer cases that would even come to court, more understanding and working with parents prior to my getting involved. I think that would, you know, decrease the amount of cases that we even see come through the courthouse doors.

FEMALE VOICE: - - .

MR. KESSLER: Great, thanks, a set of really, really important questions. First on institutional conscience kind of as a legal and a kind of rhetorical form, I've actually, I've spent some time trying to figure out just when the term first appears in the literature. I haven't been that, I mean it's obviously it has appeared recently. The idea is certainly older, I mean, what, the way you get the church amended, right? The way you get the first federal conscience clause is in response to a federal injunction against a Catholic hospital and from the beginning you have arguments that the institutions themselves need to be protected. So you see in the congressional debates, in the legal discussion, doctors, nurses and hospitals and other institutions and it quickly, you see a move to extend it to non-hospital, not-for-profit businesses and then for-profit businesses. You see that in the seventies and you see it recurring today in a much more aggressive way though I think partly because there are so many more advocacy organizations that are capable of bringing these cases.

So it goes back, you know, so that idea of protect the institutional conscience goes back to the dawn of conscience clauses certainly. I will say that there is a theological side to it. This may be getting off the kind of the terrain we generally have in law schools, but definitely in a lot of Catholic theology and in kind of Christina theology in general there are folks talking about the kinds of conscience that in here both in individuals and in various institutions and civil society. So there's some background there in Catholic thought.

As a legal matter, no court has ever recognized, other than Citizens United, there has never been an extension of a First Amendment right to an institution. These are all third-party or associational standing theories that are being brought.

And in a bunch of recent cases the federal judges have been pretty, have kind of tasked the ACLU and other folks who are arguing against institutional conscience saying basically the way you're arguing this no one has standing to bring this kind of suit. So you see, I think you see right now the federal courts being quite sympathetic to institutional conscience claims for, you know, a variety of reasons, but part of it is a procedural issue where it's not clear who would bring some of these claims when you're dealing with, like, various insurance schemes that employers are paying into.

On the issue of the kind of heterogeneity of Catholic beliefs in the sixties and seventies in the period I covered, absolutely. And that obviously continues to the current day. There were, as I mentioned, one example is most mainstream Catholics in the sixties were very pro contraception. National Review in 1965, National Review did a big issue in favor of contraception. The laity and many in the clergy were furious at Humanae Vitae in '68 reaffirming the papal ban on the use of birth control.

But yes, across the political spectrum there's a lot of heterogeneity. And the question of who speaks for the church is a big issue in Catholic history going back, you know, going back a long time. And I think that's a struggle. You know, I think that's, no, I mean it is. It really is. It really is. I mean it's a really deep struggle going on.

As to where this comes back into the law is to what extent can courts, and this relates to kind of the last part of your question, can ask whether the rights being asserted by religious institutions are like reflect the beliefs of their members? You know, so when Notre Dame brings this kind of suit, what do you do with the fact that lots of Notre Dame theologians and Notre Dame students say that's not their understanding of natural law theology. There we have a lot of precedent in First Amendment law saying you don't examine the content of religious belief.

So there, you know, there's a liberal line of precedent or at least it emerged in what you might think of in a liberal way, saying listen. Folks are heterodox. Most don't necessarily have beliefs that are in keeping with the orthodox interpretation of Christianity or Judaism or Islam. We are not going to get in the habit of holding up a particular alleged belief and seeing how it conforms with the particular faith tradition or particular religious community. That kind of emerges in the sixties in draft law cases where you have, you know, a bunch of young men saying this is my belief. That's their belief. And you originally had judges saying, well, that's not what the Presbyterian Church says. And the Supreme Court forced that back. That now in the reproductive rights context is leading courts to say listen, we're not going to get into this for-profit steel recycling business. Their religious beliefs sound pretty unique, but we don't, we don't get into it.

So to that extent that's a way that the Court is trying to kick the can of what you're describing, which is debate within, say, the Catholic community about what is the proper interpretation of Catholic law or Catholic natural law on these issues.

Courts are trying not to get involved with that, but what that means is it gives a lot of authority to the institutions that have the money to bring these cases.

Did that, I mean I've said a lot but please tell me what I've missed?

FEMALE VOICE: - - .

MR. KESSLER: Right.

FEMALE VOICE: - - .

MR. KESSLER: Right. Well, I can tell you that the ACLU Liberty Project, which is obviously, and I have a somewhat interesting position in these cases because the Liberty Project and the ACLU both does repro rights and religious liberty and so they're really trying to find some kind of, kind of a - - path, but they have been arguing to the best of my knowledge that that issue that you're describing should be talked about on the burden side of things. You know, basically saying, okay, like we recognize that this is a buzzword for religious belief and no one's saying it's not sincere, but how attenuated is this for you? What actual burden does this have on your institutional mission and how do we talk about that? And so they've been trying to attack, sorry.

MS. FRANZONELLO: No, no, no.

MR. KESSLER: Maybe I should - - .

MS. FRANZONELLO: Well, I mean I'd love to chime in on this question, too.

MR. KESSLER: Yep.

MS. FRANZONELLO: And I would largely, in many ways we agree obviously about, you know, the law. It goes back a long time talking about institutional conscience. It goes back to like what you were saying the church amendment, but what I always like to point out is not an amendment for churches but as Frank Church who was the Senator who sponsored that amendment and I think it's kind of funny and ironic isn't quite the right word. I'm always confused about the use of ironic because I grew up when Alanis Morissette really ruined that for me. I mean, I don't even know. I don't understand what irony really means, but so but the Church Amendment so we've had statutory protections for institutional conscience for, you know, as long as a lot of these ethical concerns have been raised. So as far as, you know, the rise of contraception and abortion that's when you see a parallel rise in conscience protections on those issues.

But I want to say a couple of things. Conscience protection doesn't, it's limited in what it does. So well, going back to again statutory versus, you know, is this required by the Constitution to protect institutional consciences that that might be, that's a different question than whether or not a particular law already protects it. And so there's both statutory and constitutional claims in these cases against the HHS mandate. So the answer might be a little bit different and I think, you know, the for-profit cases it is a question of first impression. I think that's what most of the judges have said already. This is a case of first impression before them, whether or not there's a religious liberty interest here for these for-profit groups.

But I'd like to point out it's always funny to me how, like, we both probably described them. You can tell which way we slant. You know, he's talking about a steel company. I would tell you this is a family-owned business.

But so I think there's questions of first impression here before the courts as far as these religious liberty interests and whether or not statutorily are protected or also constitutionally protected. This is going to play out probably, I mean it's going to go up to the Supreme Court. There's already a Circuit split so this will be a fun year for conscience to see how that plays out, but conscience protections don't force all Catholics to abide by Church teachings just because a Catholic institution doesn't provide contraception though its insurance plan.

So if you're a student at Notre Dame, you know, Notre Dame isn't on its insurance plan going to, and again, actually students isn't probably the right example to use here because I mean there's so many complications in the Affordable Care Act as far as what the mandate applies to who, so let's talk about faculty because that's probably a more clear example of where the mandate actually applies versus student insurance because there's a lot of exceptions here. But so if you're a Catholic, or if you're a faculty Catholic or not at Notre Dame and Notre Dame doesn't provide contraception coverage for you in its insurance because its institutional mission, it's against its institutional mission and its religious beliefs to, that doesn't prohibit you from using contraception. And it also doesn't, you're not required as a faculty member at Notre Dame to stay with Notre Dame forever until you die. This is a free association that you've made with that university that has this religious principle.

So conscience protections for a university like Notre Dame or any institution, Americans United for Life we're not religiously affiliated. Obviously a mandate saying that we would have to cover surgical abortions in our insurance plan would be against our institutional conscience. So again, it gets even more complex than just religious liberty interests but where to you, you know, freedom of conscience that's not religiously affiliated, you know, what do you do with an organization like Americans United For Life where this is a sincere conscience belief of ours is that does that fall under, you know, the First Amendment's freedom of religion, freedom of conscience? So there's a lot of complex tings that haven't been sorted out, but as far as what's constitutionally required but as far as statutory protections there is a long history of protecting not just religious liberty but the freedom of conscience more broadly. So things like the Church Amendment talk about not only religious beliefs but moral convictions. So it's not just tied to religion, so that's kind of where I wanted to chime in. There's a lot, I think, of agreement in what Jeremy and I would say about the history of conscience laws.

MR. KESSLER: If I could insert very quickly-

MS. FRANZONELLO: [Interposing] Yes.

MR. KESSLER: -one maybe additional piece of potential disagreement-

MS. FRANZONELLO: [Interposing] Great, and then I'll respond.

MR. KESSLER: -but just to note something that, you know, I think is worth saying is that a lot of the conversation that I see going on today about these conscience productions seems to suggest that there is a long and robust history in the United States whether constitutional or statutory of exempting various practices from government regulation on religious or moral grounds. And I would just offer the claim that that is not true as a historical matter. That generally it is very hard to be exempted from the purview of government regulation for religious or moral reasons. I mean, this is why there was a massive fight over many, many decades between World War I when we had the first national draft through Vietnam about what was the extent you could get out of being forced into the military for years of your life, forced to hold guns and kill people? You know, so that took a long time and there are no constitutional protections that protect soldiers should we have a draft from being conscripted into the army. That's purely a matter of legislative and administrative grace. So I mean, and I totally, I absolutely recognize that there are, and Anna's quite right, that there is a variety of statutory, legislative, administrative, and judicial issues at play here, but I think the way I would want, you know, if I were teaching a class in this, the way I would want to understand folks how to come to terms with this new issue of conscience in the reproductive rights context, is it is quite new. And the variety of claims searching for exemption from federal regulation and state regulation this is a novel practice in American history. I would say it's not the norm in American history for reasons of order and liberty that we hear so much about in other contexts.

MS. FRANZONELLO: I guess I would ask you, well, a couple of things, partly in the reproductive context and partly because a lot of these issues are new to you, so that's why we see this rise. Like I said, they parallel the rise of contraceptives and abortion and the rise of conscience clauses related to those, and I can agree that in practice there's ample examples of freedom of conscience, freedom of religion not being respected, but would you agree though that the principles at least are, and I think that's what people are mostly saying is that we have a robust history of these principles at least being, I mean in our federal Constitution and in state Constitutions most of not all talk about freedom of religion and freedom of conscience. So I mean these principles are longstanding. Whether or not in practice they've been granted robustly is obviously, you know, I can agree that that's not always been the case.

MR. KESSLER: Absolutely.

MR. STEIN: I think we have time for one last short answer - - .

FEMALE VOICE: - - .

MS. FRANZONELLO: Yeah. Well, first of all, I like that you brought up that you work at a Catholic institution that provides contraceptive coverage, so again, this goes to the point of not all Catholic, that have the name Catholic attached to them or however you want to describe it, nothing in a conscience protection that conscience clause is going to make your university stop doing that.

So but anyway, to your question about whether when, like, feticide laws or I'm trying to think of what else, well, personhood, which AUL doesn't, we don't support personhood amendments, but that's a longer I mean strategically and effectively aren't anyway. But so I'm not going to defend personhood amendments but as far as feticide laws and those kind of things it does show sort of a schizophrenia in the law and I think, you know, obviously when they're being used against pregnant women who are trying to carry their babies to term, those kind of things, that's not the intent of the law and obviously there should be reform if that's the case.

I think what Farah mentioned and a lot of things that Gigi brought up today as well show that even changing the law on abortion is not going to get rid of a lot of the pressures on pregnant women that a lot of women feel they need to have an abortion. I did side about [phonetic] counseling at an abortion clinic for a couple of years when I was in college and before I went to law school and for those of you that aren't familiar with that term, I would speak with women who were going into an abortion clinic and, you know, offer them alternatives, and I learned very quickly, you know, that you don't just offer alternatives. You ask women questions, you know, why they're there.

And I talked to hundreds of women who were having abortions and most of them had the abortions and I would say, and this is an anecdotal experience, but I don't think, nobody has an abortion just to exercise some right. There is a reason why they're there, and I would say in my experience most of the women I talked to felt alone, trapped, scared and that there were some other pressure that was pushing them there. And it's, I mean, it highlights the importance of what, it's not just about changing laws but changing societal pressure on women and so that we do respect mothers and pregnant women, that there isn't this pressure towards abortion that I think a lot of women face.

So I would say where there's a, where laws are being applied not with the intent that the law had and obviously that has to change and, you know, if it takes legislative changes that, you know, can work towards that. And sometimes when it's just a bad judge doing it, I mean, you're in law school. How many times do you read cases where I mean it makes no sense? So you can't, we're always going to have bad judges who are applying the law irrationally, but we can work towards changes on that. I don't know if that's a sufficient answer for what you're looking for? Okay.

MS. DIAZ-TELLO: I have a follow-up question to that one. What you've expressed is really beautiful and I really appreciate hearing it, and what it makes me think is that I wish that your organization had been there when we were filing the amicus briefs in *Ankrom* - the case in Alabama, because in fact the only organization that filed a brief in support of the prosecution of these women, which was detrimental to the public health and to maternal and child health, was Liberty Council—

MS. FRANZONELLO [interposing]: Mm-hmm.

FEMALE VOICE: —a group that focused their briefs entirely on the idea that a fetus should be considered a child for the purposes of the law and that women should be locked up. So I guess that was more of a comment than a question.

MS. FRANZONELLO: Okay. Okay, and I mean I'm not terribly familiar with the cases that you're talking about and we do, we primarily do legislative work not, I mean we do get involved in amicus briefs but yeah, I don't know. I don't know the specifics of the case or if that was ever brought to our attention or not.

MR. STEIN: Okay. So we should probably allow a little bit of a break for our speakers before our next speaker so I want to thank our panelists for their time.