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presents

WHAT IS THE “FREE PRESS”?

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PANELISTS:

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MR. LEO: Well, we are all here, so I guess we can start. The topic is, “What is the Free Press,” obviously triggered by the CIA case.¹ I must tell you that in New York, where I’m from, the major media are in high dudgeon, and about this, not even medium dudgeon. The almost mandatory view is that this is an infringement on the press, that as tribunes of the people, they should not be interfered with. There’s a whiff of sanctimony in all this, complicated by the fact that there’s a lot of resentment about press bi-

¹ See, e.g., David Johnston & Richard W. Stevenson, *Cheney Aide Charged With Lying in Leak Case*, N.Y. TIMES, Oct. 29, 2005, at A1 (reporting on indictment for lying to investigators and misleading the grand jury of Lewis Libby, Jr., the Chief of Staff of Vice President Dick Cheney); David Johnston, *Another Time Reporter is Asked to Testify in Leak Case*, N.Y. TIMES, Nov. 28, 2005, at A1 (describing reporter’s testimony before grand jury for case against Mr. Libby).

as these days that gives extra heat to this issue.

My own opinion, and I'm not going to come all the way down here and not impose it on you, is that journalists are citizens too, and like everybody else, if there are no alternative sources and it's a serious criminal matter, journalists like everybody else have to testify. The idea that we are somehow apart from the rest of America doesn't sound right to me. We'll see if everybody on the panel is wise enough to agree with me.

The press is amazed that reporters have been turned into investigative agents of the prosecutor in the CIA case. And although a lot of the outrage has been hidden behind the soap opera of the Judy Miller case, it's coming out now—and even more outraged that it turns out that one to three journalists may be the chief witnesses for prosecution, which has never happened before. So, we've assembled this distinguished panel. I'll read their bios in the order in which they will speak to you.

Eugene Volokh teaches free speech law, criminal law, copyright law, and the law of government and religion at UCLA. He's the author of a casebook on the First Amendment and Religion Clauses.² Before coming to UCLA, he clerked for Sandra Day O'Connor on the Supreme Court, and Alex Kozinski on the Ninth Circuit Court of Appeals. He is the founder and co-author of the Volokh Conspiracy, which is, in my opinion, one of the five or six best blogs produced in this country so far.³ Those of you who follow the legal blogs know that every time there's a judicial opening of any note, the name of Alex Kozinski is instantly floated, but that's changed now. Because Eugene is such a success, they float the name of Alex and Eugene for almost any—of course, the electronic trail is too large.

Carol Darr became Director of the Institute of Politics, Democracy and the Internet in 2001. She is an associate research professor at the Graduate School of Political Management at George Washington University. During the Clinton Administration, she served as Acting General Counsel for the U.S. Department of commerce and an associate administrator of the Office of International Affairs and the National Telecommunications and Information Administration—big title. She has been General Counsel to the Democratic National Committee, Chief Counsel to the Dukakis/Bensen Presidential Committee, and Deputy Counsel to the Carter/Mondale Committee.

Next, we have Lillian BeVier, David and Mary Harrison Distinguished Professor of Law at the University of Virginia. She's taught constitutional law, with special emphasis on the First Amendment, intellectual property, real property, and torts. She has taught at Santa Clara and Stanford University Law Schools. She was nominated by President Bush and

² Volokh's First Amendment and Related Statutes: Problems, Cases, and Policy Arguments (2d Ed.) (Foundation Press 2005)

³ Eugene Volokh, Volokh Conspiracy, <http://volokh.com> (last visited Sept. 28, 2007).

confirmed by the Senate to the Board of Trustees of the Legal Services Corporation, of which she is now Vice-Chair. She is on the Board of Visitors of the Federalist Society.

David Anderson holds the Marshall and Emily Wolf Centennial Chair in Law at the University of Texas Law School. He has written many articles on defamation, privacy, newsgathering, and freedom of the press. He's been a visiting scholar at Columbia, Cambridge, and many distinguished universities in the U.S., Europe and Australia. Oddly, for a panel put together by lawyers, he has actual media credentials. He was a newspaper and wire service reporter before coming into the law. He has written a casebook on mass media law.

Now, we've agreed to this order, with Eugene going first, because he has volunteered to lay out the issues that we are going to talk about today. Eugene.

PROFESSOR VOLOKH: I'd like to frame the discussion by asking, "Who counts as the press?" Part of the answer is pretty clear: when it comes to the First Amendment, anybody who writes is the press. In the *Reno v. ACLU*⁴ case in 1997, the Court made clear that the First Amendment covers both online and off-line media. Likewise, the Court has long recognized that the amateur media (for instance, the traditional street-corner leaf-letter) is protected by the First Amendment together with the professional media. Thus, there's no need to draw lines between a web-blog—such as instapundit.com or Volokh.com—and Slate.com, which is an all-online magazine, or WashingtonPost.com, which has some purely online material as well as the *Post*'s printed text.

But things are far less clear as to what I call "optional speech protections"—protections that are not required by the First Amendment but are voluntarily implemented by legislators, common-law-making judges, or state constitution drafters.

There are many kinds of such protections, but I want to focus here on the ones that are relatively content-neutral but medium-specific. Libel retraction statutes are one such example. State law could throw the book at anyone found guilty of defamation. It could authorize all constitutionally permissible damages (including punitive damages and presumed damages), assuming the actual malice standard is satisfied.

But many state laws say that if a newspaper doesn't receive a prompt retraction demand, or receives a prompt retraction demand and then promptly retracts the original allegation, then it's off the hook for punitives and presumed damages. These statutes provide *optional* speech protection. Nothing says the legislature *has* to provide such protection. The question is

⁴ 521 U.S. 844 (1997).

whether the legislature should extend protection only to newspapers and not web-blogs, or only to newspapers and magazines and not television stations, or otherwise discriminate on a medium-specific basis.

Journalist privileges are another example of optional speech protection. I very much agree with John Leo that journalists aren't *constitutionally* entitled to a privilege not to testify about confidential communications. However, if you look at the law of privilege, a variety of professions and relationships have been given optional—not constitutionally mandatory—legislatively-granted privileges not to testify about confidential communications. Psychotherapists get such privileges; doctors get privileges in some measure; lawyers get privileges, which may be dictated by the Sixth Amendment in some cases, but most lawyer privileges go beyond that. So some states—over half the states at this point—have created statutory journalist privileges. What happens if the privilege covers people who, for example, work for “newspaper[s], magazine[s], or other periodical[s]”?⁵ Are blogs covered? Who counts as press, for purposes of this particular optional statutorily defined press privilege?

Likewise, what about media exemptions from campaign finance laws? Campaign finance law, as we will see, provides special treatment to the media, but who is the media? Is a blogger like me the media? As it turns out, there was an answer given to this question by the FEC yesterday, and we'll get to that in a moment.

Let me step back from this and suggest that there are three kinds of questions in play here, of which I'll discuss the first two kinds. First, is it a good idea to discriminate based on medium, and especially against blogs?

Second, do the laws as currently written indeed discriminate based on medium? It's an interesting question of statutory construction. As you lawyers—as opposed to us law professors—may know, for every case in which the Court looks to the Constitution or to abstract policy arguments, there are dozens of cases where the courts simply ask what the statutes say. Or at least the courts *should* ask what the statute says.

Third, is it constitutional to discriminate based on medium when it comes to optional speech protections? It's an interesting question, but, as is common with constitutional questions, not the most interesting one. I will save it for another day, but my short answer is that, given the Court's current case law, the answer is probably “yes.”

So let's begin with whether it's good to discriminate against blogs; and to answer that, let's begin by looking at blog readership statistics (or the best guess about blog readership statistics that we get from the “unique visitor count per day” estimates that various software tools provide). If you look at the list of the top blogs by late 2005 traffic, here's what you see.

5 CAL. CONST. art. 1, § 2(b); see also NEB. REV. STAT. § 20-145 (1999).

First up is a big left-wing blog, DailyKos; it gets almost 800,000 views per day. Gizmodo,⁶ a blog about gadgets, is number two on the list, with almost 300,000 a day. The libertarianish politics and public policy blog Instapundit⁷ (run by law professor Glenn Reynolds) gets 150,000.

Michelle Malkin, a prominent conservative columnist—who is actually a member of the press in her own right, even setting aside her blog⁸—gets 100,000. That brings us down to number thirty-two—a high-quality thirty-two—27,000 views a day, which is not chopped liver, and that's us at the Volokh Conspiracy.⁹ Compare these numbers to newspaper readership statistics, and you see that while blogs aren't as widely read as the top papers, many are in the same ballpark as many substantial newspapers. Number 100 in the newspaper list—this is 2002 data—is at about 100,000 views a day; and quite a few blogs have more than 100,000 readers.¹⁰

So many blogs are pretty widely read; they thus have the potential to be important participants in public debate. To begin with, more opinion sources are generally better than fewer. But beyond this, blogs are probably better than most newspapers at covering niche interests, from tax law to physics to other things that many mass-market newspapers don't cover. It's often hard to build enough of a constituency for these interests to justify writing about them in a local newspaper. But a blog can be read throughout the whole country (or the world), and can be distributed very cheaply without regard to geography. In fact, the leading case involving a blogger who claimed a journalist's privilege involved a niche blog about Apple products.¹¹

Blogs can also often better provide expert commentary than traditional media. It's no accident that many top blogs involve people who are experts in their field, whether academics or others. Most experts don't want to go out there and try to get their own newspaper columns; that format may be too stifling, and experts may want to be able to speak in somewhat more technical terms than would be welcome in a newspaper. If you're interested in news about sentencing law and policy, it's hard to beat the Sentencing Law & Policy blog.¹²

Blogs also do more media criticism than the media does, and thus help hold the mainstream media accountable. Mainstream media generally doesn't see media criticism as a high-value, high reader-interest story. The *New York Times* will never run on the front-page, "*Washington Post* Screws Up," because that's seen as too much of an industry insider story, which most readers don't want to read. And this judgment might be

⁶ Gizmodo.com, <http://www.gizmodo.com> (last visited Nov. 10, 2007).

⁷ Instapundit.com, <http://www.instapundit.com> (last visited Nov. 10, 2007).

⁸ MichelleMalkin.com, <http://www.michellemalkin.com> (last visited Nov. 10, 2007).

⁹ The Truth Laid Bear, <http://truthlaidbear.com/ecotraffic.php> (last visited Sept. 28, 2007).

¹⁰ *Id.*

¹¹ *O'Grady v. Superior Court*, 44 Cal.Rptr.3d 72 (Cal.App. 2006).

¹² Sentencing Law & Policy, <http://sentencing.typepad.com> (last visited Mar. 11, 2008).

right—but it's still useful to have a place that features "*Washington Post* Screws Up" stories, and keep the *Washington Post* (and any other media) on its toes. Many blogs are that sort of place. So blogs are both complements to mainstream media and its rivals—which makes it good to keep them on a level playing field.

Nor is it helpful to try to distinguish blogs on the grounds that they aren't edited or fact-checked, and are thus more likely to be inaccurate. To begin with, many op-eds and newspaper columns are at most lightly edited and fact-checked, if that much. Some magazines maintain professional fact-checking staff, but most newspapers don't.

Moreover, what many bloggers lack in editors or fact-checkers they make up for in expertise. When it comes to criminal procedure, I'd trust my colleague Orin Kerr, who is a leading criminal procedure scholar (even though he, like all of us, can make an error in off-hand writing that an editor would have caught), over a journalist who is not a criminal procedure expert and who is edited by an editor who is not a criminal procedure expert.

But beyond this, even if leading bloggers tended to make more errors than newspapers of comparable circulation, that would have little bearing on whether they should get the media exemption from campaign finance law—an exemption that extends to media "commentar[ies] [and] editorial[s]," and not just media factual reporting.¹³ Likewise, comparative accuracy analysis should have little bearing on whether bloggers are entitled to the journalist privilege. It's usually precisely when journalists are reliable that people most want the journalist to testify about what they had learned—if bloggers are less reliable, then that just means that testimony from them will generally be less valuable.

My argument, then, for protecting blogs goes beyond just "all media speakers should be treated alike." That's a good First Amendment argument, but it's not clear whether it's a good argument as to optional speech protection, because the legislature is not required to grant *everyone* protection. If blogs either lacked value because they had very low readership, or lacked value because they didn't provide useful commentary, there would be no particular reason for the legislature to provide this optional protection. But they do have value, much like newspapers and magazines have value, and should thus be protected.

Now let's move to what the law in this field actually is, and let me focus on two examples—the journalist privilege and campaign finance law.

How do journalist privilege statutes actually treat bloggers? Well, it depends on the statute. The Nebraska statute, for instance, provides absolute protection against being required to disclose sources of information ga-

¹³ 11 C.F.R. § 100.7(b)(2) (1998).

thered for “any medium of communication to the public.”¹⁴ (This is much broader than any First Amendment claim that the Court is likely to accept, if it is likely to accept anything). And it pretty clearly covers all media of communications, including blogs: “Medium of communication shall include, but not be limited to, any newspaper, magazine, other periodical, book, [or] pamphlet”¹⁵

Now compare the California Constitution’s express absolute protection for a “publisher, editor, reporter, or other person connected with or employed upon”—so far quite broad—“a newspaper, magazine, or other periodical publication”¹⁶ Is a blog a “periodical”?

Well, an active blog is a periodical in the sense that it’s updated periodically, rather than just once. But on the other hand most blogs don’t have a fixed period between publications, which some definitions of “periodical” require.¹⁷ For economic reasons, newspapers have a fixed period—once a day—as do magazines (generally once a week or once a month). Blogs don’t have to be published at fixed intervals, and since we don’t have to, we don’t. If there’s a new story, why should we wait until the next day to post? One of the advantages of blogs is their timeliness. But maybe that strips us of the privilege because it means a blog isn’t a periodical.

Here’s another oddity. It turns out that, according to some dictionaries, a periodical requires a period of more than one day, so that a daily is not actually a periodical.¹⁸ If that’s so, then our blog would not be covered as a “periodical” because we publish too often. I don’t see much of a policy justification for such a distinction in treatment; but if I’m going to assert rights drawn from the text of the statute, I’ve got to pay attention to the text of the statute.

I think that when it comes to rival definitions of periodical—requiring a period of more than one day, requiring a fixed period, or requiring publication that is fairly regular rather than once-only or highly intermittent¹⁹—the policy arguments can make a difference, and I think they cut in favor of the last definition.²⁰ But this interpretive question is thorny, and the likely

¹⁴ NEB. REV. STAT. § 20-144 (1999).

¹⁵ NEB. REV. STAT. § 20-145 (1999).

¹⁶ CAL. CONST. art. 1, § 2(b).

¹⁷ *E.g.*, Merriam-Webster Online, <http://www.m-w.com/dictionary/periodical>, defn. 2a (“published with a fixed interval between the issues or numbers”) (last visited Sept. 17, 2007).

¹⁸ *See, e.g.*, American Heritage Dictionary, <http://www.bartleby.com/61/43/P0194300.html>, defn. 2a (“Published at regular intervals of more than one day.”) (last visited Sept. 17, 2007).

¹⁹ *See, e.g.*, *O’Grady v. Superior Court*, 44 Cal.Rptr.3d 72, 104 (Cal.App. 2006) (suggesting that publications that are not “published in distinct issues at regular, stated, or fixed intervals” but have articles “added as and when they become ready for publication” might qualify as publications).

²⁰ *See, e.g., id.* at 104 (taking the view that “Given the numerous ambiguities presented by ‘periodical publication’ in this context, its applicability must ultimately depend on the purpose of the statute,” and that here, given the goals of the journalist’s privilege, the legislature likely intended “periodical publication” “to include all ongoing, recurring news publications while excluding nonrecurring publications such as books, pamphlets, flyers, and monographs”).

result is thus not trivial to predict.

But maybe blogs are not periodicals; maybe we're magazines instead. True, blogs certainly don't look like magazines. But how many people, before they got into this room, if asked whether a Slate.com is an online magazine, would have said yes? How many would say that it is not an online magazine? [Show of hands.] Yes, so most people say that it is; you might add the qualifier "online," but it's still seen as a magazine, though it isn't printed on glossy paper and distributed every week or month through the mail and on newsstands.

Now our blog is not exactly like Slate.com; for instance, we're not as professional (though magazines have been known to be published by relative amateurs). But maybe we're kind of the online equivalent of a magazine. As it turns out, a recent opinion letter from the General Counsel's Office of the FEC dealt with the media exception to election law by saying that blogs are the online equivalent of newspapers or magazines.²¹ So maybe this argument is another way blogs can qualify for the exemption. Again, it's an interesting interpretive question.

New York has a still different kind of privilege, covering only those "who, for gain or livelihood, [are] engaged in . . . writing . . . news intended for a newspaper, magazine . . . or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public," when "such news com[es] into such person's possession [in confidence] in the course of . . . obtaining news . . . for public dissemination."²² That excludes the purely noncommercial blogs, but it looks like making even a modest amount of advertising revenue will let the regular blogger be covered. Delaware is odd because it requires that you spend twenty or more hours a week in the course of actually writing stuff for public dissemination, which many bloggers are probably embarrassed to admit that they do. However, the advantage is that once you satisfy that twenty-hour minimum, the statute exempts every sort of reporter, journalists, editor, or "polemicist."²³ So, if anything, I think we're clearly polemicists, so we qualify for the exemption in Delaware.

Of course, there are problems with such broad protection. Imagine that Joe tells me about a crime he committed. Called to testify at Joe's trial, I say, "Look, I'm a journalist; I might have ended up posting something based on Joe's account on my blog. I sometimes do these sorts of things." A traditional journalist would get protection in this situation if Joe was one of his or her sources. Can it be possible, though, that anyone who has a

²¹ See Brian Faler, *FEC Considers Restricting Online Political Activities*, WASH. POST, Mar. 21, 2005, at A17; see also FEC Advisory Opinion 2005-16 [hereinafter Opinion 2005-16], available at <http://saos.nictusa.com/saos/searchao>.

²² N.Y. CIV. RTS. § 79-h (McKinney 2000).

²³ DEL. CODE ANN. tit. 10, § 4320 (1999).

blog gets protection from testifying against their friends?

I think probably the better approach would be to narrow the privilege in a way that neither journalists nor others get protection in that kind of situation, though it's an interesting question how we distinguish things that we get from bona fide investigations from things that our buddies just tell us. It is undeniably the case that if you extend the journalist privilege to bloggers, you're going to have a lot more people trying to invoke it.

Now, let me close with campaign finance law, especially because Lillian and Carol are going to be talking about it. Campaign finance law limits expenditures in various important ways. First of all, it basically bans corporate expenditures related to candidates, with some exceptions. The result is that individuals can speak about candidates, but corporations can't. But, you might say, the *New York Times* is run by a corporation, right? How can it say anything about candidates? Aha—that's because of the special media exception to campaign finance law.

Independent expenditures coordinated with candidates are also dramatically limited: They're treated as contributions, and thus aren't allowed if the coordinating spender spends more than a couple thousand bucks on them. An example of a coordinated expenditure would be the *New York Times* calling a candidate and saying (expressly or implicitly), “we want to know where you stand because if you stand the way we stand, then we're going to endorse you.” That would be coordination, and illegal if GM did it. But the *New York Times* is entitled to do that—again, because of the media exemption.

Also, expenditures of a sufficient size must be disclosed, which is a pretty substantial procedural burden, though not an outright ban. But the *New York Times* doesn't have to disclose every time it publishes something or has spent money on something having to do with the candidate—again, because of the media exemption. And the exemption covers every news story, commentary, or editorial distributed through facilities of newspaper, magazine, or other periodical publication. So we encounter the same question: is a blog another periodical publication?

As I alluded to earlier, the FEC General Counsel's letter says that blogs are online “magazine[s],” and are therefore entitled to this kind of protection.²⁴ The FEC took the view that because the statute was written long before there were blogs, it should be read in light of modern technological circumstances—sort of like the way we read the Constitution's provision for an army as including authorization for the Air Force. We don't require a new constitutional amendment to recognize the Air Force, because it's a modern aspect of an army. Similarly, a blog is the modern online magazine, according to the FEC—though again we have to recognize that if bloggers get the media exemption and anybody can be a blogger, then

²⁴ See Opinion 2005-16, *supra* note 21.

this will become a very broad exemption indeed.

So with that, I close, and turn things over to my fellow panelists.

MR. LEO: Now that Eugene has laid out the parameters of the discussion, I should remind the panel that we all agreed to limit statements to twelve minutes. After everyone has spoken for twelve minutes, we will go directly to questions from the floor. If you wish to rebut, you have to simulate a response to someone's question.

Carol Darr.

PROFESSOR DARR: Thank you. What Eugene was just talking about is the great segue into what I want to expand upon, which is the campaign finance implications of treating bloggers as the media.

The FEC just put on its website a draft advisory opinion, the one Eugene alluded to, that gave the media exception to a law established by former U.S. Senator Gene Carnahan and several political operatives in Missouri. The blogosphere will probably be delighted with this exemption, but I see it as a case of "be careful what you ask for" and I want to tell you why, and I want to make three points.

The first point, I think we can all agree on. The landscape of politics and journalism have changed profoundly. As Meetup CEO Scott Heiferman has said, the Internet has democratized democracy. It has lowered the barriers to entry. Now, anybody who wants to report or comment on the news of the day can do so, and their voice can be heard around the country and even around the world. In fact, some of the bloggers have audiences bigger than some of the midsize newspapers, as the statistics that Eugene just showed you point out.

The second point is nobody really wants to interfere, including me, with the free-speech rights of these bloggers. They have asked to be treated the same as any other media by the Federal Election Campaign laws, and it's hard not to be sympathetic. Today, the FEC issued a draft advisory opinion regarding a blog called FiredUp.com. This blog basically is no different than any of the other top ten, top fifteen blogs you see on the Democratic liberal side of the Republican conservative side, so it's going to have wide applicability. And not surprisingly, as Eugene said, the FEC stated that the blog was entitled to the media exemption. The legislative history of the FECA and the Commission's past precedents are so broad that I don't see how they could have come to any other conclusion. This is not a big surprise.

The third point I want to make is that even though asking for that media exemption was an easy ask, we are going to find out that it's going to be a very expensive gift. The system of campaign laws that we have

known for the last thirty years, including the prohibition on corporate contributions that has been in effect for almost 100 years—since the Tillman act in 1907—that system of laws cannot accommodate a widely granted media exemption. This draft opinion, if it becomes official—and I’m assuming it will—will have the effect of absolutely destroying the limitations and prohibitions on corporate money, union money, big money, and even foreign money.

It comes down to this. The FEC and Congress can widely grant a media exemption to anyone with a blog, or almost anyone. Or they can regulate money in politics. They cannot do both. Let me explain why. Campaign finance laws limit what individuals can contribute to candidates, political parties, political candidates. The federal laws prohibit corporations and unions from using their treasury money and their dues money, respectively, in making contributions. And essentially anything of value counts, unless there is a specific exemption. And as we all know, for people involved in politics, there are lots of exemptions.

One of the biggest exemptions, and I think the best exemption, is the media exemption, which was obviously put in to the statute so as not to interfere with the free press. Let me give you that definition again: The media exemption exempts from the definition of contribution and expenditure, “any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcast station, cable station, newspaper, magazine, or any other periodical publication, unless it is owned or controlled by candidate or party or political committee.”²⁵

The effect of the media exemption is this. A press entity can spend an unlimited amount of their own money promoting, attacking, supporting, or opposing a candidate. They could even use the magic words; they can advocate the election or defeat of a candidate in their broadcasts and publications. Publications like the *New York Times* do this all the time. They use their corporate money to produce editorials and news stories, and then publicly distribute their views. Now, anybody who has that media exemption, including the bloggers, can do the same thing.

Further, the FEC has said that the current media exemption allows the media to distribute its content in any manner that is consistent with industry practice. So in keeping with this, what this means is that a blogger with a media exemption can distribute its political editorials or political solicitations by putting them on a website, in emails, in RSS feeds, or listservs. Like broadcasters, a blogger can produce expensive videos that political operatives can use for their own purposes, such as the network footage of Michael Dukakis that you all remember, in the army tank looking like the Red Baron, that was used in the 1988 election.

And here’s the good part. They can do all of this while their em-

²⁵ 11 C.F.R. § 100.7 (1998).

ployees coordinate with the campaigns. We don't call it this. We call the employees reporters or editorial writers, or we call them political cartoonists. But essentially, they are employees and they can coordinate with the campaign. They would call it covering the campaign. But essentially, it's the same activity; activities that, if these people were employees of, say, Procter & Gamble, it would count as coordination. In other words, as long as the media are pursuing their journalistic function, for all practical purposes they are exempt from campaign finance laws.

This legal right to spend an unlimited amount of money advocating the election or defeat of a candidate, and also coordinate with them at the same time, is open not only to corporations but to individual, independent journalists, and to foreigners and foreign money. Rupert Murdoch, *Pravda*, *Al Jazeera* all have the same rights as the *Washington Post*. This media exemption allows all of them, for understandable reasons, a lot of leeway because to do otherwise would interfere with their rights as journalists. The exemption is open to all—foreign and domestic, good, bad, hacks, crazies, everybody. Everybody from the *L.A. Times* to the independent journalist in a basement distributing work on a mimeographed piece of paper gets the exemption.

Bloggers have said, quite rightly, what about us? What's the difference between everybody else and what they do, and what we do? And they've said we fall squarely within the Act's definition of media. We cover stories. We issue commentary and editorials. And we're periodic. That being the case, we are also entitled to the media exemption. And the FEC, at least in the draft opinion, seems to be agree with that.

However, if you give the media exemption to twenty million bloggers, or even 200 of them, then all somebody has to do to be exempt from the campaign laws is to establish a blog. The entry costs are nil. Democracy has become democratized, and so has the press. We can all be media; we can all be press; and therefore, anybody who wants to be exempt from the campaign laws can do so.

It gets better. The media does not have to disclose where its money comes from. Unless they are a publicly held company, they don't have to tell anybody who their investors are, who their sponsors are, who their partners are, who their advertisers are, if it's not otherwise apparent. They can take any kind of money from anybody, and it is all hidden from view. To those who argue that we can rely on real-time public disclosure to clean up federal elections, I would say think again. There are as many ways to get around disclosure as there are the campaign act itself, and the media exemption is just one of those. Think of the possibilities in the next election: no disclosure; no limits on any kind of money, including foreign money; and you get to coordinate with the candidates. Think of swift boats on steroids. You will be able to do anything.

I do not bemoan the democratization of the media. It was long over-

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due. But I do fear that our fragile, very flawed system of campaign finance laws is about to be completely destroyed by the media exemption.

(Applause.)

My next line was going to be, there are those who would applaud that result—but let me say, only if you think that the system we have now cannot possibly get any worse than it is. I've been involved in campaign finance for thirty years, and it is full of loopholes. You're about to see no laws whatsoever. You're about to see—

(Applause.)

PROFESSOR DARR: —it's a basic fundamental difference, and I disagree.

You know, the FEC is still going to regulate the nickel-and-dime stuff. But the game is over, and I guess I would say, your side won. The Hundred Years War against political money—in that war, Big Money has won. Congratulations.

Thank you.

MR. LEO: Lillian BeVier.

PROFESSOR BeVIER: I want to respond first to just the simple fact that I'm talking after Eugene Volokh and Carol Darr. But talking after you Eugene, I feel that if I talk that fast, my tongue will get twisted around my—and I can't think that fast either, so I'll just go a little bit slower.

Eugene talked a bit about the statutory interpretation questions with respect to all of these various state statutes that give reporters privileges. One of the issues, of course, that one would confront in those statutes is who is a journalist and who qualifies. These are statutes of both inclusion and exclusion; who is not qualified? You have to, of course, decide what the rationale is for those journalists' privileges.

What I want to do today is actually change the subject a little bit with respect to both that and of the media exemption, and go to something which, in my view, is more fundamental and goes to the heart of why these questions are hard, now that the blogosphere seems to be sort of coming into its own.

Many, and I have reason to believe most of those who were in this room and who love freedom, are inclined to read those provisions, both the

media exemption and the journalist privilege, broadly so as to include as many people as possible, and certainly to include bloggers. Bloggers are very salient at the moment. They seem to fit completely within the rationale of journalist privilege, for example, as well as perhaps the rationale for the media exemption.

But my position is a little—I want to take a point of view that’s a little bit different from, we should read those provisions broadly so as to protect bloggers, and be somewhat iconoclastic. And it leads me to ask, well, how did the press get these privileges in the first place? I suppose I’d pick up on your notion that journalists ought to be citizens like everyone else, and we might want to worry about reporter’s privilege, despite the fact that therapists and clergymen and so forth have it. Those people have it in order to enable them to provide the service that they are hired by their clients or their penitents or whatever to give. And so, the rationale for those privileges I think is quite different.

We came to the view, or seemed to be willing to come to the view after Watergate and the *Washington Post* breakthroughs there, that the press can do no wrong, that the press is the agent of the public, and without the press we wouldn’t know anything, and we have to count on them to be our agent and bring us the news, and they wouldn’t be able to bring us the news if they couldn’t keep their sources confidential. All that’s true, but usually when you have an agent, you have a principal. And very often, when you have an agent and a principal—we’re supposed to be the principal—you are inclined to have problems of what we in the Academy call agency slippage, where the interests of the agent are very different from the interests of the principal, and the principal has no means of holding the agent to account, no means of making sure that the agent is covering the right stories, is talking to the right people, is bringing the truth to light.

So, this leads me to just add a kind of caveat about the whole idea of journalist privilege, the caveat having to do with the accountability of journalists, both to the public—i.e., us, the people that they allegedly serve, as our agent, to bring us the news—and of course to the criminal justice system. I worry about that. I think that, of course, any time you have a law that is going to mandate disclosure at some point, you are likely to have what the journalists would say is true; you’re likely to have a little as communication. In other words, people are going to be more guarded when they talk to the press. So I understand there’s a trade-off with saying I’m not completely with you on the journalist privilege, a trade-off in the sense perhaps of somewhat less information from confidential sources. Personally, I’m not sure the press privilege gives us the best of the bargain with respect to what that trade-off is and what it should be.

I have many thoughts and little time. So let me start in the campaign finance and the media exemption, telling you that I come at this issue—it sounds like the way a lot of you do. I’m not a fan of campaign finance

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regulation generally, and I have long been a critic of the regulations, and I've long been a critic of the restrictions recently passed, in particular those on corporate and union electioneering communications, those that say if you're a corporation, you can't spend corporate funds and you can't mention the candidate's name. I have thought that those are transparently incumbent-protective. We have enough problems in our democracy, what with gerrymandering and so forth, and incumbents have enough protection that I think the electioneering communications restrictions are very problematic.

Consider, however—and we say, well, there's a media exemption for those and so the media corporations are going to be able to talk about candidates and write their editorials and give us their commentary. And all that is true. But I don't know whether you remember this vividly as I do who was on the side of campaign finance regulation. Well, the *New York Times* and the *Washington Post*, of course, were going to be exempt from it, and guess who was the biggest fan of campaign finance regulation—sort of the mainstream media, the people who would remain in control of the public agenda and would simply be able to continue their dominance, if you will, of what the issues are going to be on the public debate.

It's worth pointing out, by the way, in response to what Carol said, that the campaign finance movement is itself a product of big money in politics, to the tune of \$123 million in the last decade, by such nonpartisan foundations as the Ford Foundation and the George Sorrell's Open Society Institute. Among the funding that they gave in favor of campaign finance regulation was \$1.2 million to NPR for news coverage of financial influence in political decision-making, a fact I learned by reading a blog on Tech Central Station.²⁶

Not only did the media publish stories about money and politics and how corrupt we all are, but they never engaged with any degree of seriousness in the First Amendment problems, that regulating corporate speech and speech about politics were raised. They talked about the First Amendment issue as if it were a sham, as if it were—well, some people think this violates the First Amendment but we don't think so. My point is not that expenditures by the media for talking about candidates and putting their points of view across should be regulated. My point, rather, is that expenditures by anyone for engaging in that activity should not be regulated; that the media is no different in that respect and in the respect of asking for and being entitled to the freedom of political debate, than you or I, certainly no more entitled to it than bloggers.

Most of you probably know that during the 2003-2004 election cycle, the FEC had interpreted the campaign finance statute to exclude communi-

²⁶ Tapscott's Copy Desk, http://tapscottscopydesk.blogspot.com/2005_03_01_archive.html (March 11, 2005).

cations over the Internet from the BRCA, McCain-Feingold—sorry, BCRA. So, we had an election cycle where, in effect, blogs had not been regulated. And I think it's fair to say that the sky didn't fall. Well, maybe it fell some places, but it didn't seem to fall for the entire country. I think it's fair to say that we got along just fine, and indeed it was a very vigorous, very intense campaign and the blogs did indeed democratize democracy, speaking about candidates, taking positions on issues and the like, in a way that was quite invigorating for many people, and really a wonderful, I think, invigoration of the political process.

Movements are afoot in Congress as well as the FEC to put that exemption for the Internet and for—I'm sorry—to put that exemption into the statute itself and to continue to exempt communication on the Internet from being covered by the BCRA. Now, you'll be surprised to learn, I'm sure, that the *Washington Post* and the *New York Times* and Representative Shays and Representative Meehan and Senator McCain are against these measures. They say that—they're not worried, of course, about competition from blogs; the newspapers are not worried about preserving a declining readership from further erosion. They're worried about corruption and about the continuing influence of big money in politics.

Well, one of the things I think we have to ask is whether these kind of Chicken Little predictions about what's going to happen to campaign finance regulation, well, if only they would come true, but I'm afraid they're not going to. Campaign finance regulation is not put at substantial risk by extending the media exemption to bloggers, for example. It is still true that all of the previous regulations about corporate contributions and about corporate expenditures discussing candidates soon before an election are going to stay in place. So, to say that bloggers are going to have free speech is going to bring the campaign finance regulation house down, I think is a bit of an overstatement about the consequences.

I would just like to suggest that I was stunned to hear Carol Darr say that it's okay for reporters and the media to coordinate their expenditures with candidates. The media exemption is not designed to coordinate or have reporters coordinate their reporting with campaigns. If it does, then I think it should be repealed. I mean, I think that's really a distortion of the political process.

But I think with respect to the Internet and blogs, what we should be realizing is that the democratization of democracy is a wonderful thing. Blogs are, as Carol noted, very easy to start. Nobody visits a blog who doesn't know where they're going and doesn't want to go there. There's unlimited bandwidth so that anyone can start a blog. It's not as though we are going to have anybody drowning out anybody else. These are the basic arguments that have been made in favor of campaign finance reform.

So, blogs are very unlikely to corrupt the process. Blogs are very unlikely to make the process further unequal. In fact, there's nothing more

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equalizing than a blogosphere. And with those thoughts, I will leave you.

Thank you.

MR. LEO: Your ten seconds are over.

David Anderson.

PROFESSOR ANDERSON: My answer to the question that Eugene raised at the outset is very simple. The press is whoever the political branches say it is, with some rare exceptions. And I think we ought to try to keep it that way. Freedom of the press actually owes them very little to the Press Clause, at least as far as positive law is concerned. The Supreme Court has never recognized any rights that are exclusive to the press, no First Amendment rights that are exclusive to the press. Of course, freedom of the press depends on a lot of non-legal forces, such as tradition and the political power of the press, its financial might and so on. The existence of the Press Clause probably reinforces some of those things, but so far as establishing constitutional principles that protect the press, the Press Clause just really hasn't played any role.

The constitutional principles that are pillars of press freedom are things like protection against the use of contempt to punish publication, protection against prior restraints, the constitutional protections in libel law, the presumption against content-based regulation—those all came from the Speech Clause, not from the Press Clause. And that, in my mind, is a very salutary thing. That makes those freedoms available to everybody; bloggers and dissidents of every stripe, and so on, as well as to the press. They are freedoms that were won by the press, but they apply equally to all speakers.

The fact that it hasn't been necessary to use the Press Clause to protect the press up to now seems to me to suggest that it probably isn't necessary now to use the Press Clause to protect new forms of communication that may clamor to be treated as press. The Speech Clause, in most instances, gives them all the constitutional protection they need, just as it does for the old media.

Now, the second legal source for freedom of the press today is what Eugene called the optional protections. I would just call them non-constitutional protections. In addition to the ones Eugene identified, there are all the access—the preferential access arrangements are made, whether it's access to the White House or access to City Hall or to disaster areas or war zones, or whatever. There are statutes protecting newsrooms from police searches. There are a great many exemptions, news media exemptions, from all kinds of regulations; securities regulations, from tax, from campaign finance, of course, as has been mentioned. There are good subsidies, direct and indirect; low postal rates, free use of spectrum by broadcasting.

These are all things that I think were thought by the legislature to enhance freedom of the press, and they're not constitutional. And because they're not constitutional, it's not necessary to identify the press in order to decide who is the press in order to decide who gets the benefit of those.

You'll notice in the examples that Eugene had on the screen, not one of those statutes described the beneficiaries in terms of press. They were all described in other ways. Now it may well be that those descriptions are obsolete, and indeed I shouldn't say may well be; clearly they are obsolete in many respects. The statutes ought to be changed. If they're not changed, courts will interpret them more broadly or more narrowly, perhaps, in some instances.

But, I think it's right to keep those decisions in the political branches and to not constitutionalize them. They're the kind of decisions that are not suited for constitutional resolution. For example, somebody has to decide who gets to ask the President questions in a news conference at the White House. The prison administration has to decide whether to take resources away from the prison library or health care or security and use it to facilitate press access to the prison, for press news coverage.

If you say that the press has a constitutional right to do any of these things, then those rights can be invoked by anyone who claims to be press and each of those decisions of exclusion becomes a constitutional challenge. Even if you thought that was desirable theoretically, you would have to think twice about the costs that that imposes. What government agency would want to get involved in making these kinds of dispensations available, if it knew that it was going to have to litigate every disgruntled applicant who is denied the benefit?

As long as these perquisites are not constitutional, they can be more or less inclusive in different circumstances. For example, I think the legislature might be more willing to include bloggers in provisions granting access to Congress than it is in granting access to war zones or prisons, where the security considerations are greater than they are in other contexts.

Now, I mentioned that I think there are some exceptions to this proposition that everything can be protected by something other the Press Clause. There may be circumstances in which freedom of the press requires reliance on the Press Clause. For example, suppose that the President decided to ban all press from the White House, to hold no news conferences, to hold no press briefings, and to forbid everybody in the White House from speaking to the press. I think that might be a threat to freedom of the press. It is not a threat that you can meet with the Speech Clause because the courts cannot hold that everybody, because we are all speakers, have a right of access to the White House.

Or, suppose that the military prevents all direct coverage of a war. No press is allowed in the theater operations, no briefings from commanders,

no access to troops who have returned from battle, no information about casualties. At some point, it seems to me that there's a Free Press claim that arises there. And again, I think it's one that cannot be addressed under the Free Speech Clause because we can't all have a right of access to the war zone. Those seem to me to be two examples of government actions that would be inconsistent with the idea of a Free Press.

How can freedom of the press be protected in situations like that, without giving a constitutional right to individual journalists or organizations? Well, I think it's possible to do that, but it requires some sort of innovative thinking. The answer is it can be done by holding that the Press Clause doesn't create individual rights. It only prohibits restrictions that are so pervasive that they prevent the press from doing its job. Now, if we ever got to that point, yes, there would be some questions about, is something called the press being prevented from doing its job? I don't have a definition for press for those purposes, and I don't think I should, or you should, or the courts should.

If you think about speech, it is still being defined. What is speech? Even though everything depends on the characterization of the First Amendment, we're still evolving what the meaning of speech is. And I think the meaning of press, if and when the Press Clause becomes constitutionally relevant, that too has to develop by evolution.

My point is that a challenger should not be able to succeed just by showing that he or she is prevented from covering the war or prevented from asking the President a question. The challenge should have to be that the press as an institution, whatever that institution is and however broad you want to make the press, that its institutional role is being denied. That's a very unfamiliar concept to First Amendment thinkers because we have come to take it as an article of faith that the Speech Clause protects everybody equally and that any free speech right may be asserted by any person. I think that managing this idea of an institutional First Amendment right of the press would require some unconventional thinking about standing, who has standing to challenge the kind of restrictions that I have described, and forms of relief, what kind of relief would be granted and who would be entitled to it and so on.

But I think those are the exceptional situations, and for the most part it's not necessary to define the press for constitutional purposes, for purposes of campaign finance and confidential sources of all these other things. It's a political thing. I very much accept virtually everything Eugene said about bloggers, and it seems to me those are persuasive arguments to be addressed to the legislature. Now, it doesn't mean you'll win. Legislatures do stupid things and they make mistakes and they get things wrong, but that doesn't mean there ought to be a constitutional remedy for it.

So, I guess my point is before we get into a tizzy about defining the

press, we ought to be asking for what purpose is it necessary to define it. And as long as it's not necessary to define it, let's not do it.

Thank you.

MR. LEO: Okay. Time for questions. Please tell us who you are and which panelist you'd like to respond, and no speeches, please. We're looking for questions.

AUDIENCE PARTICIPANT: James Young, National Right to Work Legal Defense Foundation. And I would direct this to any or all of the panelists. I'm delighted that Congress has already made sure that people can't use the wealth they earned to express opinions that are opposed to mine. George Soros comes to mind. And I'm particularly interested—particularly delighted that they banned the use of union dues money for contributions to candidates. We all know that that works very well in preventing unions from using forced dues for political activities, as in California last week.

I guess the question that I would ask and I would have the panelist address is, why are we spending so much time limiting the use of voluntary funds in politics, and virtually no one is addressing the issue of forced union dues used for politics?

MR. LEO: Carol, I think it's for you.

PROFESSOR DARR: I'm afraid that's true. You know, I think the answer is obvious. You know why the Democrats don't take that issue on; because most of the unions favor the Democrats. But let me tell you kind of the best one sentence I ever heard about campaign finance laws that I think sums it up. Somebody said, after a war called Watergate, the great powers got together and hammered out a treaty, and that treaty was the election laws. And if you look at the laws as a treaty, there's something in it for big labor, there's something in it for big unions, there's something in there for incumbents, there's something in there for Democrats and Republicans. That's the treaty. When you look at it that way, it makes sense. That's what big labor got. That's why it's there, the same way—that's why corporations can spend money in similar ways with their corporate money.

PROFESSOR BeVIER: There was a price to be paid for that treaty in political freedom. So I mean, basically—

MR. LEO: Your mic's not on.

PROFESSOR BeVIER: —there's a price to be paid for that treaty, and that is a price in political freedom. But with respect to the question of why the forced contributions are not salient, I think Carol has a very good point. It is not constitutional for unions to spend their employees' money. If their employees ask for it back, they're entitled to get it back. But we all know that the check-off is something that the unions have fought, and so they do it with the implicit acceptance by their members, and it's not a politically salient issue, certainly in mainstream political discussions, because without that money the unions would have a really hard time being as effective as they are in the political realm. And they are very powerful, as you know, for Democratic candidates, and I suppose for some Republicans as well.

MR. LEO: Anyone else on that question? Alright. We'll move to the next question now.

AUDIENCE PARTICIPANT: Jennifer Barnett. I am a staff attorney with the Institute for Justice, and I'm from the Phoenix Lawyers Chapter. First, I guess I'm curious if anyone on the panel is familiar with the recent decision of the Seattle or Washington state trial courts—Mr. Volokh, you may be familiar with it—holding that two talk radio show hosts, their commentaries supporting an initiative to repeal a gas tax had to be declared as in-kind contributions to that initiative process because they supported the initiative on air.

And it's slightly different from the blogosphere, but there is a rise in talk radio programs, particularly with satellite radio, and I'd be curious to hear any of the panel members' thoughts on what kind of national implications this has, if you are going to have talk radio hosts and perhaps a wider net cast of anybody who expresses an opinion in favor of a particular initiative having to declare those as in-kind contributions subject to campaign finance reform laws.

PROFESSOR DARR: You know, that's going to be a matter of state law, what counts as a contribution and a referendum. One point I would make with regard to the federal law. If you can't distinguish between individuals and individual journalists, between corporations and media corporations, between foreign money and foreign media, you have a couple of choices. You can either not regulate any of them or you can regulate all of them, and since we don't want to regulate the media, where this is going to go is that I think you're going to see laws across the board, including state laws, just down a rat hole. You're not going to see any laws.

PROFESSOR VOLOKH: Carol, you presented a powerful argument that this would allow the spending of money for political speech in ways that the existing system does not permit. But I'm wondering what you would propose as a solution.

Let's just take a concrete example. I actually don't blog much about candidates on my blog, but assume I find there's some candidate whom I really like, or whom I really oppose. Suppose I start posting things criticizing him or her, and then you figure out that I spend \$50 a month or \$600 a year on bandwidth, or even more. Eventually, at some point, we will hit the level where fair accounting would lead to disclosure obligations. Do you think I should have to file expenditure reports whenever I comment about candidates?

Personally, I have no idea how to file these reports, and I have no desire to find out how to file these reports. I suspect it would take me a good deal of time to file each report. Should I be filing these reports? Should the law require me to file such reports, because I'm not really the media?

PROFESSOR DARR: You'll be real surprised to know that, no, I don't think you should have to.

PROFESSOR VOLOKH: But if that's right, then I shouldn't have to file expenditure reports because I'm part of the media. I thought you said it would be horrible if bloggers were seen as part of the media—no?

PROFESSOR DARR: No, you know, I think what you can do within the law we have now is you can raise a lot of the exemptions. You know, for example, you've got an exemption in federal law. You can now have parties in your own home and spend up to about \$1000, and it just doesn't count. Just ignore it. You know, you can spend a thousand—

PROFESSOR VOLOKH: But for reporting purposes? I thought you need to report anything past a certain—

PROFESSOR DARR: —no, past \$1,000. You can spend an unlimited amount of your money on food and lodging when you're traveling around. You can put similar exemptions in there for bloggers, for their server costs, for other things.

PROFESSOR VOLOKH: What if I decide, for example, that we are getting enough money from advertising that we can hire a research assistant. It sounds like you are saying that if I've got \$10 million and can start

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a newspaper—that's probably not enough to start a newspaper these days, but assuming I've got a lot of money—I can start a newspaper, and of course once I start the newspaper, both the Website and the newspaper will be protected. And if I spend zero money, or maybe up to thousand dollars, I'd probably be okay, so long as I don't have to hire a subcontractor.

But say people tell us, "Your design stinks; you need to get a good web designer," or "You should get a research assistant," or whatever else. If I listen to them and I want to spend \$1,000 or \$5,000, then all of a sudden I'm out of the safe harbor, and I've got all of these other reporting responsibilities. But again, if I have so much money that I spend it on starting a full-fledged newspaper, then I'm back in the media safe harbor and I'm okay. That's a weird system.

I could see a system that says we actually don't want the \$10 million plus publisher to get the exemption. That makes sense to me, though I still wouldn't support it: if you have enough money to start a newspaper, you're the ones we're worried about, because this is big, big money, which might be corrupting or inegalitarian or whatever else should trigger restrictions. I could see a situation where it doesn't matter if you spend less than \$10 million; under \$1,000, or even \$1,000 to \$10 million.

But it makes little sense to say that it's okay if you have a little bit of money, and it's also okay if you have a huge amount of money because you are entitled to start a newspaper and nobody can doubt that your media, but if you're "in-between" media—a blogger who has a research assistant or a blogger who hires a computer consultant—then you're out of the media exemption. Am I understanding that proposal right?

PROFESSOR DARR: It depends on how the FEC does it. You know, what I think they ought to do is—let me back up a little bit. You know, what the Internet has done is it's brought a lot of people into politics and into political commentary who weren't there before. You know, fifteen or twenty years ago everybody involved in federal politics for the most part had access to expert law through the candidates, through the political parties, and so this issue didn't come off much. But now, you have a lot of people who are only peripherally, you know, connected to candidates who are spending money. And the law has got to be changed to accommodate that so that plain old ordinary people don't get caught up in a web that they didn't even know existed.

The point I want to make about bloggers and this media exemption is that, you know, I do worry about big money in politics. That's a point of view different from you all's. And my point was that if you go down this route, it has a cost that you can't regulate money at all. At a point when you are spending \$5,000, \$10,000 on a candidate, you know, why should you not have to file any reports when I, as a political committee on the ground doing bumpers stickers and yard signs—

PROFESSOR VOLOKH: But if I only put in \$5 million into starting a newspaper or a magazine, then I wouldn't have to file these reports, right?

PROFESSOR DARR: That's right.

PROFESSOR VOLOKH: So you're analogizing bloggers to political candidates, where I think I'm actually more like a newspaper. This is a weird situation. The new technologies have made speech cheaper, so there's no need to invest a million dollars; you can get away with just investing \$10,000. But now, because you're not spending as much money, it's like you've committed the sin of not spending the right amount of money, and for that sin you are punished by being denied the media exemption.

That's the difference between me and the *L.A. Times*—I suppose there are many differences between me and the *L.A. Times*—but one difference between us is that they've got a lot of money, and they're home free. However, if I want to spend only a modest amount of money, I'll be subject to these restrictions. Granted, assume I'm spending more than zero money, but only a modest amount of money—why does that make sense?

PROFESSOR DARR: Well, you know —

PROFESSOR ANDERSON: Can I attempt to jump into that? I think—

PROFESSOR DARR: —but I want to say something, too. But go ahead.

PROFESSOR ANDERSON: No, go ahead.

PROFESSOR DARR: You know, what's happened is the Internet has upended everything. You know, twenty or thirty years ago we all knew who the media were. And the campaign laws were willing to give them wide berth, whether they were partisan, nonpartisan, or whatever. It just kind of wasn't a problem, you know, because you could put them off to the side. And now, when everybody is media, my point is you can't have everybody be media and the media be exempt, and have any kind of semblance of campaign finance law that works that I can think of. That's my point.

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PROFESSOR ANDERSON: I think the argument that Eugene is making is simply that Congress drafted the exemption too narrowly, that it should be a broader exemption and not just the media but include lots of other people. That's fine.

PROFESSOR VOLOKH: No, no, no—it said newspaper, magazine, or other periodical. The FEC quite plausibly said that a website is an on-line magazine. Slate.com is an online magazine, even though it's corporately funded. I think I'm not that different from Slate.com.

I could even set up my blog so that all of my posts were batched so they would be published every three hours—not very good from a reader's perspective—and so I would think I'm a periodical. If Congress had said, "Only if you invest at least X million dollars will you be entitled the media exemption," then that might be a different story. But Congress didn't say that, so we're actually not even talking about a congressional judgment that needs to be respected. It said newspaper, magazine, or other periodical. Why am I not another periodical?

PROFESSOR ANDERSON: Well, you're just arguing against the FEC's interpretation of the statute.

PROFESSOR VOLOKH: I'm arguing in favor of the FEC interpretation. The FEC is on my side; it says blogs are online magazines, and are therefore covered.

PROFESSOR ANDERSON: In a situation like the Seattle case, which we started with, there may well be a First Amendment problem there. The rationale of *McConnell*²⁷ was that the threats to democracy that are posed by corporate treasury money and union money are so great that Congress has a compelling interest in regulating that speech. I don't know whether that rationale covers radio talk show people in Seattle or not. I don't know whether it covers bloggers. But you know, there is—in this instance, I think there is a First Amendment argument to be made, and it may well be that the First Amendment forbids the application of these regulations to the talk show hosts. Maybe it forbids it to bloggers.

AUDIENCE PARTICIPANT: My name is Brad Smith. I'm a professor at Capital University Law School in Columbus, and I'm a former Commissioner of the Federal Election Commission, until about two months ago.

²⁷ *McConnell v. FEC*, 540 U.S. 93 (2003).

The exchange that Eugene and Carol just had with Professor Anderson, chiming in as well, has largely taken away my point of being at the mic because that was the exchange that I to some extent wanted to have. But I do want to raise a couple of quick points.

I guess first, Carol, I think you made a statement that I think was simply inaccurate. It may reflect your views, but it's just inaccurate. And that is, you said nobody wants to regulate individual bloggers, and that is just not true. If anybody here has questions about that, all you have to do is read the briefs filed in court by Senator McCain and Senator Feingold and Representative Shays and Representative Meehan, and it is very obvious that they want to regulate individual bloggers. The briefs reek with hostility toward the Internet. They describe it as a loophole, and many, many more negative terms than that.

PROFESSOR DARR: Can I ask a question about that? Do you think that McCain wants to regulate bloggers, or do they want to regulate large expenditures of money through bloggers?

AUDIENCE PARTICIPANT: I think McCain wants to regulate bloggers, and I think he's made that pretty clear. He won't say that statement in those terms, but he has repeatedly indicated, again with a great deal of hostility, and he is not willing to support even the most modest things that would offer any kind of protection to the bloggers. And a look at what people do, and when people are unwilling to offer protection to folks who feel threatened and have a reason to feel threatened because of complaints are filed against them with the FEC, and they would like some clarity of the law, I have to take that as an indication that these people want at a minimum to preserve the right to regulate that type of activity.

One could also, of course, point to numerous statements Senator McCain has made over the years that he does want to regulate negative attacks on politics, on politicians, and that he doesn't do it only because of the First Amendment. But that would be his pleasure. That would be his preference within the political system.

PROFESSOR DARR: Some people would disagree with that. I just want to make that point.

AUDIENCE PARTICIPANT: Now, so people very clearly want to regulate, I think, bloggers' activities. Maybe you don't want to, but I think that many people quite clearly do.

The second point that I would make is that I would just emphasize that people do need to understand the nature of the press exemption with the

FEC. You only get the press exemption while you were being press, whatever that entails. That is to say, you cannot, simply because you start a blog and have the press exemption, if the press exemption were extended to blogs, start a get out the vote apparatus that includes numerous phone calls and driving people to the polls and putting up billboards, or whatever else it might be. The press exemption extends only to the activity that you are doing that is covered as press activity.

So, the idea that—I sense some people might have gotten the misimpression that once you are a newspaper, you could therefore contribute \$6 million to the John Kerry for President Campaign in cash or something, or you could set up a get out the vote operation for him, but you can't. Now you can, if you're the *Philadelphia Inquirer* editorializing the front page that your main goal for the coming year is to elect John Kerry. You can put things in your newspaper telling people how to contribute to the John Kerry Campaign, and you could relentlessly bias your news sources and your reporting to try to get people to vote for John Kerry. But, you have to be operating within that function.

Within that, that leads to the point that I think Ms. Darr has made. She has made an excellent argument against allowing the free press to cover campaigns, that it allows large amounts of corporate contributions to get into the system, and in very hostile ways. We've seen it in Sinclair Broadcasting, a large corporation that spends millions, as Eugene pointed out, and wanted to force all of its stations to air an anti-Kerry documentary right before the campaign. We saw all kinds of campaigns like that.

So I guess the question I'm left with, or comment, is it seems to me is what we've hit is a question of line-drawing, and where do we draw the line, whether we defined it as constitutional lines or merely some type of statutory line? And the real question becomes, how do we draw a line that makes sense? I think what we're seeing is the sort of intellectual dead-end of campaign finance reform. The question I would pose, which I guess most directly to Carol, is if you agree that the *New York Times* website would be protected under the statutory press exemption, so we'll take it out of the constitutional issue, then would InstaPundit be protected? And if InstaPundit would be protected, why? And what value is served by not protecting InstaPundit? If InstaPundit is protected, then is a smaller blog such as the Volokh Conspiracy protected. And if not, why? And it seems to me that the most obvious answer we're getting to is that the bigger you are, the more you look like a big corporate sponsor of traditional media, the more likely you are get the press exemption.

So it seems to me, we have turned the purposes of campaign finance law on its head. We're now telling you, if you have big money, go ahead; if you have small money, you have a problem. I do want to point out, for Eugene's sake, if you're spending \$50 a month on bandwidth and you are expressly advocating candidates, you already have reporting obligations

with the FEC, and people can file a complaint against you for failing to file those reports.

PROFESSOR VOLOKH: Rats. I wish I hadn't heard that.

PROFESSOR DARR: Can I respond to one thing Brad said? I absolutely agree when he says you have reached a dead end in campaign finance law with this media exemption. I agree with that. That is essentially my point. You can't have it both ways. You can't regulate big money under the current system and have this media exemption. If you believe, as I do—and a lot of people do—that having some limits on big money in politics is a good thing, then you've got to start all over. And I swear I have no idea where to go. I don't know how you do it.

PROFESSOR VOLOKH: But Carol, I'm not sure that that's an adequate answer. It seems to me that there are several possible answers. One is a recognition that, indeed, the system is broken, and partly because of the media exemption. So we need to get rid of the media exemption, which—

PROFESSOR DARR: —we could cover a lot of reasons, but that's one.

PROFESSOR VOLOKH: —fair enough. So therefore, the *New York Times* cannot editorialize in favor of a candidate because it's a corporation and because, under any reasonable accounting system, the contribution is going to be large enough that it will be above whatever the threshold ought to be for permissible corporate expenditures.

If you say, "No, the *New York Times* has to maintain this right," then it seems to me that you do have part of an answer. By saying that, you would have committed yourself to maintaining a media exemption, and then up comes Brad's question, which recognizes that if you commit yourself to maintaining a media exception, you have to be able to explain its boundaries.

PROFESSOR DARR: No.

PROFESSOR VOLOKH: No?

PROFESSOR DARR: No—

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PROFESSOR VOLOKH: No, you don’t have to explain it?

PROFESSOR DARR: No, I’m trying to explain it. I guess I’m not going as good as I thought I was. My point to all of this is, you know, this used to not be a problem. Twenty years ago this issue would never have come up because, you know, you had media; we all knew there were; they had this big exemption. Now, when everybody can be media, you can’t do that anymore and since nobody wants to take away the press exemptions of the mainstream media, what you’re going to have to do—well, there’s a great phrase I heard the other day, “the media formerly known as mainstream.” You know, you don’t want to take away from them. You also can’t deny it to the new media.

PROFESSOR VOLOKH: So what’s your solution? That is why I’m puzzled.

PROFESSOR DARR: I don’t have a solution. That’s my point. I don’t see how you do it.

PROFESSOR VOLOKH: So let me ask you this. Assume that my bloggers and I want to hire a research assistant, and we want to do other things that will lead us to spend a tiny fraction of what the true big money—the *New York Times*, I think it’s fair to say, is big money, as is Slate.com—spends. We want to spend a small fraction of what they spend, but we want to spend several thousand dollars because, thankfully, we’re getting enough in advertising and it would be really nice to have a research assistant. Should we be allowed to do that?

PROFESSOR DARR: Under the current laws now, you would have—depending on whether you’re a corporation or not, but the law would certainly ensnare you. I don’t think it should.

PROFESSOR VOLOKH: So you do think that there ought to be media exemption.

PROFESSOR DARR: Of course.

PROFESSOR VOLOKH: Okay, now—

PROFESSOR DARR: And I think you ought to get it.

PROFESSOR VOLOKH: —so who shouldn't get it?

PROFESSOR DARR: I can't—you know, how do you distinguish—

PROFESSOR VOLOKH: So you—

PROFESSOR DARR: —yeah, you go down the kind of the food chain. You know, do you deny it just to the little ones? Of course not. That doesn't make any sense. Do you deny it to the big ones? I don't see how you can. I think you have to give it to virtually all of them.

PROFESSOR VOLOKH: So your solution is to have the media exception, and to have it cover all bloggers.

PROFESSOR DARR: Yes.

PROFESSOR BeVIER: Carol, could I ask a question. I'm not exactly certain why it is you say that the—this is the end of campaign finance regulation. I mean, what about the limits on individual contributions and, you know, corporate expenditures, and so forth? Are those just—do you think that nobody's going to pay attention to them anymore? Are they just already so loose that there are so many avenues for political speech that the contribution limitations and the expenditure restrictions don't keep big money out? I mean, I don't understand what you think is going to happen with the rest of the—what the rest of the restrictions in BCRA.

PROFESSOR DARR: You will have some little restrictions in the law. But my point is, you know, if you're a blogger and you can't distinguish between bloggers/media and blogger/individual, how do you regulate money, if you can't distinguish between corporate media and corporations? Because anybody can be media, I don't see how you can regulate politics the way we have been doing it for thirty years. It doesn't work anymore.

PROFESSOR ANDERSON: Well, what's wrong with the explanation that the Supreme Court gave in *McConnell*,²⁸ which was that media don't pose the threat that corporate union treasury money poses in elections? Now, that leaves a problem about who is media, but unless there's

²⁸ *McConnell*, 540 U.S. 93.

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an equal protection problem, nonetheless that somebody is the Press Clause claim, which I—

PROFESSOR VOLOKH: How can media not pose a threat, if media are corporations? Media money is corporate money.

PROFESSOR BeVIER: That's one answer. Another answer is, how many corporations in this country do you think there are? There are millions of corporations in this country. Some of them have huge corporate treasuries, but so many, many, many do not. I mean, there are tons of corporations, millions of corporations in this country that don't come within the rationale of big corporate treasury. And how you deal with—I mean, the Court wasn't talking about reality when they talked about the threat of big corporate treasuries. They were talking about something quite different. I'm not sure what, but I just don't see how their picture matches with corporate America.

PROFESSOR ANDERSON: Well, you know, Congress, like all other legislatures, often has to deal with questions that are matters of degree. And you know, I think they looked at the realities of American political life, and they said the expenditures from corporate treasuries pose a threat that is different in kind than the threat that's posed by commentary, editorials, or news stories.

Now, Eugene's proposed solution was—I think, maybe—was to say the *New York Times* should be barred from editorializing. Well, I don't know that that would be a big problem, if you could confine it to that. I don't know that editorializing is a necessary adjunct of the First Amendment. Lots of people don't do it, and there are lots of questions about whether it has any effect. But you couldn't stop with a prohibition against editorializing because people would simply accomplish the same thing through commentary. Well, you stop commentary. Well, then, how about news stories? Because, then the same thing would be done through news stories. So, it does not seem to me that there's a solution that's as easy as saying, well, just prohibit the *Times* from editorializing.

So, it seems to me that you have—this really is what Carol is getting at, that if you're going to regulate corporate money in campaigns, you either have to exempt some form of media or you have a constitutional problem. Now, maybe it's a Press Clause problem. The Court didn't seem to think so in the last case. You either have to exempt them or you have a constitutional problem; or, you simply can't do it. That, I think, is the dead end that she's talking about. She is saying that if you can't maintain a workable exemption for news media, then you can't regulate campaign finance altogether. Now, most of you—that's the result you want.

But once you—if you're willing to accept the proposition that Congress accepted, that there is a particular problem with corporate money, and if you're willing to accept the Supreme Court's judgment about that, that yes, that Congress could rationally make that determination. That's really all the Court has to say. Congress could rationally think that there is a sufficient threat from corporate money that it provides a compelling interest for Congress to regulate it. I think that's all that's been said.

And then, the rest of it is all just to say, well, who else can show—or with respect to whom else can Congress show a sufficient compelling interest.

MR. LEO: Can we let a couple of questioners speak now.

AUDIENCE PARTICIPANT: My name is Ray Loginess. I'm Vice President and Legal Director of National Right to Work Legal Defense Foundation. My question is for Professor Anderson. I think I heard you say that the Free Speech Clause of the First Amendment would be violated if the President refused to hold press conferences or allow reporters access to the White House. I don't see how that could be the case under the Supreme Court precedent in the case that we brought, called *Knight v. Minnesota Community Colleges*.²⁹ Minnesota had a system whereby only the exclusive bargaining representative could meet with the college faculty administration to discuss matters of education policy. The Supreme Court upheld that statute on the ground that it was just like a member of the Congress closing his door to lobbyists. Well, if a member of Congress under the Petition Clause could close the door to lobbyists, why can't the president refuse to hold press conferences?

PROFESSOR ANDERSON: My statement was not that the Speech Clause would prevent it. It's that the Press Clause does. I don't think the Speech Clause does. The reason the Press Clause does, and this is my exceptional situation, in my view, there was a case involving a particular reporter's access to the White House, *Sherrill v. Knight*.³⁰ The Secret Service denied Bob Sherrill a press pass to the White House. The D.C. Circuit held, erroneously I believe, that he had a constitutional right to a White House press pass. That's a mistake, and I think your Minnesota decision agrees with that.

What I was trying to posit was a situation where the interference with freedom of the press, whatever that means in the Constitution—it is a constitutional concept—was so great that the courts would have to say, okay,

²⁹ 571 F. Supp. 1, 13 (Minn. 1982), *aff'd*, 460 U.S. 1048 (1983).

³⁰ 569 F.2d 124 (D.C. Cir. 1977).

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whatever freedom of the press means, it doesn't permit this. So I think that any other examples we could come up with, *Sherill v. Knight* or whatever, they don't come close to the kind of massive, complete interference with freedom of the press that I was positing.

PROFESSOR BeVIER: Excuse me. I think David is probably correct about that. What I think is really the case, however, is that the two hypotheticals he posed are hypotheticals in which the press has at its command resources of complaint and distress that would prevent, politically, those kinds of door closings to occur. I think that, you know, the government knows that it's got to try to get the press on its side, and certainly politicians know that. That's why there are so many confidential sources telling somebody delicious secrets to so many news people. But I think we can say that the press itself has wonderful resources of self-protection, much more than do I or do you.

PROFESSOR ANDERSON: I certainly do agree with that. And I think that's a very good reason to be skeptical about press claims that are brought under the Press Clause. I very much agree with that. I'm not so sure that my hypotheticals are completely unthinkable. The war, the complete exclusion from war, we came close to that in the Afghanistan War, the first six weeks of the Afghanistan War. There was no coverage. No coverage—nobody on the ground; nobody speaking to commanders; no reports from anybody about what was going on, except from Rumsfeld in Washington. So, it's not at all clear to me that it's impossible for the press to be unable to resist certain of these governmental intrusions.

(Panel concluded.)

**The Federalist Society for Law
and Public Policy**

presents

**ORIGINALISM AND CRIMINAL LAW AND
PROCEDURE**

2005 National Lawyer's Convention

November 10, 2005

PANELISTS:

Professor Ronald J. Allen, John Henry Wigmore Professor of Law,
Northwestern University School of Law

Professor Carol Steiker, Howard J. and Katherine W. Aibel Professor of
Law, Harvard Law School

Professor Craig S. Lerner, Associate Dean for Academic Affairs and
Professor of Law, George Mason University School of Law

Hon. Christopher A. Wray, King & Spalding litigation partner and Former
Assistant Attorney General, Criminal Division, U.S. Department of Justice

Hon. Edith Brown Clement, United States Court of Appeals, Fifth Circuit
(moderator)

JUDGE CLEMENT: I am Edith Brown Clement, also known as Joy Clement, from the Fifth Circuit, but actually I live in the Fourth Circuit now, thanks to Katrina. I'm glad we have a number of people here to discuss originalism and criminal procedure.

As you all realize, there are several provisions in the United States Constitution to affect criminal law, and most specifically, criminal procedure, which we will be discussing. The problem is what to do with the technology that has developed over the past 200 plus years. There are several areas that I'm sure the founders didn't contemplate, such as digital communications, heat sensors which locate lamps growing marijuana, and

the home of Black Berry/cell phone/future means of communication, which reminds me, please turn yours off or silence them. Mine just rang, so I know they're probably not all off.

We have a fascinating panel this afternoon. We have three professors and a lawyer who has a wealth of experience in the criminal law field. Our first speaker is Craig Lerner. He is a professor at George Mason University School of Law, where he has been for five years. Before that, he was associated with the Office of Independent Counsel for several years, and he practiced in the white-collar criminal field and the communications field. He was a law clerk in the D.C. Circuit, so I'm sure he was exposed a lot of criminal law there. Also, he was a teaching fellow at Harvard, which makes sense because he was an undergraduate of Harvard, and also a graduate of Harvard Law, and then in his spare time got a masters at the University of Chicago. He has published a great deal, and I like some of the titles. I will read them to you—*Reasonable Suspicion and Mere Hunches*,¹ my favorite one, because I am from New Orleans, Louisiana, is *Legislators as the American Criminal Class*.² I'm also curious about *The United States PATRIOT Act: Promoting the Cooperation of Foreign Intelligence Gathering and Law Enforcement*.³ There may be something we can discuss about the PATRIOT Act with respect to the separation of powers, since they now want federal judges to report to Congress anyone who's sentenced, so that they can evaluate whether it's correct or not. I think that could be a problem. He has also published two articles on probable cause and an article on joint defense agreements, which as you all know is just asking for trouble.

Our second panelist is Professor Robert Allen. He is presently at the Northwestern University School of Law. He did his undergraduate work in mathematics at Marshall University, which is helpful if you do have to deal with the sentencing guidelines, since most lawyers don't do math. Then, he went to law school at the University of Michigan. He is an internationally recognized expert in the fields of evidence, procedure, and constitutional law. He's published many books, and 90 articles and major law review articles in major law reviews. You may recognize him because he is in the national broadcast media, discussing constitutional law and criminal justice quite frequently. He's also held professorships before he went to Northwestern, at Iowa and at Duke, and he's lectured at a number of national and international laws schools. He has also been invited to give lectures to the governments of China, Mexico, Trinidad, and Tobago. He spent the past ten years of his research focused on the nature of juridical proof. He is a member of American Law Institute, and he has chaired the Evidence Sec-

¹ Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407 (2006).

² Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599 (2004).

³ Craig S. Lerner, *The USA Patriot Act: Promoting the Cooperation of Foreign Intelligence Gathering and Law Enforcement*, 11 GEO. MASON L. REV. 493 (2003).

tion of the Association of American Law Schools. He was Vice Chair of the Rules of the Procedure and Evidence Committee at the ABA, and he has also served as a Commissioner of the Illinois Supreme Court.

Our third panelist is Christopher Wray, who was and is a litigator at King & Spalding. He presently is the Chairman of the Special Matters and Government Investigations Practice group, where he deals with securities and fraud matters, as well as white collar criminal issues. For two years, he worked as the assistant attorney general in charge of the Department of Justice ("DOJ") Criminal Division. During that time, there was an effort to address the wave of corporate fraud scandals, and he attempted to restore some integrity to the United States financial markets, which I think has been successful. As Head of the Criminal Division, he led investigation, prosecution, and policy development in nearly all of the fields of federal criminal law, specifically intellectual property piracy and cyber crime, and racketeering. He has played an integral part in the DOJ's response to the September 11 attacks and has played a key role in the oversight of the legal and operational actions in the continuing war on terrorism. He spent from 1997 to 2001 in Atlanta as an Assistant United States Attorney, where I'm sure he got a lot of criminal experience also, and he served as a law clerk in the Fourth Circuit. He graduated from Yale as an undergraduate, and as a lawyer.

Our fourth panelist—ladies last—is Carol Steiker. She is presently a professor at the Harvard Law School. She graduated from Harvard, Radcliffe Colleges, and Harvard Law School. She served as law clerk to Judge J. Skelley Wright, who is from New Orleans, on the D.C. Circuit, and also to Justice Thurgood Marshall of the Supreme Court, and she got most of her criminal law reality check serving as a public defender in the District of Columbia, I would imagine. She has written numerous articles on criminal law, criminal procedure, and capital punishment. Most recently, she served on the Board of Editors for the second edition of the *Encyclopedia of Crime and Justice*,⁴ and she's working on two lengthy projects. One is on the changing face of capital punishment in America; the other one is on mercy and institutions of criminal justice. She served as a consultant and expert witness on issues of criminal justice for many non-profit organizations, as well as for federal and state legislatures.

I think we'll have an interesting afternoon. Please give these panelists your attention. After they address you, then the panelists will have the opportunity to cross-examine the other panelists, and we will then open the floor to questions. Thank you very much.

PROFESSOR LERNER: Thank you. I was asked to go first because

4 ENCYCLOPEDIA OF CRIME & JUSTICE (Joshua Dressler ed., Gale Group 2d ed. 2001) (1982).

the thought was that I would defend originalism and present an ample target to my co-panelists.

Soon after the President nominated Harriet Miers to the Supreme Court, Judge Robert Bork, as you may have seen, published a scathingly critical editorial in the *Wall Street Journal* criticizing Miers for not being an originalist.⁵ According to Bork, judges who are not originalists end up legislating from the bench, and for originalists this is bad, obviously, because it's an illegitimate enterprise. Judges, as we heard repeatedly during the aborted Miers nomination, are charged with applying the law, not making it up.

Second, this enterprise is bad for functionalist reasons. Judges are not picked or trained to assess the costs and benefits of newly minted public policy rules, nor do they have staffs equipped to assist them in these endeavors. As we know, the staffs that Supreme Court justices have consist of a quartet of fawning 27-year-olds straight from the intellectual hothouses of Cambridge and New Haven.

A third argument for originalism is an aesthetic one. This is my favorite. Supreme Court justices should remain securely cosseted in their judicial robes. Originalism, as an interpretive methodology, constrains a free-wheeling, let-it-all-hang-out jurisprudence that is aesthetically very bad for the country. Criminal procedure provides many examples, I fear, of terrorist prudential deformities that do not pleasantly engage the eye. Questions about police in criminal trials seem to fire the imagination of Supreme Court justices far more than ERISA preemption issues, and they promptly abandon the tedious constitutional text to ruminate on philosophy and morality.

Let me give you one example: *Mapp v. Ohio*⁶—of course, the grandfather of modern American criminal procedure. In concluding his decision requiring the exclusionary rule in every state court in America, Justice Clark cast off his judicial robes, revealing I fear the emaciated and unsightly figure of the philosopher king. “Our decision,” he intoned without the slightest hint of irony, “[is] founded on reason and truth.”⁷ On political legitimacy, functionalist, and aesthetic grounds, Supreme Court justices should wear traditional robes. Originalism is attractive because it provides constraints against extrajudicial ruminations on reason and truth, ruminations that many Supreme Court justices are supremely ill suited to engage in.

Yet, one cannot leave it at that. Of course, an obvious response to Judge Bork in this argument so far is that I have posited a choice between originalism and letting-it-all-hang-out jurisprudence between the two. Of

⁵ Robert H. Bork, *Slouching Towards Miers*, WALL. ST. J., Oct. 19, 2005, at A12.

⁶ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁷ *Id.* at 660.

course, originalism is preferable. But more commonly, a choice confronting a judge today is not originalism versus letting it all hang out, but originalism—at least as some pedant might discover it—and following decades of precedent that might have strayed far from the Constitution. To the extent that my aesthetic objection to non-originalism is a reaction to Arian empty philosophizing, it might seem that a precedent-bound jurisprudence is preferable to originalist recourse to first principles.

I think the issue is starkly posed in the criminal procedure context, where you have a number of cases like *Mapp*,⁸ *Miranda*,⁹ and *Katz*,¹⁰ that have essentially replaced the Constitution as guiding principles. Justice Scalia has said that almost every originalist would adulterate the strong medicine of originalism with a doctrine of *stare decisis*, but when does the originalist hearken to the originalist voice of the Constitution, and when does he follow meekly in the footsteps of his predecessors, however wayward their path? That is the question, and I don't think Justices Scalia and Thomas agree on that.

I don't think there's a simple algorithm, a scientific solution to that problem. I don't think this, however, is an irrefutable problem. These disagreements notwithstanding, originalism I think might most be modestly cast as an interpretive tool to assist judges when considering how much deference is owed to prior decisions, and the appropriate level of caution or enthusiasm and extent of the examining or limiting those precedents. That's the argument for originalism.

The basic criticism originalism, of course, in bare bones, is that the cultural, technological, legal environment has been so transformed over the past 210 years that the original meaning of the Constitution does not and should not provide any or much guidance. My first reaction to this criticism is always to conceive it: if courts, and particularly the Supreme Court, were in the business of fashioning policy solutions for all the ills that afflict us, the Constitution, its text and its meaning, would indeed supply inadequate guidance. But if the Supreme Court's role were more modestly cast to be judges, I'm not so certain the Constitution is radically deficient.

On the descriptive claim that originalism does not play a significant role in modern criminal procedure, it might be sufficient to note the remarkable uptake in references to 18th-century English and American police and trial practices and treatises in Supreme Court criminal procedures over the past 15 years. Of course, skeptics of originalism might counter that all these references to *Entick v. Carrington*,¹¹ Camden, Storey, Cooke—these are all simply rhetorical parsley. There they are for show to satisfy aesthetes like me. Under this view, Justice Scalia is doing exactly what Wil-

⁸ *Id.* at 643.

⁹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁰ *Katz v. United States*, 389 U.S. 347 (1967).

¹¹ *Entick v. Carrington*, 95 Eng. Rep. 807 (1765).

liam Brennan and Earl Warren did; he's following his moral intuition, but he's simply covering up better. I am not persuaded by this criticism.

There is ample evidence that originalism is doing independent work, that it is driving many recent opinions. Academic critics who once mocked what they called to Scalia's Law and Order originalism¹² have been proven wrong again and again in recent years as he has voted on originalist grounds to extend protections for criminal defendants. The case last term, *Crawford v. Washington*, in which Justice Scalia overruled a 24-year-old precedent and expanded the reach of the Confrontation Clause on originalist grounds, held that the Sixth Amendment required the exclusion of testimonial evidence, however reliable, unless the defendant was permitted to cross examine him.¹³ Of course, the *Apprendi*¹⁴ line of cases were all designed to ensure, consistent with the original meaning of the Constitution or what at least has been alleged to be the original meaning of the Constitution—I'm not so certain about the historical materials here—that juries, not judges, make factual findings that justify conviction and punishment.

Another remarkable example of Justice Scalia as an originalist civil libertarian is his concurring opinion in *Minnesota v. Dickerson*,¹⁵ in which he suggested that the uncertainty about the constitutionality of risks during brief interrogatories stopped, because he frankly doubted "whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity."¹⁶

Or finally, consider Justice Scalia's dissenting opinion in *County of Riverside v. McLaughlin*, where the Court considered the constitutionality of a local practice of waiting as long as 48 hours before providing an arrested person with a judicial determination of probable cause.¹⁷ Scalia noted Storey's claim that the Fourth Amendment was "little more than an affirmation of a great constitutional doctrine of the common law."¹⁸ He lectured the majority that the Court should balance law enforcement interests and privacy concerns only when confronted with novel issues of reasonableness.¹⁹ No balancing was appropriate in resolving these questions on which a clear answer already existed in 1791 and has been generally adhered to by traditions of our society ever since.

Well, not surprisingly, given Scalia's view of the Fourth Amendment,

12 Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239 (2002).

13 *Crawford v. Washington*, 541 U.S. 36 (2004).

14 *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

15 *Minnesota v. Dickerson*, 508 U.S. 366 (1993).

16 *Id.* at 381 (1993) (Scalia, J., concurring).

17 *County of Riverside v. McLaughlin*, 500 U.S. 44, 59–71 (Scalia, J., dissenting).

18 *Id.* at 71.

19 *Id.* at 59–71.

he has ridiculed many modern criminal procedure opinions, and perhaps no decision has received more derisive abuse from him than *Katz v. United States*.²⁰ That was the case, of course, that involved a wiretap on a public telephone booth. The Court, or at least Justice Harlan, held that the Fourth Amendment protected—this was wonderful—actual subjective expectations of privacy that society recognizes as reasonable, or something along those lines.²¹ As Scalia noted, this test is self-indulgent.²² It lacks any plausible foundation in the text of the Fourth Amendment. And, “unsurprisingly, those ‘actual (subjective) expectation[s] of privacy’ that society is prepared to recognize as ‘reasonable,’ . . . bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.”²³

Now, *Katz*, according to the familiar story, uprooted decades of perhaps already withering precedent, which had premised the Fourth Amendment on protection of property rights, not privacy interests. Chief Justice Taft’s opinion in *Olmstead v. the United States*²⁴ is the classic originalist statement of this view. Government agents in that case tapped Olmstead’s telephone lines, outside his home.²⁵ And Taft, relying on what he regarded as the original meaning of the Fourth Amendment, found no constitutional violation, the simple reason being that there was no physical trespass on Olmstead’s property.²⁶ Now Taft’s view, I don’t think, was a frivolous one. It would seem to hew closely to Lord Camden’s statement in *Entick v. Carrington*, that “our law holds the property of every man so sacred that no man can set foot upon his neighbor’s close without his leave.”²⁷

Also, the text of the Fourth Amendment, with its references to person, houses, papers, and effects, arguably suggests that physical intrusion is a necessary predicate for a Fourth Amendment violation. That was, I think, Justice Black’s view, dissenting in *Katz*.²⁸ The story typically told in law schools today is that this absurd, hypertextual connection between property rights and the Fourth Amendment has been thankfully interred by cases such as *Katz*, where the Supreme Court replaced the antiquated originalist property paradigm with an updated modern privacy paradigm. It’s a nice story. It’s actually something of a fable, as Professor Orin Kerr, who’s here, and may want to distance himself from everything I say, has written.²⁹

Doctrinally, to a remarkable extent, the Fourth Amendment is still about protecting property rights, not privacy interests. Police can fly over

20 *Katz v. United States*, 389 U.S. 347 (1967).

21 *Id.* at 361 (Harlan, J., concurring).

22 *Kyllo v. United States*, 533 U.S. 27 (2001).

23 *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring).

24 *Olmstead v. United States*, 277 U.S. 438 (1928).

25 *Id.*

26 *Id.*

27 *Entick v. Carrington*, 95 Eng. Rep. 807, 817 (1765).

28 *Katz v. United States*, 389 U.S. 347, 364 (1967) (Black, J., dissenting).

29 Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531 (2005).

your land in helicopters. They can insert undercover agents in your midst, wearing wires. You can search your friend's house and car, finding stuff that you own, none of which would violate your Fourth Amendment rights. So even muddled with cases like *Katz*, the originalist echoes can still be heard in Fourth Amendment jurisprudence.

I should briefly note that Scalia's originalism in the Fourth Amendment context is not the same as Taft's. He seems more willing to translate the Fourth Amendment to modern conditions, finding Fourth Amendment violations even in the absence of physical trespass. This was of course illustrated in the *Kyllo* case, where Scalia found that the use of a thermal detection device to measure heat discharged from a home constituted a search, and in the absence of a warrant violated the Fourth Amendment.³⁰

Kyllo, for me, was a disappointing opinion because it seems that Scalia, I think, abandoned a principle of rigorous originalism and seemed to ground his decision incredibly on *Katz*—yes, the much mocked *Katz*. And second, because Scalia did not, I think, give sufficient credence to Justice Stevens's dissenting objections on pragmatic grounds that perhaps it is best to leave to the legislatures the responsibility of monitoring emerging technologies. It might have been possible to craft something along the lines of an originalist opinion there, that a thermal detection device was in effect invading Danny Kyllo's castle, and if the ratifiers of the Fourth Amendment could be brought back and asked, what do you think of thermal detection devices, they would say this is as horrifying as a physical intrusion on a home. Frankly, I must say I don't find this particularly persuasive. I couldn't care less if police directed thermal detection device at my home. Other people might feel differently, and I urge them to lobby Congress and state legislatures to convince them. I am just unsure why courts are involved in this enterprise.

The sky won't fall if the Fourth Amendment were restricted to property; that is, if we returned to originalist cramped vision of the Fourth Amendment. *Katz*, for all the non-originalist flowery rhetoric, has been a meaningless decision, as Professor Kerr suggested.³¹ On the narrower issue confronted, Congress responded almost immediately by enacting Title III, which actually extends even more protections than what is guaranteed by the Fourth Amendment with respect to wiretaps.³²

Very briefly, two originalist agenda items/pure fantasies—one, maybe it's time to revisit the issue of incorporation. You know, for a century after the adoption of the Fourteenth Amendment, it was not thought that the Fourteenth Amendment applied each of the Bill of Rights protections

³⁰ *Kyllo v. United States*, 533 U.S. 27 (2001).

³¹ See Orin S. Kerr, *Digital Evidence and the New Criminal Procedure*, 105 COLUM. L. REV. 279, 307 (2005).

³² Criminal Resource Manual, 27 Electronic Surveillance, Title III, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00027.htm.

against the state exactly as they applied to the federal government. I think this would be a very useful development, although perhaps unlikely.

Second, circuit riding—let's bring it back. It didn't stop existing until the mid-19th century. You look at the Supreme Court today; God knows what the percentage of their docket is for criminal cases: a quarter, half? None of them have any experience adjudicating criminal law trials. I mean, to some extent Justice Breyer, but typically not. I think it would be very useful for them to actually have to spend some summer months, instead of going to Salzburg, traveling the country and actually having to hear criminal trials and see what it's like to apply the *Miranda* rules they dreamed up, with all their permutations, with all their exemptions. And best of all—and here is where I think Judge Clement would appreciate this—maybe it would be nice for them to have decisions that can be ruled upon by the people who are generally in the business of being ruled upon by them.

Thank you.

JUDGE CLEMENT: Thank you, Professor Lerner. You relax while they shoot at you.

Professor Allen.

PROFESSOR ALLEN: Thank you, Judge Clement. It's a great pleasure and honor to be here—the honor from the fact that I'm a great enthusiast for the work done by the Federalist Society, although I've never been a member. I shouldn't confess this, but I will correct this deficiency, I promise, as soon as we are done with this panel tonight—at least, unless you will to the contrary by the time we are done.

I am very much also in the debt of the Federalist Society not only because of the tremendously valuable work that you do but because you produced three of my favorite people, my colleagues. Steve Calabrese and Gary Lawson have been long-time colleagues of mine at Northwestern—Gary unfortunately decided to go to that team that won the World Series last year—and John McGinnis, who is presently at Northwestern. These are wonderful people, and they reflect all the best values of the Federalist Society. They're always open to new ideas. They're attentive to what you have to say. They respond in interesting and helpful ways, and keep balance, which is what the Federalist Society, from my point of view as an outsider, soon to be rectified, does.

Now, the issue of originalism is interesting, and you can see the attraction of originalism, or textualism, or literalism in lots of ways. And I think Craig identified the most important of which, which is all of these are mechanisms or searches for ways to constrain judicial decision-making, which otherwise to be unbounded and both unprincipled and inconsistent with

democratic decision-making and the like. There is also a related, much more general point. There is an attraction to theorizing of any kind. Theorizing allows a mass of information or a complicated situation to be reduced to a manageable size. It often allows you to control that complex problem or process; to predict its outcome; and to change things as you go along. So all of these, I think, at both the discrete level, why originalism itself is attractive and why theorizing more generally, are very critically important.

The difficulty, though, is that what you arise—I'm going to return to this at the end of my remarks—when you theorize, you have to have a model that captures the reality appropriately; not exactly, not precisely at all respects, but appropriately for your purposes. And I think there's a serious question about whether any relatively simplistic theory of constitutional interpretation does that with respect to the modern society in which we live.

Now having said that, let me be clear about something. You can ask three questions about anything, but certainly originalism. You can ask the what, the why, and the should questions. You ask questions about descriptive accuracy. You can ask questions about if it isn't or is descriptively accurate, why it is or isn't descriptively accurate. And then you can ask the should or the justificatory question, you know, what's justified, originalism or as alternative, and so on.

My self-conception, my self-conceit, if you will, is not that of a philosopher; it is that of a scientist. What interests me is how the system actually operates, statements that have truth value. I want to describe accurately the legal process, predict it and so on, not attempt to engage in a normative debate about justification. So I'm going to address the first two of those points, the "what" and the "why" questions, and leave for others the more normative question about "should."

One of the reasons this question is interesting today is because of two important decisions, and Craig mentioned them both—*Crawford* on the one hand and *Apprendi* through *Blakely*³³ to *Booker*³⁴ on the other. And I think this puts on the table a question of whether we're seeing a resurgence of interest in originalism or increasing significance and so on. I have to tell you, I think the answer to that question is absolutely not. It's as clear as a bell that there is not much to be said about the significance of originalism for constitutional criminal procedure. Even the two cases in which you might plausibly make an argument that you see the influence of it—and by the way, I want to be clear about something. When I say "the influence of it," I'm talking about the work product of the Court, not individual statements by justices. I mean, there obviously are justices who make claims

³³ *Blakely v. Washington*, 542 U.S. 296 (2004).

³⁴ *United States v. Booker*, 543 U.S. 220 (2005).

along these lines with some regularity, but the issue is when they command a majority of the Court in a way that seems actually to solidify the significance of originalism.

Crawford v. Washington is a good example.³⁵ That's the only case, the only clear-cut case, in which you have a majority of the Court seeming to adopt an opinion that does, in fact, employ a very strong originalist language. And I think that's true. On the other hand, what you need to be aware of is that *Crawford* is one of a long series of the Court struggling with the relationship between the Hearsay Clause and the Confrontation Clause. Now, it may turn out tomorrow or two years from now or ten years from now that this really was the beginning of the originalist revolution in criminal procedure. I have to tell you, given the complexities of that relationship, I think we have to hold our breath and wait, and indeed the Court has already taken two cases this term in which I predict that they will make clear that the parameters of *Crawford* are quite constricted. I may be right; I may be wrong. We'll see. But you do have to realize that is one of a series of cases struggling with this relationship. Nonetheless, it is the one case in which there is a clear majority adopting this originalist perspective.

In the *Apprendi* to *Blakely* to *Booker* line, Scalia's opinion does try to tie its results to an originalist argument. The originalist argument has virtually no evidence to support it. Indeed, in the opinion itself, basically the argument is that although our originalist position has very little evidence, your—in particular, O'Connor's—alternative has none. So, it's like a relative plausibility theory. We have a psalm; you have none. This is not a very robust originalist methodology.

Moreover, what's often neglected when thinking about originalism in *Apprendi* line of cases, in particular, *Booker*, is this is presented as the federal guidelines that haven't been struck down on originalist grounds. In fact, what the Court probably did in *Booker* was uphold the guidelines. There are two opinions. The second is more important than the first. The second is the remedial opinion. In that opinion, the Court concluded that you could indeed—the guidelines may not be mandatory, but they could be advisory and you can have appellate review of reasonableness of deviations from the guidelines.³⁶ There's no reason why Congress can't give teeth to the standard of review. If they do, essentially you end up with the guidelines in a somewhat different vocabulary. So, that's not very strong support for any kind of a robust originalism.

If you get away from these two cases and you look at the general lay of the land, what you see are vast provinces in this territory that have virtually no connection to originalist points of view. Again, Craig mentioned some of them. A *Mapp* and *Katz* regime in the Fourth Amendment is very

³⁵ *Crawford v. Washington*, 541 U.S. 36 (2004).

³⁶ *Booker*, 543 U.S. at 268.

distant from it. One of the cornerstones, really, the real cornerstone, I think, is not *Mapp* but *Gideon*.³⁷ That's actually the real cornerstone as to interpretations of the meaning of *habeas corpus*, which—I won't get too technical here, but if we put aside *habeas corpus*, it's *Gideon* which gave rise to modern constitutional criminal procedure. You cannot justify the *Gideon* line of cases in any remotely originalist way, and one of the important areas—not the entire area, but one of the important areas—of the Fifth Amendment is *Miranda*. It's the same thing. I mean, it's about as far from originalism as one can possibly get.

Nonetheless, to test this hypothesis, I decided to actually go through the last two terms and look all the decisions again. I read them when they came out, but some of them aren't in my area of significant interest, so I went back and looked at them all. But what you get is a long list of cases, in many of which there could have been originalist arguments and not a single one was made. By far the most striking of these on the counter side, on the counterbalance of the non-originalist, is *Roper v. Simmons*³⁸—to my eyes it is a shocking opinion, and why were you not more up in arms?—maybe you were and maybe I missed it; I was out of the country. But you were not up in arms about this, the conclusion by a majority of the court with at least three members actually signing off on this, that it is up to them personally to decide the appropriateness of punishment under the Cruel and Unusual Punishment Clause.³⁹ Now, I cannot imagine anything more like what Professor Graglia was railing against earlier today and more inappropriate from an originalist position.

Now, I have two pages of notes, because one page is nothing but a listing of the cases from the last two terms in which originalist arguments might plausibly have been made—Fourth Amendment cases, confrontation cases, discovery cases, all kinds of stuff—and in not one of those was there a serious originalist argument. I am happy go through them if anyone is interested, but I will not at this point. But just to mention a couple of those, there are whole areas again that just have no relationship to any plausibly originalist position. Think about the *Brady* line of cases. There are constantly *Brady* cases, discovery cases—that have nothing to do with what was in anybody's mind 200 years ago.

Think of the terror decisions, the three terror decisions—*Hamdi*,⁴⁰ *Padilla*,⁴¹ and *Guantánamo Bay*.⁴² Again, not much there—there could have been—but not much there are about originalist perspectives. Or, the *Miranda* decisions of two terms ago, *Patane*,⁴³ *Seibert*,⁴⁴ and to a lesser extent

³⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

³⁸ *Roper v. Simmons*, 125 S.Ct. 1183 (2005).

³⁹ U.S. CONST. amend. VIII.

⁴⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁴¹ *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

⁴² *Rasul v. Bush*, 542 U.S. 466 (2004).

⁴³ *United States v. Patane* 542 U.S. 630 (2004).

Fellers.⁴⁵ *Fellers* is really a Sixth Amendment decision—again, no connection here. And I could—if in our discussion you want to talk about them - give you some more examples. But if you look not at these two opinions, only one of which is plausibly originalist, and that's *Crawford*; that's it. So, in terms of the what, there isn't much there to suggest that originalism is of any great significance, at least in terms of the decisions being reached now. Now, the issue can be more complicated than that. Maybe some issues are settled, and they're settled because of originalist positions and so on, so I mean, there are some interesting things to talk about here.

All right, so that's the "what" question. What about the "why" question? Well, you know, there's a theory out there that the fields I'm interested in, constitutional and criminal procedure and evidence, are kind of insulated from larger currents of constitutional law, in particular, and we suffer from it. I have the exact opposite view. Now, I guess that's not a surprise. I think you constitutional theorists out there suffer from not having engaged with constitutional criminal procedure and evidence. Why? Because these cases make you deal with the nitty-gritty of real life. You know, in separation of powers cases, you can also often abstract away from what the real issues are. It's really hard to do that in the criminal cases, the evidentiary cases, and so on.

And what am I getting at? Well, when you look at it from this bottom of the heap perspective, which criminal procedure and evidence questions make you look at—you know, what's really going on? Who did what there for a man, what's going on? You see a couple of interesting things. One you see—and there are two I want to make—one is how dramatically the world has changed, and two, the implications of that for theorizing, the point I said I'd come back to at the end.

First of all, obviously some things are decided consistent with what you might claim to be an originalist position. But a lot of what matters to the criminal process exists in a world that simply was not contemplated either 200 years ago, or if you want to talk about the Due Process Clause, 150 or so years ago. My favorite example is wiretapping. No one, not even Ben Franklin flying his kite in rough weather, was thinking about wiretapping. So now, what to do with an originalist position when a problem simply was not contemplated?

Appeals and the right to counsel—there were some appeals in some states in various ways, and very odd modern points of view, but there's no view that appeals were a necessary part of a criminal process. The old Western slogan, "give them a fair trial and hang them," is right. There were no appeals. You gave them a fair trial, and you hanged them. In the

⁴⁴ *Missouri v. Seibert*, 542 U.S. 600 (2004).

⁴⁵ *Fellers v. United States*, 540 U.S. 519 (2004).

late 1880s, criminal appeals were allowed in federal court for the first time. Now, there were some peculiar ways you can sometimes get a review and some states did different things and so on. But now much of the world centers on appeals. No one was thinking about this.

What about the police? The police didn't exist in the United States until the late 1800s. So now you have an investigative body that simply didn't exist, but at the time, these procedural protections were created in the body in the Bill of Rights. Organized criminality was not an issue. What about the distinction now that is pressing so much public policy between criminality and terror, or between terror and war? The tripartite relationship between those three was not really well thought out and contemplated.

Well, in any event, I could give other examples—organized criminality; that was not what people were thinking about when they were thinking about the criminal process. It just was not on anybody's radar screen. And the world we now deal with is just not the world we had then. And more importantly, there has been not just a change, which is a common factor in these discussions, but in fact, things exist now that *literally were not conceived of*. Now at that point, you can start analogizing, and that's what you do with respect to wiretapping. Some people respond by saying, well, reasonable this, reasonable that. Well, you can start an analogy, but you can't formalize analogy. You can analogize in one way; I can analogize in another. And there is no formal means of adjudicating over those analogies. That means you are divorced from any algorithmic conclusions driven by your methodology.

Now the last point, if I could have one more minute —

JUDGE CLEMENT: Yes.

PROFESSOR ALLEN:—one more minute. A cautious and hesitating one more minute, but—

JUDGE CLEMENT: You're the math major.

PROFESSOR ALLEN:—one more minute because I think this is really the most important point from my point of view, again, as a self-conceited scientist. Why do these theories seem to have so little bite, even though you argue about them so vociferously? I think it is because they misconceive the object of their theorizing.

Again, those of you who know about the literature in evidence, in particular, we know a fair amount about the relationship between complexity and decision-making. And you can say some systematic things about what

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can be captured by deductive algorithmic top-down theories and what resists them. Issues like ambiguity, unpredictability, the significance of common sense, actually describe or predict the extent to which areas of law are capture-able, or at least have been captured, by algorithms, like, for example, microeconomics, which does capture antitrust but does not capture negligence.

Now, when you look at the constitutional interpretive process, it is highly ambiguous, very unpredictable, and probably requires common sense. So I would predict as a scientist that this is exactly the area that is going to avoid algorithmic solutions. So, I think in fact what you do when you start trying to reduce constitutional interpretation to a relatively straightforward or simple theory is that you are neglecting that it simply does not capture the reality of the object being theorized, and as a result, it resists it.

So, I think from my point of view, from my own professional point of view, that is the most interesting thing about this. From your point of view, it is probably uninteresting entirely, and we can go on after this and talk about normative questions about originalism and so on. But I did want to emphasize it because what I predicted that no matter how much we talk about this, you are going to continue to see exactly what I went through. The Court has done it the last two terms, and it captures 50 years of their jurisprudence, that it is going to raise these kinds of arguments as tools when they are appropriate. But the idea that any particular tool, whether it's originalism, strict construction, textualism, whatever, will be a dominant theme and a dominant determinant of outcomes, is simply going to be falsified by the facts.

Thank you.

JUDGE CLEMENT: I'm not sure you answered the "should" question, but you're out of time. But you can use it in your rebuttal.

PROFESSOR ALLEN: Sorry.

JUDGE CLEMENT: Mr. Wray—Assistant Attorney General.

HON. MR. WRAY: Not anymore. I just saw some of my former colleagues in the Criminal Division, and I am busy frantically thinking whether I am about to repudiate some position I took, and so I am sure that they will tell me I am being inconsistent with my own original understanding. But I think when you start talking about something like originalism, to set it up the way the Federalist Society always does, and which I think makes it more interesting, is a pro-con kind of debate. It is probably sort of decep-

tively simple because I do not think anybody who is a proponent of originalism, which I consider myself to be, advocates using originalism to the exclusion of every other interpretive tool, like textualism, looking at the landscape of precedent, and so on so forth. So it has to be considered as one of many tools, and not the only tool.

The second thing I guess I would say is that, if you are going to be against it, then the obvious question comes up, well, what are you going to propose instead? Craig went over that little bit at the beginning, and trying to keep things within time limits went over it pretty quickly. But I think the points that he summarized quickly are important, because as hard as it may be sometimes to figure out what the original understanding was, if you do not look at something like that, then I think you end up looking at something like what side of the bed the judge got up on that morning, and which newspaper he likes to read the most, and which editorial page he subscribes to the most and worries about getting hammered in the most. And that starts to become, at least to my mind, a little bit more like the finger to the wind judicial interpretation, which if you are trying to promote stability and predictability and consistency, if you're trying to have a limited role for the judiciary, I think you have to look at things like originalism. So I would say to the critics of originalism, if not that, what else? And I would like to hear the defense of what that would be.

But to say that using originalism in this arena in particular is a good idea, does that mean that doing that by itself will answer the question before any given court in any given case? No, I think not. And does it mean that you are even able to find the original understanding in every case? I do not think so, either. But not being able to find something and just not looking for it are two very different things. Like I said, if you are not going to look for it, then you have got to wonder what else you are going to be looking at.

The third thing I would say is that just to say that looking at the original meaning in the context of criminal procedure, does that mean that you are necessarily going to only be looking at criminal enforcement techniques, investigative techniques, processes and procedures and so forth that were in existence at the time of the framing, or at least contemplated at the time of the framing? Again, I think not. I think the answer is somewhat like what now Chief Justice Roberts said in his confirmation hearing, which is where there are very broad terms reflecting broad principles that the framers chose, I think I prefer to assume they did that deliberately knowing that they were not going to be able to anticipate techniques and technologies and so forth, but that they wanted to have some level of consistency in the principals in terms of how they were going to be applied for all those unforeseen facts.

So, that to me starts to come down to what is it you are going to draw from the historical evidence? Do you just look at it and say, well, they

didn't contemplate heat-seeking sensors, so forget all the original understandings of the Fourth Amendment? Well, I do not think so. But it does make it a lot harder to figure out what you can draw. And there are things, to take the *Kyllo* case as an example, where I think the original understanding helps limit just how far afield the court can get. It does not get you all the way there; it does not get you to the final answer of the question. But things like the sanctity of the home, the notion that the home is the sort of quintessential protected location for search purposes, is a principle that you can glean from that is historical evidence and keeps the Fourth Amendment jurisprudence that the Court engages and from getting, I would argue, way adrift.

I share some of the disappointment that some of the others have articulated, that the Court did not take that historical analysis as far as it could in *Kyllo*. But I would argue the way to reconcile *Kyllo* with some of the other cases in the same arena is that it is, in fact, based in part on original understanding of the Fourth Amendment.

For example, that very principle—the idea that a man's home is his castle, and so on and so forth—if you put the *Kyllo* case and the heat-seeking device used they are up against cases like *Caballes*,⁴⁶ which involved detection dogs on things like cars, or the case, the *Dow Chemical*⁴⁷ case that was referenced earlier involving flyovers, the way to understand those cases as being consistent with each other is based, I think, on that principle that the home is different. There is obviously a lot more to it, but I don't think saying that the original understanding does not get you all the way there is the same thing as saying it is irrelevant or inappropriate to use.

Another example in the Fourth Amendment context might be in the context of seizure. Justice Scalia, I think, wrote a pretty persuasive opinion for the Court in the *Hodari D.* case, in which he looked to the original meaning to say that seizure can't be understood to include a guy who sees a cop walking towards him and runs away with no physical force, not even any physical touching, that that is not a seizure.⁴⁸ It seems to me pretty logical, and maybe they would have gotten that way without looking at the original meaning, but I have to believe that doing so helped in that particular case.

That does not mean that original meaning is not messy, and some of the cases you have heard about today illustrate that point. The sentencing cases are a classic example. Although the Court purported to ground its rejection of the sentencing guidelines as then written on historical evidence—I am no historical scholar, but from what I have seen—the historical record is a lot murkier and a lot more unclear than the Court would suggest, and

⁴⁶ *Illinois v. Caballes*, 543 U.S. 405 (2005).

⁴⁷ *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986).

⁴⁸ *California v. Hodari*, 499 U.S. 621, 626 (1991).

that right around the time of the framing, courts were moving away from determinant sentencing into sentencing within a range. And essentially, the criminal procedure in that very area was in flux at the time of the framing.

Therefore, you have to sort of look at, well, what was not in flux at the time of the framing? Well, what was not in flux were certain things that I think all the members of the Court seemed to agree on. One, a jury has to find beyond a reasonable doubt the elements of the offense; fine. But two, the judges had pretty broad discretion to look at certain facts, to impose a sentence within the range, whether that's zero to whatever the penalty was. At least most of the members of the Court profess not to disagree with that proposition.

So then, the question becomes the issue that was actually presented in the case, which was if it is okay for a judge to sentence based on facts that he or she alone finds at sentencing as aggravating or mitigating the defendant's conduct, anywhere from a range of, say, zero to life, it seems pretty clear that that is constitutional. All the guidelines do, in effect, is structure or shape that discretion within the range. Is there any reason to think the historical evidence suggests that that suddenly transforms what would otherwise be constitutional scheme into an unconstitutional one? And I did not see anything in any of the opinions that bore on that point. So, again, does that mean that the historical evidence is irrelevant? No, it just means that it did not get the Court all the way to the answer. In that particular case it left a morass that those of us who are on either side of the criminal justice system are still unraveling.

Crawford,⁴⁹ which was also mentioned, is another example of where it gets pretty messy. But again, messy and irrelevant are not the same thing. It is pretty clear that from the historical evidence that is recited in that opinion that the *Roberts*⁵⁰ case, which essentially allows the admission of out-of-court testimonial statements, based solely on a judge's finding of reliability, trustworthiness, and so on. But to take it to the next step and sort of categorically exclude all such statements is not so clear, and if you look at those opinions, one of the things that I think is interesting is there is a pretty lengthy historical debate between Justice Scalia writing for the Court, and Chief Justice Rehnquist on the other side also pointing to historical evidence. The fact that there is a debate, I would suggest, means that—let me step back. The fact that there is a debate over the historical evidence does not mean that that evidence is irrelevant. It just means that it is harder.

But again, I come back to the point that I made at the beginning, which is just because something is hard does not mean it is irrelevant, and if you are not going to use something like originalism along with other

⁴⁹ *Crawford v. Washington*, 541 U.S. 36 (2004).

⁵⁰ *Ohio v. Roberts*, 448 U.S. 56 (1980).

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tools like textualism, then you have to ask, what are people going to be using instead. And I think the reality is you pretty quickly degenerate into judges using their own subjective policy preferences to fill the gaps that they would otherwise be able to fill using originalism. So I would argue that it is relevant, it is appropriate, but like anything else, it has its caveats and qualifiers and limits to its utility.

Thank you.

JUDGE CLEMENT: Thank you, Chris.

I think Professor Steiker is about to answer Chris's question: if not originalism, what else?

PROFESSOR STEIKER: Actually, I was not planning to do that, but I can try. I will. Ask me anything.

I am very happy to be here to participate in this event. I always admire and enjoy the events that the local and the national chapters of the Federalist Society put on, and I am very pleased to be here.

What I plan to do—though I will accept the Judge's challenge to a certain extent—was something a little bit narrower, perhaps either correctly or incorrectly interpreting the point of this particular panel. The conversation thus far has been at a very abstract level about the virtues and vices in general of originalism as an interpretive methodology. And I think we've had a very interesting discussion that's pointed out most of the main things that originalism has to say for itself and what people, the proponents of it, seek to achieve by it and some of the concerns and the limitations of it. I guess the question that I had in mind was, is there anything in particular about the context of criminal procedure that would suggest that originalism is either a more or less appropriate tool in the toolbox of interpretive moves.

I guess I was going to make a somewhat more modest point that, at least in a certain large part of the context of criminal procedure—that is, the context of the regulation of police practices generally, which is the entire scope, pretty much, of the Fourth Amendment, and part of the scope of the Fifth and Sixth amendments as well, there are a lot of reasons to be more skeptical about originalism than just generally as an interpretive methodology. I was going to point out three reasons why we might, in that context, have more concerns about originalism as a tool than in others. But I will also try to answer—in my twelve minutes or so—what, if not originalism, then what? Because I think the “then what” has been implicit in what has been said, and I will just try to make it a little more explicit.

So, what are the three reasons why I think the criminal procedure context is not welcoming soil for originalism as a methodology. One has to do with a point that was in fact Chris's point, and in fact Chief Justice Ro-

berts' point during his confirmation hearings, which is that not all parts of the Constitution speak at equal levels of generality, and sometimes it seems positively clear that the framers themselves were not seeking to constrain future generations. Now, many people have sought to make this point generally about originalism. The framers themselves were not originalists and didn't seek to bind future generations to their particular conceptions of the shape of constitutional prohibitions and rights.

But in the Fourth Amendment context, in particular, it is very hard to think that the framers meant to bind future generations because it is one of the few provisions of the Constitution that actually adverts to the idea of reasonableness, or actually unreasonableness. But the proscription of unreasonable searches and seizures without further definition positively invites future generations and future constructions of reasonableness. A lot of the debate in originalism is whether we ought to look at the common law at the time of the founding, and there is some debate about which founding. Is it the actual founding of the Constitution in 1789 or 1791? Or, is it the later founding of the Fourteenth Amendment Due Process Clause, through which the Fourth Amendment was incorporated? So was it 1868, or was it 1791? But in either case, the question is what were the particular things that were thought to be reasonable or unreasonable then, or do we take the concept of unreasonableness and try to apply it to new—are we to think of ourselves as bound by the particular things that were thought to be reasonable or unreasonable at the time? That is the first argument.

And it is somewhat ironic that—I had not thought about this in these terms, but Ron's comments made me think that it is somewhat ironic that a bigger bite of originalism has been in the Fourth Amendment area, where we have seen a lot of Fourth Amendment originalist opinions, at least at the Supreme Court level, and fewer in areas where the text of the Constitution, at least, seems to invite that much less, in the Sixth Amendment and all criminal prosecutions. It is amazing the contortions the Supreme Court has gone through to interpret "all" as meaning, "well, some, but not every single one." So it is a little bit ironic that some of the parts of the Constitution that least invite broader conceptualization have gone the non-originalist route, and the provision that seems to most invite it has been the object of a lot of work of originalism.

In a piece that I wrote⁵¹ responding to an essentially originalist approach to the Fourth Amendment by Akhil Amar, who I know is here today, I said that there were two important changes in historical context from the 18th to the 20th century that should really inform our idea of what things are reasonable or unreasonable—searches and seizures under the Fourth Amendment—and one of the two that I pointed out, which was pointed out by Ron, is the development of police as a social institution.

51 See Carol Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994).

At the time of the founding, there was no such thing as professional police forces. It was all an informal, unprofessional constabulary and the duty of “watch and ward” and the *posse comitatus* and the “hue and cry” in the marketplace, there was no professional law enforcement. And the development of professional police forces in the mid-1800s, I argued in this piece, necessitated a change in the way we thought about what kinds of searches and seizures were reasonable and unreasonable.

The other change, a big change certainly from the 18th century, and a change that precipitated the Due Process Clause, is the problem of racism in the United States and having large populations of different races that lived in cities and that were disproportionately or differently policed by professional police forces also led to different concerns. These are somewhat different points that I made my article, but since almost no one here probably has read that article, I have no hesitation with diverging from my own prior views.

But the two more pragmatic points that I wanted to make that you could generate from those differences have to do with the fact that the police provisions of the Constitution have audiences that are unique, and for whom originalism is going to be very unhelpful as a way for them to figure out either their constitutional duties or their constitutional rights. So, constitutional duties—who is the primary audience of the Fourth Amendment? It is law enforcement. And it is a really serious problem to have an originalist methodology that tells law enforcement agents and institutions that the way to figure out what your duties are is to get some staff historians and find out what was permitted exactly at common law in, you know, the middle of the 18th century. I think this is really a problem, and you can see it in many of the debates about individual provisions about what exactly the history of the late 18th century showed.

How in the world are police departments supposed to train their forces and predict the future trends in the Supreme Court, if originalism is the methodology? I would like to add a friendly amendment to Craig Lerner’s suggestion that the Supreme Court justices ride circuit. I would like them to go on police patrol ride-alongs. Have them ride with the police and rule from the back seat. You know, what can you do without being able to call down to the Supreme Court librarian and have them bring up the common law of 1782 for them to consult? So I think that is a real problem.

And the other problem is a more abstract version of the same problem, which is that in order for law enforcement to be able to predict future cases—the way we do it now, the way we train as law professors, the three of us here, what we drill and what you all will remember from your own days from law school—happily, I hope, but perhaps not—is that the primary methodology that we teach is analogy. Now Ron criticizes theory, high theory, as a general rule because he says analogy, deciding things by analogy, is insufficiently—what is the word he used? Algorithmic; I just like

that as an adjective—insufficiently algorithmic.

But here, I would like to borrow a little bit from Chris. What is the alternative? When you consider what the alternative to deciding by analogy is, each particular question requires that call down to the Supreme Court library to find out what the practice exactly was here, in that particular context, in the 1700s. And if all we can do is fill in little points on the map, one by one, by reference to historical practice, there is absolutely no way to predict the future in any particular way. Right now, we can try to predict by analogy.

So, the Supreme Court says you need a warrant to search a home. You do not need a warrant to search a car. Do you need a warrant to search a Winnebago? This was actually a question until the Supreme Court decided it.⁵² But in deciding whether you need a warrant to search a Winnebago, did you have to try to find out what the thought was about Winnebagos, or shall we say, covered wagons that people lived in back in the 1790s? Or could you try to reason by analogy: why was it that you needed a warrant to search a home and why was it that you did not need a warrant to search a car? And it is only if you allow decision by analogy that you can have this kind of predictability, which is what I urge that in police practices is a much more important value—it is always an important value, but it has the supreme importance, unique importance, in the context of police practices that make originalism truly more problematic.

The other audience—this is my third point, and I think I may have to stop here—but my third point is that the other audience of police practices, aside from the police, is the policed—the people with whom the police have the most and interaction. And the concern so far, one of the main attractions of originalism, and it is an attraction to me as well as to any thinking person, is the idea of constraint—constraint of judicial authority, of democratic accountability, and the idea that we would have a written constitution that would constrain judges is of course a kind of legitimacy that is extremely attractive.

But there is a flip side to legitimacy, and that is that constitutional adjudication appears to take seriously the concerns of the moment and the concerns of people. And so, this is where the issue of race comes in. It is impossible without some kind of normative discussion about what the real problems are, as opposed to simply what the particular conceptions of the framers were in 1791, that is necessary for the evolution of constitutional rights to have legitimacy in the eyes of the people whose rights it delineates.

And I guess in this context, I think of the recent events in France over the last few weeks, and the images on television of gangs of minority youth

⁵² *California v. Carney*, 471 U.S. 386 (1985).

out of control and burning police departments and attacking police officers, partly out of a sense of outrage that their concerns and their rights, if you will, have not been taken sufficiently seriously, and that to have a kind of constitutional discourse that refuses, eschews any talk of a normative basis for rights, I think runs the risk of lack of legitimacy in this other way.

So, I am going to close with an example, and then ten seconds of response—I think I have implicitly answered the “what’s the alternative” question. The example is the Supreme Court’s decision in *Atwater*.⁵³ That is what I refer to as the soccer mom case, the woman with her two kids in the pickup, who was stopped by a police officer because they didn’t have their seatbelts on, and the police officer did a full custodial arrest and took her away in handcuffs.⁵⁴ And the question was, is it a reasonable or unreasonable search and seizure for the police to conduct a full custodial arrest for a merely fineable misdemeanor offense?⁵⁵

This goes all way up to the Supreme Court, and judges and justices all along the way disagree about whether or not this would have been considered reasonable in 1789. Ultimately, the Supreme Court decides that the history does not render it unreasonable,⁵⁶ but the lack of the ability of all these judges, with all their law clerks, with all of their libraries, to come to any definitive answers should give us pause as to whether or not that’s really a good way to decide that question.

And then after the Supreme Court decides—Justice Souter for the majority decides, you know, we really cannot decide based on the history that this was unreasonable, so what do we have to look at? We have to look at, he says—and it is clear that the Court really wants to look at this—is this a really big problem? Are there a lot of cops out there who are conducting custodial arrests of people for merely fineable, non-jailable misdemeanors? And the answer is no, it does not seem to be a very big problem. And he basically said, call me if it gets to be a big problem and we will talk about it then.

But the “call me if it gets to be a big problem,” the idea that somehow the bigness of the problem, the extent to which this is a concern that this should be something we should be concerned about, the inability of originalism to ask that question at all or to answer it, I contend is a problem. Granted, it opens the door to what Chris might call policy preferences, but it is only through frank discussion of the normative underpinnings of the nature of constitutional rights can a certain kind of legitimacy attend to decisions of this kind.

So the question is, what is the alternative? The alternative, I have to

⁵³ *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

⁵⁴ *Id.* at 323–24.

⁵⁵ *Id.* at 326.

⁵⁶ *Id.* at 355.

say, is not a complete disregard of the constitutional text and saying, you know, the Constitution says something about searches and seizures, and allows you to judge—I am not a judge, but if I were—allows me, the judge, to decide whatever I want. It is rather a displacement of particular conceptions with a broader level of generality, with the idea of concepts and conceptions.

A lot of this work has been done up at the level of theory by people like Ronald Dworkin, but I think that is the counter-originalist move, the idea to move to a level of generality, at which the particular conceptions of the framers about reasonableness give way to a broader concept of reasonableness, which requires some normative underpinnings, some frank discussion of the “shoulds,” the things that Ron wanted to avoid, but I think that constitutional adjudication cannot and should not avoid.

Thank you.

JUDGE CLEMENT: The last I heard—I admit I have not heard the news this afternoon since we were driving in from Charlottesville—was that in France they had immediately arrested, convicted, and were deporting these people. So that is a whole other constitutional procedure that we will not be faced with, I have a feeling, since we do have a constitution.

Would any of the panelists like to give a very short rebuttal before we open the floor to questions and answers?

Ron.

PROFESSOR ALLEN: Very briefly. I agree with Professor Steiker that the police are one of the intended audiences of the Supreme Court. But I guess the message is what police hear is not necessarily the message the Supreme Court wants them to hear. And this is the functionalist point that they are not equipped to monitor any of this. So take *Miranda*.⁵⁷ *Miranda* is not a bad rule in terms of monitoring the police and regulating them. It is not a bad legislative rule; of course, it was not enacted by legislature. So here is the problem. The Supreme Court is now in the business of sort of evolving *Miranda*.

My favorite case is *Oregon v. Elstad*.⁵⁸ This is this case in which they had a non-Mirandized confession, then they gave the guy *Miranda* rights, and then they get another confession.⁵⁹ And so, the Supreme Court says, you know, “this is okay.”⁶⁰ This is 1985. Little did they know that for the next 20 years, this was in police manuals; this is exactly what they taught:

⁵⁷ *Miranda v. Arizona*, 384 U.S. 486 (1966).

⁵⁸ *Oregon v. Elstad*, 470 U.S. 298 (1985).

⁵⁹ *Id.* at 300–01.

⁶⁰ *Id.* at 309.

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get a guy in, jam him up, get him to confess, then Mirandize him, then get another confession. It happened for 20 years before the Supreme Court knew about this in the *Siebert* case⁶¹—so the whole point is that if this is done legislatively, there is probably a better equipment for monitoring and checking it.

And finally, on the reasonableness point, I agree; reasonableness seems to invite a kind of balancing of privacy interests versus law enforcement needs. It is, I think, checked by this person's papers, houses, and effects, so I think that is a cabining of what is being talked about. And also, I think reasonableness, to me—since it involves this balancing, again returning to my corporation point—to me, it raises the question of why is the Supreme Court dictating a uniform police manual given the fact that reasonableness might differ in Utah and in inner-city Washington, DC. I mean, it seems to me this is crying out for local jurisdictions to evolve differently. And so, I will leave it at that.

JUDGE CLEMENT: Thank you.

Yes, Chris.

HON. MR. WRAY: I guess I wanted to respond to the same point, but in a slightly different way, which, as I said before, if the question is not originalism, then what, and what I heard was normative underpinnings, Dworkin, the concerns of the moment, and as somebody who has actually spent a good part of my career as a prosecutor working with the police and law enforcement, sometimes in the process of training them, I would not suggest for a minute that studying the common law and Blackstone and everything else is something I would recommend for the local police officer. But most of them learn from lawyers working with them in their jurisdictions, and most of those lawyers, and the police who work with them, would feel far more comfortable trying to figure out and predict where they can go with something like originalism as part of the calculus, rather than worrying about whether they draw this judge or that judge, or are they going to be in Los Angeles or Richmond? And so I guess I would say at the end of the day, is it perfect? No. But is it superior? I would say yes.

As to the discussion of the situation in France, I guess I just cannot help but remark that it reinforces my view that that is why we should not be looking at French law.

PROFESSOR LERNER: Are you done, Chris?

⁶¹ *Missouri v. Seibert*, 542 US 600 (2004).

HON. MR. WRAY: I am.

PROFESSOR LERNER: I would like to just sharpen this discussion a little bit with four quick points. I may be the outlier here, but these kinds of conversations seem to make sense to me only if the theory that is been advanced has a sharp edge to it. That is, originalism or textualism or whatever it is that you are talking about dominates over other things, because if the issue is instead, is originalism or textualism or whatever a variable to be taken into account in a judgmental process, that is banal. Of course it is. No one is going to deny those points. It becomes uninteresting.

Second, I just do not understand an argument that says something along the following lines: “the first five steps of the argument can be deductive and the last two can be non-deductive,” which sounds to me like what one is saying when it says originalism takes us part of the way but not all the way. I mean, that sounds like you have assumptions, you deduce things from them, you get to step four in the argument, but then step five and step six are not deductive. Well, if they are not deductive, you have no reason to think the conclusion bears any relationship to those assumptions that began that deduction. So I am literally mystified by what that might mean.

Third, to be clear, I was not attacking analogy—not that anybody thought I was—I was describing analogy. You cannot formalize it. That does not mean it is not useful. Analogical reasoning is terribly useful. So are conventions, so is common sense, in a judgmental process. But when you shift from judgmental terms to analytical terms, back to deduction and hard edges, you have a different story, a different problem.

And fourth—this leads me to just my last point—no one is claiming that things like originalism should be completely disregarded. To say it is not an entire story is not to say the opposite, that it is completely irrelevant. Again, in a judgmental context, of course original meaning and all these other things plausibly can matter. Maybe you want to say they should matter. It is okay with me. To me, the interesting question is, how do you go about regulating this complex process?

JUDGE CLEMENT: Thank you. If you have a question, you need to get in line. We have two people lined up. And let me remind you, the focus is on the question, not the statement.

Yes sir.

AUDIENCE PARTICIPANT: My name is Ken Bishop. My question is simple. What does “the people” in the Fourth Amendment mean? With regard to the French situation, are those members of “the people,” if it

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were in the United States? With regard to illegal aliens, undocumented workers, people who do not contribute to the society in the United States, should they be protected by the Fourth Amendment? This issue is raised by Chief Justice Rehnquist in the *Verdugo*⁶² case. I think it was about a 1995 case. And I would like the members of the panel to address the meaning of “the people.”

JUDGE CLEMENT: By inclusion or exclusion?

AUDIENCE PARTICIPANT: Whichever way it pleases them.

PROFESSOR LERNER: When I used to teach criminal procedure, I loved that because I remember in that case, Chief Justice Rehnquist says “people” is a term of art,⁶³ and we see it first in the Preamble, so it gives me an opportunity to sing what I learned. “WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish justice”⁶⁴—and so I think his point there is that the people obviously means us, Americans here. So that is the argument that we should not extend the Fourth Amendment rights to outsiders, I suppose. But I am not sure if others on the panel would agree with that.

HON. MR. WRAY: Do you remember the facts of *Verdugo*?

AUDIENCE PARTICIPANT: I confess, not.

HON. MR. WRAY: A drug trafficker was arrested by the DEA in Mexico and brought to the United States and incarcerated.⁶⁵ He was raised in the United States. It was an unreasonable search and seizure issue, and the U.S. Supreme Court found that he was not “a member of the people,” and therefore he had no Fourth Amendment rights. I think that might be a good way of handling undocumented aliens.

JUDGE CLEMENT: Did you have a comment, Ron?

Thank you, sir. Next.

⁶² United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

⁶³ *Id.* at 265.

⁶⁴ U.S. CONST. pmbl.

⁶⁵ *Verdugo-Urquidez*, 494 U.S. at 262–63.

AUDIENCE PARTICIPANT: With respect to search and seizure, do you see probable cause warrant requirements as consistent with originalism? And do you view originalism with respect to reasonableness as a question of determining what was thought to be reasonable at the time under historic circumstances, or reasonableness as an issue to be determined by juries in civil damages actions without immunity?

PROFESSOR ALLEN: Let me answer that one—

JUDGE CLEMENT: All right, Ron.

PROFESSOR ALLEN: —because I can say a good word for originalism. Well, I could look at the text and see probable cause in warrants there, so I am pretty sure they were thinking about probable cause and warrants. Of course, that answers very little as to what they thought that meant and how we should construe the clause, but sure, they were there.

JUDGE CLEMENT: Carol.

PROFESSOR STEIKER: Well, I mean, this is actually the subject of the article, the debate,⁶⁶ that Akhil Amar and I had these many years ago because he argues that although warrants and probable cause are in the Constitution, they actually are in there to limit the use of warrants, not to enshrine warrants as the gold standard for constitutional reasonableness, because what courts have done is read the two clauses together: there shall be no unreasonable searches and seizures, *and* no warrants shall issue but upon probable cause. So, Professor Amar, who took an essentially originalist approach, argued that probable cause and warrants were actually a way of limiting the warrant; the warrant was a bad thing; and the Fourth Amendment limited the use of warrants as opposed to enshrine to them as the ultimate standard.

I actually—there are many other historians who have disagreed with him on that and there is a range historical debate about what—this goes to my point about, if historians cannot agree, this is one of the problems of originalism because there is a huge debate among historians about the relationship of the two clauses of the Fourth Amendment. I argued that there were reasons of changed circumstance, that the conception of reasonableness should let us consider things like professional police forces and problems of racism, something that originalism, that the whole originalist de-

⁶⁶ See generally Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Steiker, *supra* note 51.

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bate has to elide because it is just not relevant to the question of the relationship between warrants and probable cause.

JUDGE CLEMENT: Thank you.

Yes, sir.

AUDIENCE PARTICIPANT: I am wondering if an originalist perspective in criminal procedure should perhaps incorporate a *Michael H.*⁶⁷ approach to the level of generality question, which would then set the preference towards the lowest level of generality in order to achieve a more restrained judicial interpretive method.

JUDGE CLEMENT: Any comments?

PROFESSOR LERNER: I think that's my position, but—I embrace that, yes.

HON. MR. WRAY: I mean, all these questions are good questions, but they are just reiterating the problem. There are lots of ways to constrain or to liberalize judgment, right? That might get one good one. And it is hard to imagine how you would think systematically about that without being pragmatic from beginning to end. You would ask questions—"what would the consequences of that be? What would be the consequences of the alternatives?"—and so on. And as soon as you start doing that, unless I am missing something, you give up any claim to originalism, not that I heard you arguing for it, but you give up any claim to originalism.

PROFESSOR ALLEN: I thought the point was that originalism is "look at the plain text through the original meaning," and I think the argument would be that if you are doing that, you discover that the Constitution does not cover as many things as perhaps now the Supreme Court has interpreted it to mean. So it would effectively result in greater judicial restraint. I mean, it is not inconsistent with originalism.

HON. MR. WRAY: I did not say it was inconsistent with originalism. I said it was not derivable from it or driven by it. It is consistent with lots of theories.

⁶⁷ See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

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JUDGE CLEMENT: All right. Can we have a round of applause for our excellent panelists.

(Panel concluded.)

**The Federalist Society for Law
and Public Policy**

presents

**THE FRAMERS' UNDERSTANDING OF
ORIGINALISM AND INTERNATIONAL LAW**

2005 National Lawyer's Convention

November 11, 2005

PANELISTS:

Professor David M. Golove, New York University of Law

Hon. Diarmuid F. O'Scannlain, United States Circuit Judge, United States Court of Appeals for the Ninth Circuit

Hon. William H. Taft IV, Fried Frank Harris Shriver & Jacobson, and Former Legal Advisor to the Secretary of State

Professor John C. Yoo, University of California, Berkeley, Boalt Hall School of Law and Former Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice

Hon. Ronald A. Cass, President, Cass & Associates, PC and Dean Emeritus, Boston University School of Law (moderator)

MR. CASS: That's not the sign to stop eating. That's just a sign that we're about to get started with the program. There are some seats down front. As in law school, you're probably safest sitting up front. We expect those sitting here to be prepared already, so we'll be calling on those of you standing in the back. I'm Ron Cass. I'm chair of the Federalist Society International Law and National Security practice group, so I'm responsible for telling you what alert level we're on today. I think after Karl Rove's speech, I think we're on low alert level.

Any time someone has what seems like a good idea, people are really

willing to line up behind it, although there are often questions about what is, in fact, a good idea. We're talking this morning about the Framers' original understanding of international law, and there are a number of topics that are wound together in this. There is international law, the Law of Nations, the common law of all people, and there's also foreign law. And at the beginning, we had attention to both. There was particularly attention to maritime law under the heading of international law, and there was the incorporation of foreign law in our own law of what we did, because we inherited a great deal from Britain, but the Framers also studied the law of Rome and France and Scotland.

We have, in today's world, a renewed sense of curiosity about the role both sources of law should play. We have international treaties that increasingly incorporate and rely on norms of international law, such as NAFTA, which in some provisions expressly invokes international law themes. And we have some judges on federal courts invoking foreign law. Famously, Justice Breyer invoked the law of one of the leading nations, Zimbabwe, in trying to figure out what we should be doing, what the right and moral thing to do was, in America under our Constitution.¹ Both of these have become somewhat controversial, and our panel today is going to straighten out any and every question you have on sources of law, both foreign and domestic, and both ancient and modern.

In order of appearance today, we have the Honorable Diarmuid O'Scannlain, who is known not only as one of the best and brightest federal judges, but one of the least pronounceable federal judges. Diarmuid is one of the judges on the Ninth Circuit, but we like him anyway. He was a tax lawyer, the Deputy State Attorney General for Oregon, and a public utility commissioner, the director of the Oregon Department of Environmental Quality. He was appointed by Ronald Reagan to the Ninth Circuit in 1986. He has sat on more than 6,000 cases and, as I understand from one of his clerks, written more than 9,000 opinions of those cases.

Professor David Golove is a scholar on constitutional law and history. He has published well-known articles on the historical foundations of the treaty power, the relationship of international courts to constitutional process, and presidential authority over military and international affairs. He teaches constitutional law and international law at New York University. He's the Hiller Family Foundation Professor of Law, and also directs the JD/LL.M Program in international law at NYU.

Professor John Yoo of Berkeley is also a leading scholar on the relationship of international law and war powers to constitutional commands. He's the author of the book, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*,² newly published. He'll be autograph-

¹ See *Knight v. Florida*, 528 U.S. 990, 996 (Breyer, J., dissenting).

² See JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (Univ. of Chicago Press 2005).

ing copies after the session, for anyone who's willing to buy one. I understand that this is not the typical academic book. I've written a number of books, and they're academic books; they're books that, once you put them down, you just can't pick them up again. But John assures me that his book isn't one of them. Actually, one of my books was bought by someone outside the family; we're still trying to track that down. In addition to his scholarly title, John is former General Counsel to the Senate Judiciary Committee and the former Deputy Assistant Attorney General of the Office of Legal Counsel. He's the winner of the Federalist Society's Paul M. Bator Award for excellence in legal scholarship, a good friend, and an excellent academic.

Will Taft is counsel these days at Fried Frank Shriver Harris and Jacobson. He's the former General Counsel of the Department of Defense. He is the Former Deputy Secretary of Defense, the former Acting Secretary of Defense, former General Counsel of the Department of Health, Education and Welfare. He has a lot of former titles. I was reading through them, and it took me 2 1/2 days to get through them. Most recently, he was a Legal Adviser to the Department of State, someone who is an expert on the topics we're talking about today. Will says he has promised us nothing about what he'll say, and he expects fully to deliver on that promise.

With that, let me turn the program over to Judge O'Scannlain.

Diarmuid.

JUDGE O'SCANNLAIN: Thank you very much, Ron. As the only judge on the panel, let me make the obligatory disclaimer up front that, while my perspective is certainly informed by my 19 years of service on the Ninth Circuit dealing with international and foreign law, including twice in the *Sosa* case,³ I speak of course only for myself and not for my court.

The Founders rather clearly believed that the Law of Nations was a body of customary law regulating mutual intercourse among sovereign nations. Article 1, Section 8 of the Constitution gave Congress the power to "define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations."⁴ In 1789, the very first Congress passed the Alien Tort Claims Act, sometimes called the Alien Torts Statute, which permitted non-citizens to sue in federal court for torts committed against the Law of Nations, or a treaty to which the United States is a party.⁵ And yet, even though the Act incorporated the Law of Nations, neither the Framers nor the first Congress felt that the Law of Nations irrevocably

³ See *Alvarez-Machain v. United States*, 331 F.3d 604 (2003), *vacated*, *Sosa v. Alvarez-Machain*, 543 U.S. 692 (2004).

⁴ U.S. CONST. art. I § 8, cl. 10.

⁵ Judiciary Act of 1789, ch. 20, §9(b), 1 Stat. 73, 76-77.

bound the United States. Instead, they felt that the Law of Nations imposed constraints “in point of moral obligation.”⁶ In their view, the United States had the power to depart from aspects of the Law of Nations, provided that it was willing to face the international consequences.⁷

With that said, I’m going to leave to my colleagues the development of the Founders’ understanding of international law. My task is to focus on another facet of the debate present at the founding: specifically, their generation’s concern about the use of foreign legal sources by American judges. By foreign legal sources or foreign law, I do not mean the Law of Nations. American judges quite appropriately apply the Law of Nations when construing treaties and determining the content of customary international law. Instead, I will be dealing with the Founders’ views regarding American judges’ use of foreign nations’ domestic law in interpreting the Constitution and laws of the United States.

As you know, in several recent high-profile decisions, our Supreme Court has broken sharply with tradition by invoking foreign practice and precedent to support a controversial holding. In *Atkins v. Virginia*,⁸ Justice Stevens referred to the fact that the execution of the mentally retarded is overwhelmingly condemned by the world community to bolster the conclusion that such practice violates the Eighth Amendment of the United States Constitution.⁹

Then, in *Lawrence v. Texas*,¹⁰ Justice Kennedy supported the Court’s holding that a statute making it illegal for persons of the same sex to engage in certain sexual conduct violated the Due Process Clause, by observing that many other countries have accepted the right to sexual freedom, and by specifically citing to a decision of the European Court of Human Rights.¹¹

Most recently, in *Roper v. Simmons*,¹² Justice Kennedy’s opinion for the Court drew in part upon worldwide legal opinion, arguing that “the United States now stands alone in a world that has turned its face against

⁶ *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 272 (1776) (Iredell, J.).

⁷ *Alvarez-Machain*, 331 F.3d at 649 (O’Scannlain, J., dissenting). One of the handful of founding-era cases involving the Alien Tort Claims Act recognized the power of the federal government to depart from the law of nations. *Bolchos v. Darrel*, 3 F. Cas. 810, 811 (D.S.C. 1795) (No. 1,607) (“It is certain that the law of nations would adjudge neutral property, thus circumstanced, to be restored to its neutral owner; but the . . . treaty with France alters that law . . .”).

⁸ 536 U.S. 304 (2002).

⁹ *Id.* at 317.

¹⁰ 539 U.S. 558 (2003).

¹¹ *Id.* at 573 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981) ¶ 52). For further discussion of the use of comparative constitutional analysis in *Lawrence*, see Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on Lawrence v. Texas*, 44 VA. J. INT’L L. 913, 915 (2004) (“For the first time in history, a majority of the Supreme Court has relied on an international tribunal decision to interpret individual liberties embodied in the U.S. Constitution.”).

¹² 534 U.S. 551 (2005).

the juvenile death penalty.”¹³ He went on to defend the use of foreign precedent against his critics, writing that “[i]t does not lessen our fidelity to the Constitution or to our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our heritage of freedom.”¹⁴

These recent examples of comparative constitutionalism in the Supreme Court’s jurisprudence have drawn harsh responses from adherents to the traditional view that American courts should place exclusive reliance upon domestic sources of law. In 2003, a resolution was introduced in the United States House of Representatives condemning the *Atkins* and *Lawrence* decisions, and, as its title states,

... expressing disapproval of the consideration by Justices of the Supreme Court of the United States of foreign laws and public opinion in their decisions, urging the end of this practice immediately to avoid setting a dangerous precedent, and urging all Justices to base their opinions solely on the merits under the Constitution of the United States.¹⁵

And, seven United States Senators introduced a bill known as the Constitution Restoration Act, which provides that, “[i]n interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional law and common law.”¹⁶

Now, I suggest that the introduction of these legislative measures resoundingly echoes the founding generation’s belief that the unique social, economic, and political realities of American life require a distinctly American jurisprudence. As you know, the earliest settlers in this country made a conscious decision to abandon certain aspects of English law. In the words of one scholar, there was among the early colonists “a very clear perception of their destiny to work out a new legal system, to established rules dictated by their special polity, or by the conditions of primitive and simple life in which they found themselves.”¹⁷

Many members of the founding generation were influenced by Montesquieu’s theory, set forth in 1748 in the *Spirit of the Laws*, that the content of a legal system ought to bear a close relation to the country’s political, social, economic, religious, and geophysical environment. To quote Montesquieu, “[Laws] should be adapted in such a manner to the people for

13 *Id.* at 575 (“[T]he United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”).

14 *Id.* at 575–77.

15 H.R. Res. 468, 108th Cong. at 1 (2003).

16 S. 2323, 108th Cong. (2004).

17 PAUL SAMUEL REINSCH, *ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES* 57 (Leonard W. Levy ed., Da Capo Press 1970) (1899).

whom they are made, as to render it very unlikely for those of one nation to be proper for another.”¹⁸ Montesquieu’s work was widely circulated and highly influential during the founding era, and the ideas formulated in the *Spirit of the Laws* helped speed the development of a legal system that was tailored to the realities of American life and shorn of foreign elements.

Thomas Jefferson, for one, was a firm proponent of this movement. He read Montesquieu and shared his conception that the tenor of a legal system must coincide with the nation’s social and cultural persuasion. At the time of the American Revolution, Jefferson helped to introduce over 100 bills designed to bring Virginia’s laws into alignment with the values of the American Revolution. In the words of one such bill, these reforms were necessary because many of Virginia’s laws were “founded on principles heterogeneous to the Republican spirit . . . [and], having taken their origin while our ancestors remained in Britain, are not so well adapted to our present circumstance of time and place.”¹⁹

Notable reforms proposed by Jefferson included the abolition of *prima genitor*. This practice of awarding an intestate parent’s estate exclusively to the eldest son was disfavored by Americans because it perpetuated an aristocratic class with vast land holdings. Other reforms proposed by Jefferson included the establishment of religious freedom and the institution of a system of humane criminal sanctions wherein capital punishment was to be reserved for murder and treason only.

James Madison was instrumental in securing the enactment of many of Jefferson’s proposals. Madison’s sympathy for the notion that our fledgling republic needed to develop a legal system that was not unduly reliant upon foreign law is evidenced in the *Federalist Papers*. In Number 42, Madison wrote that “neither the common, nor the statute law of [England], or of any other nation, ought to be a standard for the proceedings of this, unless previously made its own by legislative adoption.”²⁰ Madison went on to assert that English law would be an illegitimate guide for the United States to follow.²¹

A different approach to mitigating the influence of foreign law was adopted by the States of New Jersey, Kentucky, and Pennsylvania, which enacted statutes forbidding the citation of English precedent in their courts. New Hampshire had a court rule to similar effect. The spirit of these early 19th-century provisions was very similar to that of the Constitution Restoration Act introduced last year, which would preclude federal courts from

¹⁸ BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 6 (David Wallace Carrers ed., Univ. Cal. Press 1977 (1748)).

¹⁹ THOMAS JEFFERSON, *Bill for the Revision of the Laws* (Oct. 15, 1776), reprinted in 1 *THE PAPERS OF THOMAS JEFFERSON* 562, 562 (Julian P. Boyd ed., 1950).

²⁰ *THE FEDERALIST* NO. 42, at 217 (James Madison) (George W. Carey & James McClellan eds., 2001).

²¹ *Id.*

relying upon foreign law when interpreting the Constitution.²² As a result of these statutes, lawyers in the young republic found it necessary to seek guidance from the country's own nascent collection of case law, rather than from the vast store of more readily available English decisions.

I hope that this overview has succeeded in demonstrating that the Founders would not have approved of the citation of foreign practice and precedent happening in American courts today. While the founding generation desired the United States to engage with the world community, and even explicitly incorporated aspects of the Law of Nations into American law, they believed that, on the domestic front, it was crucial to forge a uniquely American jurisprudence. They accordingly felt that American jurists should place no reliance upon foreign legal authorities when interpreting the Constitution and laws of our own country.

I'm grateful for this opportunity to share perspectives with you, and I look forward to the question-and-answer session.

Thank you.

PROFESSOR GOLOVE: I want to thank you all for inviting me to address you today, and for the honor of being on this distinguished panel.

The topic today is rather broadly formulated—the understanding of the Framers and the founding generation of international law—and I'm going to make my remarks rather general in nature, in accordance with the topic at hand.

So, very broadly, I think it's uncontroversial to observe that the revolutionary and founding generations both held the Law of Nations in very high regard, and it was very influential upon their thinking in general, and it served as an important source and guidance in many of the major political actions that they took during the Revolutionary period, and then the founding.

Now, speaking in particular about the revolutionary generation before I get to the founding, it's uncontroversial that the great writers of the Law of Nations, Vattel, Grotius, Pufendorf and others, many others, along with the great writers of the Natural Law tradition, Locke among them, were highly influential with the revolutionary generation and provided much of the inspiration for the Revolution itself. They were part of the Enlightenment rationalist tradition in which the American Revolution was born.

Now, more specifically, the Law of Nations played a very vital role in

²² See generally Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. § 201 (2004) ("In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than the constitutional law and English common law.").

shaping the development of the conflict between the colonists and Great Britain. The colonists turned to the Law of Nations for developing ideas about an imperial constitution and imperial constitutional arrangements with the British Empire that might be acceptable to the colonists. But when those ideas failed—that is, when the British refused to accept them—they then moved, after the Declaration of Independence, to adopt the Confederation. Now, again, the Confederation itself was rooted in the teachings of the great writers and the Law of Nations. The term itself, “confederation,” and the related terms, “federation” and “federal,” were all terms that were borrowed very self-consciously by the revolutionaries who created the Articles of Confederation from the Law of Nations.

During the critical period—the so-called critical period after the creation of the federation and before the founding—the Law of Nations played a very a vital role in U.S. policy. The federal government or the Confederation government was as assiduous as it could be in trying to strictly uphold, on behalf of the United States, the Law of Nations in the conduct of the Revolutionary War and in its relations with other powers, and they bitterly criticized the British for its unwillingness to recognize the Law of Nations applying to the revolutionary struggle.

Now, it's true that the weakness of the Confederation structure and the centrifugal forces that it unleashed made it extremely difficult for the Confederation officials—for the federal officials—to actually ensure that, at the state level, there would be compliance with the Law of Nations and with the treaties of the United States. And, in fact, it was the failure of local officials to be able to carry out international obligations of the United States that was one of the principal impetuses to the Philadelphia Convention, and, ultimately, to the Constitution.

It's worth noting that the opposition, if it were opposition in the sense, to the Law of Nations, at least to complying with the treaties of the United States and the Law of Nations, was not a principled opposition to the Law of Nations. It was rather a caving-in by localist politicians in the states to the intense pressure that they felt from popular pressure for taking reprisals against the loyalists in the wake of the revolutionary struggle. So it was not principled—the arguments that were brought didn't actually attack the Law of Nations—they were rather sophisticated claims of interpretations of the Law of Nations, and led to nearly disastrous consequences for the nation.

Now, let me turn to the founding generation. The founding generation also held the Law of Nations in equally high regard. The reverences for the Law of Nations that are expressed by the leading Founders repeatedly in their writings are legion. Major figures in the American Revolution and founding who wrote about the Law of Nations, including Hamilton, Madison, Wilson, Jay, Iridell, St. George Tucker, Marshall, and many others, wrote paeans to the Law of Nations, which were a commonplace throughout the entire founding period. There was almost a total absence of dissent-

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ing views on this question.

I'm going to touch on some of the reflections of this reverence or high regard that the Founders had for the Law of Nations in the founding period. Let me begin with the Declaration of Independence. Even the Declaration of Independence—earlier, obviously, than the founding—Jefferson's famous invocation of the importance of appealing to or showing a decent respect to the opinions of mankind is well known. Less well known, but highly relevant—and especially in light of Judge O'Scannlain's remarks—I think it's worth quoting Madison. In view of the general debate that the judge was referring to the over use of foreign precedents and international precedents in U.S. courts, and over the so-called global test that was much discussed during the last presidential election, and in view of the current foreign policy crises we face, let me read from Madison in Federalist Number 63. He says,

An attention to the judgment of other nations, is important to every government, for two reasons: the one is, that, independently of the merits of any particular plan or measure, it is desirable, on various accounts, that it should appear to other nations as the offspring of a wise and honorable policy: the second is, that in doubtful cases, particularly where the national councils may be warped by some strong passion, or momentary interest, the presumed or known opinion of the impartial world, may be the best guide that can be followed. What has not America lost by her want of character with foreign nations? And how many errors and follies would she not have avoided, if the justice and propriety of her measures had, in every instance, been previously tried by the light in which they would probably appear to the unbiased part of mankind.²³

Another reflection of the Framers' regard for the Law of Nations appears as the pervasive view—really the unanimous view—that the Law of Nations was much like other law, like common law. It was law in that sense. It was binding on the United States. It was obligatory for the United States to follow international law, and to a rather remarkable extent, that it was enforceable as law in the courts of the United States.

Another point I want to make very briefly is that, during the Revolutionary war, during the critical period—throughout the entire founding period and much beyond—there was a very great importance attached by the founding generation to U.S. compliance with the Law of Nations. And there was also an equal insistence on compliance by other countries and vindication of U.S. rights under the Law of Nations, particularly with regard to the British. In fact, this was a matter of principle, and it was the *causas belli* which led to the War of 1812.

Now, let me turn to the role of the Law of Nations in respect to the Constitution itself. The Law of Nations is pervasively related to the American Constitution. Of course, there is again the idea of Federalism, which was borrowed from the Law of Nations. In this respect, one of the great

23 THE FEDERALIST NO. 63 (James Madison), *supra* note 20, at 325.

geniuses of the founding generation of the Framers was their transformation of the idea of federalism into a new and unique form of government.

The Law of Nations provided, much like the common law as to other parts of the Constitution, the background set of principles against which they would be necessary to understand what the Framers were doing, particularly with regard to foreign affairs powers. What is the treaty power, for example? Or, what is a treaty? Well, the answer lies in the knowledge and understanding of what the Law of Nations provides, and this is a pervasive feature of all foreign affairs provisions.

The Constitution also included many provisions which were designed to encourage and facilitate U.S. compliance with the Law of Nations, and it's probably true that at least most of the Founders, or the majority of the Founders, felt that, *in extremis*, Congress should have the power to violate the Law of Nations, but Congress only. And they incorporated a number of mechanisms into the Constitution, the purpose of which was to ensure that compliance would be the rule.

Now, let me just specify—I have very little time, so I'll just specify—the major mechanisms that they developed. One is that they gave federal courts jurisdiction over all those kinds of cases they can imagine which would raise questions of the Law of Nations. It's not that they didn't expect the state courts to apply the Law of Nations; on the contrary, they did expect the courts to apply the Law of Nations. But they were concerned about the problem of uniformity in the interpretation of the Law of Nations and treaties. And they also wanted to give Congress at least the option to make sure that it would be an exclusive federal matter; that is, the interpretation of the Law of Nations.

Of course, the Founders made it difficult to enter into treaties; but, once treaties were entered into, they adopted an innovative—and at the time, unique—provision which made the treaty, upon ratification *ipso facto* at least in most cases, the supreme law of the land under the Supremacy Clause. Now, this, from the very beginning of our history, gave rise to the self-executing treaty doctrine, that treaties—at least in many contexts—can be enforced by courts directly as law, and also to the idea that treaties are binding on the executive branch, given its duty faithfully to execute the law.

Finally—and this is the point that I want to emphasize today—the Framers provided that the President would be bound in exercising his foreign affairs powers, his constitutional foreign affairs powers, to observe the Law of Nations. And in particular, when the President was acting and commander-in-chief, he would be bound to observe the international laws of war.

Now, maybe I can state that a little differently and a little more affirmatively. The Framers understood the commander-in-chief power itself to be power subject to other separation of powers constraints and the Bill of

Rights, but the power to exercise the belligerent rights of the United States under the laws of war. This was an extremely broad grant of authority to the President, but it was not an unlimited grant of authority. One limitation was precisely rooted in the very conception of the power itself, which was the power that the President could exercise the belligerent rights of the United States, but he couldn't go beyond the belligerent rights of the United States. He couldn't violate what they would have called, and did call, the rules of civilized warfare.

Now, let me read to you from Madison—this is pervasive understanding of the time of the founding—from one of his famous *Helvidius* letters in 1793. Madison says, “[T]he executive is bound faithfully to execute the laws of neutrality,”—that’s part of the laws of war—“whilst those laws continue unaltered by the competent authority”²⁴ That is, by Congress. “It is bound to the faithful execution of these as of all other laws internal and external,” that is, internal, meaning municipal law or congressional statutes; and external, meaning the Law of Nations.²⁵ “It is bound to the faithful execution of these, as of all other laws internal and external, by the nature of its trust and the sanction of its oath”²⁶

But it wasn't only Madison. It was Hamilton and his *Pacificas* letters. It was many, many other leading members of the founding generation who expressed his view on a variety of occasions. It was, in fact, taken from the British constitutional practice. It was in the mid-18th century, when Lord Mansfield, patently most famously, in a very famous memorial he wrote on the Silesian loans to the Prussian king, where he established and elaborated the principle that the king could not order violations of the laws of war—the crown had no such power—and that the British courts would not give effect to orders which violated the Law of Nations. It was an article of faith among the founding generation, a basic Republican limitation on the scope of executive power. It appears in Marshall Court decisions repeatedly, and it appears in opinions offered by executive branch officials during the early Republic, as well as members of Congress in debates over the quasi war with France in the 1790s, and then again in the lead-up to the War of 1812.

I'm going to close there with the following observation. There's a real dilemma for those who hold too strongly to two views, and I assume that there may be people who fit that description that are members of this Society. On the one hand is a deep skepticism about international law, perhaps even hostility to international law; and, on the other hand, a deep respect for the founding, and for original meanings and original intentions. This is a real dilemma, and, I would urge you, when you hear the siren call of

²⁴ JAMES MADISON, “*Helvidius*” Number 2, reprinted in 15 THE PAPERS OF JAMES MADISON 80, 86 (Thomas A. Mason et al., eds., 1985).

²⁵ *Id.*

²⁶ *Id.*

people who want to tell you that it ain't so, that you listen to the siren calls with a degree of skepticism and give those claims a degree of scrutiny that is sufficient to really convince yourself honestly that the views they're expressing reflect the understanding of the Founders.

Thank you very much.

PROFESSOR YOO: I'd like to thank the Federalist Society for once again—as it does on an annual basis—saving me from the jurisdiction of the People's Republic of Berkeley and allowing me to come to a slightly more conservative place, the city of Washington, D.C. Also—no offense, Judge—I'm also very happy to be outside the jurisdiction of the Ninth Circuit for a few days. Although, as you all know, Congress is studying the proposition of splitting the Ninth Circuit, and I think the real answer is that we should split the state of California and have a section in the center called Schwarzeneggerland, where people can move if they want to escape the city of Berkeley, or at least Los Angeles, rather than splitting the Ninth Circuit.

I also would like to thank Ron. I am trying to plug this book; *The Powers of War and Peace* is the title.²⁷ I don't think I'm signing any copies. This is actually a draft. It seems to be the habit that drafts of mine get out before the final versions. But I think the final version is now out and I encourage you to purchase it. Buy it on Amazon and if you don't like it, you can return it. It doesn't hurt the sales figures.

Let me make a few comments about international law; and I think David and I see things, probably not surprisingly, very differently, although I do welcome him into the camp of originalists. I think it's a very odd thing, actually, if you look at international law as a field. Most people who might think of themselves as liberal academics usually worship at the altar of Madison and Hamilton and the framing, and I think it's great that we have chosen to fight on common ground.

Many things David said I think fairly represent the majority view in the academy today, those views being that international law is federal law and is binding on the United States through the Supremacy Clause; the idea that the President, in particular, cannot violate international law—there are some people who go farther and say that the President cannot terminate treaties on his own authority, that he needs congressional permission. All of these positions, like many things in the academy, have the virtue of being utterly inconsistent with practice and the beliefs of numerous Presidents and Congress over the years. Just the treaty termination question—more than half the treaties we've ever terminated have been terminated by the President alone. As you know, we're fighting in the federal courts now the

²⁷ See YOO, *supra* note 2.

idea of whether customary international law itself can be binding on the United States and actually become federal law.

I want to address a few of those issues mostly through the lens of treaty termination, and, in particular, the neutrality proclamation. But, before I do that, I think it's fair to admit that international law was important during the drafting of the Constitution. Certainly there are phrases in the Constitution, like the power to declare war and the power to define violations of the Law of Nations, which explicitly refer to international law. It is also true that the Framers were very worried about states violating international law. That had led to the disputes with Great Britain at the time. And it's true that the United States had often made appeals to international law in its diplomatic relations, which is not surprising because, if you think about it, in the late 18th century, the United States was a militarily weak country, and it was commonly using international law to try to convince the British not to do yet another bad thing to the United States.

On the other hand, it's useful to think of what the Constitution actually did—let's start with the text and structure. What did the Constitution actually do to prevent these problems? It doesn't actually say anywhere in the document that international law is part of federal law. The Supremacy Clause doesn't mention international law as one of the binding forms of supreme federal law. What the Constitution did, I think, quite simply, is it centralized control over international law and foreign affairs in the national government and left it up to the national government to decide whether to violate international law or not. So, a lot of quotes you read from the framing about how great international law is and how it shouldn't be violated are usually the Framers criticizing the states in their practices, which led to the crisis with Great Britain.

The other thing is, think about how the Supremacy Clause and federal lawmaking work. If you look at the Supremacy Clause, if you look at how laws are made in this country, they all involve some kind of process that goes through the House or the Senate, and the President, or both or various accommodations of such. Why would it be that the Framers would have created a way for a body of law to be directly incorporated into American law without any review, or being passed on in any way by the political branches of government, unlike statutes, treaties, and constitutional amendments? All those forms of law either involve the President, or the Senate, or both—actually they do involve the President and the Senate. Why would it have been that international law would have been exempted somehow from this process for making all other forms of federal law?

The one thing to turn to would be treaties, because I think it would be the case that, if we could agree that presidents can violate treaties or terminate treaties on their own authority, which seemed to be a much harder form of international law, then, certainly, I think it would logically be the case that the President would have those same powers with regard to inter-

national law, customary international law, which are never actually expressed in any kind of written document.

Take a look at the treaty power. The first major treaty controversy that arose in our country was over the neutrality of the United States in the Napoleonic wars. In 1778, the United States signed a treaty of alliance with France, which committed us to defending French territory in the Caribbean, and actually committed the United States to letting the French use the United States as a territory or a base to conduct naval operations against anybody that it was at war with. 1793 was the beginning of the war between France and Great Britain. France declared war on Great Britain and Holland, and the United States government was thrown into turmoil because we weren't sure whether our mutual defense obligations with France required us, or would require us, to enter into the war against Great Britain—something nobody in the government wanted to do.

On that occasion, President Washington held a Cabinet meeting. This was actually a day when they had Cabinet meetings that actually decided things, sort of like an appellate court—except for the Ninth Circuit, of course. They sat in a room together and talked about the neutrality proclamation, and we have the documents of what Washington asked them and what people's responses were. And the interesting thing is that nobody in that room, for one, ever thought that the President had to consult with Congress in deciding what policy to pursue in violating, suspending, terminating, or acting inconsistently with the treaty with France. This was quite interesting, because this was a treaty that wasn't even made by a president; it was made in 1778 before the Constitution.

If there was a belief at the time that the President needed cooperation of the other branch of government to violate international law, you would've thought that he would have wanted to consult Congress on the interpretation of the French treaties. Instead, everybody in the Cabinet—and this included Jefferson and Hamilton—seemed to agree that this was a presidential decision; this was not some kind of joint presidential-Congressional decision.

The other thing they argued about was international law. Hamilton argued immediately for a suspension or termination of the treaties because the regime in France had changed, and, he argued, we had made the treaty with the king of France, and now there's this rabble or mob in charge of France; we don't have a treaty with them, so we're out of it. We don't need to obey this treaty. Jefferson made an argument based primarily on international law that said that we are not allowed to break treaties just because there's been a change in government. At the same time, however, Jefferson never argued, Hamilton never claimed he argued, and Washington never thought it was an argument, that, if he decided to terminate the treaties, that, even if it were illegal under international law—if Jefferson was right that this somehow would prevent the President from reaching that

decision and acting upon it under our constitutional system—if you go back and look at the records, I think it's quite clear everyone assumed that President Washington could have terminated our treaties with France if he had wanted to. Instead, what he did was he issued a neutrality proclamation, which said that the United States would remain neutral in the conflict, and no U.S. territory could be used to help in attacking either the French or the British, which itself was quite inconsistent with the text of the Treaty of Alliance with France.

The passage that David quoted from Helvidius comes from James Madison. He was quite critical of the neutrality proclamation. I think it's the judgment of most historians that the Helvidius argument was quite unsuccessful. Madison himself didn't really want to make it. It's very interesting Jefferson was so irritated because, he said, Hamilton was out there writing too much in the newspapers—he has his famous quote. He says Hamilton is such a busy body; he's like a host of people all by himself. So he wrote a letter to Madison and he said, well, I'm not going to write this, but, Madison, you, please write some papers responding to Hamilton's defense in the neutrality proclamation. You have a clear idea of who was the judge and who was the clerk here.

So, Madison went out and he wrote these Helvidius papers. His basic argument was that the neutrality proclamation was illegal and unconstitutional because, by declaring peace, President Washington had deprived Congress the ability to declare war, which I think many people today agree is a complete *non sequitur*. Congress could have declared war, if it wanted to, regardless of the neutrality proclamation. And I think, because of that, historically people have thought the Helvidius arguments and papers are quite unconvincing.

The other thing I will note is that I don't think Madison was quite consistent himself during his career. In the Virginia ratifying convention, which is the convention where the commander-in-chief powers were extensively debated, Patrick Henry—those of you who have ever looked at this, remember, Patrick Henry was the fellow who said “give me liberty or give me death,” and then a lot of people tried to give him the latter—Patrick Henry claimed, making exactly the claim that people make today, that the commander-in-chief power was so large and great it would lead to a Democratic tyranny by the President as the head of the military.

Madison, of course, said that you should have faith in Congress; Congress will have the funding power to cut off any misadventures by the President. But there was no claim in the Virginia convention, where the Constitution only passed 188 to 180—just a four-vote difference—that it was going to be international law that was going to bind the commander-in-chief.

So, putting the framing aside, just let me end by asking whether it would make sense as a matter of policy today for us to read the Constitu-

tion to bind the President or bind the United States through international law. Why would it make sense for us to adopt this reading of the federal lawmaking system that would bring in this body of law without having to go through the process of statutes or treaties, rather than what I think the Framers thought, which would've been sort of a political process check under international law?

So just ask yourself the questions about the use of force. You know, under international law today—conventional international law—it's a violation of international law for a country to use force, except in its self-defense or when it's authorized by the Security Council. And I think it's worthwhile to ask whether that's actually yielded good results for the United States or the international system. So, two cases in point. First, a case where the UN's power was upheld was in the case of Rwanda, where the United States and other countries did not receive Security Council resolutions to go to Rwanda, and the lesser nations never sent any real troops to try to stop what was happening in Rwanda, and you saw a genocide of almost a million people there.

Also ask yourself the question about Kosovo, where the United States and its allies invaded, attacked another sovereign nation, Serbia, without UN Security Council permission. I think many people honestly would have to admit that our intervention in Kosovo was illegal under international law. But was that not, in fact, better for the United States and its allies, and, if you want to call it, global welfare that the United States did not feel itself bound by the UN Security Council in that case.

So, it's always fine and great, obviously, if the United States can act consistent with international law; but the question is whether the United States should be bound in all cases to have to obey international law, even when it would be better for our country, or for the international system, for the United States to act contrary to it. I think our Framers, in their wisdom, left that question up to the President, primarily, or the President and Congress acting together; but they certainly didn't try to answer that question through the Supremacy Clause or trying to bind our nation into international law without the check of the political process.

Thanks.

HON. MR. TAFT: Well, let me say I am very grateful to the Federalist Society for the invitation to be with you today. I've heard that some of your invitees recently have been eager to put some distance between themselves and the Society. Not me. For a person who has been just a normal conservative Republican for 60 years—which is to say, since before my mother came out of the ether—an invitation to be on a panel here is obviously pure gold. Harriet Miers should've been so lucky. And, in my case, I'm very grateful, and I will be sure to put it on my résumé, that I have been with you now not just once, but twice, in any case, should a sen-

ator should make an inquiry about this. It's a great pleasure for me to be here, not only for that career move purpose, but also to be enlightened by my fellow panelists on a subject in which I have to say they have the advantage of me in terms of scholarship and expertise.

Just very briefly, then, since we've taken a lot of time and they've covered a lot of ground, I'll give you my few points that have occurred to me as I have looked over the subject that was assigned to us in this panel. My impression is, essentially, and I think it's agreed here, that the Framers were very committed to compliance with international law, at least at the state-to-state level, the obligations taken by nations.

One of the objectives of the Declaration of Independence was to take advantage of the status of a state on the international plane; particularly the right—and it's in the last part of it—the right to contract alliances. But, there was a real focus on what states were, by right, entitled to do; and the Framers well understood that obtaining these rights also entailed assuming some responsibilities and duties; and I think there is every reason to believe and to know that they were very much committed to establishing the United States as a nation. A part of that was to take its place in the international scheme—to have those rights, and to insist on them—but also to insist on the duties of other states to respect their rights, and to undertake to respect those rights and those duties themselves.

This appears, as I say, in the Declaration of Independence. It's also very evident, it's in John Jay's famous grand jury charge in Richmond, where he talked of the Law of Nations, "by which nations are bound to regulate"—*bound*, he says—"to regulate their conduct towards each other."²⁸ And it's also there in the early court cases. You see it in *The Charming Betsy*,²⁹ which circumscribes the role of other laws to make them conform where possible, unless absolutely directly contrary, to international law and customary law and the Law of Nations. You see it in *Guyot v. Hilton*³⁰ and a number of other cases. It's well-established, and I don't think there's any disagreement on the panel about that.

The more difficult question has always been how far the Law of Nations has been imported into domestic law, and what the Framers' conception about that was. And, to the extent that it may have been imported into domestic law, how did that happen? My sense of where the Framers were—and I hesitate to put it this way—but, in some respects, it seems the Framers got it wrong as to what the Constitution meant, or has come to mean; certainly, because my impression is that most of the Framers felt that international law, the Law of Nations, had come in more effectively into domestic law than in fact has been the case, or, in fact, I would say, has been desirable.

²⁸ Jay, charge to Grand Jury, *Henfield's Case*, 11 Fed. Case No. 6360.

²⁹ *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

³⁰ *Hilton v. Guyot*, 159 U.S. 113 (1895).

They got this idea, I think, from Blackstone—who, in the middle of the 18th century, was the authority with whom they were all familiar—who said that the Law of Nations was part of the law of the land of Great Britain. There's no ambiguity there. You find it also in the Attorney General's opinions—Attorney General Randolph; Attorney General Lee—both said very simply that the Law of Nations was the law of the land. And, in fact, I think Attorney General Randolph—and, this would've been in 1792 or 1793—said that it was the law of the land; even though “not specifically adopted by the Constitution or any municipal act”;³¹ so, he was importing it. At least, that was what he thought, perhaps not thinking deeply—obviously not with the advantage of all of the scholarship that we now have—but it's there. This was certainly his impression.

I think Washington's neutrality proclamation, and Hamilton's defense of it to which John Yoo has referred, also relied to a degree and an aspect to which he did refer, on importing customary international law into domestic law in a rather dramatic fashion, where Washington actually attempted to bring in the law and make violations of the Law of Nations criminal just by saying so in his proclamation. It's clear now that this is not possible. That's been established, and I think rightly so.

Madison, as John said, was stimulated by Jefferson to respond to Hamilton's defense of the proclamation. And, in this aspect, I think Madison was correct, and he's been borne out later: namely, that, in making something a criminal act by the statement that something was a violation of the Law of Nations, that in fact you do need an enactment of legislation by Congress; and Madison did make that point. I think it was a good point, and it has stood up. He said that basically that the Congress had to act under Article 1, its authority to define the offense against the Law of Nations; and, of course Congress did do so, I think just a year later. So, it wasn't a disagreement of policy, but it was a disagreement as to what was necessary and how you would bring the Law of Nations properly into domestic law.

So, in any case, it seems to me fair to say—and this is clear—that the Framers were not really of one mind on the extent to which the Law of Nations would become the law of the land. There was some idea that it certainly had become so, or could be made so, but there was no agreement on either that point or, if it did, where it did. Was it going to be a part of federal common law? Was it going to be just a rule of decision for courts? Was it going to be part of state common law? Or, none of these—would you actually need the legislation, which Article 1 authorizes Congress to take? I don't think, as I say, that there was complete agreement on that point; and that, of course, enables us to continue to discuss it as we do, and to seek for more enlightenment.

Thank you.

³¹ 1 Op. Att'y Gen. 26, 27 (1792) (Randolph).

DEAN CASS: Well, now that we have dealt with importing international and foreign law into U.S. law, we can deal with exporting some of the control over the panel to the audience. Now we are open for your questions. I know this is a very shy group, so we'll let you volunteer before we began calling on members of the audience.

Let me encourage people to line up behind the microphones. Let me ask you to get in line there.

We'll start with the first gentleman at the microphone.

AUDIENCE PARTICIPANT: My name is Ben Davis. I teach at the University of Toledo Law School. My question is along these lines. First, going back to originalism: I have great ambivalence about originalism, simply because I have an ancestor from 1787, who was born in Africa and who was enslaved in 1800, and two of the people who owned her and her family were presidents of the United States; so, I go way back with an issue on the ideas of the people at the time.

But, with regard to the discussions that you have here, my question is, isn't it just a dance between *de jure* and *de facto* here, where you could have Mr. Golove's point of view of *de jure* and there would be an obligation, but that *de facto* when the President of the United States, under the commander-in-chief powers, otherwise violates some kind of international law obligation, there is no sanction against him in our system; so you can reconcile both Mr. Golove that Mr. Yoo by that.

Now, if there were enforcement mechanisms that would constrain the President of the United States or the people who work for him—for example, for conspiracy to commit torture—in courts of the United States, that might resolve the issue in terms of the limits there would be on the President. But, barring enforcement mechanisms either at the state or federal level, aren't we just left with a *de jure* obligation, but a *de facto* non-application with non-enforcement, which would reconcile both?

DEAN CASS: Let's see if the panelists can reconcile their views with that question.

PROFESSOR GOLOVE: Yes, I think it's a good point. I don't think our views can be reconciled, even through that method. I think they're irreconcilable. I think John and I are, in some sense, inhabiting different worlds, and to a very disturbing degree to me. But I'm going to put that aside for the moment.

Yes, this is a *de jure* world I'm describing. But, mind you, this is a feature of public law in general. That is, it's not unique to the Law of Na-

tions that, when a governmental official in a capacity to take action may, in fact, violate the Law of Nations and there is no reliable procedure to correct the violation to vindicate the rights that have been violated, that is a feature of the Law of Nations. It's also a feature of all constitutional law.

Courts are sometimes available. The question is why it is the courts are complied with. After all, courts don't have an army to use against the political branches. The public law in general has this feature, and it means that, sometimes, for example, presidents violate constitutional law and nothing is done about it because they have impunity in a sense; because there's not a political process which would necessarily vindicate their rights. That doesn't change the *de jure* status of the constitutional rights that are in issue, any more than it changes the constitutional obligations of the President to comply with the Law of Nations.

JUDGE O'SCANNLAIN: I would just like to add that I think there is at least one situation in which international law or the Law of Nations is part of American law, and that is in the Alien Torts Statute; because we have to determine whether an alien who invokes that statute has rights which arise out of the violation of the Law of Nations, and that's what was going on in the *Alvarez-Machain v. Sosa*³² case; and, to that extent, it would seem to be that it would have to be a recognition that international law is American law to that extent. And, a great deal of what we were doing in those cases was trying to identify, based on everything from Pufendorf and Grotius and others, what is the norm to which the United States is committed.

DEAN CASS: John, do you want one more crack at this before we take the next question?

PROFESSOR YOO: You know, I agree with David that we inhabit different worlds. It's probably safer for both of us. But let me just ask—in response to your question, I think what you just suggested—Congress passing a criminal statute is perfectly appropriate. I mean, Congress can also incorporate norms of international law into domestic law both through the Alien Torts Statute or Criminal Acts, and it has the power. Article 1, Section 8 says that Congress has the power to define and punish violations of the Law of Nations. It also seems to imply that, if Congress doesn't do it, why should that actually exist, then, as a legal prohibition as directly to federal law without congressional action?

Let me give you examples, then, of whether we really want to test the idea that *de jure* or *de facto* international law should constrain the Presi-

³² *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

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dent. Many people in international law believe that the use of nuclear weapons against cities is a violation—a massive violation—of human rights. Almost half of the Court of International Justice issued an opinion suggesting that. Would that mean that the President was constitutionally prohibited from considering the use of nuclear weapons without any congressional action?

Again, take the example of Kosovo. Kosovo was illegal under international law. Does that mean that, under our Constitution, it was illegal for the President to order the use of force in Kosovo? Put aside the fact that the war was also a violation of the War Powers Resolution.³³ But is that—without congressional action one way or another—is it unconstitutional for the President to launch our forces into Kosovo?

DEAN CASS: Let me take the next question.

AUDIENCE PARTICIPANT: Judge O'Scannlain, forgive me if I don't have this exactly right. The Restoration of Constitution Act that you referred to—where is the authority of Congress to do that? I'm asking because I don't know. And assuming they have the authority, is it truly binding on the Supreme Court and the other courts? And even if it is binding, are they likely to just ignore it anyway?

JUDGE O'SCANNLAIN: Well, first of all, it's not an act; it's a bill that was introduced. That would be the name of the act, if in fact it would pass. I am not aware of any significant probability that it's going to get anywhere, other than the fact that it was introduced. And I think, if anything, it's an expression of anxiety expressed in that form. That is to say that there are very obvious, as you suggest, separation of powers issues that would have to be resolved, if, in fact, it would ever be passed. My reference to it is only to suggest how topical all of this is and how concerned a very wide variety of Americans feel about this whole issue.

AUDIENCE PARTICIPANT: My question is kind of specific. It's to the whole panel, but I was curious about what the panel's opinion is on international efforts to affect individual liberties—specifically, the effects to try to change internationally—gun control efforts is specifically what I'm looking at—and efforts to possibly affect the Second Amendment within the country, and what the panel's opinion is on how that's going to be affected.

³³ 50 U.S.C. §§ 1541 *et seq.* (2006).

DEAN CASS: Do you have a weapon at the moment?

AUDIENCE PARTICIPANT: No, sir. Not right now. Not in D.C.

DEAN CASS: Then you can answer as you want.

(No response.)

DEAN CASS: No takers, huh? Obviously everyone agrees with the question.

HON. MR. TAFT: I think that's right. There is no basis on which foreign countries or peoples can enact statutes for the United States or amend our Constitution, as you've suggested. It can't happen.

PROFESSOR GOLOVE: I think it's uncontroversial that a treaty that is in violation of the Constitution—say, one of the provisions of the Bill of Rights—is an unconstitutional treaty and wouldn't be given effect in the United States.

DEAN CASS: Hopefully, you'll rest easy now.

AUDIENCE PARTICIPANT: My name is Briard. I'm a French Supreme Court attorney. I want to thank you, Judge, for quoting my compatriot, Charles Louis de Secondat, Baron de Montesquieu—this was the name, the complete name. The guy had a long name. And I want to thank also Professor Yoo for mentioning the 1778 treaty, which reminds us that our country was the very first in the world to recognize your independence.

DEAN CASS: We'll now entertain a motion to overturn the Neutrality Act.

AUDIENCE PARTICIPANT: On the issue we talk about, I would like to say three things. The first is that, to me, it is a very essential to make the difference between international law treaties and foreign domestic laws and foreign case law.

Second, I am the very first one to say that it is good to promote dialogue between judges, dialogue between nations, dialogue between lawyers and jurisdictions, and the mutual influence can exist. We have to face the same problems.

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But, third, if I had any advice to provide to American judges—and I have no competence to do that—but, I would say, stop being fascinated by the case law of Strasbourg. Stop—

(Applause.)

AUDIENCE PARTICIPANT: —I would say stop quoting the case law of Strasbourg. This case law—and I know I can speak freely—that case law is completely out of control. It is made by 45 judges, and, if you do that, you will be—especially in a country presiding by the jurisdictions—you will be in the same situation that we are today, which is a country where we gave up our very precious gift, which are sovereignty and independence.

Thank you.

(Applause.)

DEAN CASS: You can see why François Briard is the President of our chapter in France, and the only Frenchman Justice Scalia is willing to acknowledge in public.

AUDIENCE PARTICIPANT: Hello, my name is Jonathan Jacobs. I'm in my second year at Georgetown University, and I'm interested in whether anyone on the panel believes *The Charming Betsy* canon—which says that courts should interpret ambiguous statutes not to conflict with international law—whether anyone believes that still reflects Congress's intent these days.

DEAN CASS: Any takers on that? I've always liked cases with names like "the Charming Betsy." You just don't get those today.

PROFESSOR YOO: I think there's a very good article by Curt Bradley talking about *The Charming Betsy* Canon as actually enhancing Congress's powers, because it prevents the violation of international law unless Congress chooses to violate international law.³⁴ And, he tried to read it also as a way of protecting the President's prerogative, just to make sure that international law is not violated deliberately unless the political branches have actually chosen and decided to do it. And, so, if they do that, you want to have something clear from them that they intended to do that.

³⁴ See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998).

HON. MR. TAFT: Let me say, I think your question was whether the Congress believes this. I don't know whether they believe it; but, I think they are aware of the doctrine, and they act in knowledge of it, and the doctrine has vitality.

PROFESSOR GOLOVE: I think it would probably be hard to answer the question posed in the general way that you did. There's a lot of international law covering a huge variety of subjects and contexts, and the idea that Congress is of one mind about the entire subject of U.S. compliance with international law seems to me to be quite unlikely. I'm not expressing any expertise about what Congress thinks or doesn't; but, it seems that, to be pitched at that level of generality, it can't be right.

DEAN CASS: We have time for two more questions here.

AUDIENCE PARTICIPANT: My name is Frank Marine. I am a recently retired Department of Justice attorney. I want to try to cut through some of the abstractions, and have a hypothetical question for Mr. Taft and Professor Golove. Let's suppose that there's a foreign flag vessel on the high seas, and on that vessel there's Osama bin Laden. The foreign country adamantly refuses to give the United States consent to board the vessel, the Vice President advises the President to go on board, seize them, and we'll worry about the consequences later.

You two are legal advisers to the President. What would you advise the President?

HON. MR. TAFT: The current president?

AUDIENCE PARTICIPANT: Yes. Take any president you want.

PROFESSOR GOLOVE: You can speak to this question with great expertise. I'm only going to say that the panel today is—John suggested that I'm originalist because I was talking about original history, but I talked about original history because that was the subject of the panel, not because I'm originalist. But I don't think that anything I said, given my own methodological perspectives, answers the question that you have by reference to the founding.

But I do think that, if you want my view about it, I think there are emergency situations where the President has to have—when the President needs to act immediately, the President has to have authority to act immediately, but then he needs to go back and get congressional authorization.

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It's a change of policy.

JUDGE O'SCANNLAIN: But his boarding would be in violation of international law.

HON. MR. TAFT: I don't believe that it would be. I think that we have a right to act against Osama bin Laden wherever we find him. We're exercising our right of self-defense. It's endorsed by the Congress. It's endorsed by the UN Security Council. And we can go get him.

DEAN CASS: Good answer.

AUDIENCE PARTICIPANT: I wonder—well, the differences between our panelists, to what extent it's affected by—really, what is meant by the Law of Nations? Will: from your comments, I think I could reach a conclusion that the Law of Nations really only means those laws that govern the relations between nations, as opposed to Law of Nations meaning what today we use or call public and national law, or international humanitarian law, or human rights law, that great body of law that's generally referred to as “international law.” Is it clear what the Founders had in mind?

If that doesn't run us out of time, then I'll add my second question, which is: What did the Founders mean by “declaration of war,” the power to declare war, grant letters of market reprisal, and define rules of captures? Did they really mean that as a code word for the ability to use force, or did it have a more special meaning?

JUDGE O'SCANNLAIN: On the first point, I think the phrase, “Law of Nations,” as it was used in the late 18th century, meant customary international law as we understand it today. I think that's fairly well understood.

PROFESSOR GOLOVE: The content of customary international law at the time was different, but no less broad than it is today. In fact, in some ways, it was broader, because it included principles of conflicts of laws; the maritime law—including at that time maritime law insofar as it affected inland waters—it affected a whole variety of other subjects which were governed by the Law of Nations, the Law of Merchants, and so on. So, there were lots of state-to-state issues that were part of the Law of Nations.

PROFESSOR YOO: But, one point that is different, I think, is that

there was no concept then that international law would dictate how governments treat their citizens in terms of individual liberties. You don't have the kind of, I think, intrusive level of regulation. There are a lot of treaties now which regulate exactly the same things that we are accustomed to thinking about being regulated by domestic governments through statutes: human rights, environment, energy consumption, and you could go on and on.

I think it is fair to say that what international law was understood to do between the 18th century and today has changed; which is why I think Judge Bork wanted to read the Alien Torts Statute to only incorporate international law of the 18th century, because he didn't believe Congress anticipated or thought that this new international law of the 20th and 21st century was what the Framers intended when they wrote the Alien Torts Statute.

DEAN CASS: My friend François-Henri tells the story of a young woman who goes to confession and says to the priest, I can't help admiring myself day after day, looking at America, thinking how beautiful I am. Is that a sin? To which the priest replies: no, my child; it's not a sin, just a mistake. I think our panelists demonstrate that we have plenty of room for both in our consideration of foreign and international law. Please join me in thanking the panel for their contribution.

(Panel concluded.)

**The Federalist Society for Law
and Public Policy**

presents

**CIVIL RIGHTS: RACIAL PREFERENCES IN
HIGHER EDUCATION**

2005 National Lawyer's Convention

November 12, 2005

PANELISTS:

Professor Richard O. Lempert, Eric Stein Distinguished University
Professor of Law and Sociology, University of Michigan

Dr. John Lott, Resident Scholar, American Enterprise Institute

Professor Stanley Rothman, Director, Center for the Study of Social and
Political Change, Smith College

Professor Richard H. Sander, University of California, Los Angeles
School of Law

Professor Douglas W. Kmiec, Professor of Constitutional Law & Caruso
Family Chair in Constitutional Law, Pepperdine University School of Law
(moderator)

PROFESSOR KMIEC: Our first speaker today is Richard Sander. He received his bachelor's degree from Harvard, and a law degree and a doctorate in economics from Northwestern. He has taught at UCLA since 1989. He has done considerable empirical research on social policy and legal education. But beyond the classroom, he has worked tirelessly for many years to improve the enforcement of fair housing laws in Southern California and helped start a program that has substantially increased the participation of low income Los Angeles workers in the Earned Income Tax Credit program.

Please welcome Professor Richard Sander.

PROFESSOR SANDER: Thanks very much, Doug. Those were kind words.

I am very happy to be here at this meeting of the Federalists. I have given about 30 presentations on this work over the last year, and I think this is the third audience that might be sympathetic to some of my arguments. But beyond that, speaking as a—I guess I consider myself a progressive Democrat—I think that along with the majority of my colleagues, all professors across the board realize that the Federalist Society plays an enormously important role in law schools as a center of intellectual inquiry by trying to get debates going and getting discussions going across ideological divides. And that is an irreplaceable role that I appreciate and I hope you continue to foster.

I am going to be very brief, because we have a lot of material to try to cover in this panel, and I think the most interesting part of these discussions is usually the question-and-answer session. I have brought along a lot of material on PowerPoint to get into specifics. I left some copies of my work at the back, but I think those have disappeared. I encourage you to follow up on any of the things that I raise and try to engage all of us on this debate on the most specific terms possible.

Let me just say that globally, I think that in addition to trying to make some arguments about affirmative action, trying to get some data into the public realm, maybe the fundamental goal of this research was to provide an opening for discussion. Professor Hoffman and I are unusual because race continues to be an enormously sensitive topic, and I think it is nowhere as sensitive than at the American academia, and it is very hard to have open and informed discussions about the pros and cons about things like affirmative action.

Our debate over the last 25 years has mostly focused on whether affirmative action violates anti-discrimination laws, equal protection laws, and so on. That is a fairly straightforward, neutral, abstract ground on which we can engage the issue, and that is an important ground. But I think that ultimately, it is tremendously important to engage the empirical realities of what the effects of preference policies are. And I say that not just because I am very concerned about the effects of preference policies on minorities, but because I think that even if *Grutter*¹ had been decided the other way, even if Congress passed something like Prop 209² nationwide,

¹ *Grutter v. Bollinger*, 539 U.S. 306, 307 (2003) (upholding the University of Michigan Law School's "narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.").

² CAL. CONST. art. I, § 31 (added by initiative measure, Prop. 209, approved Nov. 5, 1996, prohibiting state discrimination or preferential treatment based on race).

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practices at schools would not change dramatically.

Doug mentioned the various idiosyncrasies of California. One of them is that we have Prop 209, and I have been able to look close-up from the inside into its effects. And although there are widely varying levels of adherence to the letter of 209, there is very little adherence to the spirit of it. Schools feel themselves to be under such tremendous imperative to achieve racial diversity that they have found lots of other ways to do it. So I do not think that the mismatch effect eight years after or nine years after Prop 209 has really been significantly difficult in California. We may be able to talk about that a little more in the discussion period, too.

But ultimately, change in practices will only occur if we change the hearts and minds of American academia. I know that is a frightening thought, but I really think that is where the battle needs to be engaged. My fundamental message is that there needs to be more discussion; there needs to be more research and more data on these issues. We have got to pursue it. And the law school world is a very good way to pursue it, because we have unusual conditions that make it possible to analyze what the effects of preferences are.

At the undergraduate level, most of the debate on preferences concerns graduation rates, which is ultimately somewhat fruitless. I mean, it does not really tell us anything about how successful the educational process is. If a school like Yale has a 98- or 99-percent graduation rate, you could say that almost all African-Americans at Yale ultimately get a degree.

The real question is what happens to long-term outcomes. What happens to the amount that you have learned in school? And the fact that law schools have fairly standardized curricula and grading systems and a bar that people take across the country makes it a rich venue to try to understand these questions.

So, I am going to very briefly summarize—what do I have? Like, five minutes?

PROFESSOR KMIEC: You have eight minutes.

PROFESSOR SANDER: I have eight minutes.

I am going to briefly summarize the key arguments in systemic analysis and save most of the specific data discussion for later. There are really five different arguments I am trying to make in the article. The first one concerns the admissions process. As Doug said, essentially I am trying to put forth two propositions. One is that what law schools do in their admissions process is essentially indistinguishable from what the Supreme Court

ruled to be illegal in the *Gratz*³ case. In other words, schools do one of two things: they either use mechanical race norming procedures to equalize the disparities between blacks and whites on background credentials—same thing for Hispanics and whites, or Native Americans and whites—or they simply segregate admissions and try to achieve the same proportional result in admission outcomes as is represented in the applicant pool itself. And there are a variety of ways of showing that.

We have got quite strong data on it, and I think that argument is overwhelming. There has been relatively little critical commentary on that particular point; maybe Rick or John will make some points about that today, but I have seen very little engagement on that. And we are now starting to see other scholars produce data and empirical analyses reaching the exact same conclusion. So I think that point is pretty established, and that is a pretty devastating point, from a legal point of view.

But what is less appreciated is that if elite schools do this process of race norming, or segregating admissions, then the schools that are further down in the hierarchy of law schools really have no choice but to follow suit, or to be all white, or all white and Asian. So, for example, if Harvard, Yale, and Stanford, exercise aggressive racial preferences, and through that process absorb all the students who would be admitted to UCLA, on race-blind criteria, then UCLA must either choose to not have any minority students or must imitate those preferences and reach further down in the applicant pool. As a result of this, what I call the cascade effect, you see a striking similarity in the credentials gap, all up and down the legal academy.

In this talk today, I am going to use something called the Academic Index, which is simply sort of a normalization of LSAT scores and undergraduate grades to a scale that goes from zero to 1000. The law schools are generally comprised of students who have academic indices between 400 and 900. And the typical black-white gap in American law schools is 170 points, a very large difference that roughly corresponds to the test score gap that we see in studies from elementary school, on. That 170 points is essentially identical, whether you look at the most elite schools or schools that are ranked 150. The only place where you do not find it are the historically minority schools because they have very large minority populations, they do not exercise the same type of preferences, and they have uniquely equal student bodies in terms of the level of credentials of students of different races. One result of that, I think, is that Howard University, for example, is, I think, eighth on the list of law schools recruited by large law firms. It is a unique place where employers can go and find students who

³ *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003) (finding the University of Michigan's undergraduate admissions practice of automatically awarding applicants from certain minority groups 20 points of the 100 needed to guarantee admission not narrowly tailored to achieve diversity in violation of the Equal Protection Clause).

have very high academic achievement, blacks with very high academic achievement, and Hispanics with high academic achievement in very large numbers.

So, point number two is that as a result of these really large credentials, and not as a result of race, minority performance, particularly black performance, in law school suffers. The argument is not that LSAT and undergraduate grades are perfect predictors of performance; they are not, although they are better than is usually reported because most analyses look within individual schools and have restriction of range problems that limit their statistical power. But for groups, the LSAT and UGPA are quite predictive of overall results, so that we see the credentials gap very closely mirrored in the performance gap in first-year grades, second-year grades, and third-year grades.

Now, I think there is some debate about whether that credentials gap explains 100 percent of the performance gap. I think that it is pretty close to 100 percent; maybe 95 percent. But I do not think anyone has put forward an argument that it is less than 85 or 90 percent. In other words, under-performance by race or things that are uniquely the case about blacks or Hispanics are not driving the fact that there are worse performances in grades, and certainly not worse performances on graduation or bar exam scores. It is being driven by the system of preferences.

Now, again I get one pick up on the point Doug made, that it is important to distinguish here that if we got rid of—if we completely eliminated what I call the mismatch effect, you would not have identical graduation and bar results across racial lines because there is this difference in incoming credentials. My argument is that the mismatch effect, the effect of blacks having much lower grades in school, roughly doubles these disparate outcomes, so that we roughly double the number of blacks who do not become lawyers as a result of these policies.

The third point is that grades are tremendously important in terms of a whole range of outcomes. They are the most important factor in determining whether you graduate from law school. I think that is fairly intuitively obvious. And they also turn out to be extremely important in terms of your bar performance, and in terms of how you are evaluated by employers. And I think actually, they are quite significant in terms of later career performance.

Prestige clearly matters on some of these factors. It clearly helps to go to a more elite school in terms of graduating. And the evidence is somewhat mixed, but I would not be surprised if there was a net positive effect of going to a more elite school and passing the bar. It certainly is helpful in the employment market. But in every analysis that I have done and I have seen other people perform, grades do dwarf the effect of prestige. That means that if you have to choose between having lousy grades and having a lower-tier school, you are better off going for the lower-tier school and get-

ting a good GPA. GPA is going to dwarf the effects of prestige and a range of practical outcomes.

And that, in turn, implies that there is something going on at law school that means that if you're at the very bottom of your class, the bottom 10 or 15 percent, you are actually learning less than you would if you were at another law school. Now that strikes people as counter-intuitive, and it is the weakest part of my argument in the sense that I do not have any direct data sort of observing the learning process. I cannot say exactly where in the first semester or the second semester this is kicking in; from, like, weekly quiz results of students or something like that. But it is the only conclusion that follows from the fact that grades drive outcomes so much more heavily than school eliteness does. And it is supported by a lot of anecdotal evidence that professors, when they teach classes, tend to observe that final exams and other evaluations from the bottom of the class show a level of confusion that is really qualitatively different from that experienced by a lot of other students. So there is something going on when you are at the bottom of the class, regardless of your race, that really affects the quality and quantity of education that you receive.

As a result of that, you see these striking patterns that—well, why do I not go forward and show you a little bit of the math.

PROFESSOR KMIEC: Time is up.

PROFESSOR SANDER: Oh, time is up? Then let me just say to summarize quickly. One is that in the job market, we again see this very powerful effect of grades versus prestige, that across most of the range of law schools, grades dominate prestige as a hiring factor. I estimate that because of the lower grades black students receive as a result of preferences, their average earnings are about \$10,000 lower than they would be otherwise. So it has an important and powerful effect after graduation, after bar passage.

And finally, the issue of what would happen to overall production of lawyers, essentially what I find is that because of the mismatch effect, there is a very large attrition of blacks. There is really no question about that. And the issue is, what would happen to the number of blacks admitted into law school if one reduced or eliminated preferences? First of all, that is only one policy option. I hope we will get to talk about all of the policy options during the Q&A.

But if we took the extreme step of eliminating preferences, I estimate that the number of blacks admitted to law school would only drop modestly, 10 to 20 percent, and that that drop would be offset by the dramatically lower attrition rates. But the real point here is not whether there would be an eight percent increase or an eight percent decrease, but that the tradi-

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tional claim that preferences are the only way to have a significant minority presence in law school is clearly wrong, and I think that point has been largely abandoned by the critics.

Thank you.

PROFESSOR KMIEC: Our next presenter is Stanley Rothman, the Mary Huggins Gamble Professor of Government Emeritus at Smith College, Director of the Center for the Study of Social and Political Change. He received his doctorate in government from Harvard. He is the author of numerous books, including *American Elites: Hollywood America*,⁴ *Social and Political Themes in Motion Pictures*,⁵ *Environmental Cancer—a Political Disease*,⁶ *The Least Dangerous Branch?*⁷—there is a question mark after that. And he is currently chairman of the National Association of Scholars.

Please welcome Dr. Rothman.

DR. ROTHMAN: I am getting too old for this. Thank you for the introduction. I am really pleased to be here, or at least ambivalent.

The current situation in law with respect to affirmative action or diversity is rather paradoxical in some ways because affirmative action—when students were admitted under affirmative action, the notion was that blacks had a special case, and so did American-Indians, because of the treatment which they had received, and they therefore were entitled to some special prerogatives. But if the decisions are made now on the basis of diversity, then the black exception disappears, and Hispanics have as much right as blacks, or African Americans, to be admitted on some sort of basis which—I will not call it quota, but which is quota-related.

This has two potential problems. One is that a conflict between blacks and Hispanics could escalate very sharply, under certain circumstances. The other is that, whereas the Affirmative-Action basis for special admissions had a moral case, the diversity is what makes it a pragmatic case, namely that diversity would affect all students in a very positive way, and therefore should be used. But if it turns out that the data shows otherwise, the Court would have to revise its decision. And that is something which I suppose the Court would not like to do, at least at the present time. We do not know what the Court will do ten years from now.

4 ROBERT LERNER, ALTHEA K. NAGAI, & STANLEY ROTHMAN, *AMERICAN ELITES* (1996).

5 STEPHEN POWERS, DAVID J. ROTHMAN, & STANLEY ROTHMAN, *HOLLYWOOD'S AMERICA: SOCIAL AND POLITICAL THEMES IN MOTION PICTURES* (1996).

6 S. ROBERT LICHTER & STANLEY ROTHMAN, *ENVIRONMENTAL CANCER—A POLITICAL DISEASE?* (1999).

7 STEPHEN P. POWERS & STANLEY ROTHMAN, *THE LEAST DANGEROUS BRANCH?: CONSEQUENCES OF JUDICIAL ACTIVISM* (2002).

In any event, the argument that diversity enhances education and interracial understanding rests upon a fairly significant body of social science literature. Unfortunately, most of this literature relies upon surveys of students and sometimes faculty and administrators. Surveys are crude instruments, indeed, and the results often produce interminable debates which vary so very much. So much for social science.

Reporter data, truth in memories, raise a host of problems ranging from selective recall to various response sets, which may be inadvertent or unconscious. Many of the most prominent studies contain questions which are quite dubious, such as, "how much has a diverse student body helped you work more effectively and/or get along better with members of other races?" It is a pretty leading question. In short, many social science surveys that support the argument that we need the benefits of diversity in college curriculum and college enrollment cannot preclude the possibility that favorable responses represent a shared mentality, rather than represent a valid inference of real-world effects. In this case, the argument that diversity is beneficial becomes circular. Students are taught that diversity is opposed only by racists and the misinformed. They are then asked whether diversity is valuable, and their positive replies are often seen as proof that diversity is valuable.

In order to avoid such problems in testing the hypothesis that enrollment diversity programs benefit the academic community, we chose a more indirect approach. In addition to standard questions, we asked students, faculty and administrators—three major university constituencies—to evaluate the educational experience offered by the college with no reference to diversity. Then we correlated their attitudes with separate, though incomplete, measures of racial diversity, namely the proportion of African American students. The study is part of a larger one which compares American and Canadian universities, which we have not gotten to yet. We hope to get there.

Our U.S. sample totaled 1,643 students, 1632 faculty, and 808 administrators.⁸ Our Canadian sample, of course, is smaller. Our survey addressed several aspects of campus opinion with regard to diversity. There is strong support among faculty, students, and administrators for the need to create multicultural courses, but not to make them mandatory. None of the constituencies agreed with the statement that "this university pays too much attention to minority issues."⁹ On the other hand, the majority of all three groups opposed hiring or admission using race or gender as counters.¹⁰

Eighty-five percent of the students agreed with the statement that "no

⁸ Stanley Rothman, et al., *Diversity and Affirmative Action: The State of Campus Opinion*, 15 ACAD. QUESTIONS 52, 57 (2002).

⁹ *Id.* at 58–59.

¹⁰ *Id.*

one should be given special preference . . . on the basis of their gender or race.”¹¹ Only 56 percent of the faculty and 48 percent of the administrators agreed with them.¹² Interestingly, 75 percent of the students, with only 57 percent of the faculty, supported relaxation of admission standards on minority groups in order to increase their chances for admission.¹³ However, all three groups—81 percent of faculty, 76 percent of the students, and 83 percent of administrators—massively oppose hiring faculty.¹⁴ I’ll let you speculate as to the reasons for the shifts in faculty views on the two questions.

We asked many other standard questions. I’ll report on just one more finding. Most of the members of all three groups believed that the effort to admit more minorities had no effect on university standards, and of the large minorities, 25 percent or more believe that academic standards have been lowered, and only very small numbers believe that standards have been raised.¹⁵

Now, the major focus—this is a side effect—the major focus of the study is based on four general questions testing perceptions of educational environment and three questions on perceptions of discrimination and the treatment of minorities. Not all questions were asked of all three samples. The point is that these questions were asked at the very beginning of the questionnaire and had nothing to do with diversity or affirmative action. We did not ask them that. We asked them how satisfied are they with their university experience, which we asked only the students. How well does the school educate its students? How hard do students work at their studies; we asked that of all groups. And how well prepared academically students were upon entering; we asked only faculty and administrators that.

Respondents were also asked whether minority students were treated better, worse, or about the same as white students; the extent to which racial discrimination is a problem at their institutions; and whether they personally had been treated unfairly because of their race, ethnicity, gender, or sexual orientation, or religious beliefs, or political views. These questions were asked of all groups.

Now, according to the original diversity model, increases in black enrollment should produce positive assessments over time from students regarding enrollment and regarding their educational experience. However, the correlations were in the opposite direction. As the proportion of black students rose, student satisfaction with the university experience dropped as to their assessments of the quality of education and work ethics of the students in general. In addition, the higher the enrollment diversity,

¹¹ *Id.* at 60–62.

¹² *Id.*

¹³ *Id.* at 62.

¹⁴ *Id.*

¹⁵ *Id.*

the more likely students were to say that they personally experienced discrimination. The same pattern of negative correlations between educational benefits of increased black enrollment appeared in the responses of both faculty and administrators. We did only a little bit with Asians and Hispanics because there were not enough of them in the sample, so this study will not be able to do very much with them.

Faculty members also rated students as less hard-working as diversity increased. Each valuation of college life that produced a significant correlation with enrollment diversity, defined as a proportion of black students, was tested by a regression that included a host of background variables, and which I shall not go into. But there are a lot of them; if you want to know, I will tell you later. It will take me the rest of the time just to reel that off.

PROFESSOR KMIEC: Two minutes.

DR. ROTHMAN: Two minutes. Okay.

Well, the higher the enrollment diversity, the more likely students were to say that they personally experienced discrimination. The same pattern of negative correlations between educational benefits and increased black enrollment appeared in the responses of faculty and administrators. Both groups perceived the decreases in educational quality and academic preparation as the number of black students increased. Faculty members also rated students as less hard-working as diversity increased. We did not ask them about diversity. We just asked them these general questions and did the correlations. And they are statistically significant, at the .01 level. They do not explain that much of a variance, but no social science study ever explains much of a variance. That is why people report the correlations.

Anyway, the argument has been made that actually admitting a larger number of black students is not the issue in terms of producing, more recently, better results. But you have to have enough black students so they can do other things, like have interactive seminars, have them meet in classrooms, get to know each other better, and see that they differ from each other. This argument goes one step back, namely that you can find the necessary, but not sufficient, conditions by having a larger number of black students in the class.

I am not persuaded by this. The studies I have seen are not persuasive. My experience does not persuade me that that is reasonable. Now, of course, we do not know for sure. I am trying to figure what to leave out. I—well, I am not going to say that. It will come out in the question period.

This does not mean that diversity is a goal that must necessarily be abandoned. The increased presence of black and Hispanic students produced in part by affirmative action or diversity does not seem to improve

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the educational interracial environment. However, the increased presence of Asian-Americans, who are often excluded from preferential programs such as Michigan's, seem to have at least some positive impact. It may well turn out that the desired benefits of a more diverse educational environment will be more rapidly treated if we do not pursue the goal too impatiently. However, much work remains to be done before we can make any strong statement about the advantages and disadvantages of diversity policy. Thank you.

PROFESSOR KMIEC: Thank you, Dr. Rothman, for your tolerance of my time quotas.

The next two speakers are respondents, and they are both quite skilled in statistical analysis. For the benefit of the non-statisticians in the audience, I would ask each of them to translate their remarks.

Professor Richard Lempert is the Eric Stein Distinguished University Professor of Law and Sociology at the University of Michigan. He is currently serving as the Director for the Social and Economic Sciences at the National Science Foundation. Dr. Lempert received his BA from Oberlin, his M.A. and Ph.D. in sociology from Michigan, and his law degree from the Michigan Law School. He has authored and co-authored numerous books and articles, including *An Invitation to Law and Social Science*¹⁶ and *A Modern Approach to Evidence*.¹⁷ His areas of particular investigation include the jury system, dispute processing, and affirmative action, as well as capital punishment. Please welcome Dr. Lempert.

DR. LOTT: He wants to go last.

PROFESSOR KMIEC: Do not welcome Dr. Lempert at this time. We will quiz him later.

The intervening respondent is Dr. John Lott, who is well known to us because he is a resident scholar at the American Enterprise Institute. He received his doctoral training at UCLA. Dr. Lott has held a number of academic positions at Chicago, Yale, Stanford, UCLA, Wharton, and Rice; also the chief economist for the US Sentencing Commission; has done profound work on the bias against the guns. He is currently completing a book on the importance of reputation and deterring criminals.

Please welcome John Lott.

¹⁶ RICHARD O. LEMPert & JOSEPH A. SANDERS, AN INVITATION TO LAW AND SOCIAL SCIENCE (1989)

¹⁷ RICHARD O. LEMPert, et. al., A MODERN APPROACH TO EVIDENCE (2000).

DR. LOTT: Well, thanks very much. I am honored to be here with such distinguished people on the panel. I suppose I first realized that there was a real problem in this area back when I was at Wharton. I kind of drew the short straw and had to be on the Admissions Committee for a couple years. Just to mention how fundamental this problem is, one of the things that I just could not get over was if you look at the number of African Americans who scored over 700 on the math portion of the SAT in the early 1990s, it was 26 in, I think it was 1992. And you had a school like Wharton where you have 4,000 undergraduates, and they average on the SAT combined totals of 1,450. Just try to figure out how you are going to—if even one school were to get ten percent of those students to go there, how many would be left for everybody else? So, the cascading problem that Richard brought up was something that I have thought about a little bit.

Now there are two sets of papers here. Both sets of these papers come to essentially the same conclusions, but I do not think the two sets of papers are equally strong. Let me start first with the research by Rothman, Lipset, and Nevitte.¹⁸ They provide two interesting papers. Clearly, of the two of these, the most important seeks to evaluate whether increased diversity improves people's perceptions of quality of education. And they look at this diversity in proportion to the student body, and at surveys of broad areas from students, faculty, and administrators. You know, it is interesting, the diversity they have there is—I do not think it is really proved what they think it has. The regressions are cross-sectional, looking across schools at one point in time, and comparing a school's characteristics with the survey data for these three groups.

Unfortunately, that is not quite the same thing as saying that you take a particular school, and you change its level of diversity in order to try to see how it affects people's evaluation of the school. The bad effect that they find from increased diversity on polling data, for many reasons, does not imply the same result that would apply for any particular school.

Let me just give you a simple example from something like industrial organization. There are lots of regressions, kind of more mundane ones. We will try to look at firm size and, let us say, the cost of firm production. If you run a cross-sectional regression, some people say, well, larger firms need to have lower costs than small firms do. But it could be that each firm is kind of at its ideal level of production for its costs. They may have certain specialized assets that cause them to fit certain niches. And so, if I were to go and change the size of any of the large firms or change the size of any of the small firms, whether I make them smaller or larger, I may increase the costs that they have. It could be that at one point in time, they're at their ideal point. And surely, that is a possibility that exists when you are looking at this type of data across schools with regard to diversity. You

¹⁸ Rothman, et al., *supra* note 8; Stanley Rothman, Seymour Martin Lipset, & Neil Nevitte, *Does Enrollment Diversity Improve University Education?*, 15 INT'L J. PUB. OPINION RES. 8 (2003).

know, it could be that all these schools have the right level of diversity for producing people's satisfaction with the schools and if you change it, you could be making things worse.

It is also very difficult to truly try to account for differences across places when you are using purely cross-sectional data. Ideally, you want to have what we call panel data, where you are going to be looking not only across places but by following each of those jurisdictions over time, so that you can go and see when a place changes in terms of its level of diversity; how things like the student satisfaction are changing relative to what they were before.

But you want more than that, in a sense, because there is one issue, and I suppose this kind of bothered me in the general discussion for a lot of these papers here; and that is you really want to have some type of exogenous change, something else that is kind of being imposed on these particular schools in terms of the level of diversity, rather than something that they're changing, their selection over time, because what could be changing the level of diversity could also itself independently be causing changes in people's perceptions about, you know, the quality of education that they are receiving.

And then, there is another general issue here, and that is just polling data *per se*. The way that this is set up is that different schools have high levels of diversity because, just generally, something else is causing both a high level of diversity as well as dissatisfaction. To put it another way, you want to ask why certain schools have higher levels of diversity than other ones. It is possible, and it could simply be by accident. It is also possible that they may have certain political views at the school that may make it less desirable for students to be there. For example, independent conflicts may arise as the school is pushing for more diversity. That is just one of many possibilities that could exist there.

Another problem is—and Rothman does recognize problems with survey data generally—if I go and give two people the same conditions, they may not come back to me in terms of the same answer, whether they are satisfied or not satisfied with the conditions. And I suppose one of the classic examples of that in labor economics is there are surveys for people on the job of whether or not they are satisfied, or what types of characteristics they are looking for in the jobs. And one of the things that people have shown for a long time is that if you take kind of the classic characteristics of male jobs—one of the things, for example, is riskiness of the job—it seems like when you ask men and women what characteristics they prefer for jobs, women seem to prefer the characteristics of men's jobs much more than men do. If you have these 1-to-10 scales, women give much higher scores than men do.

But the problem is when people go back and say: how much more do you have to pay a woman to essentially take a risky job, than you have to

pay a man to do a risky job? It turns out that you have to pay the woman much more. So, just because they go and they say, on a 1-to-10 scale, that they rank riskiness or find it more attractive relatively than men do, that does not mean that they're answering the questions in exactly the same way that the men do with the same set of facts that they may be perceiving there. You could have the same type of phenomenon that exists across different schools.

I would like to turn to Dr. Sander's research. The type of argument that he is making, or at least the results that he is finding, something that's been around for a while—I mean, Milton Friedman and Tom Sole have argued these types of cascading effects and impacts that these can have for a while, but despite that, I think it is still extremely useful for someone to actually go out and try to measure these things, and try to do it creatively with the data that is available.

Again, this is difficult data to deal with, and it is difficult for many of the same reasons that I was bringing up with regard to the polling data because ideally, you want to have panel data. You want to have panel data where you have some type of exogenous change that is occurring, that is not a choice made by the individual school itself. And you want to have changes that occur over time.

There have been a lot of improvements in the data, and you can just see it across the different papers as they are being written. Rick was mentioning earlier, I guess, and maybe he will talk about this in the response time, I guess he has some new work I have not seen on Proposition 209. Maybe that can answer some of the questions because, ideally, 209 could provide an interesting test here. You have something else that is being imposed on the schools in terms of whether or not they are able to or would use affirmative action. Now, he can argue that they get around it. The question is how quickly they get around it. I would argue, and it could be that for a year or two, you do see a big change in how they admit the students, and then after awhile, they get around it and you go back to where we were before.

But in some sense, it is even more ideal that they get around it, at least from a science perspective, and that is because then you kind of have two tests. You have got the change. You can go and see when they change. Who gets in first; do I see a change in the grades; do I see a change in the rate at which these students graduate; do I see a change in their bar pass rates in one direction. And then, does it go back in the other direction once they start going around it? It is nice to have those types of additional tests.

The only other thing that I can think of that might be analogous is when schools have to deal with the bar association. At least, I have heard stories about the bar association. Without naming names of particular schools, the bar association will come down on a particular school and say you are not admitting enough minorities. And so, the school will go and

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change how it admits people. Now, if you have schools that are a particularly important share of the law students that are produced in a particular state, you could look at the overall bar passage rates to see the spillover effect on other schools, if students do not get into one particular school and now they are, to deal with the cascade and the overall impact issues that Rick—that is kind of motivating his discussion there in terms of what has happened to the total number of people who are going to become lawyers or whatever.

But you can still, even without it being a major share, look at some of the more direct questions about what happens to their grades in school and what happens to the rate at which they graduate. So those are the types of things I hope Rick is going to go into, hopefully with this 209 data and it just generally could be done.

Rick recognizes a lot of these weaknesses with the data and tries to deal with them. In general, I think the most important thing that he tries to do, and you can see it in many of the discussions here, try to deal with all broader selection problems. They are inherent in this data. Anyway, I read six papers over the last week, two of them by Sander and four of them by his critics. And just as an aside, the amount of name-calling was pretty amazing to me.

PROFESSOR SANDER: Not on my side.

DR. LOTT: No, do not worry. It was much more obviously, by a huge ratio, from the other side. It brings in considerations about, how do you respond to that? Do you just try to respond as an academic, just keeping it on the level? But I am not sure. You would have to ask some political type how best to respond to these things. But Rick, as he says, has pretty much kept in line.

Also, I just cannot help but mention this. It makes me wonder what the gain is from having law reviews. I am pretty cynical of the refereeing process in general, but I think it would provide at least some kind of controls on these things. I cannot even imagine what it would be like having second- and third-year economics students edit economics journals, let alone second- and third-year law students edit economics papers for law reviews. And also, I think the papers would be a lot shorter than what I have had to read over the period of time, so that would be a minor benefit.

Now the broad data, as Rick has pointed out and Doug pointed out, is pretty shocking. I mean, I will just give you one thing that I am going to concentrate on in terms of this discussion. If you look at the top-tier law schools, 52 percent of blacks in those schools have average GPAs that are

in the lowest ten percent of their class.¹⁹ Only 5.6 percent of whites fall in the bottom ten percent of their grades.²⁰ And even Rick's critics acknowledge that these raw numbers are just amazing. The responses, though, avoid the most basic problems. Ayres and Brooks claim that Sander is wrong in the important sense that if you were to move students from the top-tier schools to the lower-tier schools, you would still have them falling in this very bottom percentage of GPAs.²¹ I will go more into that in a minute.

But the question of why they get low grades to begin with, let alone why they would still get these low grades even if we moved them to lower-level schools, is never explained, really. I mean, I could guess, knowing Ian Ayres pretty well, that he probably believes there is some type of systematic discrimination that is occurring in law schools which is preventing these people from going and getting higher grades. I am not really sure how that would actually work in practice with blind grading and law schools.

And there is one other general point I want to get into before I get into the numbers here, and that is rational expectations. It is kind of an economist term. But essentially, you believe the people should guess the problems in advance. One thing that makes me somewhat skeptical, at least coming into the results that Rick gets here, is why would people go to schools that they are going to end up doing so poorly at, not graduating, and then not being able to become lawyers to begin with? You know, it could be that people are just fooled into these types of things, but you would expect there would be something learned over time, and maybe after the amount of publicity that Rick's paper has gotten, maybe we should see some changes in terms of people going through that. I doubt it, but it would be interesting to see if that was the case. Okay, so you still need to explain—let me back up for a second. One of the most interesting sets of data that exists here is the first- and second-choice decisions that students face—there are multiple tables now that look at this type of issue.

But the bottom-line question I think needs to be addressed in these studies is why students pick their second choice, versus their first choice. It could simply be that if I could go into a high school and a low school, the reason that I picked the low school, the reason was I decided at the last moment I don't want to be challenged. Well, if that's the case, that provides certain information on systematic biases that might exist there in terms of their grades.

I mean, it could be that the students that go to the second choice are

¹⁹ Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 427 (2004).

²⁰ *Id.*

²¹ Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2005).

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students that would get as high a grade as if I were to forcibly move somebody who's going to their high first-rate school, and move them to a lower-ranked school. So, that might under-predict the benefit from getting rid of affirmative action. It could be income that decides to do that. If you have the income to do it, you also have the issue of someone with a higher income might be able to concentrate more on—do we have 15 minutes?

PROFESSOR KMIEC: Yes.

DR. LOTT: So, I did want to get to a point here. You know, it is possible that the second-choice students just kind of—they read Rick's studies, and they know that they would run into problems going to the other schools, and those would be kind of the ideal people that we'd have moving into it. But it's still a question of trying to control and account for it because there are certain systematic biases.

The Ayres and Brooks paper²² attempts to redo some of the basic regressions that Rick has, including a variable for whether or not there is a second choice here.²³ They claim to find that the second choice is not, you know, a student going there does not improve their grades relative to what they would have otherwise. I think part of it could be explained by not accounting for these biases that we are talking about.

But another thing has to do with the sample size that they have here. They are not comparing all first choice schools versus all the second choice. They have a very small subset of first-choice schools they are looking at. They are looking at first-choice schools when the student also reveals information on the second-choice schools, and that essentially cuts the sample size by about two-thirds that they have to make the comparison. And it makes it a lot less likely that they're going to get a statistically significant result.

Even more than that, while Rick does not run regressions on this, he does provide kind of a table that shows the means on the stuff there. One thing that's interesting is that the ones that are being excluded tend to produce an even greater difference between first- and second-choice schools in terms of things like bar passage rates. And so including those, you would imagine, and a regression would, not only because you have a larger sample size, but because the means are different there, be even more likely to produce statistically significant results.

So, there are other things here. I could go through the different regressions. I am not going to go through those. But let me just say a couple things to think about. We have seen a lot of institutional changes in law

²² *Id.*

²³ *Id.*

schools over time. You do not fail students anymore, really, in law schools. Why do you not fail them? I think part of it is this fact we are talking about in terms of GPAs. If you fail students these days, you would overwhelmingly be failing minority students. You also have the content of classes. I worry, from reading this type of stuff, whether maybe the emphasis on policy discussions very heavily in the top-tier law schools might put minority students at a disadvantage, if they are having these other difficulties going through and learning the material. On the other hand, it might not be too bad for some kid who scores really highly on the LSAT, because he can go and pick this up on his own. I will not go through this, but it is just a bit of an irony that the professors whose classes I have sat in on, that primarily tend to go and do policy discussions are probably the ones that push the hardest for affirmative action, and there might be a little bit of a tension there just to think about.

PROFESSOR KMIEC: Well, now a man who needs no introduction, because he has had one, but we welcome Dr. Richard Lempert. And in case anything gets lost in the translation, I want to get right to the kind of hardball part of the analysis here. Dr. Lempert writes that Professor Sander's research has serious statistical, analytical, and data flaws, and that he provides no reliable support for his hypothesis or conclusions that he draws from it.

With that as an introduction, Dr. Lempert.

DR. LEMPERT: As I set up my computer, I'd like to ask two questions. I know that this is a sophomoric test for a show of hands, but I am curious. The first is, in terms of this discussion and debate, how many of you would have different views on affirmative action depending on whether Rick Sander's arguments are scientifically accurate or, in fact, the real world is almost the opposite of what he says? Whose opinions would be changed?

(Audience responds.)

DR. LEMPERT: Okay, that is good and interesting to see. And of course, it is not necessary for anybody's opinions to be changed. If you view the Constitution a certain way, it does not depend on empirical evidence. But in a certain sense, there is no point in these discussions unless some people are open to science, as I am.

The second question, and this will not apply to the older faces I see out there, but I am also curious as to how many of you people who were in schools at a time there were black professors in law schools, encountered

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one or more black professors who you thought was really a good teacher or you felt had a real impact on your education?

(Audience responds.)

DR. LEMPert: Okay, I am going to come back to that in a bit. Is this on now?

Have you ever had this problem before? Do not even—here is a point we can begin with, which I think is maybe one of the few points that Rick and I are going to agree on. Rick has had this experience many times. He has gone before audiences who are presumptively unsympathetic to him. So now, we find the situation reversed; we will agree this is fair. And here are the questions I asked, at the same time.

[Brief pause to adjust PowerPoint slide]

PROFESSOR KMIEC: This is pretty much what we do in law school when we are not doing policy.

DR. LEMPert: Sorry about all that.

First, I just want to give you some numbers about how many people are affected. We tend to talk in terms of percentages. You hear 80 percent, 50 percent. What are the numbers? I should emphasize, this is 1991 data. Unfortunately the best we have is for the cohort entering in 1991. But the situation may have changed since then, and in various ways. Only with the 1991 data can we ask how many people were affected, and who?

If we consider affirmative action admits to be people who get into law schools when their index scores—that is, their undergraduate grades and LSAT scores—would have predicted that they would have not been admitted, then in 1991 there were 2,740 black affirmative action admits. Who was hurt by this, we can ask. Well, if we consider those hurt, those people who were predicted to have been admitted who had not been admitted because their places were taken by non-index admits, there were 4,392 white students who one would have expected to have been admitted on the hard credentials, who were not.

However, let us look at the number of whites whom we may think of as affirmative action admits: they are 2-1/2 times the number of blacks; thus there were more than 6,000 white students who were admitted to law schools though their credentials would have predicted that they would have been rejected. You could still have admitted about 2,000 of these affirmative action whites along with all the admitted affirmative action minorities

and also have admitted all of the whites who were predicted to be admitted and were not. Yet when whites who feel they should have been admitted to law school and were not feel they have been victimized by affirmative action, they focus on minorities admitted to law school with weaker credentials than theirs and not on the larger number of whites who were admitted although they did not have the index credentials that the schools that admitted them ordinarily demanded. That is just to give you an idea of the numbers.

My critique of Rick is simple, and I cannot say it any more kindly; I hope this does not count as name-calling. I do not think his work is very good science. It was called in one article “cold fusion.” I will not go that far, but I have serious problems with it. I think there are statistical and methodological errors in it. I do not think there is any support in these data for the mismatch hypothesis, and I think there is less than no support for his claims that attorney production would increase if we had no affirmative action.

At this point, some of you may want to scream. You all as lawyers know about, “he-said she-said” type cases, and I think you also know that the only thing worse is, “this expert said, that expert said.” How do we make any progress in resolving different social science claims, particularly in a brief commentary? In a certain sense, we cannot make truly serious progress, but you have on the web and the law reviews, articles that Rick has written, and that the critics have written. Also, we will publish—my co-authors—a web response to his reply in the *Stanford Law Review*.²⁴ If you really are interested and concerned, check out the detailed discussions and you can decide whose arguments hold up, or give the conflicting pieces to people who know statistics and they can decide.

However, the situation is not as bleak as it may be because Sander admits to at least a number of the flaws in his work. He does this in his reply to our critique in the *Stanford Law Review*.²⁵ He admits that our criticism of his estimate that the number of black lawyers would rise without affirmative action is apt—he calls this our strongest point. We certainly can agree, and this is one other point that Rick and I can agree on, that there would be huge fluctuations in what happens depending upon the number of whites who are applying to law school in a given year. He admits at another point that certain results depend on a questionable coding decision, where he lumps people as white when he does not know their race. And he also admits that his models are improperly specified because they do not take account of selection bias. Now, only the last, he sees as mattering. There are also what I call omissions by silence in his reply to

²⁴ Richard Sander, *Reply to Critics*, 57 STAN. L. REV. 1963 (2005).

²⁵ David L. Chambers, Timothy T. Clydesdale, William C. Kidder, & Richard O. Lempert, *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855 (2005).

critics. There are very serious critiques that I and my co-authors make in our article, which would expect to be answered if they were wrong, but they are not answered.

If you don't have a social science background, here comes my one lesson in statistics. If you take away nothing from this discussion except this particular lesson, and none of the details of our discussion, you still would have benefited. Rick writes about the T statistic, and I will just quote the part that is in italics, "T statistics above 2.0 are usually taken to signify that the independent variable is genuinely helpful in predicting the dependent variable."²⁶ That statement, as we say bluntly in our article, making a point he never responds to, is wrong. It is wrong in "Statistics 101" sense. As he himself recognizes, T statistics are very sensitive to numbers and to the statistical qualities of the distribution. One may have a highly significant relationship, particularly in a data set as large as the bar passage study, which has data on more than 20,000 students, and it may have no practical importance whatsoever. One of the problems with the analysis is that it treats everything that is statistically significant as if it was practically significant. That is simply not true.

Listening to his presentation, I want to give you one more lesson, one that John alluded to, and this is that correlation is not causality. The fact that people with low grades in law school do poorly on the bar exam does not mean that the lower grades have caused poor bar exam performance. One cannot ascertain that from the data.

There is no evidence of a mismatch. This slide provides a reanalysis of the data. Rick's hypothesis is very simple. If you hold index scores constant, because of the mismatch effect, people will do better the less challenging the law school they go to. Here we look at the data, and we hold index scores constant. We put an X for every prediction that is opposite the predicted direction, and P when it supports Rick's hypothesis. You will see in this table, which talks about black graduation rates, and in this table, which talks about black bar passage rates, that the Xs overwhelmingly predominate. Contrary to the predictions of the mismatch hypothesis, if you have a given index score, you tend to do better in both graduation and bar passage, the more selective—not the less selective—the more selective the law school you go to. This is completely consistent, I should note, with Bowen and Bok's study at the undergraduate level.²⁷

What is most important here, I think in these tables, is that the effect is strongest for students attending elite schools. John, who I think is not aware of all the data, suggested there was a huge problem in failures at elite schools. This is the one level of school where blacks tend not to have problems. They attend and they graduate and they get good jobs.

²⁶ Sander, *supra* note 19, at 429.

²⁷ See generally, William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (1998)

In my own research with some colleagues on Michigan Law school alumni, we found that over a 27-year period, about 95 percent or more of our affirmative action graduates—most of whom were black—graduated and passed the bar. Their incomes and job satisfaction were no different than were white alumni over that 27-year period, and they tended to do a bit more service. So the mismatch hypothesis in the bar passage data, as Rick originally analyzed them, are not supported.

He does make a selection bias argument, and in a sense he has to because the data when simply analyzed do not support his analysis. So it becomes a more complicated analysis. It is basically one that controlling for index scores, blacks do not do worse than average as school selectivity increases, but that is because blacks in more selective schools have disguised strengths that are not measured, and that if these blacks, say at a school like Michigan or Harvard, went to a school like, let us say, Iowa or DePaul, they would do even better than they do because of selection bias.

I have a couple of things to say about this—the first is this is completely inconsistent with the first point that Rick made in his presentation to you. The first point he made his discussion was that law schools, particularly the elite ones, select only mechanically on the basis of LSAT scores and undergraduate grade point averages. You cannot have that both ways. Either law schools select on features beyond the index credentials, in which case there may be something to the mismatch hypothesis, or there is no mismatch hypothesis—no selection bias, I should say—because selection bias depends on selection occurring on unmeasured variables. There is, I should note parenthetically, a kind of self-selection which Rick's response doesn't take notice of, which does open the door slightly to selection bias and raises some complications. But the key focus is on law schools. So, you can't have it both ways; you can't both claim that law schools, whatever they say, admit applicants almost entirely on the basis of index credentials plus race and argue that selection bias on unmeasured variables explains why, despite your mismatch hypothesis, black students at more elite schools seem to do better than black students at less elite schools in graduating and passing the bar.

There are other analytic problems. As John correctly alerted us to, there may be other things that explain outcomes. In fact, if you look at the differences between second-choice and first-choice people, you find that they differ dramatically in the degree to which their motives are driven by financial aid. A much higher proportion of second-choice people than those who went with their first choice said financial aid was very important in choosing what law school to attend. We know that schools tend to give their financial aid more generously to those they most want, so there is still selection bias in Rick's analysis, and he does not correct for that.

What does occur if you abolish affirmative action is a devastating effect on black enrollments. If you look at current data or relatively recent

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data, 2003 data, if you just select on the basis of LSAT and undergraduate grade points, blacks would constitute 75 percent of the top ten percent of the class in the top ten schools, and only one percent of the top 11 to 25 percent schools; you can see those numbers, 1.65 percent when we get to the 26 to 50-percent schools. So there would be a devastating effect. Even if we double these on the theory that law schools would look at other factors, you have a miniscule representation of blacks. This has a devastating effect on the black professorate. Sander's own data show this, yet 25 percent of 604 black law professors teaching in ABA-approved schools went to Harvard and Yale, and the top ten law schools produced 40 percent of black law professors.

I cannot comment on Rothman at all. I do not think his science is nearly as flawed. I just think it does not say terribly much. We can ask questions about that.

I want to just end with one note. Why do I care? I have spent I cannot tell you how many hours. My wife can tell you how many late evenings we have not spent together because of my reworking of these data. I do care. I care passionately about this. Partly, I care about good science, but beyond that I do care about affirmative action.

One reason is I care deeply about equality. It would be lovely to think that racism was behind us, but recent research is even more striking about what is going on; for example, research reveals that there is a cost to a black name. One researcher sent out job application forms answering real ads. The vitas are identical; many more and many quicker callbacks went to those with a white name than to those with a black name. In one study, it turned out the whites with a criminal record were more likely to get job interviews than blacks with the same vita without criminal records. The implicit association test shows mental processes that disadvantage blacks without people even realizing this. There is also a stereotype threat which seems to lead to poorer test performance, regardless of what has been learned, by stigmatized minorities.

The second thing is I care deeply about integration in the schools that I teach in and the society I live in. This partly is a function of me being raised in the 1960s and looking at the pictures of the South, but there is also a note of pragmatism. There was just an interesting column in the paper today about the French example, what is going on and how the lack of integration, the lack of caring for others, has led to sometimes violent social conflict. I want us all to live together in equality and in peace.

Thank you.

PROFESSOR KMIEC: We have very little time left, but I want to give Dr. Sander in particular, since his presentation is at the core of this, the opportunity for rebuttal. And I would ask those who have questions to be

at the microphone, as you already are. And I would ask Dr. Rothman to lead off the question period.

Dr. Sander.

PROFESSOR SANDER: I think Dr. Rothman is going to make a few comments while I change the computer.

PROFESSOR KMIEC: Okay, we are changing computers.

Dr. Rothman.

DR. ROTHMAN: I have been beautifully ignored here, so I do not have many comments to make. I would only say that the worst criticism one can get is that you did not do the study I would have done. The fact is we did not do the study that someone else might have done. We did not have the money, and we did not have the time. We may do some more of it later. And we agree that that raises some serious problems.

The point, however, is that we had a modest goal: to raise some questions about articles on affirmative action and diversity, which are widely published in our field, which dominate the field. We had some data which raised some questions about those. And all we do is raise questions, and it may not be much, but it is a beginning.

My colleague who is a statistician happens to be sitting in the audience, and I am going to ask him if he has anything he wants to say at this point. Bob.

AUDIENCE PARTICIPANT: Bob Lichter. I have worked with Stan in the past. I vetted some of the statistics on this article. Of course, this is what Dr. Lott raises as issues of research and design. And of course, it is always better to do longitudinal studies. But the real world does not always permit ideal solutions.

I think the strength of the Rothman paper is that it takes a body of literature that is overwhelmingly based on survey data that argues because people say diversity is good, that means it actually is good. In a sense, if we get rid of this problem of what we call social desirability response set by saying, well, one would think that this is true that if the schools that have higher minority representation, people would say nicer things about the school, they would be happier, so on and so forth. You would think this would also be true, but it is not the case.

Now it could be, of course, that there is some additional variable out there that is influencing both diversity levels and satisfaction. Dr. Rothman did not have time to mix a lot of the control variables. It could be that all

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over America, schools are at their perfect level of satisfaction, that if Villanova has more minorities than Temple, and dissatisfaction is also greater, it just happens that way it is possible. And we have to admit these possibilities. But I think a lot of people are going to advance by introducing real-world variables.

And if you look at this not as a case of trying to prove negative effects but basically trying to support cases that are made purely on survey data and try to support it using more strenuous measures and finding that it is not supported, I think that is a genuine advance in the argument.

PROFESSOR KMIEC: Thank you, Dr. Lichter. And now we will hear from Dr. Sander.

PROFESSOR SANDER: Yes, I will just add, I agree completely with what Dr. Lichtman just said. I think the key contribution of the survey research that Dr. Rothman has done is to point out the methodological weaknesses of what has been so heavily relied upon and try to set us on a path towards asking the questions in a more meaningful way, that are actually capable of having multiple answers. We are running late, which is a shame because, as I said, I think the key usefulness of these sessions is real engagement. But I am going to try to engage as many of the points as I can in just a few minutes.

This is one of the key regression analyses in systemic analysis. And Professor Lempert argues that I am misstating what the statistical significance is, and that becomes a serious problem because it leads me to think that relationships are meaningful when they are not meaningful. And he has argued specifically that equations like this do not really tell us much about actual performance.

The point of this equation is to illustrate, do a regression analysis, to try to show that law school GPA is tremendously more important than school eliteness in how you do on the bar. And it is something that is hard for non-experts to interpret. So it is particularly vulnerable to an argument that sort of says, well, that does not really prove anything.

So, let us see if this proves something more. This is a chart showing the proportion of students who graduate and pass the bar. It is essentially a crosstab, trying to illustrate the data behind the regression I just showed you. Students in the left-hand column are students who have GPAs in the bottom 10th of their class, at schools ranging from the most elite, that's tier one, to the least elite, that's tier six. In the right-hand column, you have GPAs of students in the top half of their class. You can see that there's an astonishing difference. GPA matters enormously.

This regression equation is not one that is showing a tiny marginal effect. It is showing a fundamental effect. It is showing most of what drives

these outcomes. And you look at this data in 20 different ways and you will come to that same result. What is disappointing about Professor Lempert's analysis, so many of his criticisms and some of the other criticisms that have been published, is sort of trying to talk past the numbers, not really grappling with what the data really shows.

Another example of this is the first-choice, second-choice analysis. We have talked about it extensively, but you really have not seen what it shows. Out of the 2,000 students in the LSAT study, about ten percent of them chose to go to less elite schools.²⁸ And on average, what that did is it eliminated about a third of the mismatch between them and their classmates. And this chart shows outcomes. The first column shows the rates at which whites graduate and pass the bar. The second column shows the rates at which blacks who go to their first choice schools graduate and pass the bar. You can see these enormous disparities—92 percent bar passage for whites; 59 percent for blacks.²⁹ The last column shows the success rates for blacks who went to their second-choice school; in other words, those who reduced somewhat the size of the mismatch that they were under. And the third column shows the predictions that fall from a simple linear application of the mismatch theory, my favorite.

I think you can see that these are fairly powerful results. There are dramatic differences between how blacks do when they reduce their mismatch sum and when they are maximizing in their league. This data is overwhelming. It speaks for itself. If you analyze statistically and try to do a regression analysis—I have not published the regressions, but I have run all the regressions that Ayres and Brooks do—you find virtually every relationship that is predicted to be significant theoretically is in fact significant.

Ayres and Brooks did an initial analysis, where they found the difference in first-year grades between first- and second-choice students was not significant, and then they wrote up an analysis saying, well, this data does not work. I went through their data over a period of weeks. We found the errors in their analysis. They redid it, and they came to the exact same numbers that I did. I do not have any disagreement with Richard Brooks on what the numbers are. But they rewrote the text in such an elliptical way, not really wanting to change their conclusions, such that John Lott could carefully read it and conclude that they are saying that there is not a significant difference in first-choice rates. They do say there is a significant difference, and in fact, the Stanford editors forced Richard Lempert to change his article to acknowledge that there was a significant difference.

DR. LEMPERT: That is just completely false.

²⁸ Richard H. Sander, *A Summary of "Systemic Analysis,"* 1 J. RACE, GENDER, & ETHNICITY 4, 15 (2006).

²⁹ *Id.* at 14.

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PROFESSOR SANDER: Now, it is not. Your text was changed to remove your claim that there was no significant difference between first- and second-choice grades. Go back to read your article. That change was made about a week before publication. There is no debate between Ayres, Brooks, and I on the fact that most of these relationships are statistically significant.

They find, for example—one area where they do find a difference is they say third-year grades are not significantly different between the first- and second-choice blacks. And that finding—they find, by excluding from their analysis, all students who drop out before they get to the third year. In other words, they eliminate most of the students who have bad grades because they have not graduated. So it totally skews their analysis. They get meaningless results. When he put the students back in you would devastate a systemically significant result.

So, I think that the debate has been ill served by a failure to not engage the data, and what we need are more social scientists who do not have a predetermined agenda looking at the state and carefully evaluating results. And I very much appreciate Dr. Lott doing that.

Thank you.

PROFESSOR KMIEC: There are a number of people waiting with questions. I would ask you to make them very targeted and very brief. We are going to take a few minutes. Please direct your question to a member of the panel.

AUDIENCE PARTICIPANT: This question is for Professor Sander. There are a few factors that I have noticed have not been mentioned so far that may be relevant.

First of all, I am wondering what the impact on the results that you found on racial preferences at the undergraduate level in the employment field; and also, what the, I guess—and also the reverse cascade effect for white students who wind up at schools that they would otherwise have gotten into a better school.

PROFESSOR SANDER: Okay. I followed the second part of your question is about, how does this affect whites. But say again the first part.

AUDIENCE PARTICIPANT: The first part is about the impact—

PROFESSOR KMIEC: : I think we actually only have time for the

second part, so go ahead and answer the second part.

PROFESSOR SANDER: Well, the effect—I mean, it is certainly a clear policy implication from this research that whites overall should benefit from preferences, as they are used currently, rather than being hurt. In other words, if they actually do achieve an admission, whites are insulated to some extent from being at the bottom of the class and having the negative effects that would result from that.

It is a little bit hard to tell because Rick Lempert again sort of mentioned that many whites fall outside the normal—the middle range of index scores of individual schools. But the degree to which they fall out of those ranges tends to be much narrower than the area where blacks are falling. So we would expect if the system was a white-only system, the mismatch effect would probably shrink because there would be a smaller gap between the credentials of the bottom of the class and the credentials of the top of the class. I think it is most clearly true in the job market scenario that whites probably benefit from having higher average GPAs, sort of as a result of involuntarily being matched with less elite schools.

PROFESSOR KMIEC: We have one final question.

PROFESSOR SANDER: I just want to point out that reading from the text, Rick, your analysis says, “Ayres and Brooks find that students who attend their second-choice school had either received better final law school grades”—you were forced to change that from saying initially saying first-year law school grades, if you go back and look at the text.

DR. LEMPert: We were not forced to change anything, at least—

AUDIENCE PARTICIPANT: Much of what I have heard from most of the panelists today kind of seems to ignore the vested interest that the establishment, big firms, the government has in affirmative action. And so—just two targeted questions with respect to that—Professor Sander, with reference to Howard University, I know it has a great reputation as a law school, but was the same 170-point gap from among the law students at Howard, as you would find with those same top minorities at the elite law schools? Because, the fact that the large law firms go there to interview means nothing, because every firm has policies where they need to bring in, or they are looking to bring in, a certain percentage of minorities, so that would obviously be a great place to go.

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PROFESSOR SANDER: Yes.

AUDIENCE PARTICIPANT: And second, Professor Lempert, how can we accurately measure things like, “they graduated” or “they got good jobs,” when we know once again that the government, big firms, are going to go out there and recruit minorities because of their own policies and what they consider valid social policy? Thank you.

PROFESSOR KMIEC: Thank you for that question, and we will ask a brief answer from each respondent.

PROFESSOR SANDER: Yes, very briefly, Howard has smaller preferences because they have sort of a large built-in pool. They also have a much larger percentage of blacks, so that also reduces the mismatch effect on its own. So the result is that you get a pretty substantial number of Howard blacks who were the top 20 percent of their class, and those students do extremely well. And you will find that generally the historically black schools, they have higher bar passage rates and better outcomes than one would expect from just looking at their incoming credentials. It suggests that there is something positive going on.

PROFESSOR KMIEC: And Dr. Lempert.

DR. LEMPERT: With respect to that question, do we just see so much affirmative action of in the legal practice world that all these data are meaningless? I think not. At least in the Michigan data, when we looked at it many of our graduates who were on second and third jobs, as white or black—there is huge amounts of changing, as you now know, unlike the earlier world. And I at least find it very hard to believe that when you’re talking about average salaries on the order of \$200,000, that firms are intentionally hiring senior people at those salaries, and the Harvard average, like \$300,000 a year—just to have a black face in there, I think these people have to be valuable.

When you look at accomplishments, when you look at leadership roles, you find that the minorities—we looked at blacks in regressions, but we were looking at Hispanics and blacks for much of this. You know, they just have very high achievement rates. If you are an alumnus and as a faculty member, you see people come back, you are aware of the high achievement of your black and white students in elite law schools. So I just do not—you know, we have a discussion of exactly this issue because your reaction is a common one. In our article, we try to deal with the reasons why we do not think that has a major impact.

PROFESSOR KMIEC: Dr. Rothman, Dr. Sander, Drs. Lott and Lempert, ladies and gentlemen, thank you for your patience. Have a good one.

(Panel concluded.)

**The Federalist Society for Law
and Public Policy**

presents

**AGENCY PREEMPTION: SPEAK SOFTLY, BUT
CARRY A BIG STICK?**

2006 National Lawyer's Convention

November 18, 2006

PANELISTS:

Hon. Ronald A. Cass, President, Cass & Associates, PC and Dean
Emeritus, Boston University School of Law

Professor Thomas W. Merrill, Columbia University School of Law

Professor Catherine M. Sharkey, New York University School of Law

Hon. Daniel E. Troy, Sidley Austin and Former Chief Counsel, United
States Food & Drug Administration

Hon. Diarmuid F. O'Scannlain, United States Circuit Judge, United States
Court of Appeals for the Ninth Circuit (moderator)

JUDGE O'SCANNLAIN: It is a great pleasure for me to welcome you to our panel today, entitled "Agency Preemption: Speak Softly, but Carry a Big Stick?" As moderator, my task is twofold. First, I hope to frame the panel discussion by reference to preemption law generally, as well as recent events and developments in agency preemption.

Secondly, I hope to convince you of the enormous importance of this otherwise arcane topic, because, while it may sound esoteric, it goes to the heart of the constitutional order, in my view. As one scholar explained, the extent to which a federal statute displaces state law affects both the substantive legal rules under which we live and the distribution of authority between the states and the federal government.

Speaking generally, there are three types of preemption: express preemption, applied field preemption, and implied conflict preemption. This panel will focus on implied conflict preemption, which courts find either where it is impossible for a private party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishment and execution of the federal purposes and objectives of Congress. Given that we have a former official of the Food and Drug Administration on a panel today, I thought I would set the stage for today's panel debate by discussing a recent state court case dealing with agency preemption.

The case is *Levine v. Wyeth*,¹ by decision of the Vermont Supreme Court. The facts of the case are simple, yet sympathetic. Levine brought a tort action alleging negligence and failure to warn against the drug company, and was awarded \$6.8 million in damages by a jury. Her claim was that the warning accompanying the drug was insufficient to alert her and her doctors to the dangers of intravenous injection. The primary question on appeal was whether Levine's failure to warn claims were preempted by the FDA's approval of the particular label that accompanied the drug.

The Vermont Supreme Court essentially held that the FDA's approval of the drug label constituted a warning floor and not a ceiling. In other words, the court thought Wyeth could have, and should have, done more to warn Levine of the dangers associated with intravenous injection of Phenergan. In dissent, the Vermont Chief Justice argued that, by approving Phenergan for marketing and distribution, the FDA concluded that the drug, with its approved methods of administration, and label, was both safe and effective. He continued, "In finding defendant liable for failure to warn, a Vermont jury concluded that the same drug, with its FDA-approved methods of administration and as labeled, was unreasonably dangerous. These two conclusions are in direct conflict."² In the Chief Justice's view, the FDA's approval of the warning label constituted both a floor and a ceiling, and Levine's claims were preempted.

Such competing views raise important legal questions. In *Levine*, the drug company's position was bolstered by a statement of the FDA that cases rejecting preemption of failure to warn claims pose an obstacle to the Agency's enforcement of the labeling requirements. So, what sort of deference, if any, is due to an agency's statement about the preemptive scope of its regulations? Most broadly, in promulgating preemptive regulations and adopting statements regarding preemption, can and do agencies adequately protect the values of federalism? How should the traditional presumption against preemption operate in this realm? Finally, what is the best way to protect citizens like Ms. Levine?

¹ No. 2004-384, 2006 WL 3041078 (Vt. Oct. 27, 2006).

² *Id.* at ¶ 45 (Reiber, C.J., dissenting).

The U.S. Supreme Court has the opportunity to enlighten us on the proper resolution of some of these difficult questions when it considers the case *Watters v. Wachovia Bank*³ later this month. At issue in that case is a regulation promulgated by the Office of the Comptroller of the Currency, which states that unless otherwise provided by federal law or OCC regulation, state laws apply to national bank operating subsidiaries to the same extent that they apply to the parent national bank. The Sixth Circuit, following both the Second Circuit and my court, the Ninth Circuit, applying *Chevron* deference,⁴ took the view that the Commissioner's regulations preempted Michigan banking laws in their entirety, as applied to the operating subsidiaries.⁵ Perhaps one of the panelists will comment on why it is that the Supreme Court took *Watters*, given the fact that the three prominent cases all came out the same way.

In any event, to help us think about the many important issues and lead-up to *Watters* and beyond, the Federalist Society has gathered a distinguished group of scholars who will speak with us today. We will be hearing first from Daniel Troy, who is a partner in the Washington office of Sidley Austin, and immediately prior to that served as the Chief Counsel of the Food and Drug Administration, after being appointed to the position by President George W. Bush. In that role, Mr. Troy was an active player in the FDA's generally successful assertion of preemption in selected product liability cases. Mr. Troy is a graduate of Columbia Law School and served as a clerk for D.C. Circuit Judge Robert Bork from 1983 to 1984.

Next, we'll be hearing from Ronald Cass, who currently serves as the President of Cass & Associates. He previously served as the Dean of the Boston University School of Law from 1990 to 2004, and was a commissioner, and then later vice-chairman, of the U.S. International Trade Commission under Presidents Reagan and Bush I. Dean Cass is a graduate of the University of Virginia and of the University of Chicago Law Review, with honors. After graduation, he served as law clerk to the Honorable Collins Seitz, Chief Judge of the U.S. Court of Appeals for the Third Circuit.

We will then hear from Professor Catherine Sharkey, a newly-minted professor of law at Columbia Law School and currently a visiting professor at NYU Law School. Since joining the Columbia faculty, professor Sharkey has come to be recognized as a leading voice in the legal academy on both punitive damages and products liability preemption. Professor Sharkey is a graduate of Yale University, as well as Oxford, which she attended as a Rhodes Scholar. She is a graduate of Yale Law School and served as

³ *Watters v. Wachovia Bank, N.A.*, 127 S.Ct. 1559, 1573 (2007) (affirming the Sixth Circuit's holding that the Commissioner's regulations preempted Michigan banking laws).

⁴ See *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (establishing the *Chevron* standard).

⁵ *Wachovia Bank v. Watters*, 431 F.3d 556, 558 (6th Cir. 2005), *aff'd*, 127 S.Ct. at 1573.

law clerk for Judge Guido Calabrese of the Second Circuit and Justice David Souter of the Supreme Court.

Finally, we will hear from Professor Thomas Merrill, the Charles Keller Beekman Professor of Law, also at Columbia Law School. Professor Merrill recently filed an *amicus* brief on behalf of the Center for State Enforcement of Antitrust and Consumer Protection Laws in the *Watters* case that will be argued shortly. He is a graduate of Brunel College and also attended Oxford as a Rhodes Scholar. After graduation from the University of Chicago Law School, he served as law clerk to Judge David Bazelon of the U.S. Court of Appeals for the D.C. Circuit and to Justice Harry Blackman of the Supreme Court of the United States.

We will hear first from Mr. Troy.

HON. MR. TROY: Thank you, Judge for the introduction. It's a pleasure to be here.

Often those of us who are members of this Society and in favor of preemption in appropriate circumstances are accused of being hypocrites. Everybody says, "Well, it's the Federalist Society," confusing Federalists and federalism. I want to make clear that there is difference between the Federalist Society and being reflexively in favor of federalism. Madison was selected as the icon for our group not because of his much later states rights positions but because he was the father of the Constitution. Sometimes I think we should have selected both Madison and Hamilton, because it is, of course, the Federalist Papers after which the Society is named, and those Papers are in favor of a strong, albeit limited, central government.

It is important in the context of this conference, which is about limited government, to focus on the importance of preemption to limiting government. What do I mean? Well, in the case of food and drugs, if you have very strong federal regulation, but not preemption, you end up with perhaps 51 levels of government, 51 different systems that people need to navigate. Now, one can imagine a world with no federal regulation of drugs at all, with every state regulating. You might have competitive federalism, in that case, and you might not.

But when you have the system that we have, at least in the realm of drugs and medical products, you cannot begin to test a product on humans without getting the federal government to approve it in advance. You cannot market the product without the federal government approving it in advance. You cannot manufacture the product without the government approving it in advance. People hear the words "new drug application" and think, "Oh, college application." In fact, a new drug application normally has as much data, as many boxes of documents, as would literally fill this room. These applications are delivered to the Agency by the truckload. The Agency looks at that data and, for the purposes of this panel, compre-

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hensively determines what may and may not be said about the drug product through labeling. Labeling is not merely a floor, notwithstanding what the Vermont Supreme Court said.

What the FDA said in its most recent preemption preamble is that it is a floor and a ceiling. I want to illustrate that by talking about some specific cases, because the devil is in the details and, on the one hand, this stuff can be esoteric and arcane, but on the other, if you really look at the public health of the matter—and, I'd like to suggest, the common sense of the matter—I think the case for preemption becomes very powerful.

Let me talk about the case called *Dowhal*,⁶ the California Supreme Court case. As many of you know, California has something called Proposition 65,⁷ which requires warnings if there's any substance in a product that can either be carcinogenic or can cause harm in a pregnancy. The issue in the case involved nicotine replacement therapy products. These are products that somebody takes if they're trying to quit smoking. The FDA said, "We want the warning to say, 'Try to stop smoking without this product. This product can be useful, but talk to your doctor. Nicotine can have adverse impacts.'"

There was a lawsuit filed under Prop 65—which, to his credit, the California Attorney General did not join. The gravamen was that they wanted the nicotine replacement therapy product to say, "Nicotine can harm your baby." That was all. But the FDA rejected this warning in a series of letters and in more formal responses to citizens' petitions. It said, "We don't want that warning." That warning might cause a woman to misunderstand that, actually, nicotine replacement products are a good thing.

Well, the California Court of Appeals said, as the Vermont Supreme Court did, that it's always better to have more warnings, and the FDA got involved. One thing the federal career officials believe is that when they decide a matter, when they have, in the language of *Chevron*, directly spoken to the precise question at issue, they should get to win. So they thought in this case. Fortunately, we went to the California Supreme Court, and the California Supreme Court said, "Actually, more warnings are not always better."

Perhaps the most controversial case involved something called SSRIs (antidepressants). It is a tragic fact that people who are depressed tend to commit suicide. So, it's hard to tease out whether there's a connection between antidepressants and suicide. At the time these products were first approved, the question to the FDA Expert Advisory Committee was: Should there be a warning that these products might cause suicide? They said no because they didn't think there was data to support that. Secondly, they thought it might dissuade people who were depressed from taking

⁶ *Dowhal v. SmithKline Beecham Consumer Healthcare*, 88 P. 3d 1 (Cal. 2004).

⁷ CAL. HEALTH & SAFETY CODE § 25249.5 (2007).

the drug.

There are many people concerned about antidepressants. So, for example, the Scientologists and Public Citizen came back to the FDA time and again asking the Agency to put this warning on, and the FDA kept saying, "We're sorry, but we don't think that's the right thing to do. It will over-warn. It's not just a floor; more warnings are not always better."

Well, a lawsuit was brought in the Tenth Circuit,⁸ the thrust of which was that, in this case, Pfizer should have labeled its antidepressant product Zoloft to say, "This product can cause suicide." It was brought by someone who survived a relative who had taken the product and six days later committed suicide, tragically.⁹ The district court said that more warnings are always better, the suit can go forward. Again, the FDA got involved and said, "Excuse me, we think that would have misbranded the product."

So, in talking about conflict preemption, it certainly begs the question, if the FDA thinks a product would be misbranded, how can state law requirements compel product labeling that would be technically misbranded and illegal under federal law? If that is not implied conflict preemption, I don't know what is.

The FDA has continued to intervene, but it's important to note that the Agency itself does not have litigating authority. The FDA intervenes through the HHS General Counsel's Office and the Justice Department.

It is the final backstop. This is, I think, one of the things that has caused this controversy and caused this panel. Instead of intervening with individual *amicus* briefs, the FDA issued this broad statement on preemption that basically said, "Our regulations are not just a floor, they're also a ceiling. More warnings are not always better. And when we make a decision we are not looking at the benefits and risks of a product in the context of an individual. We're making a societal decision. We understand that all drugs have risks. There are no drugs that are risk-free; people often forget this. And so, we understand when we put the product on the market that there will be some adverse events. That is an unhappy fact that comes from having therapeutic products. But we're making a broad risk-benefit calculation, and so that calculation must necessarily displace state suits that would have the effect of undercutting the FDA's definitive determination about the warning label."

And so, to close, this is part of what is sometimes called the "stealth tort reform" by the Bush administration. But it seems to me that if you're going to have a very powerful regulatory scheme, that there is naturally going to be some state regulation imposed through the product liability system that has to be set aside. Thank you.

⁸ *Miller v. Pfizer Inc. (Roerig Division)*, 196 F.Supp.2d 1095 (D.Kan. 2002).

⁹ *Id.*

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JUDGE O'SCANNLAIN: Dean Cass.

DEAN CASS: Before I start, I have to say I had a phone conversation with my colleagues here, and I misunderstood the topic. I thought that they said talk softly and do shtick. So I'm going to begin with a brief anecdote.

This is actually a story my wife told me, involving a friend of hers who one day saw a funeral procession in the suburbs of Washington. It was a very unusual procession. In New Orleans, you're used to seeing that but not in Washington. It consisted of a hearse followed by a second hearse, followed by a woman dressed in black walking a dog, followed by a thousand women in single file.

My wife's friend went up to the woman walking the dog and said, "You know, I have to ask you. This is the most unusual funeral procession I've seen. Who's in the hearse?" The woman said, "It's my husband." "How did he die?" The woman pointed and said, "My dog attacked him. We were having an argument. The dog took it seriously, went berserk, and killed my husband." Her friend apologized and said, "Who's in the second hearse?" And the woman said, "It's my mother-in-law. She tried to intervene and the dog killed her too." Susie's friend thought for a minute and said, "Can I borrow your dog?" At which point, the woman said, "Get in line."

There are some ideas that seem like good ideas, and appeal to a lot of people. We're really not dealing with one idea here, but three: the idea of limited government, the question of the level of government appropriate to make a particular decision, and the question of which organ of government should make that decision. What's the right competence? Is it the courts? Is it the agencies? Is it the Legislature?

For me, the ultimate test is not, "does this get us a particular amount of government?" It's a combination of quantity and quality of government. If you look to the Framing, the concern wasn't just to limit government. After all, the Constitution expanded the national government in very significant ways over the Articles of Confederation. The goal was to preserve and protect liberty and security, which is done by having not the minimal government, but the right sort of government, delivered in the right way.

The Constitution gives the national government control over interstate commerce. It also has a provision decreeing that the national government should not tax or lay particular impediments to the trade coming out of any one state. It says to the states that they shouldn't lay taxes on the trade coming out of their states unless they're so directed by Congress; and the tax goes to the Treasury. What the Framers were quite clearly trying to do was to facilitate the free flow of goods among states. They were cognizant of the fact that if you don't give the national government the control over

the flow of goods within states, you will have a lot of impediments to trade, because states have an incentive to internalize benefits and externalize costs.

We see this all the time when you look at how state attorneys general deal with companies doing business in their state. They try to impose special burdens on the business that can bring benefits into their state; they try to localize regulation of what is a national or international enterprise; and they frequently do this using very ham-handed means, because if they were more transparent about what they were doing, it would be more difficult to get where they want to go.

The distinction Dan Troy drew between those who are Federalists, believing in a system with different levels of government, and those who believe that all decisions should be made by the state or local level, is a very important one. There are certain decisions that should be made at the state or local level because they deal with state and local problems. That is most congruent with protecting the liberty and the values of the people in those states or localities. When you deal with something that has national or international scope, giving states the right to speak to those issues can be counterproductive to liberty, security, and efficiency.

When we are trying to determine who ought to be making these decisions, we are often dealing with statutes that most of us might not like. We think the area of regulation may not be a good thing. We think the national government is excessively regulating. But to then say that the way to deal with this problem is to allow states to also regulate may impose additional duplicative and conflicting burdens on businesses. Those are the things we ought to disfavor and avoid whenever possible.

A lot of the cases we are dealing with here deal with the question: When an agency is regulating, what presumption should attach? Should the presumption be that an agency regulation ousts state regulation? Should we be relatively inclined or relatively disinclined to find conflicts? Historically, the rule has been that we are relatively disinclined to find conflicts.

The next level of argument is: Who ought to be making that determination? Here is where things have gotten more contentious. The courts have said that the agencies at the national level issuing regulations are given deference in interpreting the law because Congress intended, in creating this particular regulatory scheme, to authorize the agency to be the first place ambiguities are resolved. This is a matter of statutory interpretation. That interpretation logically extends to the interference or noninterference with the schemes of state and local governments.

Judge O'Scannlain asked, "Why, when all of the courts—the Ninth Circuit, the Second Circuit, the Sixth Circuit—came out the same way on this, did the Supreme Court take *cert*?" I think they were confused. They saw the six upside down and thought it was a nine. You know, the Su-

preme Court took cases from the Ninth Circuit to reverse your colleagues, not you. I also noticed that at the dinner the other night that there was a place for Judge O'Scannlain, but they did not put the usual "reserved" sign. They were afraid he would think it said "reversed".

PROFESSOR SHARKEY: Good afternoon. I want to talk about what I call an "agency reference" model—as distinct from an "agency deference" model—to be used in a court's determination of implied preemption, particularly in the products liability context.¹⁰

First, to set the stage, consider that the FDA and other agencies have recently enacted "preemption preambles"—statements included in preambles to final regulatory rules indicating the agency's belief that the federal regulatory standard preempts common law tort actions.¹¹ As Dan Troy has pointed out, the FDA included a statement of preemptive intent in its recent rule governing the format and content of prescription drug labels. NHTSA's (National Highway Traffic Safety Administration) preemption preamble appears in a recent notice of proposed rulemaking about roof safety standards. The Consumer Products Safety Commission, for the first time in its thirty-three-year history, proposed a preemption preamble in a 2006 regulation addressing flammability standards for mattresses. (The FDA and NHTSA had done so previously.)¹² Given the flurry of recent federal agency activity here in Washington, D.C., this topic has real currency.

The agency reference model is a middle-course approach to guide courts in making implied preemption determinations. Where Congress is clear about its intent to preempt or displace state law, its intent would govern. It turns out, however, that when Congress enacts piecemeal legislation concerning specific products, such as the Motor Vehicle Safety Act or the Federal Boat Safety Act, Congress has been anything but clear. Typically, these product statutes include very broad preemption clauses that expressly preempt any conflicting state requirement. Congress usually says that state "requirements" or "standards" are preempted, using broad language that has been read to include common law state tort actions. These broad preemption clauses are coupled with very broad savings clauses that purport to leave common law actions intact. In these instances, Congress seems to be saying everything. In other instances, such as the Food Drug and Cosmetic Act, it is all but silent. In the provisions that deal with medical products, there is a preemption clause, but in the provisions dealing with drugs, there is not. As Congress does not expressly answer the

¹⁰ For an elaboration of this framework, see Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. _ (forthcoming 2008).

¹¹ See Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007).

¹² 21 C.F.R. § 201 (2006); 49 C.F.R. § 571 (2005).

preemption questions that products liability cases implicate, there is ample room for other decision-makers—namely, courts and agencies—to step in.

Congress's failure to weigh in on the issue of preemption of common law actions, which cannot realistically be ascribed to inadvertent omission, is puzzling. For example, associated with the Federal Insecticide, Fungicide and Rodenticide Act, at issue in the recent Supreme Court case of *Bates v. Dow Agrosciences, LLC*,¹³ there are over a thousand pages of legislative history and yet not a word about the fate of state common law tort actions. But when this Act was amended in 1972, such actions were quite common. The interesting question is an institutional one: Does Congress punt the preemption determination to courts or to agencies? How should this interplay work? The agency reference model that I advocate would leave the decision-making power in courts, but not allow them either to give mandatory deference to the agency position or to ignore the agency's position.

Contrast the present situation where courts are taking extreme positions when faced with the issue of whether the FDCA and regulations promulgated thereunder by the FDA preempt common law failure to warn claims. In his remarks today, Judge O'Scannlain mentioned the *Levine v. Wyeth*¹⁴ case, which exemplifies one extreme pole, where courts say that there is a "presumption against preemption" and that the purpose of the FDCA is to protect health and safety, so how could any state tort action ever be preempted? The idea that more regulation is always better seems clearly wrong in the context of drugs or any product situation where the determination rests upon risk-risk tradeoffs. If you add warnings, you're not just warning consumers of certain risks, you are inevitably creating alternative risks insofar as individuals, or their physicians, are scared off from these drugs. That is one extreme.

At the other extreme lie courts that defer unconditionally to the FDA's "misbranding" argument in favor of preemption of common law claims: that a manufacturer can never unilaterally strengthen or alter a label warning, lest it risk being prosecuted by the FDA for misbranding the drug. The upshot is that the FDA's pre-market new drug approval process would grant the drug manufacturers immunity from state common law tort actions (most often failure to warn claims). And this safe harbor would protect drug manufacturers even in situations where new risks (of which the manufacturer was aware) come to light in the post-approval period.

But between these extreme positions lies a middle-course approach, whereby courts would be able to look specifically at the risk-risk determination by the Agency—not just at the time of approval, but during the post-approval period as well. Most of these cases deal with situations where

¹³ 544 U.S. 431 (2005).

¹⁴ No. 2004-384, 2006 WL 3041078 (Vt. Oct. 27, 2006).

new risks allegedly came to light in the post-approval process. The manufacturer then has an opportunity to go back to the FDA.

In *Levine*, the manufacturer went back to the FDA (during the post-approval period) to try to strengthen a warning for a different variety of the drug and was told to “[r]etain verbiage in current label.”¹⁵ The court nonetheless held—erroneously, in my view—that a state law failure to warn claim was not impliedly preempted by the FDA’s regulatory action pursuant to the FDCA.

*Perry v. Novartis*¹⁶ embodies the middle-course approach that I am advocating here. The federal district court rejected the two extreme positions: at one pole, that the FDA’s preemption preamble should be rejected altogether, and at the other pole, that the preamble should be accorded mandatory *Chevron* deference. Instead, the court decided that the FDA’s views embodied in the preamble should receive *Skidmore*, or “power to persuade,” deference.¹⁷ I think that the *Perry* court staked out the correct approach.

Moreover, this middle-course position comports with the U.S. Supreme Court’s jurisprudence. I unearthed an interesting positive empirical finding when doing a study of products liability preemption. If you look at the U.S. Supreme Court’s product liability preemption cases, which span from *Cipollone*¹⁸ to *Bates*,¹⁹ in every case (save *Bates*), the Court’s ultimate decision, whether pro-preemption or anti-preemption, aligns with the position urged by the relevant agency. Thus, the FDA had argued in favor of preemption in *Buckman*,²⁰ and the Court went that way; it argued against preemption in *Medtronic*,²¹ and the Court went that way. NHTSA argued in favor of preemption in *Geier*²² and against preemption in *Freightliner*,²³ and the Court followed suit. The Court’s anti-preemption holding in *Sprietsma*²⁴ likewise follows the agency’s position. The Coast Guard, having done a risk-risk analysis, came to the conclusion that no uniform propeller guard design was suitable, given the variety of recreational boats and motors in existence; and thus, a state law design defect claim in no way interfered with any federal policy reflected in its decision not to regulate.

The Supreme Court has been very cryptic. It has never said, “We are applying *Chevron* (or *Skidmore*) deference here.” Most often in dissent, Justices try to force the issue by saying, “Look, the Justices in the majority

¹⁵ *Id.* at ¶21.

¹⁶ *Perry v. Novartis Pharm. Corp.*, 456 F.Supp.2d 678 (E.D.Pa. 2006).

¹⁷ *Id.* at 683.

¹⁸ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

¹⁹ *Bates v. Dow Agrosiences LLC*, 544 U.S. 431 (2005).

²⁰ *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341 (2001).

²¹ *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

²² *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000).

²³ *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995).

²⁴ *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002).

are giving deference by saying things like 'We give significant weight to the Agency's determination,' but they never come out and say they are according *Chevron* deference." If you look carefully at what the majorities in those cases do, though, I think they apply something that looks like *Skidmore* deference, and in general provide a model for courts to follow.

One last observation: if you look at the dozen or so cases that post-date the issuance of the FDA's preemption preamble, some have been decided by federal courts, some by state courts. The state courts have, over the past quarter century, consistently rebuffed the regulatory compliance defense to state common law tort actions; it is hardly surprising, then, to find that state courts, on the whole, seem predisposed to resist the idea of federal preemption of state law, which after all, is essentially an even more forceful immunity-conferring mechanism. The federal courts seem more likely to listen to what the FDA says, and the FDA is much more likely to intervene in federal cases, either on its own or when the Court asks for its views.²⁵ That will be a very interesting dynamic to observe over time.

Thank you.

JUDGE O'SCANNLAIN: Our final panelist will be Professor Merrill.

PROFESSOR MERRILL: Thank you very much. I notice that the room is a little crowded in the back, so in the effort to clear things out, let me announce in advance that I'm going to be talking about administrative law doctrine for the next eight minutes. In case you want leave quickly, now is your chance to do that.

I'm going to approach this from the perspective of administrative law rather than tort law or ordinary preemption law. I think when you approach it from a perspective of administrative law, you discover that the range of disagreement here is actually quite narrow; that a number of propositions which you might think would be contestable in fact have been resolved, more or less, by express holdings of the Supreme Court or by settled propositions (or at least what I regard as several propositions, of administrative law). So, let me mention three things that I, at least, regard as settled propositions, which have the effect, I think, of compressing the area of disagreement down to a fairly small point.

First, it's well established that agency legislative regulations have preemptive effects. If an agency has been delegated power to act with the force of law, to issue legislative regulations, where those legislative regulations are deemed inconsistent with state law—by the court, at least—

²⁵ See Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Courts*, 15 BROOKLYN J.L. & POL'Y 1013 (2007).

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there's no question that the federal regulation trumps or preempts state law. This was held back in 1961 in *United States v. Shimer*²⁶ and reaffirmed in the *de la Cuesta*²⁷ case in 1982. The issue is off the table.

Second, if Congress expressly delegates authority to an agency to issue preemptive regulations—not just legislative regulations, but regulations that say, “We deem state law in Area X to be preempted”—that is permissible as well. There are a number of examples in federal law where Congress has given express preemptive authority to agencies, whose exercise of that authority has been upheld by courts. The Supreme Court's authority at this point is a little sketchier. If I had my way, the Court would insist a bit more on the need for express delegated authority to preempt, rather than finding it in some kind of clearly implied fashion. There's a case called *New York v. FCC*²⁸ from 1988, in which the Supreme Court found express authority to issue preemptive regulations based on congressional ratification of prior practice by the agency, which I think is pushing it a little far. But the basic proposition that Congress can expressly delegate preemptive authority to an agency, I think, is off the table as well.

Thirdly, an agency's statement of its opinion about the preemptive effect of either the federal statutory scheme or a combination of the federal statutes and federal regulations is not entitled to *Chevron* deference. The reason for this follows from recently established principles about when *Chevron* does and does not apply. The infamous *Mead* case that Ron tried to make me promise not to mention, holds—, well, who knows exactly what it holds?—I think it holds that agencies are entitled to *Chevron* deference only if they act with the force of law; meaning that they're issuing something like a legislative regulation which is within their delegated jurisdiction. If they issue an interpretation of rule or some kind of opinion letter, that's not entitled to *Chevron* deference.

Now, with respect to these preambles, the issue is a little bit trickier. I take it that a statement in a preamble about the preemptive effect of a federal regulation being adopted pursuant to whatever perambulatory statement does not itself have the force of law. Administrative lawyers distinguish all the time between what's called the Statement of Basis and Purpose required by Section 553 of the APA and the regulation itself. The regulation itself is a thing that goes into the Code of Federal Regulations. That's what has the force of law. The statement in the preamble is the explanation for the regulation. It does not of its own effect have the force of law.

If an agency has to interpret federal statutory authority in order to reach a particular legislative regulation, and the explanation for its statutory

²⁶ U.S. v. Shimer, 367 U.S. 374 (1961).

²⁷ Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982).

²⁸ City of New York v. F.C.C., 486 U.S. 57 (1988).

authority is in the preamble, it is entitled to *Chevron* deference, because the explanation is the condition precedent for the regulation itself. But if you have something like a regulation dealing with drug labeling and the FDA says in the preamble, "By the way, it's our opinion that any state court action inconsistent with this labeling would be preempted," that's just a statement of agency opinion; it's not a necessary condition of finding authority on the part of the agency to issue that regulation. It would not be entitled to *Chevron* deference.

So, I think those propositions are pretty much settled.

What is not settled is the issue presented by the *Watters* case, which is going to be argued on November 29. The issue is: What happens if an agency that has legislative rulemaking authority—but has not been given express authority to issue preemptive regulations—uses its general rule-making authority to issue what purports to be a legislative regulation, which regulation then states the agency's determination that state law in a particular area is preempted? Is that sort of legislative regulation pursuant to a general delegation of authority rather than to an authority to preempt also entitled to *Chevron* deference, or to some lesser degree of deference, presumably *Skidmore*?

In answering this question, I think we have to revert to more general principles and not simple case law and settled principles of administrative law. Several propositions are relevant here in sorting things out. First of all, I do not agree with Ron's statement that determinations of preemption are simply a species of statutory interpretation.

In preemption cases, there are three determinations to be made, not just one. The first determination is that somebody, be it a court or an agency, has to decide what the federal law means or requires. That's an exercise of straightforward interpretation. Then, the decision-maker, be it a court or agency, has to decide what the state law means or requires. That's another exercise in interpretation. The third step is critically different; that is, the decision-maker has to decide how much tension there is between the federal and the state law, if any; and, given the degree of tension, whether it's necessary to displace or nullify state law in order to effectuate the general purposes of the federal statutory regime.

Now, in some instances, that third step is not necessary. You've got an express preemption clause which is squarely on point; that would not be a contested case. In all other cases, if there's a dispute about the scope of an express preemption clause, something about obstacle or frustration of purpose preemption or field preemption—even, in most cases, of conflict preemption where there's not a square X or Y type of conflict—somebody has to decide whether a displacement of state law is necessary.

So, the question is really one of institutional choice, as several of the other speakers mentioned. Who is going to make this determination of displacement? I think an argument can be made that the agencies ought to be

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given significant say-so in this exercise. The agencies, after all, have great expertise about the nature of the statutory scheme. They probably have a unique understanding about how state law is or is not going to interfere with the way the federal statutory scheme is carried out. But let me give you some quick reasons why I think strong *Chevron* deference probably is not the way to go in making this displacement determination. I'll just mention these quickly.

First of all, and Cathy mentioned this briefly, preemption is an issue that comes up in state court almost as often as it comes up in federal court. I have trouble imagining exactly how the U.S. Supreme Court is going to enforce a duty upon state courts to give *Chevron* deference to federal administrative agencies on the question of preemption. The Supreme Court just does not have the institutional capacity, I think, to change state court behavior in that radical direction. Something like a *Skidmore* doctrine, which allows agencies to submit their views in various ways and instructs courts to give them effect insofar as they are persuasive, would, I think, be something more reasonably workable in the state court system.

Secondly, I think there are systemic considerations here. Most of our panelists are interested in explaining how Madison was really in favor of a powerful federal government, but there are systemic interests here in terms of maintaining a balance between the federal government and the states; that is, not having the federal regulatory juggernaut completely take over our system. I'm concerned that if each federal agency which has a little individual regulatory slice of the world is given *Chevron* deference for its determinations, we're going to see a lot more displacement of state law. There will be a tendency for each agency individual to push the limits of federal law in isolation. We need some kind of judicial counterweight to that. I think the federal judiciary, the Supreme Court in particular, which has a broad-brush picture about the need for state and federal balance in the system, is a better institution to maintain that balance than are individual agencies.

Lastly, and I'll close with this point, the question of whether agencies can preempt or be given strong *Chevron* deference for preempting state law is another one of these issues that implicate the scope of an agency's authority. All sorts of scope issues come up about whether agencies can regulate with the force of law or not. But there are reasons to be concerned about giving that issue to states to decide under a strong deference doctrine like *Chevron*. Agencies would have a tendency to view state regulators as rivals, to see state courts as rivals, and try to expand their authority. We need federal courts to discipline the boundaries of agency action. *Skidmore* is better suited to doing that than *Chevron*.

Thank you.

JUDGE O'SCANNLAIN: Well, I want to thank the panelists for lay-

ing out all of the considerations very, very effectively. Before we take questions from the floor, I thought I would offer the opportunity for each of the panelists to comment on anything any of the others have said. And since Mr. Troy went first, he'll have the first crack.

HON. MR. TROY: Thank you. I think Tom expected me to start throwing things at them on the question of *Chevron* versus *Skidmore* deference. I think they are very strong arguments, which I understand, for according *Skidmore* deference, but I want to make couple of points. First of all, the preamble—there's preemption whether or not the Agency came out with the preamble, and the Agency was asserting that there was preemption before that. The key point is, what are the decisions that the agency is making, and what kind of a position does it put the company in? So that's point one.

Point two: The FDA was very clear that you do need to come post-approval and adhere to the very stringent regulations which require you to notify the Agency of additional decisions, of additional information, and a company's obligations do not end once the product is approved. An FDA scrutiny of a product does not end once the product is approved. This is a misconception. Companies are required to collect adverse event data and to feed it back to the Agency under very stringent time frames. The Agency continues to monitor that data.

But this *Levine* case, which I am not involved with, let me confess—although I do generally represent, at this point, many clients in connection with these issues—but in the *Levine* case, I want to spend a moment on it to show what an existential threat it is to FDA, what an untenable position it puts the company in, and how bad it is for the public health. In this *Levine* case, basically FDA look at the data. The company came and said we want to put this additional warning. And FDA said we don't think it's warranted. We think the current route of administration, notwithstanding that it has some very serious side effects—in this case, the women, tragically, who is very popular local musician, lost her arm—but we believe this is the proper route of administration, looking at all of the data.

And so, the company actually not only gave in all the relevant data, but the company actually proposed an additional warning. FDA wrote back formally, "retain current verbiage". If a state court can come along and say who cares what the FDA says, Company, you needed to do something else, what does that say, A, about the FDA's ability to decide what is and is not on a drug label; B, what is the company supposed to do?

I'm not saying that any time a company changes its warning before FDA has officially blessed it, there's misbranding. But there are circumstances where FDA has said, you know what, you can't just slap any warning that you want for sort of just defensive labeling purposes. The problem with that, and this gets into the public health point, is the labels have be-

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come—let's be clear. When we're talking about FDA labeling, we're talking about those little things that are folded that are in, you know, tiny, tiny, tiny font that fill pages and pages and pages and pages that basically nobody can read—which we all read slavishly before we take each pill—those are actually intended for the physician, but even the physicians, they have become so prolix that FDA found that they were being written too much as defensive legal documents rather than as risk communication documents to doctors. And so the context in which FDA put out this preemption statement was a context in which it was overhauling that labeling, that physician label, and it was saying we're going to try to make this simpler. And what happened in the sort of run-up to it was the company said that's a great idea. Less is more. You know, doctors and health care practitioners will be able to understand more if the thing is simpler. But if you make us take out warnings, we're going to get killed in product liability litigation and failure to warn litigation.

So the FDA said, well, we think it's a better thing for the public health, that better decisions will be made, if you have, for example, the summary provision that they called highlights, and we're going to say that if we tell you that you have to take something out or exclude something from highlights so that the public health goal can be achieved of a clear, simple message to doctors. If we're telling you to do that, you shouldn't be held liable by state courts for failure to warn. And that was the context in which FDA ultimately issued this.

Now, whether it gets strong *Chevron* deference or whether he gets *Skidmore* deference, I think it's sufficiently persuasive that it doesn't really need strong *Chevron* deference to prevail. Obviously, some state courts have disagreed, and this is an issue that is going to be—there's going to be further judicial resolution of it. But the public health of the matter is such that we really do have and need to have one agency that determines what doctors are and should be told about a product, as long as that agency is being given the relevant information as quickly as possible, and as appropriate.

JUDGE O'SCANNLAIN: Any rejoinder from the Academy?

PROFESSOR SHARKEY: Two quick points. The first one is, listening to Mr. Troy, it seems like he might adopt my middle-course approach, which of course would get me very excited.

HON. MR. TROY: I didn't realize I had that power.

PROFESSOR SHARKEY: *Levine* is a case that we would both see

as being wrongly decided case. There's strong evidence that, in that instance, the FDA actually rejected increasing the strength of the label. But would you adopt more broadly my middle course position?

Perry v. Novartis,²⁹ which you have not talked about, is a case in which the court finds no preemption and looks to the fact that the FDA didn't make a specific determination regarding the relevant risk one way or the other. A more extreme position—either the FDA's misbranding argument or *Chevron* deference to the pro-preemption position embodied in the preamble—would have led the court to the opposite result. In fact, the court held that there was no preemption specifically because the FDA was looking at a bunch of inconclusive evidence and wasn't able to make a definitive determination to regulate or not. *Perry* is thus a less clear-cut case than *Levine*, given the scientific uncertainty surrounding the risk and the FDA's apprehension at weighing in prematurely.

The contested ground is going to be in these contexts, where the relevant agency doesn't regulate, and you need to ask "Why not?" In *Sprietsma*,³⁰ for example, the Coast Guard didn't pass a uniform federal regulatory standard for boat safety, and it came up with some reasons like, given that the boats are designed in various particular ways to suit local conditions, it was not possible to come up with one uniform standard. What the Coast Guard, in not regulating, did not say that it wanted to leave the determination to the market or that it specifically wanted to displace state law. In such contestable cases where the FDA has not made a specific determination, I wonder whether Mr. Troy would sign on to my middle ground position.

The second quick point I'd like to make focuses on the disclosure of information to the FDA. I agree with what Mr. Troy said with respect to the FDA attempts to tell the drug manufacturer that they have all sorts of obligations to come back with new information. A new report just came out studying the FDA, which shows how the FDA can enforce the promises that they ask of drug manufacturers. In a similar vein, I think our system should think about crafting rules to be information-forcing. My middle-course approach places a burden on the manufacturers to come back to the FDA with evidence of newly discovered risks during the post-approval period. Fraud perpetrated on the FDA is another matter.³¹ The FDA's preamble contains a "fraud caveat," suggesting that FDA-approval based preemption is conditional upon the manufacturer's not having withheld information from the FDA. But how will this disclosure of information be policed? The problem is that the Supreme Court has said, in *Buckman*, that fraud on the FDA claims are preempted. Unless the FDA polices not only

²⁹ *Perry v. Novartis Pharm. Corp.*, 456 F.Supp.2d 678 (E.D.Pa. 2006).

³⁰ *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002).

³¹ See Catherine M. Sharkey, *The Fraud Caveat to Agency Preemption*, 102 NW. U.L. REV. __ (forthcoming 2008).

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fraud but incomplete information disclosure as well, a kind of regulatory void is created.

HON. MR. TROY: A company is obligated to reveal to the Agency every adverse event it finds out about, and that is enforceable. If you don't do so, there are, can be, and have been—for example, *Guidant*—criminal penalties associated with that. The thing that people said that FDA cannot enforce is commitments post-marketing to do certain clinical trials, okay? But companies have an ongoing legal obligation to monitor and report to the Agency every adverse drug experience that they find out about, and they have obligations to do what they can to try and find out that information. It's just specific studies that the Agency currently cannot compel people to do post approval.

JUDGE O'SCANNLAIN: Dean Cass.

DEAN CASS: Thank you. Some of you may have noticed it's very difficult to open the doors in the back. That's for a reason. We knew we'd be talking about the difference between *Skidmore* and *Chevron* deference.

JUDGE O'SCANNLAIN: It came to that, didn't it?

DEAN CASS: After 30 years of law teaching I recognize that glazed expression, and I want to offer a word of explanation before I disagree with my colleagues. There are some concepts that are so complicated that only administrative law professors could embrace them.

For those of you who are not familiar with the jargon, *Chevron* deference is what I give to my wife. I know we're going to wind up doing what she says, so we start out with the presumption that that's what we're going to do.

Skidmore deference is what she gives to me.

HON. MR. TROY: If you get *Skidmore* deference, you are a lucky man.

DEAN CASS: There are many reasons I am a lucky man.

PROFESSOR MERRILL: Whatever happened to no deference, Ron?

DEAN CASS: The nice thing about *Skidmore* deference if it means that we do what I say when she's persuaded that she wants to do it anyway. And that's why the notion of *Skidmore* deference is a wonderful concept for courts, which means that they do what the agency says when they would've done it without the agency doing it anyway.

I think that we are better off having very simple concepts here. When Tom says that the Supreme Court can't police all the state courts and can't make sure they give *Chevron* deference, that doesn't strike me as a reason for telling them to give agencies no difference in all, which is essentially what the alternative is that Tom has moved to. I think that we have a world in which either we can give deference of some undefined magnitude or really not give deference at all. Courts talk about *Skidmore* deference when they aren't really deferring to the agency.

I think that we also are in a world where, when agency is making decisions, it is making decisions trying to do the sort of risk-risk analysis you're talking about. I think agencies, as bad as there are times at doing this, are far better suited to that than courts are. I have the utmost respect for judges, but I know many of them. And the last thing you want to see is having judges make this sort of complex risk-risk analysis. It's like I know they're going *Dancing with the Stars* now—watching the ordinary football player dance is not a pretty thing.

JUDGE O'SCANNLAIN: Before calling on Professor Merrill, I would like to invite any of those among you who would like to ask questions to come up to the microphone, and we will recognize you in the order in which you appear.

Professor Merrill.

PROFESSOR MERRILL: Well, I don't think *Skidmore* deference is no deference at all. I think that's much too cynical a view both about courts and about agencies.

Bill Eskridge has a study that he is finishing up now in which he looks at every Supreme Court decision involving a federal agency going back to 1950 or something like that.³² And it's an interesting study. He shows that federal agencies do very well; they win about 70 to 75 percent of the time. And there doesn't seem to be much of a correlation between the *Chevron*, *Skidmore*, or cases where there is no express tentative review at all. So to that extent, I guess that does tend to reinforce the idea that these standards

³² William N. Eskridge, Jr. & Lauren Baer, *The Supreme Court's Deference Continuum, An Empirical Analysis* (*Chevron to Hamdan*), __ GEORGETOWN L.J. __ (forthcoming 2008).

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of review don't really matter that much.

But that's a study about the Supreme Court, and the Supreme Court I think maybe a little different from the lower courts, where I have a feeling that *Chevron* deference really does make a difference. When federal courts think that *Chevron* applies, they shift into a different mode of thinking about agency decisions than they might otherwise think about them.

The other interesting observation that's come out recently, is Nina Mendelson has a study about this issue in the *Michigan Law Review*,³³ and she looked at all of the agency decisions that were rendered under the executive order requiring federalism impact statements. She reports, quite strikingly, that when agencies do talk about preemption, the analysis is not very illuminating. The usually just try to follow judicial preemption doctrine and predict how a court would decide the preemption issue, rather than actually discussing underlying substantive issues about how much state law is going to interfere with federal law and how important it is to have a uniform federal scheme in a particular area.

One of my thoughts about the desirability of *Skidmore* is that *Skidmore* really would force the agencies to try to persuade courts about whether preemption is acceptable or not acceptable, and so it might, in a helpful sort of way, cause them to give more thoughtful consideration to the underlying policy variables, which is after all what we're really looking to them for illumination about. And if they just announce that they think it's preempted or not preempted and they are entitled to *Chevron* deference for that, we're really not going to get some of the benefits from agency decision making that we could potentially get under a different standard of review.

JUDGE O'SCANNLAIN: Thank you very much.

Now, the floor is open for questions. Please give us your name and your hometown.

AUDIENCE PARTICIPANT: Thank you, sir. My name is Brad Tupe. I'm from Pittsburgh, Pennsylvania. In any of these product liability trials, in the courtroom you have the plaintiff telling the story of the injury—the adverse reaction, the chemical exposure or whatever the case may be—you have an expert witness that testifies that if only the manufacturer had added a certain line to the warning, this never would have occurred, which is usually fallacious. And then you have a jury that hears evidence over the course of a few days, maybe a day, maybe a week, maybe longer, deliberates an hour or two; a jury made up of people, some of

33 Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737 (2004).

whom have college educations and some of whom don't, who then determine, in the case we're discussing, that the plaintiff should receive a multimillion dollar award.

Contrast that with the negotiation, the adversarial negotiation that occurs between a manufacturer and either your agency, Mr. Troy, or the EPA in the case of a FIFRA pesticide, that takes years, millions of dollars, truckloads of documents, and you're going to have a situation where a jury hearing evidence for just a couple of days can substitute a judgment for this adversarial agency process. It doesn't make any sense.

What's really going on, I submit, and I'd be interested in your response, is that the courts are saying that the manufacturers are insurers, and that every injury must have a remedy, and that's never been our law.

JUDGE O'SCANNLAIN: I think there's a question in there somewhere. Responses?

HON. MR. TROY: Well, you make a very good point. I'm not sure that everybody in the industry would necessarily characterize their relationship with FDA as adversarial. There is, you know, a lot of cooperation and collaboration because, frankly, companies have an interest in an appropriate label that does adequately address the risks of the product, in part because it protects them in product liability and partly because they want to—you know, they have reputational interests in a lot of contexts, especially vis-à-vis position physicians. And it will not do if, you know, they are underestimating or understating what the risks are. And then, physicians can end up with, you know, bad outcomes and themselves getting sued in medical malpractice. And let's—you know, even though we're all lawyers, let's be clear that it's not the law that motivates everybody in the healthcare system. There are actually some people who want to make people better and want to do the right thing.

But you're right. You're right, and one of the ideas that people have floated in the drug contexts is, should there be some kind of better way? Should there be some kind of alternative compensation system, since we know to a moral certainty when a product is approved that there are going to be a certain number of people who are going to be harmed by it? Let's take statins, those cholesterol-lowering drugs which are literally miracles of modern technology, and the most important thing that any of you can do is go and check your cholesterol and probably—this is what Bob Temple, the dean of the drug approval process, always says—the most popular public health development in the last 15 years has been development of statins.

We know there are going to be a certain number of people who get a terrible condition called rhabdomyolysis. Is it worth it societally for those 50 people who are going to get rhabdomyolysis to have the incredibly posi-

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tive public health benefits associated with statins? Of course it is. Should something be done for those 50 people? You know, there's a pretty good case that there should be. Should it be handled through our tort system, which is essentially a lottery? I would argue the answer to that is not.

JUDGE O'SCANNLAIN: Dean Cass.

DEAN CASS: Well actually, having spent 15 years as a dean, I'm at my best turning the mic on and off for my colleague here.

I think it's very important to recognize that there will be cases when it is appropriate to have the issue handled through the tort system. My disagreement, I think, with Tom and Catherine is over where the presumption should lie on who should make that decision. And I think that while the agencies do have incentives to overreach, the complex decision, the amount of difficulty in trying to figure out what should be opened up to other mechanisms and what should not, is so difficult, and it is so likely to be gotten wrong because the competence of the decision maker in a state court litigation is so much less sophisticated at making this decision, so much less geared to making this decision, even if they had every incentive to do that, I think that the risk of doing it that way is greater. So my presumption would lie with the ability of the agency to say don't do that.

PROFESSOR SHARKEY: It is important to frame the debate as the balance and interplay between state common law tort and regulation.

I want to sound two notes of caution for people who are in favor of broad preemption of state tort law. First, the argument in favor of preemption can become overdetermined. Take, for example, the position of Richard Epstein, a colleague at University of Chicago. Richard believes that product liability cases should be handled in contract, not tort law. Having failed to convince the academic community or the prevailing court systems of that view, he then moved to the view that there should be a very strong regulatory compliance defense. Regulatory compliance as an absolute defense was an abject failure in terms of taking hold across state jurisdictions. It turns out there are very few state outliers. Michigan is the only state that has a regulatory compliance statutory defense that's almost airtight. Having failed there, Epstein moves to a position in favor of preemption across the board here. But even he will say this is therefore an overdetermined view. It doesn't actually rest on the nuances of Supreme Court jurisprudence on preemption principles. To my mind, the intersection between preemption principles and the tort law regulatory balance are actually important issues to think about.

The second note of caution is to recognize that all federal agencies should not be treated as equals. It is often said that the United States, as

compared to Europe or other countries, regulates products mostly *ex post* via litigation. Of all the federal agencies, the FDA engages in the most stringent *ex ante* regulation. The stringency of *ex ante* regulation might directly affect our views of agency preemption. Would we, for example, want to defer to agency preemption when the relevant agency is the Consumer Product Safety Commission which regulates without undertaking the kind of comprehensive review conducted by the FDA? Would our views on preemption change depending upon the particular federal scheme, and corresponding statutory authorization for the relevant agency? For these reasons, I think it's important not to let a view that juries can't decide issues swamp what actually could lead to a principled argument for preemption in a particular context.

JUDGE O'SCANNLAIN: Next question from the floor.

AUDIENCE PARTICIPANT: Richard Samp from Arlington, Virginia. Very often the Supreme Court, in its preemption cases, says, well, we start with a strong presumption against preemption because, after all, the Congress is known to be so respectful of the use of states that they would never want to unknowingly preempt some sort of state law. And while sometimes I think that's just to make way argument that's put into the cases, I think at least Justice Ginsburg believes that because she were repeatedly say, well, even when there's evidence that Congress intended to preempt affirmative state regulation, I think it would be just so outlandish that they would ever want to preempt a common law tort suit. But I'm just never going to agree that there is such preemption, unless Congress says that explicitly.

Certainly, as you can tell from the gist of my question, I think this whole idea that Congress really starts with this presumption against preemption just has no empirical basis. And it seems to me that if a court looks very carefully at all the evidence and it says, well, it's a close question, but we think that at the end of the day the evidence is slightly in favor of preemption, it would make no sense to say, but nonetheless because there's a presumption, we're going to shift the balance and go against preemption.

I'm wondering if there is anybody on this panel who would support the idea that there also be a presumption against preemption?

JUDGE O'SCANNLAIN: Professor Merrill.

PROFESSOR MERRILL: Not me, but—

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JUDGE O'SCANNLAIN: But you have the floor. It's okay.

PROFESSOR MERRILL: I think the problem with the presumption against preemption is it's just too overly broad. I mean, you could either have a presumption in favor of the states in every case or a presumption in favor of the federal government in every case. Either one of those rules would be overly broad.

The presumption against preemption fails to account for the fact that we have a federal government of enumerated powers. And so, in some areas, the regulation of interstate commerce, for example, why would you have a presumption against preemption? Because that's presumptively an area where the federal government has exclusive, or at least plenary, authority to regulate, and the dormant Commerce Clause stands as testament to the fact that there is in fact a presumption in favor of federal regulation in that area.

The more interesting aspect of your question I think is this question about to what extent the states are represented in Congress. This is an argument that Herbert Wechsler pioneered back in the 1950s, and it continues to have adherents, and it is offered as a justification for federal courts not overriding state prerogatives in different areas.

One interesting thing I'm sort of struggling with right now is to what extent does that sort of perspective apply to administrative agencies to either an equal, lesser, or greater extent than to Congress itself? Again, I think the answer is probably it all depends on what agency you're talking about. We have a lot of administrative agencies, and EPA is the one I'm most familiar with, where most of the regulating under the federal statutes is done by state administrators, and so federal EPA is constantly interacting with state regulators on a daily basis and is very familiar with state perspective on problems. In that sort of context, you might say that the agency really is a very effective representative of state interests because they're intimately familiar with the state perspective.

But other agencies, and here I would hazard to cite the Office of the Comptroller of the Currency as a potential example, are quite the opposite. In the banking world, you have federally chartered banks and state chartered banks. The OCC is in charge of federally chartered banks and states are in charge of state chartered banks, and there's not a lot of interaction between those two groups. So when the OCC seeks to preempt state regulation of state chartered operating subsidiaries of federal banks, they're entrenching on the turf of the state regulators in a big-time way, and they don't really have a lot of information as to what the impacts of that are going to be. So in that context, Congress may in fact be a better forum for sorting out state versus federal interests than the agency is.

So it's a very competent question and one reason I think maybe Herb

Wechsler's analysis is not the way to go in trying to sort out these issues case by case.

JUDGE O'SCANNLAIN: Before taking a comment from Professor Sharkey, Professor Merrill, would you like to hazard a guess on what the Supreme Court will do in the OCC bank case? This is *Waters*.

PROFESSOR MERRILL: This is my private view and not the view of any client that I represent in this case. My guess is that the Court is going to look at this and they're going to say, is there any way we can decide this without reaching this issue? I think they'll figure out a way of doing that. So this big debate, which has been briefed in the *amicus* briefs between *Chevron* deference, *Skidmore* deference, and no deference on this little issue, my guess is will not be resolved by *Waters*. But I've been wrong before.

JUDGE O'SCANNLAIN: Professor Sharkey.

PROFESSOR SHARKEY: I just wanted to make a point about the presumption against preemption. In these products liability Supreme Court cases, it's actually interesting to trace where the presumption does and where it does not rear its head. So in *Geier*, of course, there's not a mention in the majority opinion about this alleged presumption against preemption, and the Court in that instance preempts. In the *Bates* case, the presumption comes back in full force. So I think that if anything—at least in these products cases—the Court has applied the presumption against preemption in a haphazard manner.

(Panel concluded.)

**The Federalist Society for Law
and Public Policy**

presents

JUDICIAL INDEPENDENCE

**2006 National Lawyer's Convention
Washington, DC**

November 18, 2006

PANELISTS:

Hon. Carlos T. Bea, United States Court of Appeals, Ninth Circuit

Hon. Danny J. Boggs, United States Court of Appeals, Sixth Circuit

Hon. Timothy B. Dyk, United States Court of Appeals, Federal Circuit

Hon. Patricia M. Wald, United States Court of Appeals, District of
Columbia Circuit (retired)

Hon. Dennis Jacobs, United States Court of Appeals, Second Circuit
(moderator)

MR. REUTER: Welcome to our National Lawyers Convention Luncheon. It's my great pleasure to welcome you here today. You, that esteemed group described by the *Washington Post*—and I want to get this right—as the “pinstriped tribe of conservative legal minds called the Federalist Society.”¹ Now why is it every time I quote the *Washington Post*, you laugh?

Anyhow, it is my great pleasure to introduce this panel and its moderator. Internally at the Federalist Society, we have been referring to this as the “bunch of judges” panel. Of course we refer to them only very respect-

¹ David Montgomery, *No Secrets Here: Federalist Society Plots in the Open*, WASH. POST, Nov. 18, 2006, at C01.

fully as “a bunch of judges.”

Now, many of you probably know that we have conference calls in advance of these panels to get everything right and discuss the logistics. And sometimes disagreements can arise. But I am happy to report that when I had the call for this panel, there were no disagreements about the order of the speakers or anything that anyone would propose to say. In fact, the only points of disagreement were how many gavels should be provided and how many federal marshals would be on hand. I am now beginning to hope that this has not become the “contempt of court” introduction.

Anyhow, what better topic to discuss here today at our luncheon than judicial independence, after the recent *Wall Street Journal* exchange between U.S. Supreme Court Justice Sandra Day O'Connor and Circuit Court Judge Bill Pryor?² And what better group of panelists could we have assembled to speak about the issue than federal appellate court judges, current and former? These are people that live, eat, drink, and sleep judicial independence on a daily basis. In fact, here at the Convention we have some twenty federal appellate court judges participating, many in today's audience. When you stop and think about it, twenty judges is a fair percentage of our entire active federal appellate bench that we have presented at this year's convention. And of course, the other night at dinner we were just a couple votes shy of being able to grant *cert*.

It really is remarkable when I reflect on the personalities and organizations that are represented by the participants in our convention: twenty federal appellate court judges, two Supreme Court Justices, state judges, and law school professors from the very best law schools in the country—Yale, Harvard, Chicago, Georgetown, Berkeley, Duke, Colombia, Northwestern, Pepperdine, and Texas—three law school deans and public policy officials, a sitting governor and three state AGs, a couple of former U.S. attorneys general, the current and two former U.S. solicitors general, and of course the Vice President. Roaming the halls and on stages, we have also seen quite a few U.S. senators, congressmen, and former congressmen, several Cabinet secretaries, the Head of Domestic Policy, journalists and commentators, and importantly representatives from Human Rights Watch, the ACLU, the Center for American Progress, People for the American Way, and the ABA. These last few are very welcome to join us here in our discussions, and they really do help underscore the spirit of debate that is so integral to the Society.

The moderator for our next panel is truly a remarkable, likable man. Judge Dennis Jacobs is the Chief Judge of the Court of Appeals for the Second Circuit. He has been a judge on that circuit since 1992, leaving a

² See, e.g., Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18; William H. Pryor Jr., *Neither Force Nor Will, But Merely Judgment*, WALL ST. J., Oct. 8, 2006, at A14.

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partnership in a major private firm to assume his position on the bench. He is a regular participant in Federalist Society events. I have never seen him perturbed or with anything but a big smile on his face and a ring of laughter nearly always in his voice. Given that demeanor, I am keenly interested to learn just how deep his concerns about judicial independence could possibly run. We are very pleased to have him with us here today.

Please join me in welcoming Judge Jacobs.

JUDGE JACOBS: The first thing I want to say is what a privilege it was for me to be here in the room last night listening to the Vice President. For me, that was sort of a lucky accident. I just saw a very long, snaking line outside, and I got on the end of it, and when I got to the front I thought that I was going to be able to buy a PlayStation. But the event was much more rewarding than even that.

As a moderator of a panel on judicial independence, I suppose I should talk up the importance of this topic and justify the time that we will spend exploring it. This discussion will be provocative and absorbing. The subject is important. But the threshold question for me is, really, whether judicial independence is a great issue in terms of the size of the threat to judges? Is judicial independence so precarious nowadays that it is a legitimate preoccupation? And if it is secure, what fuels this issue as a major controversy?

One essential preliminary to the discussion: this topic will be discussed chiefly, though not altogether, in the context of federal judges. The subject sprawls when it is expanded so that each of the states is in play, and the panelists and your moderator have all been on the federal side, so we will focus on what we know. As to independence, I suppose I should ask if I should be worried. Under Article III, I enjoy enormous insulation from reprisal. My salary is secure, and if I am impeached, I will not make less than I do now. I hold a position of distinction and moderate power, recently diminished by my becoming Chief Judge. And if I am so inclined, I can arrange to be lionized.

Federal judges who focus on criticism or threats of impeachment may be susceptible to being characterized, possibly mischaracterized, as a bit overwrought. On the other hand, there are assaults on judicial independence that need to be decried. But when one talks about independence, it is important to ask, independence from what? From Congress? The Executive? From critics? From humiliation? From gross disrespect? From threats of impeachment? From imputations of partisanship? And, independence to do what? Presumably, our jobs.

Finally, as we talk about the subject, we should not forget that the empowerment of judges is at the same time an empowerment of the legal profession and the legal community. The bar has its own interests, and it

would be naïve to think that the bar is the only major player in our economy that is not self-interested and working to expand its influence. So, when the bar rears up to defend judicial independence, often for judges who exercise or overextend their sweeping powers, we cannot know who is moved to defend judges out of neutral sense of public interest, who is making room for doctrines that they approve and that judges promote, and who in that group is aggrandizing the power of the legal profession generally to operate and promote its agenda without the kind of bare-knuckled criticism that prevails everywhere else in our culture.

To discuss these subjects and many others, we have, as Dean has pointed out, a very distinguished panel. We are going to hear very briefly from each of the four speakers, so that you can get acquainted with their views, and then I will pose a bunch of questions.

Our first speaker is Danny Boggs of the Sixth Circuit Court of Appeals. He is a Kentuckian who attended Harvard and the University of Chicago Law School. He returned to Kentucky after school and was legal counsel to the governor, among a number of other distinguished positions in state government. He came to Washington and was assistant to the Solicitor General of the United States, and other jobs. And then, after an interlude in private practice, he returned to serve in the White House Office of Policy Development and Special Assistant to the President. In 1986 he was appointed to the Sixth Circuit. In 2003 he became Chief Judge.

Patricia Wald was educated in my circuit with a law degree from Yale and a clerkship on the Second Circuit. She has had a varied career and practiced in the Justice Department, in the Neighborhood Legal Services, and in the Center for Law and Social Policy. She was appointed to the D.C. Circuit in 1979, became Chief Judge of that court in 1986, retired in 1991, and since then has been intensely active in the American Law Institute, and, very recently, as a judge of the International Criminal Tribunal for the former Yugoslavia.

Carlos Bea grew up in Los Angeles. He has a BA and a law degree from Stanford. He worked in a firm in San Francisco, had his own firm for 15 years, until the Governor appointed him to the San Francisco Superior Court. In 2003, he was appointed to the Court of Appeals for the Ninth Circuit, where he now serves.

Timothy Dyk is a circuit judge on the Federal Circuit. He took office in 2000. A graduate of Harvard Law school, he was a law clerk to Justice Reed, Justice Burton, and Chief Justice Warren. He served as special assistant to Assistant Attorney General Louis Oberdorfer in 1963 to 1964. I am happy to say that I sat with Judge Oberdorfer on my court this past Tuesday. And Judge Dyk has been adjunct professor at a number of distinguished law schools.

We will begin with Judge Boggs.

JUDGE BOGGS: Thank you, Judge Jacobs. I have been asked to give my views on judicial independence very briefly, so I will rattle through this. First, I think that there are two aspects of judicial independence, inner and outer. Inner is what we do as judges. Outer is what people may do, or may try to do, to us.

Discussions of judicial independence largely and most frequently focus on the second, but I think the first is really the more important to start with. One of the things I did in my checkered career was to go to Moscow on several occasions and teach Russian judges. Especially in the early days, when the USSR was still in existence, they spoke about “telephone justice,” meaning the party boss would call judges up and tell them how to rule. We heard a great deal about this. Finally, a very cynical defense attorney who had managed to stay active under the Communists said, “Listen, these guys are talking about telephone justice. That is only for the stupid ones; the smart ones don’t need to be called.” I take from that that, whether carrots or sticks are being used, if you internally think that you know how this case is *supposed* to come out, then you are not independent.

To take another example, Professor Mark Tushnet, a man of great stature in the academy, had a law review article a number of years ago, explaining how he would act as a judge.³ He said, “Well, I would decide what decision in this case is most likely to advance the cause of socialism, and having decided that, I would then write an opinion in the grand style.”⁴ Now to me, that is not judicial independence. No one has a gun to his head, but he is not getting his ruling from impartial principles; rather, from an overarching appeal to personalities or principles other than those of the law. So, to me, the internal is most important.

With regards to the outer part—what can be done to us? Well, we have seen what has happened in other countries. Blessedly, we have been almost, but not entirely, free of force. There was a group we had in our court once litigating under the title of “By Any Means Necessary.” If they had actually meant it, that would have been a threat to judicial independence.

Then, there is money and compensation. Hamilton obviously focused a great deal on those two. Rampant and uncompensated for inflation at some point could become a threat to judicial independence. I do not think that it has yet, but it could. And the third is obviously the threat of dismissal in some way. Frankly, that threat in the past has been so weak that I do not think any of us are intimidated by it—although, as my wife continues to tell me, “Your tenure, Love, is not for life; it’s during good behavior.”

³ See Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411 (1981).

⁴ *Id.* at 424.

Now, there are many other things said and done about judges that may be bad ideas—but bad public policy ideas that are not threats to independence. Nor is criticism a threat. I take my text from Churchill, who at one point said that, “I do not resent criticism, even when occasionally, for the sake of emphasis, it parts company with reality.”⁵ I think that is what judges have to do. The phrase “independence” may be a little off-putting to people. In my part of the country, if you say, “Zeke, he’s real independent,” that does not mean he is impartial. It means he is willful and headstrong. That is not what independence is about. Independence is not an end in itself. It is a means to impartial adjudication.

Hamilton, in a part of *Federalist* 78 not frequently quoted, says, “To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents.”⁶ I take from that that we are not independent to exercise an arbitrary discretion. We are independent to be impartial arbiters.

Dennis asked me to be provocative. I will just throw out one more thing. I will put it on the table as heretical. We say that judges should never be impeached for their decisions, and obviously in the ordinary run of things that is true. But let me just ask the question at least. A judge who behaved as Judge Tushnet would have, or a judge who avowedly always ruled for the litigant with a lighter skin, or a judge who would permit an execution for treason on the testimony of one witness in the face of the clear constitutional command that there must be two witnesses; would that be worthy of impeachment? I do not think that we have any judges that go that far, but I think sometimes it is well to posit the outer limit case to show why simply wrong decisions are not actionable by positing the heretical notion that it is possible that there could be decisions that would be impeachable.

Thank you.

JUDGE WALD: When I first got this invitation, I felt a little bit like Eleanor Clift on the *McLaughlin Group*. But I see it is not that way. On the contrary, I am surrounded by former colleagues.

I feel that the threat of lack of independence is not, quite frankly, on the individual level. The Founding Fathers gave us life tenure on good behavior and no diminishment of salary. Like Judge Boggs, I have been abroad, and it is not just telephone justice in a lot of countries. In Bulgaria, they shut off all the electricity in the court building when they do not like the decision. There are variations on this theme from which we have also thankfully not suffered in the States. But I think it is interesting to look at

⁵ MARTIN GILBERT, THE CHURCHILL WAR PAPERS 120 (1941).

⁶ THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (J. Cooke ed. 1961)

this issue historically because, actually, as Alexander Hamilton recognized in the more familiar part of the *Federalist*, the Judiciary is probably “the least dangerous” branch in terms of its power.⁷ It has not the power of the purse, nor of the police. In the very beginning of our country Congress made a few attempts at perhaps unwise impeachments, but that died out. It has been a long time since there has been any serious threat of impeachment.

Article I says that Congress defines the inferior tribunals⁸ and, I think, under Article III can make the regulations and exceptions to appellate jurisdiction of the Supreme Court.⁹ Those are big powers. I think it is Professor Geyh in Indiana who has written a book recounting historically how there has come to be a kind of mutual restraint—which I hope can continue—between Congress and the courts.¹⁰ In other words, there is a tacit understanding that they simply are not going to use those kinds of powers, even when they get mad at the courts for particular things they have done.

I do think some of the *ad hominem* attacks on judges have gotten particularly nasty in the last several years, but that may be a mark of the general polarization of parties and the political debate we have had. Judges have taken some of the brunt. It is something that I think we ought to keep our eyes on. We should try to keep the discourse civil. It is fine to criticize judges for their reasoning or for their decisions when there is disagreement. But when criticism turns particularly nasty and derogates into name calling, it is just possible, as Professor Geyh pointed out in his book, that if enough mud is slung around, some of it might actually stick. So, I think it behooves us all, whatever side of the issues we are on, to try to keep the discourse civil.

I do agree with Judge Boggs; internal independence is terribly important among judges. The Constitution makes the appointment of judges inevitably somewhat of a political process—nominated by the Executive, confirmed by the Senate—all sorts of people get in there and put their two cents in for their own particular reasons. But once the judge is on the court, he really has to be very careful, very conscientious—I think most are—in looking inward as to whether, when a decision comes up, he is at all worried about its effect upon the people who appointed him or the people whom he tends to ideologically align with. Decisions ought to be something that comes out of looking at the law, such as it is, or consequences of the law as best one can account for them.

There is some very interesting research which shows that the independence of the judge may be not so much a concern about the political rami-

⁷ *Id.*

⁸ U.S. CONST. art. III, § 1.

⁹ U.S. CONST. art. III, § 2.

¹⁰ Charles G. Geyh, *WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* (Univ. of Mich. Press 2006)

fications upon the judge's original party of appointment as peer pressure. There is a growing amount of it demonstrating that if three judges from a like background sit together, they are very much more apt to render a decision which is very strong in terms of a particular viewpoint. If you have one judge from another point of view, it is apt to break that up. Even if they come out with the same basic majority decision, it is apt to be in different terms. It is not apt to be as strong. It is apt to reflect more difference of opinion. Here again, that may have some implications for the kind of prolonged periods in which, in some courts, the same judges sit for a very long time.

The last point I want to make is that there is a difference between independence—admittedly an ambiguous term—of individual judges and independence of the Judiciary as an institution. Some of the considerations are different. Of course, under Article I, Congress has the right to create these inferior tribunals and to define their jurisdiction.¹¹ But from what we can tell from the debate at the time, the notion was that the federal courts would serve as kind of an umpire to make sure that the other two branches did not overstep their particular bounds.

Perhaps we have different opinions on this matter, but at least some of us are concerned when both the Executive and Congress seek to take from the courts, powers they have had traditionally which affect the rights of individuals. I know this is a controversial subject, but the recent examples I am thinking of are the removal of *habeas corpus*¹²—I think that is the word in the Military Tribunal Act—and any other type of proceeding in which certain things could be issued in favor of the format that laid it down. We also have other doctrines, some of them imposed by the courts themselves, like state secrets, which obviously we need to a degree, but have been interpreted to in effect, remove judicial review in some cases—such as the wiretapping surveillance program. That decision has gone the other way but some other decisions have not, so that the courts have in effect lost their role entirely. That is something I think we judges and others should keep their eye on, to make sure that the courts do not get marginalized or stripped of what I think is their true role in the constitutional structure.

JUDGE BEA: I was very glad to hear Judge Wald say that we are not here to defend particular attacks on judges, being from the Ninth Circuit, as I am. The term in the discussion is judicial independence, and I propose we step back and take a look at it from two different angles. The one we have been talking about up to now is the independence of the Judiciary from outside pressure.

But the electorate has been telling us, I think, over the last few years

¹¹ U.S. CONST. art. III, § 1.

¹² The Military Commissions Act of 2006, Pub. L. No. 109-366, § 949, 120 Stat. 2600 (2006).

that there is another type of judicial independence they are interested in, which is perhaps independence *from* the Judiciary in certain matters, such as same-sex marriage. Overreaching courts have spawned this criticism, and, as we know from the recent exchanges in the *Wall Street Journal*, Justice O'Connor has taken the view that this poses a grave threat to judicial independence.¹³

She has cited three sources¹⁴ which I would like to discuss briefly. One is the state ballot measures, the most unusual of which was Jail for Judges, which would have stripped immunity not only of judges but of jurors in grand jury proceedings in South Dakota. That went down to a ninety-to-ten defeat,¹⁵ showing the good sense of the people of South Dakota. The next one was the Colorado initiative, which limited judges' terms and applied the limitation retroactively, which also went down in defeat.¹⁶ The third was what I thought was a rather modest proposal in Oregon to have appellate court judges have districts for elections, on retention elections. This is not a revolutionary idea to us in California, since we have had that since 1905, but that also went down to defeat.¹⁷ So, it does not look like the ballot is going to be a big threat to independence of the Judiciary, at least this year. Congressional action also has not been particularly successful. The Inspector General bill of Congressman Sensenbrenner was not acted on. Also, the Pledge of Allegiance jurisdiction stripping was not acted on.

So, what it really boils down to, I think, is that Justice O'Connor is a bit touchy about public criticism of the Court's decisions. And she has picked up an ally, Nan Aron, president of the Alliance for Justice, which I am not sure was expected, who writes in the *Wall Street Journal* letter column a few days ago: "Judicial independence is under attack not because judges are busy creating the right. Rather, it is under attack because the Right's messaging machine espouses facile rhetoric so often that activists are now responding with the overreaching measures which Justice O'Connor correctly decries."¹⁸

So, what grave threat is left? The Alabama jurists who took that strong position on placement of the Ten Commandments in the courthouse have not even survived the Republican primary and are no longer in office. Personal threats, well, I do not want to minimize what happened in Chicago a few years ago,¹⁹ but we do not seem to have the personal threats we did in

¹³ O'Connor, *supra* note 2.

¹⁴ *Id.* (referring to judicial accountability initiative measures, Colorado's Amendment 40, and Oregon's term limit for judges).

¹⁵ *Capitol Insider*, the Oregon State Bar Public Affairs Newsletter (Nov. 14, 2006).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Nan Aron, *Letter to the Editor*, WALL ST. J., Nov. 16 2006, at A17.

¹⁹ Jodi Wilgoren, *Haunted by Threats, U.S. Judge Finds New Horror*, N.Y. TIMES, Mar. 2, 2005 (describing the murder of a federal judge's husband and mother, presumably in connection with a ruling

the days of desegregation and the kind of person who really intends to do us ill will act this way: there was an item in the *Fort Worth Star-Telegram* recently about a lady who had sent some home-baked cookies with rat poison to the members of the Supreme Court and the chiefs of staff of the Army, Navy, and Air Force, with a letter saying, "This is meant to kill you, this is poison," tacked on top of it.²⁰ I do not know whether she benefits or not under the sentencing guidelines that allow downwards departures for early acknowledgment of responsibility, but she got fifteen years.

Now, the jurisdiction stripping question is front and center. First of all, I would note that this really is not something new. Jurisdiction stripping has been around since about 1820, when some people tried to get rid of Section 25 of the Federal Judiciary Act of 1789.²¹ That went through certain mutations in the Reconstruction Era. It was not always a conservative construct. Remember the Norris LaGuardia Act which stripped the federal courts of injunction power in labor disputes and in Yellow Dog contracts?²² We have a series of jurisdictional stripping statutes of recent vintage which are not all that controversial in the Antiterrorism and Effective Death Penalty Act of 1996. One deals with second and successive *habeas* petitions. The Immigration Act has one regarding removal orders for prior convicts.

The one that Judge Wald indicates is going to be the subject of some discussion: whether limitations of review of *habeas corpus* is a suspension or not under Article I, Section 9.

But I am going to talk a little bit about what I consider to be a real threat to judicial independence, which does not have to do with the federal judiciary; it has to do with State-contested elections. First, a disclaimer: I was appointed a judge, and within eight days was told by the county clerk that I was in a contested election. I did not have much time to do anything bad or good, but I knew I was in an election. And I was sitting in the City and County of San Francisco, appointed by a Republican governor, registered Republican, a Catholic, white and married—and it was not a same-sex marriage. So my election was less an election than a miracle. I won 59-41.

But there are two types of elections. The retention election is used throughout the country, and it says yes or no as to a sitting judge on an appellate court. I do not have anything particularly bad to say about that. It is very rare that one has to spend a lot of money defending a retention election. They are usually not successful, although they were in California in getting out three Supreme Court Justices in 1986. I think that is a valid ex-

made against a white supremacy group).

²⁰ Linda Greenhouse, *Justice Recalls Treats Laced With Poison*, N.Y. TIMES, Nov. 17, 2006.

²¹ See, e.g., JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION OF THE UNITED STATES (Richard K. Cralle, ed., 2001).

²² 29 U.S.C. § 103 (2006).

ercise of democratic consensus, whereas the contested elections where one or more candidates run for trial or appellate seats have gotten totally out of hand. My election cost me \$100,000, and that is peanuts these days. The average price of a judicial office, according to a study by an organization which always draws a laugh here, the ABA, is about \$431,000.²³

These increases have two effects. One, the judge who gets the money to run the election gets it mostly from attorneys, and sees those attorneys the next day in court. Second, I have observed judges looking over their shoulder before making decisions because of an upcoming election. It has happened in San Francisco with some frequency. And then there is what I call the bureaucratic and administrative nuisance. It is a subtle limitation on independence. To give you an example, take the recent Advisory Opinion No. 67 of the Judicial Council,²⁴ which requires judges to make disclosures as to which seminars they go to. You must make disclosures, for instance, when you go to FREE. That is the Foundation for Research on Economic and Environmental Issues in Montana. And you must make one if you go to a George Mason seminar. But you do not have to make one if you go to the seminar by the judicial division of the ABA. That distinction supposes that FREE and George Mason are tainted by ideology, while the ABA is not.

Overall, I think that the grave threat that Justice O'Connor was talking about does not exist, at least not at the level of the threat to independence which exists at the state level because of contested elections.

JUDGE DYK: Thank you. I agree that the problem at the state level is a significant one. I am going to confine my remarks, however, to federal independence and look at this a little bit historically. It is a lot easier to address this subject historically since the passions have cooled, though addressing it in the present is obviously important also.

It strikes me that there are two kinds of threat to judicial independence. One is the kind of threat that results in a case or controversy. In that category the Judiciary has the keys to its own prison. It is able to adjudicate whether the threat to its independence is consistent with the Constitution, with the Compensation Clause, with the Life Tenure Clause, or with Article III itself. Perhaps with some exception, most people seem to agree that the Judiciary can be the final word on those issues. We have court cases considering issues of judicial compensation,²⁵ of jurisdiction strip-

²³ *Report of the American Bar Association Commission on the 21st Century Judiciary*, 29, available at http://www.soros.org/initiatives/justice/articles_publications/publications/jeopardy_20030613/justiceinjeopardy.pdf.

²⁴ Committee on Codes of Conduct, Advisory Opinion No. 67, *Attendance at Educational Seminars*, available at <http://www.uscourts.gov/guide/vol2/67.html>.

²⁵ See, e.g., *United States v. Will*, 449 U.S. 200, 230 (1980) (finding unconstitutional Congress's

ping,²⁶ and of the elimination of judgeships, as happened in the 1802 Judiciary Act, as well as cases involving congressional efforts to change the result in particular cases that have been adjudicated by the courts to confer inappropriate duties on the judiciary, such as advisory opinions. In these areas, the cases come to the courts; the courts can resolve them. And the Supreme Court is accepted by most people to be the ultimate arbiter of the question.

I do not see those issues as presenting quite the same threat to the Judiciary as the kinds of issues that cannot come before the Judiciary—those with regard to which we have to rely on the good will of the Executive, Congress, and the support of the Bar and the public. The quintessential example of this, of course, is the FDR court-packing plan. Adding Justices to the Supreme Court is not something that results, I would assume, in a case or controversy that can be adjudicated by the courts. The courts had to rely on the U.S. Senate to support it and prevent the court-packing plan from being enacted.

Another example would be the refusal of the executive branch to enforce judicial decisions. There is not much the judges can do about that, and there are historical examples—of course, President Jackson's famous remark about *Worcester v. Georgia* that, "Chief Justice Marshall has made his decision; now let him enforce it."²⁷ There are modern examples too. In the Eisenhower administration there were decrees in desegregation cases that the Administration simply did not do anything about in the *University of Alabama* or one or two other instances; ultimately forced by public opinion, as in the paratrooper intervention in Little Rock.²⁸ That is a matter of some concern.

Restricting the resources of the Judiciary would be a matter of serious concern that the Judiciary itself cannot deal with, or refusing to provide physical security for judges, which we see as an issue in foreign jurisdictions occasionally. Those are things that the Judiciary itself cannot do anything about. The questioning at confirmation hearings of judges, where there are efforts to get judges to promise to rule in particular ways in future decision-making—there is not much other than refusing to answer the question that the judges can do in the course of those hearings.

So, there are hundreds of pages of Hart and Weschler that can come before the Judiciary where the thrust to judicial independence can be resolved by the Judiciary itself, but the more serious problems are the in-

attempt to alter judicial salaries).

²⁶ See, e.g., *Calcano-Martinez v. INS*, 533 U.S. 348 (2001) (deciding to retain jurisdiction over alien habeas claims despite congressional attempt to strip jurisdiction by statute).

²⁷ CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 219 (Little, Brown, & Co., 1923).

²⁸ MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT* 91–92 (2007).

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stances in which the Judiciary cannot do anything to protect itself and has to rely on other parts of the government and the bar and the public to protect it.

JUDGE JACOBS: I just would like to pose a few questions to the panel, most of which kind of bounce off comments that were already made. As Judge Wald has pointed out, the Military Commissions Bill, signed into law last month, strips us of jurisdiction to hear a petition for a writ of *habeas corpus* filed by any alien enemy combatant anywhere in the world. My question is what interest do judges have in the scope of our own jurisdiction? Is it a problem of judicial independence or is it just a matter of separation of powers?

Anyone?

JUDGE BOGGS: Well, the way you put it I guess harkens back to my quote that there may be things that are bad policy, but they are not necessarily threats to the independence of judges. I think there is an interesting distinction or concomitance between individual judges, which is what I was mostly talking about, and the judiciary, which is what Judge Wald talked about. I would not see something like that case that you just mentioned as being any threat to my independence, which is how I handle my cases. But of course, it also brings into play Judge Dyk's point that the judiciary is the guardian of itself in the sense that if the law is declared unconstitutional, the litigation itself protects us.

JUDGE BEA: Well, on this question of jurisdiction stripping and taking away the right of *habeas corpus*, we had a situation since 2005 in the Real ID Bill,²⁹ which has taken away *habeas* from immigrants and said that the only judicial review that they get is a petition for review following the BIA. I have not seen any constitutional attacks on that.

For those of you who are doing this kind of work, the scope of review, the amount of evidence, the judicial determination under *habeas* is quite different from a petition for review from the Board of Immigration Appeals, the latter being, I think, more restrictive than the former. So the issue of whether stripping *habeas* from aliens is any worse than stripping a *habeas* from illegal combatant detainees is something which will probably come up.

I am sort of amused by the fact that no one has brought up the unconstitutionality of the Real ID Act that I know of, but everybody is talking about the unconstitutionality of denying that same right to illegal comba-

²⁹ See REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005).

tant detainees. They have different constituency.

JUDGE WALD: Well, I think, as someone said initially, maybe our terminology is not perfect. When we are talking about independence, obviously we are talking about sometimes different things. But I do think that Article III, which defined the judicial power—implicit in that, and even for the originalists in most of the discussions that went around at the time the Constitution was adopted, was the notion that the courts would do two things as the federal judicial power. One, they would act as a sort of umpire in certain situations between the executive and the legislature to make sure the Constitution itself was honored. And secondly, that with the addition of the Bill of Rights, all the debate became about that later on, that there would also be a protection for that.

The basic constitutional question, you are right, as to who has *habeas corpus*—whether it extends beyond citizens or beyond constitutionally—is one that has not yet been decided. The *Rasul* case³⁰ said there was a statutory right under the statutory articulation of *habeas corpus*, and that issue may yet have to be decided.

But on your last point, I think there is a very basic question that bothers a lot of people. Certainly, as you know, in Congress it only passed by one or two votes or whatever it was. The chances are, I would guess, it will be revisited again in a later Congress. But the Military Commission Act does not just take *habeas* away from persons who are eligible for deportation or for the aliens in Guantánamo, but for legal residents of the United States who are not citizens.³¹ And that does go one step above and beyond anything that has gone before. You could be here for forty years as a legal resident, have raised your children, run your store, whatever, and suddenly find that you were an enemy combatant and had no *habeas corpus* rights. So whether or not technically that comes under the rubric of independence, I do not know. You could have a word fight. But I do think it is an issue that ought to concern the judiciary.

You know, my final remark is we could have our salaries—I mean, I have a nice pension but I no longer have a salary—we could have our salaries to the day we die, and we could be sure that we were not going to be impeached. But if you were sitting there and really had no jurisdiction to decide anything that was important constitutionally, I am not sure whether that is where we want to go.

JUDGE JACOBS: Thank you. One issue that has frequently been

³⁰ *Rasul v. Bush*, 542 U.S. 466 (2004).

³¹ See The Military Commissions Act of 2006, Pub. L. No. 109-366, § 949, 120 Stat. 2600 (2006).

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discussed in the context of judicial independence is the nomination and confirmation process, which has been growing increasingly tough over the last couple of decades. But considering that federal judges get life tenure once that ordeal is over, how can it be said that the process itself has an impact on the judicial independence of anybody who is serving?

Any takers?

JUDGE DYK: Well, do you think that in situations in the Senate hearings, if a judge is asked how he or she would rule in the future on a particular case and is compelled to answer that question, that can overhang future decision-making in a way that does interfere with independents?

JUDGE JACOBS: Assuming one is compelled to answer.

JUDGE DYK: Well, I mean—you could refuse to answer, but then you can also not get confirmed.

JUDGE BOGGS: No, many judges have refused to answer and have generally been confirmed. I suppose the opposite side of it is your independence, as he says, is once you are sworn in, you can simply say “sorry, I lied.”

JUDGE BEA: But that did take place on the Senate, right?

JUDGE BOGGS: I mean, in a sense, you know, Lincoln had the right quote here. I think he was talking about—it may have been about Chase, and he said something like, “we must have a man who will be sound on the Greenback Clause, but we cannot ask him because if we did, he could not answer, or if he did, we would despise him for it.” And that is sort of the dilemma of the nomination process. And to me, it gets to that question of what is good policy. They cannot shoot you or hit you over the head or cut your salary once you are in office, and the fact that they can read back to you your testimony is not very much of a threat to my independence—although that may have been because I was not asked very many tough questions.

JUDGE WALD: I think that it may not even be such a threat to judicial independence. You get through smoothly and you go on your way. Although, let us assume most judges, the ones that I know, are conscientious. And if they have said something, they tend to try to stay on the same path hereafter, rather than say “bye-bye, I’m on the bench now and I’m on

my own.” But I think the importance of the confirmation process—which has defects—is that it gives, or it should give, the people in the Senate, if they used it rightly, if they used it with caution and thought, it gives them a basis for deciding whether or not they want to confirm somebody on the bench. But it also becomes a forum to introduce, with television, the American public to some of the issues.

So just as a point, as we are talking about other countries’ experience, it was interesting to me because the European Union now has a kind of tennet. They have norms, but for the area over which they have jurisdiction, one of their norms of the judicial area is that legislatures should have nothing to say about, and should not have any role in, the confirmation of judicial appointments; it ought to be entirely an executive or commission etc. I think that is wrong. I think actually the confirmation process, although it has been misused, does serve an important process apart from whether it affects the independence of the judges.

JUDGE BEA: I would like to just take a moment to shoot one bird down. You hear from time to time that the Senate confirmation process is so harrowing that good people are shooed away or scared of becoming federal judges. I have not noticed that. What I have noticed is a lot of people trying to get their foot in the door and trying very hard to become federal judges.

JUDGE JACOBS: We are going to take questions from the floor in a moment. I am just going to ask one last question of my own.

Lawyers, and the bar in general, have a supposed duty to defend judges who are under attack on the theory that judges are prevented by ethics, and probably prudence, from defending themselves. Is this duty being discharged, in your view, and is this duty being discharged evenhandedly?

Any takers?

JUDGE BOGGS: Well, I think that when judges are attacked on a substantive basis, you have some lawyers who agree and some who do not, just like law reviews. And probably the law reviews are not completely evenhanded either. I think that in the instances that are, in my view, real threats—for example, the South Dakota referendum or something that were to dismiss existing judges, as in Colorado—I think the defenses have been pretty evenhanded. When it comes to criticism, I originally said that was not a threat to independence, so if some of my friends are for me and some of my friends are against me, that is just what happens, just like the law reviews or the editorial page of my local paper.

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JUDGE WALD: I think the bar has an obligation to defend, when the criticism is very much *ad hominem*, et cetera. There was a period in the beginning of women judges, and I remember seeing the article where an executive, a member of the executive department who was mad at a decision said, well, what would you expect of a woman judge? When that kind of thing comes up, yes, I think the bar does have an obligation. And to a fair degree—and I do not read the papers all over the United States, I read the eastern seaboard ones—I think that they have mutually taken up that cudgel. And as you say, obviously if the reasoning is lousy or they think it is lousy, they have every right to say that.

JUDGE DYK: Can I make one more comment? I wonder if in the last ten or twenty years, the bar itself has become less independent than it was as a result of the competition for clients. I think, in terms of the sort of support the judiciary can expect from the bar, I think it was a lot greater forty years ago than it is now, just because the bar itself has lost independence.

JUDGE JACOBS: I will take some questions. A question seeks to elicit information rather than to give it. It usually starts with what, where, or why, and it ends on an uptick like a valley girl.

Yes sir.

AUDIENCE PARTICIPANT: I was interested in what Judge Bea said, and I was interested in the other panel members, in terms of the effect of judicial nomination hearings, and particularly potentially their effect, if there is an effect. If you have been attacked strongly enough by somebody in these hearings to any degree, does that effect what you might do later on?

JUDGE WALD: Well, it did not affect me, and I did have a very controversial confirmation, as my good friend and colleague Judge Sentelle in the first row will attest to. I think if you have the skin, the tough skin, to go through the confirmation hearings, especially if there is controversy, then it has been my experience that it does not affect you afterwards.

JUDGE BOGGS: I have seen people on my own court as they come on perhaps a little bit scarred, and that falls away very, very quickly, it seems to me. Now I guess in the Supreme Court you expect everyone to be controversial, although as it turned out, Ginsburg and Breyer were not as controversial. But everybody goes in, I think, thinking that it is not going to happen to them, so I really do not think people are discouraged in ad-

vance from seeking office. It is almost like that quote from the death penalty cases that the people who end up being the most abused, it is like it is freakish, like being struck by lightning, that you end up being designated by the Senate Judiciary Committee as the designated piñata for that part of the hearings.

JUDGE BEA: If you have been through a judicial election, a Senate nomination is a walk in the park.

JUDGE JACOBS: Yes sir.

AUDIENCE PARTICIPANT: (off-mic).

JUDGE JACOBS: Does the threat of dividing the Ninth Circuit and the other related issues for organizing the judiciary bespeak a threat to the judiciary?

JUDGE BEA: I have a little bit of experience in that. There are judges who are very much for the split, and there are judges who are very much against the split. We talk about it, but it never affects our judicial opinions that I am aware of. It does not have any effect on the judges when we are judging cases. We clash in front of the Senate judiciary committees. We clash on the pages of the Federalist publications. But I do not think it has any effect upon our judicial independence.

JUDGE JACOBS: We will take one or two more questions.
Yes sir.

AUDIENCE PARTICIPANT: I think many years ago, Henry Hart—and you will correct me if someone here knows this article—made some provocative remarks about the removal of jurisdiction from federal courts, particularly with regard to the Bill of Rights.³² And he posed this question: Would it be constitutional for the Congress to take away the court's jurisdiction to hear cases involving individual rights? And as I remembered, his position was, as long as there were courts open, in this case state courts, to hear those cases, there is no monopoly on the federal courts reviewing these cases.

³² See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

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JUDGE JACOBS: Any comments?

JUDGE BEA: Well, I think that was his position—and I can't remember his name, he was from Stanford. Gerald Gunther wrote a very long article in 1984 about that and came to the conclusion that Hart was right and that as long as it was the well-drafted jurisdiction-stripping bill, it would be found to be constitutional.³³ But that was his opinion.

JUDGE WALD: I certainly would—I hold my fire on the constitutionality of it because I am familiar with the debate and some of the authorities. I am not absolutely convinced that that is how far Congress could go in removing the appellate jurisdiction of the federal courts. But I think more important is there is still something that I will loosely call the spirit of Constitution, and I think the notion, if you took away review from the federal courts on most of the independent components of the Bill of Rights—whether you want to call it a legal question that judges should not worry about or a policy question which all Americans, including judges, should worry about in terms of the spirit of the Constitution—I think it would be a very serious question.

JUDGE JACOBS: That is the last question. We could go on a long time, but there's another panel. Thank you very much to the members of the panel.

(Panel concluded.)

³³ See Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 921 (1984).

**The Federalist Society for Law
and Public Policy**

presents

**ARE WE OVER-LAWYERING INTERNATIONAL
AFFAIRS?**

2006 National Lawyer's Convention

November 18, 2006

PANELISTS:

Professor Philip C. Bobbitt, University of Texas School of Law

Dean John D. Hutson, President and Dean, Franklin Pierce Law Center

Professor John C. Yoo, University of California, Berkeley, Boalt Hall
School of Law

Dr. Philip D. Zelikow, Counselor of the Department, United States
Department of State

Hon. Edwin D. Williamson, Sullivan & Cromwell, LLP (moderator)

JUDGE WILLIAMSON: Good morning. Although this panel is entitled, "Are We Over-Lawyering in International Affairs?," I think the better way to describe it is: What is the role of lawyers in making legal policy? As you've heard from several of the panel discussions at this Convention, the global war on terror has raised, not only serious and difficult legal questions, but serious and difficult legal policy issues—such as whether terrorism should be addressed as a matter of criminal law or as a matter of the laws of war, and whether it presents a new paradigm that must be addressed by a new set of rules, and what those rules should be.

This panel will discuss the role of lawyers—particularly government lawyers—in addressing questions of legal policy. We will discuss fundamental questions such as: Should lawyers decide legal policy? Or, is that

best left to the policymakers? Should lawyers give advice as to legal policy, or should they stick to providing answers as to what the law is? How should lawyers respond to what a policymaker thinks is the legal question, but is really a question of legal policy? If lawyers find the law vague or lacking, should they fill in the gaps, advising as to what the law should be? Was Secretary of State Rice right when she warned the American Society of International Law that lawyers should not stretch laws, such as the Geneva Conventions, to apply to circumstances they were not designed for? Did the Office of the Justice Department's opinions on interrogation techniques stretch in the other direction when they held that laws did not restrict the President's authority? Should lawyers indicate the quality of the response to a question? For example, should they say how a court would, or should, decide, or is it just enough to say that this is a reasonable answer and others may differ? What should a government lawyer do after losing an intra-governmental policy argument on a legal issue? Is the answer different if the argument was over a legal policy issue?

We have a distinguished panel to discuss these issues. Our first speaker will be Phil Zelikow. Phil is currently the Counselor of the State Department. This is not a legal position, but a very serious policy position, from which he advises the Secretary of State on a wide range of issues. He was the Staff Director of the 9/11 Commission, and in the past he has been a trial and appellate lawyer. He has been a Foreign Service officer and served on the NSC staff. Prior to becoming Counselor, he was the White Burkett Miller Professor of History and Director of the Miller Center of Public Affairs at the University of Virginia. He will provide the insight of a policymaker on the role of lawyers in making legal policy.

John Yoo will follow Phil. John needs no introduction to this group. His latest book, *War by Other Means*,¹ has just been released and John will be signing copies of it this afternoon. Whether you agree with John, it is a great book. Just look at the table of contents: War, the Geneva Conventions, assassination, the Patriot Act, the NSA and wiretapping, Guantánamo Bay, interrogation, military commissions. It sounds almost like the agenda for this Convention. John is currently a professor at the University of California at Berkeley Law School. From 2001 to 2003, he served as Deputy Assistant Attorney General in the office of Legal Counsel. He played a prominent role in the formulation of the legal opinions addressing many of the key issues that have arisen in the war on terror.

John will be followed by Admiral Dean John Hutson. John is President and Dean of the Franklin Pierce Law Center in New Hampshire. He is a career naval officer and, in 1997, became the Judge Advocate General of the Navy. Dean Hutson can, I believe, present the views of the career (particularly the uniformed) government lawyer.

¹ JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006).

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Our final speaker will be Philip Bobbitt, who holds the A. W. Walker Centennial Chair at the University of Texas Law School in Austin. Philip has served in the government in both policy and legal positions. He was in the White House Counsel's Office in the Carter administration. He served on the Senate Iran Contra Committee, and served as Director for Intelligence, Senior Director for Critical Infrastructure, and Senior Director for Strategic Planning at the National Security Council during the Clinton administration. I had the good fortune of inheriting this lifelong Democrat as my counselor for international law when I served as legal advisor in the George H. W. Bush administration.

So, Phil, why don't you start things off.

DR. ZELIKOW: Thanks. I am happy to have the opportunity to address this group today. I want to cover three major points: (1) the paradigm of armed conflict we are in now, (2) the challenge of making legal policy, and (3) the way in which we are adjusting our understanding of legal policy.

First: the paradigm of armed conflict as it applies to the conduct of the war on terror. I said in remarks to an ABA committee earlier this year that, before 9/11, we had a criminal justice approach to combating terrorism. In 1998, we indicted Osama bin Laden, for example. But the criminal justice approach to fighting Al Qaeda was not effective. So, therefore, after 9/11, we shifted to an approach of conducting armed conflict. For a variety of reasons, I think that was a fundamental and necessary shift in approach. The paradigm of criminal justice is inadequate in dealing with a large transnational phenomenon like Al Qaeda, for a number of reasons—and, armed conflict, I should mention, is not simply a metaphorical term. It is real. It is a real war in Afghanistan. It is a real war in Iraq. The government engages in actions under the law of armed conflict in other parts of the world that are effectively ungoverned. And, it partners with local governments' antiterrorism efforts—for example, in places like Northern Pakistan. Of course, the law of armed conflict is supplemented by criminal justice procedures, when people are captured under the legal regimes of different states, and inside the United States. But the law of armed conflict has to be an essential part of the legal approach to the war on terror. That is an argument I made at greater length in my remarks. Frankly, I think that it will be hard for any administration, Democratic or Republican, that succeeds the Bush administration, to say: "We are going to discard this approach altogether and go back to criminal justice: Article III courts and indictments in the Southern District of New York." When people look back on this period, whatever the controversies, they will see the importance of this paradigm shift.

That said, you have to interpret and manage the law of armed conflict and make policy decisions in a way that allows that paradigm to be sustain-

able and effective. If you want other countries to accept that you are operating under the law of war, it helps to interpret the law of war in a way they can understand and accept. If you choose to interpret the law of war in ways they cannot live with, it is very difficult to get them out of the criminal justice paradigm with which they feel more comfortable—you cannot build an international consensus around your new approach. That complicates the way you do business around the world.

I should note that this is not just a matter of deferring to world opinion. I know that this is a red flag to some conservatives. But this is not a matter of scoring well in a world opinion poll. Getting the cooperation of other countries is actually quite important to the effectiveness of the war on terror; and, if you want countries to cooperate with you in the international rendition of terrorist suspects, certain things need to be available; if you want them to make their airspace available for flights of government aircraft, certain things need to be true; if you want their police and soldiers to help you in a variety of ways, their governments have to be able to live with what you are doing. If the circle of cooperating governments gets narrower and narrower, the reach and effectiveness of our ability to conduct a global war shrinks commensurately.

So, it is a legitimate goal to build an international coalition that shares our basic principles; and our goal should be to persuade our international partners to understand that the law of armed conflict has to be an essential part of our approach to the war on terror. But this is fundamentally a policy argument, not a legal argument. I have not said, for example, that we are bound, as a matter of law, to apply a particular interpretation of the Geneva Convention or common Article III. I said that it is prudential, as a matter of policy, to apply legal principles that other countries can understand and accept, whether or not you believe that you are bound to make that choice. In fact, this was one reason why the 9/11 Commission recommended that, as a matter of policy, the U.S. government apply common Article III as a floor on its behavior, without engaging the issue of whether we are bound by that principle. This position has now effectively been decided for the Administration and the United States by the Supreme Court.²

Let me turn to my second point, then: legal policy. If I asked how many of you believe judges should make public policy from the bench, I doubt many would reply in the affirmative. That is my view, too. In general, I am reluctant to have judges make policy. Why is that? Because they are not trained to do it. They are not democratically empowered to do it. Thus, their legal reasoning seems forced when they are trying to achieve a public policy objective. Likewise, lawyers should not make public policy in the Executive Branch through interpretation of law. If they interpret the law in ways designed to make public policy, they are engaging in the same

² *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2796–97 (2006).

problematical behavior (that is, unless the lawyers are explicitly acting as policymakers, using the criteria and approach policymakers use, considering the full range of prudential political and international considerations as a policymaker would, from formal training or experience). We are not trained in policing and public order. A course in criminal procedure—even advanced criminal procedure, or mastery of Fourth Amendment law—is not the same as a course in policing and how to maintain public order in developing societies. Nor is it a course in how to practice effective counterterrorism, or a course in how intelligence collection works in the counterterrorism or counter-insurgency world. Lawyers do not necessarily receive much formal training in the kind of political analysis of international policy issues that is likely to arise in this twilight war in which we are now engaged.

This is not a partisan comment. It was true in the Clinton administration; it is true in the Bush administration (to some degree). I am just stating it as a matter of course. What happens, for one reason or another—either, because someone asked for it, or because it came from below—is an agency will develop a proposal about something they want to do. Let us suppose that proposal also involves highly sensitive intelligence issues; as in, for instance, the context of covert action. That proposal then usually goes to an interagency lawyers group. The key interagency meetings tend to be dominated by lawyers, who are mostly arguing about whether this is legal. Then, there are intense debates on how to describe the appropriate authorities—in which, again, the primary drivers are the lawyers. Finally, the document is finished, and the policymakers come back into the process, usually at the level of Cabinet principles. At this point, the cake is already pretty well baked.

I would argue that this is not an ideal way to make decisions about legal policy in the war on terror. John Yoo, I think, was an important policymaker in this regard. It is hard to read his book and not come away with that impression. Indeed, many of the major characters in his book are lawyers who worked with John in fashioning these policies. Without taking a side on his decisions, step back and notice the way policies are made and who the critical participants at the sub-Cabinet level are making them. There are exceptions—some of the internal DOD procedures, and so on—but I think what I am describing occurs commonly enough.

What then, are issues that surface when you bring full policy analysis to bear, as opposed to the simple question of what can I do and what can I not do? Basically, it is a balance of effectiveness against moral issues. Moral issues are not the same as legal issues. I need to stress that point. So, for instance, considering the effectiveness of detention and interrogation procedures, you can look at the experience of the French in Algeria. John cites the effectiveness of French techniques, for example, in the Battle of Algiers. But those same techniques caused an enormous reaction in France that helped shorten France's ability to conduct the war—not for le-

gal reasons, but for larger political reasons.

I wrote two case studies on the conduct of policing in Northern Ireland about fifteen years ago, spending a lot of time in Belfast. It has been a tortuous process of trial and error in British policing and interrogation methods. The question is not just one of effectiveness. It is a question of the sustainability of certain procedures over time. They are learning, in this painful process, what is both politically, internationally, sustainable and effective. It is a similar story with Israel and the United States. We have a lot of history in these matters. In the interrogation procedures, for instance, much had not been thoroughly analyzed at the time decisions were made—understandably, as they were made under great stress. Even today, we have an almost laboratory case of the way we handle terrorists outside of Iraq—and the way we handle terrorists inside Iraq under the law of armed conflict, who are just as dangerous.

Another issue is sustainability—both in the domestic and in the international sense. The most effective policies will be those that survive from one administration to the next, regardless of party affiliation; regardless of who is in control of Congress. The people carrying out these policies need to feel that they are not going to be whipsawed back and forth, as in the Church committee period and after. Late this summer, the President made a series of announcements that really moved us into a different legal phase in the war on terror. He was already moving into this phase before the Supreme Court decision, despite the controversy over the Military Commissions Act. He is building a sustainable partnership, working with the Congress and foreign countries for what he called “a common foundation.” He is using the military commissions for the major war criminals who helped carry out the 9/11 attacks—accepting that the way those people are treated will come out. It is more important to bring them to justice. This means a relatively limited role for some of the secret CIA procedures. But it fences off the things we have to be able to do in that realm that are invaluable. We need a durable legal framework in which to provide necessary policy guidance for the conduct of this conflict, and we need to be able to obtain broad durable support for the way we conduct it. I think, in other words, despite what you may read, we are moving in a reasonably healthy direction—moving forward in a way that will allow us to sustain the fundamental paradigm shift that occurred after 9/11.

PROFESSOR YOO: I would like to thank the Federalist Society for inviting me to speak twice in two days. And, in particular, I would like to say that I am not plugging my book again. I am going to plug Phil’s book. He has a great book on the Cuban missile crisis,³ which I read a long time

³ THE KENNEDY TAPES: INSIDE THE WHITE HOUSE DURING THE CUBAN MISSILE CRISIS (Ernest R. May & Philip D. Zelikow eds., 1997).

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ago, about how interagency process is an important factor in how we make policy, and how sometimes interagency processes take over and decide things that the elected leaders of the government does not actually intend or want to happen. I also learned a lot from Phil Bobbitt's book—which I highly recommend—*The Shield of Achilles*,⁴ which is sort of a bigger-picture analysis of the changes in the world and the place of the United States in that world, and how we, in some ways, have to confront the dangers of proliferation of WMD and terrorism. From both of those books I have learned quite a bit in thinking about these issues.

First, let me say that, as regards the question of the panel, has there been an over-lawyerization or a change in the amount of lawyering in the way we conduct foreign affairs? I think it is undeniable that there has been. You could look at the war on terrorism and some of the wars before that for evidence of this fact. We have accounts of our military leaders, our civilian leaders, going up even to the President of the United States, choosing bombing targets in Kosovo and Afghanistan with lawyers sitting right next to them, evaluating on-the-fly, on an *ad hoc* basis, whether selection of this or that target would be legal or not under international law.

There is a well-known story about a convoy leaving Kandahar, that our commanders thought about attacking because it was believed to have a large number of Taliban leaders. But, because their families were in the convoy, a military lawyer in the command center vetoed the strike. I cannot tell whether that was a good decision or a bad decision, but it gives you a sense of how powerful lawyers have become in the fighting of war. It is hard to imagine this happening in the other major conflicts that we have waged, such as World War II or the Civil War. You do not see any accounts of lawyers playing that significant a role, sort of day-to-day operations of the military.

This also takes place at much broader policy levels. Here, I disagree with what Phil just said, that there is a line between law and policy. My sense from working in the government is that, actually, lawyers tend to confuse that line—they think that a lot of what most people think of as policy is actually governed by law. One of the jobs of the Justice Department while in the Administration, oddly enough, was to stress that, in fact, the law does not decide these questions—that it really is a more difficult decision for policymakers to make. I quite agree with Phil, that, as lawyers, we may not be the most competent people to make those policy decisions, because we are not trained in how to make decisions about the effectiveness of different procedures, the effect they have on our ability to cooperate with other countries, and the effect they have on support for the United States in other areas. Those are all very important things that people are trained to do in public policy schools, through experience in the bureaucracies.

⁴ PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* (2002).

Take, for example, the Geneva Convention debate, which you have all likely heard about. Even to say, as I thought—and, I think the Administration thought—that the Geneva Conventions did not cover the war with al Qaeda, that does not tell you as a policy matter whether we ought to do so at all. There are important reasons you could argue, as Secretary Powell did at the time, in favor; but there are also reasons against it. Philip mentioned this interagency process of lawyers and said that I was going to have posttraumatic stress syndrome, because one thing I thought I would never have to hear again after I left the government was another interagency process. But, let me relive it for you to show you how painful it can be.

In this interagency process, you have lawyers who say: “We should give people Geneva Convention protections, because we are worried about how the Conventions will be honored in future conflicts against the United States.” That is a perfectly valid concern. But, to me, it sounds like a policy consideration. We felt that this kind of enemy was not covered by Geneva because of the nature of the organization, that that ought to be taken into account when we think about whether to engage this war. Concerns about future compliance with Geneva by other nation-states should not influence what we decide now, in this particular situation. It is not a question about whether the Geneva conventions, and their text and history, really cover the war on terrorism; it is an argument about policy considerations and the debate over whether to follow them or not. What I found in the interagency process debates is that, lawyers in favor of following the Geneva Conventions with Al Qaeda would make the argument as though it were a strict legal matter how those conventions ought to be interpreted, rather than a policy argument about what to do once you know what the law is.

The other thing is, we are all trained in law school to understand that the law we have today and the law we are making in the future is subject to policy; that it is an expression of policy. Legal scholarship over the last thirty or forty years has shown how often legal rules are actually policy choices. I found in the government that there was a curious inability to understand international law in that way. In some respects, the people we train to work on international law issues and to think about international law bring this very oddly formless perspective to it. It is the thought that international law is very clear; that it can be applied with great clarity; that it does not embody policy choices; and that it ought to be obeyed in all circumstances, without regard to thinking about how to change it. Those of us (or common-law lawyers) understand that the common law is an evolutionary system, and that you can change it through time over practice. There is an important component of that in international law. But, we had people in these arguments who thought that it was quite clear what international law required, and how it applied to something which a common law lawyer would typically think of as protean—as in, here is a new situation, the war on terrorism; and we have to think about how to apply and adapt these older rules drafted for a different situation to this new circumstance.

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A third thing that really struck me in these interagency processes is that there are people who firmly believe that international law is not just as secure and firm as domestic law, but that, in fact, it is federal law. There are people who would say that, if we think this is international law, the President is constitutionally bound to enforce it as though it were on a par with a statute or a treaty. That was just striking, how much that view—which I have always thought of as a fairly aggressive view promoted in the academy—had really seeped into the teaching of international law in our government. I just do not think there is much historical or textual basis for that proposition. There is no international law part of federal law in the Constitution itself, aside from when Congress decides to make something a criminal offense. We have historical examples, for example, of people like President Washington, who tried to prosecute people for violating his proclamation of neutrality in the absence of a congressional statute, though the courts refused to go along. But I have often thought this fails to think about how international law is an extension of international politics, and that taking some of these positions really does advance a certain kind of foreign policy or not.

The United States often promoted a view of international law that sought to constrain British interests, when we were a weaker country and they a stronger country. And, if you think about it, that is exactly what is going on today in reverse. Weaker countries, particularly in Europe, are using international law to constrain policy options that the United States should have in the war on terrorism. So, if France wants to play a bigger role in international affairs, but does not want to invest the military and diplomatic resources required, international law affords itself as a convenient way to constrain the larger power in the world—which, at this time in history, happens to be us.

What we have to do is decide whether we are going to decide on policies that might be effective, and balance it against what the effects might be—which Phil described quite well—in harming cooperation between the United States and other countries in fighting the war on terrorism. Those policies might be inconsistent with the way other countries view international law; but I do think that the United States' views are often downplayed. And, we are a country that is providing a public good: international stability. Our views on international law, I think, ought to be taken into account more seriously and heavily—particularly in the laws of war. A lot of other countries just don't fight wars and aren't responsible for conducting military and intelligence operations designed to protect the West.

DEAN HUTSON: Good morning. I, too, want to thank the Federalist Society for inviting me here. It is a real honor. I am a little embarrassed to admit to you that I have not actually written any books. I have read a number over the years—none of those that have been touted thus far, though, I have to admit. But it is an honor to be with this distinguished group, whose

careers I have watched over the years.

In answer to the question, I would echo John with a resounding, "Yes." But, also agreeing with John, I am not sure that really answers the question. We in the United States over-lawyer an awful lot. This is part of it, to be sure. But, the other way of looking at it, is that we often hide behind law and lawyers. We let them do the dirty work for us. One of the things I discovered, after being a lawyer for thirty-five years or so, is that the law itself is less important than I thought. The lawyers are more important. Clever lawyers, perhaps too clever by half, can get around the laws. And so, lawyers have become increasingly important; but that creates the problem of over-lawyering.

My job this morning is sort of unique and narrow. I am supposed to talk about the military and military lawyers, because they have been thrust into the forefront recently. They have become of great interest to people, and I think they have acquitted themselves nicely. In that context, let me talk for a moment about the law of war. (I should credit Colonel Bill Eckhart at the Army War College for what I am about to say, because I have grievously stolen a lot of his ideas). I view the law of war as a sort of continuum, with law at one end and war at the other end. There is a great deal of tension in that continuum. The law values the system, the means. War glorifies the end, the results. The armed forces fear that they are going to lose the necessary means by which to achieve the end. The lawyers worry about loss of jurisdiction (yet another tension). The law restricts power. War uses power. The law tries to limit disorder and violence. War thrives on disorder and violence.

There are some great similarities, though, too. Both are vital to the success and security of the country. And, to some extent, one is a means to the end, in that there are lawyers involved with the military mission trying to facilitate it and make it work. The military mission is to fight and win the nation's wars. But that is all the military can do. We need to keep this in mind in the present situation. All the military can do is provide the time and space necessary for the real solutions to take place. The military is not the solution in and of itself. The real solutions are economic, cultural, social, religious and legal; so that, the lawyers involved in the war-fighting aspect, providing the time and space necessary, become part of the solution in the sense of providing the law of war. The military, and the lawyers in the military, are not very good, honestly, at peacekeeping. They can do it at the point of a bayonet, but, when you sheath the bayonet, all hell can break loose again. And, they are particularly unsuited for nation-building. That is somebody else's responsibility. The Judge Advocates understand and respect the chain of command and the mission of the military. They also are very good generally at protecting their superiors from making mistakes, protecting them oftentimes from themselves.

It is absolutely necessary that the military lawyers understand that the four-star general or presidential appointee sitting across the table from

them is not their client. Their client is the United States of America. It is not the individual. It is very easy for lawyers in the government and in the military—particularly in the military, where chain of command and loyalty are so vitally important—to forget that. When I was a young lawyer in the Navy—and, this was during Vietnam, and we were all essentially avoiding the draft and becoming lawyers because it seemed cleaner—we spent a lot of time debating whether we were lawyers first or naval officers. What was our primary responsibility? To whom did our allegiance lie? To what profession did we owe fealty?

But this was a red herring. Nobody asked the pilots whether they were pilots or naval officers first. Nobody asked the submariners where their loyalty lied. It is the same thing for JAGs. The United States Armed Forces demands of them that they be the very best lawyers they can possibly be. That is all that they have to do, be the best lawyers that they can possibly be. I say with some pride that we have seen that in the last few years. We have seen it with the lawyers that have been defending people on military commissions. People come to me and say, “John, are you surprised that they have been so vigorous?” like we expected the lawyers in uniform to just lay over and play dead because defending alleged terrorists was not the thing to do. The answer is no: I was not surprised at all. In fact, I expected it.

I testified at the Senate Armed Services Committee a few months ago about the military commissions, and sat next to the JAGs of the various services. They testified honestly and forthrightly about where they thought the military and the administration had made mistakes, and what they thought was the way ahead. I thought they showed a great deal of courage in doing that. But, again, I was not surprised. I think it is important for all lawyers—particularly lawyers in the military—to lead from the rear. Whether you are trying to get some junior enlisted person to understand that it is not in his or her best interest to take the stand, or whether you are trying to convince the four-star of what he ought to be doing, it is necessary for lawyers to lead from the rear. If you do that, you will find yourself—not directly, but very effectively—in the policymaking position; because lawyers have the unique position of advising the people who make policy. It is easy to get lost in that. It is easy to hide and say, “Well, it is not my decision; all I did was give advice.” But, good lawyers know the law, and great lawyers know about life. Law is not practiced in a vacuum; it’s practiced in real life. The military lawyers I have seen have demonstrated that in great abundance. And, I am awfully proud of them. Thank you.

PROFESSOR BOBBITT: In 1990, the states of the world gathered in Paris to adopt the Charter of Paris. It incorporated the Moscow and Copenhagen Declarations. It was, perhaps, the most important treaty since the Charter. I had just started work then as the Counsel on International Law for the State Department. And, I tried to get IL, as it is known, to send

lawyers to Paris. The acting legal advisor said, "Why? I mean, what would they do?" His view, I think, was rather like the view of my colleagues up here. There is law, and then there is policy. That struck me as wrong then, and it does now too. It leads to all sorts of practical impossibilities, because it is hard to extricate law from policy.

In fact, it makes lawyers much more dictatorial. When they reflect policy preferences, they are forced to clothe them in the language of the compelling nature of the law. It represents a very retrograde view of how we use lawyers in this society. I agree with the premises of my colleagues here—we do need to reform international law, as well as domestic law, to appreciate the new strategic context we're entering. But I strongly disagree that the way to do that is to pretend that lawyers should be confined to reading statutes and declaring obstacles, or their removal.

For the long wars of the twentieth century, we separated law from strategy. That was good for us. It allowed us to avoid militarizing the domestic environment and politicizing the strategic environment. That, in turn, allowed bipartisanship over many decades. We won the wars against fascism and communism. But, in the period we're entering now, we need to reintegrate law and strategy; and, the failure to do that, which we have seen in abundance in the last few years in Iraq, is giving us a reputation for fecklessness and lawlessness that will make the sort of consensus that Phil Zelikow talked about very difficult to achieve—not only abroad, but also domestically.

There are, I think, three wars on terror that we are trying to prosecute simultaneously. One is a war against terrorism—a particular kind of terrorism, twenty-first century networked global outsourcing terrorism. This one will not be confined to radical Muslims; although, the market innovator of sorts was Al Qaeda. The second war against terror is a struggle against the proliferation of weapons of mass destruction for "compellence" rather than deterrence. Sometimes, these two theaters intersect; and that makes terrorism especially terrifying. But, sometimes they do not; and, progress in one dimension makes the other dimension actually worse off. The third is an effort to protect our civilians from the consequences of infrastructural failure, whether it is natural or unnatural, critical infrastructure failure or a biological attack whose origins we do not know and may never know; as, indeed, we do not know the authors of the anthrax attacks.

To win those wars, the first weapon we must deploy is law; and the way to deploy it is not to treat lawyers like closet cases. When we have learned that law is our strongest suit in this society, that there is a reason why lawyers play such a large role in Congress, we will avoid the two extremes of either pretending that a lawless approach to strategy can succeed, or lawyering in a way that makes law a kind of Trojan horse for the policy preferences of lawyers.

I was sitting here, listening and thought of a deceased friend of mine.

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I wish he were here. His name was Lloyd Cutler. He was a very prominent Washington lawyer. He was not a conservative. I doubt he was a member of the Federalist Society. But, he had a very subtle and powerful view of law. Most people do not realize this, but he was the mind behind the Algiers Declaration that got our hostages back. It allowed the President much more flexibility than we otherwise would have had. He even treated being a lawyer as something like being a mechanic; like something which would have forced him to defer to policy persons. Had that happened, he would have lost his usefulness. As the dean told us, it was because Lloyd was a very great man, as well as a great lawyer, that he was so useful to the many presidents—presidents, by the way, of both parties—over such a long period of time.

I imagine that many of you are lawyers, and some of you law students. I ask you to reflect on the unique role that America has given lawyers. If you are a physicist or a mathematician and you cross a border, you still have your yellow pad with you and your chalkboard. But when a lawyer crosses the border, she becomes just another tourist. It is the jurisdiction that empowers you. And, in this country, lawyers have been given a unique role. That puts a big responsibility on you. You have become defenders of the Constitution, just as much as the 101st Airborne. To withdraw from this, or fail to appreciate the important role law and lawyers play in the wars on terror, would be a big mistake.

(Panel concluded.)