

The Magazine of the Federalist Society

# The Federalist Paper

February 2012

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WINTER  
ISSUE

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Student, Lawyers &  
Faculty Division  
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# THE FEDERALIST NO. 78



“The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”

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## LETTER FROM THE EDITOR

Dear Friend of the Society,

We are pleased to bring you the winter issue of *The Federalist Paper*. Inside, as always, we review the many programs and publications the Federalist Society has sponsored through its various divisions and special projects over the past months.

The Federalist Society hosted its annual National Lawyers Convention in Washington, D.C. from November 10-12, 2011. The Convention's theme this year was "The Constitution of Small Government?" The headlining event was the Annual Dinner, during which U.S. Supreme Court Justices Clarence Thomas and Antonin Scalia were honored for their service on the High Court and gave brief remarks to a packed ballroom at the Omni Shoreham Hotel. Thank you to the more than 1,800 people who attended and helped make this year's Convention another success.

The Lawyers Chapters, Student Chapters, and Practice Groups continued to provide an excellent quantity and variety of programming focused on current developments in the law, including the Supreme Court's decision in *Wal-Mart v. Dukes* and its upcoming consideration of the challenge to the Affordable Care Act.

This year, Stanford Law School will host the annual Federalist Society Student Symposium on March 2-3. The topic of the Symposium is "Bureaucracy Unbound: Can Limited Government and the Administrative State Co-Exist?" You can find more information on the event at [www.fed-soc.org/symposium](http://www.fed-soc.org/symposium). We hope to see many of you there, and we will include a survey of the various panels and speeches in the next issue of the magazine.

As always, we invite and encourage friends and members to send in comments and suggestions—and look forward to hearing from you!

# Features

February 2012



*(above) The Federalist Society's Student Division staff and student chapter volunteers from across the country gather during the closing reception of the 2011 National Lawyers Convention in Washington, D.C. (right) U.S. Supreme Court Justice Antonin Scalia addresses the attendees at the National Lawyers Convention's Annual Dinner.*



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# Student Division

by Alexandra Bruce

Our student chapters hosted over 700 events last fall. The student chapter leaders have worked hard organizing and advertising these events, choosing interesting topics—some of which are noted below—and establishing effective communications strategies to ensure high-quality discussions and high attendance numbers. As a result of these efforts, the number of events continued to rise and surpassed those of the previous fall.

Many student chapters found environmental law to be a popular topic on campus. Federalist Society chapters at Yale, Colorado, Stanford, California-Berkeley, Columbia, and Brigham Young hosted extremely successful events focusing on the topic of environmental law. Many of these events attracted crowds of over 100 students, lawyers, and professors.

The *Wal-Mart v. Dukes* case, in which the Supreme Court upheld the dismissal of the largest civil rights class action suit in history, proved to be a stimulating topic with our student chapters last fall. Both Virginia and Harvard hosted debates focusing on the case that drew audiences of over 100. Debates like these tend to facilitate

environments of open discussion and allow law students to truly understand the competing issues involved in landmark cases such as *Dukes*.

Large crowds also attended our chapters' debates on the proper role

three-day convention, the student volunteers were able to enjoy panels, luncheons, and receptions with many of our distinguished Federalist Society members and speakers.

The 31st Annual Student Symposium will be held on March 2-3 at

Stanford Law School. This year's topic, "Bureaucracy Unbound: Can Limited Government and the Administrative State Co-Exist?" will feature many prominent panelists, including U.S. circuit court judges Carlos Bea, Thomas Griffith, Brett Kavanaugh, and Sandra Ikuta. U.S. Senator Mike Lee will give the keynote address at the closing banquet.

During the record-breaking fall semester, the Federalist

Society student chapters are already making their cases in the competition for this year's Feddie awards. These awards include the James Madison Award for Chapter of the Year, Alexander Hamilton Award for Most Improved Chapter, Samuel Adams Award for Membership Growth, and Tom Paine Award for Creative Publicity. Winning chapters will be awarded their Feddies at the Student Symposium closing banquet.



*Justice Clarence Thomas (sixth from right) takes time to visit with the Federalist Society's Catholic University of America Columbus School of Law in January.*

of the judiciary. The Chicago Chapter hosted a debate on this topic with Clark Neily of the Institute for Justice and Ashley Keller of Barlit Beck that brought in 90 attendees. Harvard, Duke, Virginia, Illinois, Northern Illinois, and Rutgers-Newark also hosted popular discussions on the role of the judiciary.

Last November, 200 of our student chapter members joined us at the National Lawyers Convention in Washington, D.C. During the

# Lawyers Division

by Lisa Ezell

The Federalist Society's lawyers chapters organized a busy fall and winter programming schedule, hosting dozens of programs over the last several months. What follows is an overview of their activities.

Several lawyers chapters previewed the upcoming challenge to the constitutionality of health care reform. Gregory Katsas of Jones Day, who is co-counsel to the Florida 11th Circuit challenge, participated in debates before the Cincinnati, Miami, Mississippi, and St. Louis Lawyers Chapters, while he presented speeches before the San Francisco and Silicon Valley Lawyers Chapters. During the debate in St. Louis, Katsas maintained that the law was a "blueprint for Congress replacing a free market economy with a command-control economy." He argued that Congress could even compel Americans to buy broccoli if it can force them to buy health care. Katsas said it was legally significant that Congress has never tried to force people to buy a product, maintaining, "The

Supreme Court has said that if a seemingly attractive power has not been exercised in the 200 years of constitutional history . . . that is a pretty good reason to think it doesn't exist." To uphold the law, the U.S. Supreme Court would have to recognize broader



(left to right) Memphis Lawyers Chapter president Greg Grisham, Distinguished Scholar in Residence at Catholic University of America Law School and Emeritus Professor of Law at LSU Law School John Baker, and Memphis Lawyers Chapter member Todd Mosley gather after Prof. Baker's speech on "The Federalization of Crime: A Look at the Case of Gibson Guitar and Beyond."

commerce powers than it had ever recognized before, broader than even *Wickard v. Filburn*. He also argued that the health care mandate is not economic activity, but rather "inactivity." Professor Douglas R. Williams of Saint Louis University School of Law argued that the health care law

## Chap-Update

and its individual mandate was justified under the Commerce Clause due to the shifting of uninsured health care costs to insurers, which he claimed cost the typical family \$1,000 a year. Professor Williams also argued that the Supreme Court had recognized broad congressional power since *McCulloch v. Maryland*.

In other related programs, Carrie Severino, the Chief Counsel and Policy Director for the Judicial Crisis Network, discussed the question "Health Care Reform: Should Any Supreme Court Justices Recuse Themselves?" in a speech to the Philadelphia Lawyers Chapter. Severino discussed her reasons why Justice Kagan should recuse herself, particularly if she received attorney-client communications from the Department of Justice attorneys plotting strategy to fight the constitutional challenges.

Roger Pilon of the Cato Institute discussed the constitutionality of the individual mandate in a speech to the Connecticut Lawyers Chapter, while his colleague Ilya Shapiro discussed Obamacare's constitutionality at a New Orleans Lawyers Chapter program. The Colorado Lawyers Chapter hosted David Rivkin of Baker & Hostetler, who discussed the Obamacare litigation in a speech to that chapter. The

**Indianapolis** Lawyers Chapter also hosted a debate between Prof. Gerard N. Magliocca of Indiana University School of Law-Indianapolis and Thomas M. Fisher, the Indiana Solicitor General, on “The Constitutionality of the Health Care Reform Act.”

The **Richmond** Lawyers Chapter hosted a discussion before fifty-eight lawyers between Professor Eric Claeys of George Mason Law School and Professor Ezra Rosser of American University Washington College of Law. The speakers engaged in spirited debate about the first principles underpinning property rights. They focused on the fundamental nature of these rights and whether they were natural or just state-created. The program was the first in a Richmond Chapter series discussing property rights. Upcoming events in the series include discussions of the proposed Virginia constitutional amendment designed to respond to Kelo, regulatory takings, takings

by debasement of the currency, regulation and the right to earn a living, and regulatory reform.

Both the **Charlotte** and **Winston-Salem** Lawyers Chapters hosted C. Boyden Gray, who served as White House Counsel for President George H.W. Bush and as Ambassador to the EU. He discussed the constitutionality of the Dodd-Frank financial reform law in addresses to both chapters. He described the law’s regulations as a “horrible wet blanket” on the financial sector, lending uncertainty and curbing job growth. He discussed the possible negative impact of the law on small business, which could face difficulties getting loans. Gray contended that the law’s increased regulations granted extraordinary authority and discretion to bureaucrats without proper oversight authority. The **Los Angeles** Lawyers Chapter hosted Peter Wallison of the American Enterprise Institute, who discussed “Did Dodd-Frank Flunk? Fannie, Freddie, and the

Financial Crisis of 2008.”

The **New York City** Lawyers Chapter also discussed the Dodd Frank legislation in its Fall programming, with a panel discussion on “The New Federal Consumer Financial Protection Bureau: Appropriate Safeguard or Regulation Run Amok?”

Participants included Professor Jonathan R. Macey of Yale Law School; Professor Jeffrey N. Gordon of Columbia Law School; and Mary E. Kissel, an Editorial Board Member of *The Wall Street Journal*, who moderated. The Richmond Lawyers Chapter co-

sponsored a program with the **University of Richmond** Student Chapter, hosting former BB&T Chairman and CEO John Allison. About sixty attended the program. Allison discussed the causes and consequences of the financial crisis. He called for less government regulation, and he blamed government policies, not corporate greed, for the financial crisis. He maintained that massive investment in real estate was also a strong contributor to the crisis, and he singled out the Federal Reserve Bank, the FDIC, and Freddie Mac and Fannie Mae as the culprits. Federal government pressure to create affordable housing opportunities led to lower lending standards and thus the subprime loan market. Allison contended that entrepreneurship was essential in creating economic growth, though that was hampered due to crippling government regulation and high tax rates.

The **Charlotte** Lawyers Chapter also hosted a debate on which method of judicial selection North Carolina should use. Approximately seventy people attended, including several local judges. Professor Scott Gaylord of Elon University School of Law argued the case for judicial elections as the “least bad” option for the selection of judges, and he attempted to refute a number of assumptions made by advocates of an appointment system. John R. Wester, a partner at Robinson, Bradshaw and Hinson and a past President of the North Carolina Bar Association, presented the case for “merit-based” appointment. The **Memphis** Lawyers Chapter also hosted a debate on state judicial selection between Tennessee State Senator Brian Kelsey and Daniel



*J. Christian Adams (right), a former Department of Justice attorney, meets with Morgan Streetman (left) and other members of the Tampa Bay Lawyers Chapter to speak about his book Injustice: Exposing the Racial Agenda of the Obama Justice Department.*

Van Horn, the President of the Tennessee Bar Association. They participated in “A Debate over the Federal Model Judicial Selection Proposal for Tennessee SJR-475” before a crowd of over forty lawyers.

Several lawyers chapters hosted events on the book *Confronting Terror* and offered commentary on the tenth anniversary since the 9/11 terrorist attacks. Professor John Yoo of UC Berkeley School of Law, who served as co-editor, and Dr. Charles R. Kesler of Claremont McKenna College discussed their contributions to the book in a speech to the **San Francisco** Lawyers Chapter. The **Los Angeles** Lawyers Chapter hosted former United States Congressman Bob Barr and Prof. Robert Pushaw of Pepperdine University School of Law on “Confronting Terror: Is Fear Wagging the Post-9/11 Policy Dog?” The **Atlanta** Lawyers Chapter hosted a program with Georgia Supreme Court Justice David Nahmias (who previously served as the U.S. Attorney for the Northern District of Georgia); Bill Jordan of Alston & Bird and formerly of the U.S. Department of Justice; and Dean Reuter of The Federalist Society and the co-editor of *Confronting Terror*. Reuter also participated in an event hosted by the **Boston** Lawyers Chapter on *Confronting Terror*. Other participants in the Boston program included former United States Attorney General Michael Mukasey, Arthur Herman of the American Enterprise Institute, and Carol Rose of the Massachusetts ACLU. Other chapters hosted similar national security-related events. Judge David Sentelle of the U.S. Court of Appeals for the

D.C. Circuit discussed “National Security Law: The Changing Role of the Courts” in a speech to the **Triangle** Lawyers Chapter. The **New York City** Lawyers Chapter hosted a program with Max Boot, the Jeane J. Kirkpatrick Senior Fellow for National Security Studies at the Council on Foreign Relations; Professor Andrew Kent of Fordham University School of Law; and Professor Michael A. Newton of Vanderbilt University Law School and a former advisor to the Iraqi High Tribunal on “Nation Building: When Can and Should the United States Do It?”

Both the **Baltimore** and **Long Island** Lawyers Chapters hosted Richard Brookhiser, the author of *James Madison* and a columnist at National Review. Brookhiser discussed “James Madison: Father of the Constitution, Father of Politics” to a sold-out crowd of over sixty-five lawyers in Long Island and thirty in Baltimore. Brookhiser focused on Madison’s role as the “Father of the Constitution” and his influence on the growth of the first political parties.

The **Washington, D.C. Young** Lawyers Chapter hosted a pair of events in the fall. In October, the chapter hosted a luncheon with former United States Attorney General John Ashcroft, who offered advice to the young lawyer crowd and added reflections from his time at the Justice Department. The Chapter also hosted FCC Commissioner Bob McDowell in its annual pre-lawyers convention reception at the Tabard Inn.

In other notable programs, the **Memphis** and **Nashville** Lawyers Chapter hosted Professor John Baker, the Distinguished Scholar in Residence at Catholic University of

America Law School and Emeritus Professor of Law at Louisiana State University Law School, on “The Federalization of Crime: A Look at the Case of Gibson Guitar and Beyond.” Baker discussed how the federal raid on the Gibson Guitar factories for evidence of banned imported wood from India has prompted a backlash against the Lacey Act. He also discussed federal over-criminalization issues, often triggered by what he said were vague criminal laws that could allow government prosecution of individuals that the law was not intended to investigate. The **Madison** Lawyers Chapter hosted a debate between Professor David Bernstein of George Mason University School of Law and Professor Victoria Nourse of the University of Wisconsin on “Rehabilitating Lochner: Defending Individual Rights Against Progressive Reforms(?)” The program is available online. The **Tallahassee** Lawyers Chapter hosted a reception with guest Pam Bondi, the Florida Attorney General. The **Atlanta** Lawyers Chapter hosted Georgia Governor Nathan Deal, who reflected on his first year as Governor and what to expect for the state in 2012.

The Lawyers Chapters are preparing for a busy winter and spring calendar. On January 28, the **Western** lawyers chapters will co-sponsor the sixth annual Western Chapters Conference at the Ronald Reagan Presidential Library. Panelists will discuss California’s business environment and the Arizona immigration case. For more details on this program, and all other lawyers chapter programming, please visit [www.fed-soc.org](http://www.fed-soc.org).

## ALUMNI RELATIONS EFFORT TAKES SIGNIFICANT STRIDES IN 2011

The Federalist Society has taken significant steps in starting alumni chapters associated with different law schools. The goal is to create chapters that run themselves largely autonomously with the Federalist Society's financial and other support.

At this year's National Lawyers Convention in November, the Federalist Society hosted separate well-attended breakfasts for alumni from Catholic, Chicago, Columbia, Georgetown, Harvard, Michigan, NYU, Stanford, Virginia, and Yale. The breakfasts were hosted by alumni representatives from each school. In most cases, both a faculty member and a current student delivered remarks about the current situation at the school. Guest speakers included the Honorable Brett Kavanaugh, the Honorable Loretta Preska, and Professors Randy Barnett (Georgetown) and Michael McConnell (Stanford).

Below is a list of additional alumni events from throughout the year:

- In February, at the National Student Symposium at the Univer-

sity of Virginia, the law school's Alumni Chapter hosted a lunch for approximately 50 attendees.

- The University of Virginia Alumni Chapter hosted receptions in March and June, the first at the home of Assistant United States Attorney Kevin McFadden, where Ronald Tenpas, co-chair of Morgan Lewis's Environmental and Climate Change Practices, spoke about climate change, and the second on the rooftop of Jones Day in Washington, D.C.

- In April, distinguished attorney Gerald Walpin hosted a well-attended Yale Law School alumni cocktail party at his home in New York City.

- In June, the Stanford Alumni Chapter hosted a dinner with Professor Michael McConnell.

Moving forward, the alumni initiative will play a more active role in finding and developing chapter leadership, together with giving them the support they need. With the hiring of Justin Shubow in a permanent position with responsibilities partially focused on these chapters, and with the interest generated so far among leaders at many law schools, we expect the alumni chapters to develop rapidly.



(above) Prof. Randy Barnett (right) of Georgetown University Law Center spoke at the Georgetown alumni breakfast at the 2011 National Lawyers Convention. Here, he is pictured asking a question of the participants in the annual Rosenkranz Debate and Luncheon with Federalist Society Board of Visitors member Andrew Redleaf (left) of Whitebox Advisors and Federalist Society Board of Directors Chairman Prof. Steven Calabresi (center) of Northwestern University Law School. (below) Prof. Michael McConnell of Stanford Law School spoke at the Stanford alumni breakfast at the 2011 National Lawyers Convention and also joined the alumni chapter for a dinner in June.





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## SOCIAL MEDIA MOVES TO NEXT LEVEL

In September 2011, the Federalist Society took an important step forward by hiring its first director of social media, Justin Shubow. A graduate of Yale Law School, an attorney, and a former editor of *Commentary* magazine, he aims to take our social media to the next level.

Through its social media outlets—its blog, Facebook page, and Twitter feed—the Federalist Society is finding new ways to extend the reach of its events, publications, and multimedia beyond its membership and to the general public. The Society also seeks to inform its audience about some of the latest developments in the legal community and to spark debate on issues that currently have an impact on the making and the interpreting of the law.

*FedSoc Blog.* FedSoc Blog (<http://www.fedsocblog.com>) is

the official weblog of the Federalist Society. The Society created the blog as an original source of news and information relevant to the legal and public policy communities. The blog links to papers and multimedia published by the Federalist



Society and to materials published elsewhere on the web, including news articles, blog posts, and videos of interest to our audience. It has been an effective means of advertising FedSoc's popular SCOTUScast podcasts. FedSoc Blog also serves to highlight upcoming event announcements, new publications, and other online features from the Federalist Society website. Keep your eye out for exciting changes

to the blog in 2012.

*Facebook and Twitter.* The Federalist Society has been using Facebook and Twitter to vastly increase the reach of its publications, multimedia, events, and programs. The Federalist Society's Facebook fan page has over 104,000 likes, and it continues to grow in popularity as people from around the web receive alerts and updates highlighting legal news and opinion as well as various Society projects. Our Twitter feed has over 6,000 followers. Through both Facebook and Twitter, the Society is making an increased effort to engage its audience by encouraging input and debate on the issues we feature. The effectiveness of this effort is evidenced by the increase of our followers, allowing the Federalist Society to reach a broader audience than ever before.

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## FACULTY DIVISION HOSTS RECORD-SETTING CONFERENCE, PREPARES TO LAUNCH BOOK EVENTS

by Anthony Deardurff

The Faculty Division concluded a productive fall semester with its 14th Annual Faculty Conference on January 5-6 in Washington, D.C. This year's conference proved to be our largest to date, with more than 100 professors from over 65 different law schools gathering to hear panels on public sector unions, judicial ethics, and the government's post-bailout role in private sector companies. Participants likewise filled the room for our signature luncheon debate as Professor Eugene Kontorovich of Northwestern University School

of Law squared off against Professor Stephen Vladeck of American University Washington College of Law on various issues involving the Alien Tort Statute, international law, and the judiciary. Executive Director Elizabeth Andersen of the American Society of International Law, which co-sponsored the debate, served as moderator. And as always faculty members provided helpful comments on a number



*Prof. Stephen Vladeck (left) of American University Washington College of Law and Prof. Eugene Kontorovich (right) of Northwestern University School of Law debate the Alien Tort Statute, international law, and the judiciary, as Elizabeth Andersen (center), Executive Director of the American Society of International Law, moderates.*

of each others' works in progress, as well as on the winning papers in our competition for young legal scholars. Audio and video recordings of the conference are available on our website at [www.fed-soc.org](http://www.fed-soc.org).

Thanks to the generous support of the Searle Freedom Trust, we are also pleased to announce that in the coming months we will be hosting, in association with the American Enterprise Institute, a series of book-related events. Our first event will take place on Tuesday, February 21 at AEI's facilities and will feature Michael Greve's *The Upside-Down Constitution*, which offers a fresh perspective on the past and future of federalism. The author will present key aspects of his argument to the press and public, followed by a question-and-answer period. Subsequent events featuring other faculty authors are in the works for March and April. We are also shortly launching a new podcast series on recent faculty books.

In addition, as the Supreme Court winds its way through the heart of the October 2011 Term we continue to work with the Federalist Society's Practice Groups in producing podcasts and providing press calls on key cases and decisions as they are handed down. We now have some twenty-five podcasts on recently argued or decided cases available online, and anticipate providing daily commentary as the Court hears argument on the various Patient Protection and

Affordable Care Act challenges this March. See [www.fed-soc.org](http://www.fed-soc.org), subscribe to our blog, or follow us on Facebook or Twitter for more information.

We have also continued to host various colloquia in our *Law and Liberty* series, co-sponsored by the Liberty Fund. Over the course of a day and half, small groups of law professors, academically-inclined



*Law professors, law students, and practitioners convene to discuss "International Law, Foreign Law, and the United States Constitution" at a Law and Liberty colloquium in Dallas, Texas co-sponsored by the Liberty Fund. (above) Prof. Robert J. Delahunty (left) of University of St. Thomas School of Law and Prof. Joan L. Larsen (right) of University of Michigan Law School. (below) Prof. Gregory S. McNeal (left) of Pepperdine University School of Law and Prof. David Moore (right) of Brigham Young University Law School.*



law students, and experienced practitioners gathered to discuss and debate enduring legal questions. Participants reviewed a carefully-selected set of readings prior to each

conference and arrived prepared to engage in extended conversation on the topic at hand. In "International Law, Foreign Law, and the United States Constitution," held in Dallas, Texas on October 21-22, participants engaged international law and foreign law from the perspective of American constitutional law, weighing a tradition of nation-state sovereignty against the demands of a highly-interconnected world. Our remaining colloquia in this cycle of the *Law and Liberty* series will be as follows: "Liberty, Responsibility, and the Legal Profession," on February 10-11 in Marina del Rey, California; "Hayek on Law, Legislation, and Liberty," on March 9-10 in Atlanta, Georgia; and "Constitutional Economics" on March 23-24, in La Jolla, California. Participants have continued to enjoy the high quality of discussion and spirit of camaraderie that mark these colloquia.

Finally, we are currently accepting applications for 2012-2013 Olin-Searle-Smith Fellows in Law program. This program offers top young legal thinkers the opportunity to spend a year working full time on writing and developing their scholarship with the goal of entering the legal academy. Applications are due by March 15, 2012, to Tyler Lowe at

[tyler.lowe@fed-soc.org](mailto:tyler.lowe@fed-soc.org). For more information, please check our website at <http://www.fed-soc.org/aboutus/page/olin-searle-smith-fellows-in-law>.

# Practice Groups Update

by Hannah De Guzman, Juli Nix & David C.F. Ray

**T**he Administrative Law & Regulation Practice Group produced a paper by Mr. Daren Bakst on the key provisions in the Regulatory Accountability Act. To further the discussion, the practice group also hosted a Teleforum call on the issue with the Honorable C. Boyden Gray of Boyden Gray & Associates and Prof. Ronald Levin of the Washington University School of Law. After providing their thoughts on the legislation and its anticipated effects on the federal rule-making process, the speakers answered questions from the callers.

In late August, the Civil Rights Practice Group sponsored a Teleforum call on the issue of Felon Voting and Section 5 of the Voting Rights Act. Policies on felon re-enfranchisement vary from state to state, with most states restricting convicted felons from voting to varying degrees. Among other issues, the panel of experts discussed the history of felon disenfranchisement laws and whether such laws violate the Voting Rights Act. The call featured Nancy Abudu of the American Civil Liberties Union, Hans von Spakovsky of the Heritage Foundation, and Roger Clegg

of the Center for Equal Opportunity as the moderator. In early November, on another Teleforum call, the same panel of experts

Ho of Gibson Dunn & Crutcher LLP, Loren AliKhan of O'Melveny and Myers LLP, the Honorable Gail Heriot of the U.S. Commission on Civil Rights, Roger Clegg, and Todd Gaziano of the Heritage Foundation as the moderator.

The Corporations, Securities & Antitrust Practice Group and the Litigation Practice Group cosponsored a program on the Future of Business Law in Mexico held in late October in Mexico City. The program included a keynote address on Competition Law by Judge Douglas Ginsburg of the U.S. Court of Appeals for the D.C. Circuit. The address was followed by a panel of experts that examined anti-trust enforcement in Mexico, as compared

to other countries, and the ramifications of price-squeeze theory. The second panel discussed a new class action law in Mexico and how it compares with class action laws in other countries.

After a recent case in the Federal District Court of Manhattan in which presiding Judge Jed Rakoff called into question the SEC's enforcement regime, the Corporations, Securities & Antitrust Practice Group hosted a timely Teleforum call on *SEC v. Citigroup* and



*Prof. Gail Heriot (right) of University of San Diego School of Law and the U.S. Commission on Civil Rights, is Chair of the Civil Rights Practice Group Executive Committee and recently participated in a panel on the Supreme Court case Fisher v. University of Texas. She is pictured here with fellow Executive Committee members Christopher Byrnes (left) and Dominique Ludvigson (center), both of the U.S. Commission on Civil Rights, at the 2011 National Lawyers Convention.*

came together to discuss the *Shelby County v. Holder* decision, which held that Section 5 of the Voting Rights Act is constitutional.

The Civil Rights Practice Group also cosponsored a program with The Heritage Foundation on the *Fisher v. University of Texas* case pending before the U.S. Supreme Court. Among other issues, the panel of experts discussed the use of racial and ethnic preferences in admissions and research on "mismatch." The panel featured James

# 2011 National Lawyers Convention



# Photo Highlights



the potential effect of the decision on the SEC's normal preference of settling cases without requiring defendants to admit wrongdoing. Who has ultimate responsibility for protecting investor interests and determining the appropriate regulatory enforcement regime? If the SEC is forced to bring more enforcement actions through completed litigation, will it ultimately bring fewer enforcement actions? The call featured Prof. Stephen Bainbridge of UCLA School of Law and Prof. Jonathan Macey of Yale Law School.

The **Criminal Law & Procedures Practice Group** sponsored a Teleforum call on the recent U.S. Supreme Court decision in *U.S. v. Jones*, a case in which the government attached a GPS device to a vehicle to monitor the vehicle's movement. Some critics argue that the question of whether the "search" was reasonable and therefore would require a warrant under the Fourth Amendment was left unanswered by the Court. Considering the rapidly-changing technologies available to law enforcement, these critics argue that the Court should have been more explicit. Among other issues, the speakers discussed the effect this ruling might have on warrantless searches, warrant-based searches, the right to privacy, and the Fourth Amendment. The speakers included Prof. Orin Kerr of The George Washington University Law School and Peter Thomson of Fowler Rodriguez Valdes-Fauli.

The **Environmental Law &**

**Property Rights Practice Group** hosted a Teleforum call with Prof. Jonathan Adler of Case Western Reserve University School of Law on the topic of Endangered Species Act reform. During the call, Prof. Adler provided analysis and commentary on the successes and failures of



*Dr. John Eastman of the Center for Constitutional Jurisprudence at Chapman University School of Law, and chairman of the Federalism & Separation of Powers Practice Group Executive Committee, speaks on the practice group's panel on "Continuity in Presidential War Powers" during the National Lawyers Convention.*

the Endangered Species Act and the various options for reform, all discussed in his recently-published book titled *Rebuilding the Ark: New Perspectives on Endangered Species Act Reform*.

More recently, the Environmental & Property Rights Practice Group sponsored a Teleforum call on the Compact Clause and the issue of Interstate Compacts featuring Michael Greve of the American Enterprise Institute and Nick Dranias of the Goldwater Institute. The Supreme Court's decision in *U.S. Steel v. Multistate Tax Commission* requiring congressional consent

only for interstate compacts that attempt to enhance "states' power quoad [relative to] the federal government" opened the door to the creation of various interstate compacts, with or without congressional consent. Today, there are approximately 200 interstate compacts in effect. Should states have the power to collectively organize to resist federal encroachment of state efforts to define and secure individual rights, and to what extent would interstate compacts empower states to redesign federal programs that intrude on their reserved powers? The speakers also discussed issues of federalism and the boundaries of states' rights and answered questions from callers.

The **Financial Services & E-Commerce Practice Group** commissioned a paper written by Alex Pollock of the American Enterprise Institute on the "Startup Expansion

and Investment Act." Congressman Ben Quayle and several co-sponsors introduced HR 2941 on September 15, with the goal of reducing the regulatory burden of Sarbanes-Oxley, and making conversion to a U.S. public company more attractive. The paper provides an analysis of the key provisions of the bill.

Most recently, the Financial Services & E-Commerce Practice Group sponsored a Teleforum call on the Consumer Financial Protection Bureau that featured Wayne Abernathy of the American Bankers Association, Jo Ann Barefoot of Trelia Risk Advisors, Prof. Arthur

Wilmarth of The George Washington University Law School, and Prof. Todd Zywicki of George Mason University School of Law. After providing their thoughts on the structure of the new agency and the potential effects of its mandate and authority, the speakers answered questions from the call-in audience.

In the **Federalism & Separation of Powers Practice Group** section of the most recent edition of *Engage*, Robert Numbers II of Womble Carlyle Sandridge & Rice PLLC and Lisa Dixon, a recent graduate of University of Virginia School of Law, wrote “A Return to ‘the Heady Days’? The Supreme Court Addresses Whether the *Bivens* Doctrine Should Extend to Employees of Government Contractors in *Minnecci v. Pollard*.” This case might determine whether employees of government contractors can be held liable for damages for alleged constitutional violations under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* and its progeny.

The Federalism & Separation of Powers Practice Group also hosted a panel on “Meet the New Boss: Continuity in Presidential War Powers” during the 2011 National Lawyers Convention. The panel featured Prof. Martin Flaherty of the Leitner Center for International Law and Justice at Fordham Law School, Andrew McCarthy of the National Review

Institute, Prof. Michael Ramsey of University of San Diego School of Law, and Prof. John Yoo of University of California Berkeley School of Law. Dr. John Eastman of the Center for Constitutional Jurisprudence at Chapman University School of Law served as the moderator.

In the **Free Speech & Election Law Practice Group** section of the November 2011 issue of *Engage*, William Maurer, Executive



Director of Legal Affairs of the Danish Center for Political Studies Jacob Mchangama speaks at an event on hate speech on Capitol Hill in November.

Director of the Institute for Justice Washington Chapter, contributed an article entitled “Illuminating *Citizens United*: What the Decision Really Did,” discussing the controversial January 2010 United States Supreme Court campaign funding decision.

At the 2011 National Lawyers Convention the Free Speech & Election Law Practice Group hosted a panel on “Voter Fraud and Voter ID—The Constitution and the

Right to Vote.” The panel featured John Fund, formerly of *The Wall Street Journal* and Opinionjournal.com, Prof. Spencer Overton of The George Washington University Law School, Prof. Daniel Tokaji of The Ohio State University Moritz College of Law, Hans von Spakovsky of The Heritage Foundation, and Judge Thomas B. Griffith of the U.S. Court of Appeals for the D.C. Circuit as the

moderator. The Free Speech and Election Law Practice Group also hosted a podcast with Institute for Justice Senior Attorney Clark Neily discussing the Florida interior design case, *Locke v. Ehrig*, as the United States Supreme Court contemplated whether or not to grant certiorari. The case implicates economic liberty and free speech and asks whether a state can require a license for interior designers or whether designers have a paramount right to speech in a business context.

In the November issue of *Engage*, **Intellectual Property Practice Group** members David Applegate of Williams Montgomery & John Ltd. and Ryan Schermerhorn of Lempia Summerfield Katz LLC wrote an article entitled “The ‘Hot-News’ Doctrine Is Hot Again! Or Is It?” The Intellectual Property Practice Group also hosted a panel on “IP and Parallel Importation—Should the U.S., Through IP Laws and Other Means, Protect Businesses

from ‘Gray Goods’ Imported Without Manufacturers’ Authorization?” during the 2011 National Lawyers Convention. This panel featured Prof. F. Scott Kieff of The George Washington University Law School and the Hoover Institution at Stanford University, Prof. David Olson of Boston College Law School, David Salmons of Bingham McCutchen LLP, Sherwin Siy of Public Knowledge, and Judge Randall R. Rader of the U.S. Court of Appeals of the Federal Circuit as the moderator.

The **International & National Security Law Practice Group** had a particularly busy fall. In October, the group held a Teleforum with David B. Rivkin, Jr. of Baker & Hostetler on the Palestinian bid for U.N. membership. Mr. Rivkin gave an update and answered questions from the call-in audience. The group additionally continued its an-

nual tradition of co-sponsoring the International Law Weekend of the American Branch of the International Law Association. The practice group was involved in two of the weekend’s panels. The first, “Habits of Compliance? International Law and the Executive,” included Georgetown University Law Center Prof. Martin Lederman, Council of Foreign Relations International Affairs Fellow Brett McGurk, Columbia University School of Law Prof. Trevor Morrison, and George Mason University School of Law Profs. Neomi Rao and Nathan Sales. The second panel, “Private Civil Litigation Against Alleged Terrorist Sponsors,” featured O’Melveny & Myers partner Daniel Cantor, Fordham University School of Law Prof. Andrew Kent, MM-Law LLC Founder Gavriel Mairone, and U.S. Coast Guard Academy Humanities Department Chairman Captain

Glenn Sulmasy, and was moderated by Center for Law and Counterterrorism Fellow and International & National Security Law Practice Group Chairman Vincent Vitkovsky of Edwards Wildman Palmer.

In November, the International group hosted an all-day conference on Capitol Hill examining the impact of speech codes in Europe and how similar trends might be emerging in the

United States. The conference, titled “Silenced: Are Global Trends to Ban Religious Defamation, Religious Insult, and Islamophobia a New Challenge to First Amendment Freedoms?,” was co-sponsored by the Hudson Institute’s Center for Religious Freedom. It began with an opening presentation by Nina Shea and Paul Marshall, authors of the recently-released book *Silenced: How Apostasy and Blasphemy Codes are Choking Freedom Worldwide*. The program then featured a series of panels. The first one, “The Muslim World,” included Cleveland State University, Cleveland-Marshall School of Law Prof. David Forte, Ahmadiyya Muslim Community USA National Director of Public Affairs Amjad Mahmood Khan, the Center for Political Studies (Copenhagen, Denmark) Director of Legal Affairs Jacob Mchangama, and the Hudson Institute’s Center for Religious Freedom Research Fellow Samuel Tadros, and was moderated by the Federalist Society’s International Affairs Director James Kelly, III. The second panel, “Growing Repression in the West,” consisted of the author of *While Europe Slept*, Bruce Bawer, noted British defense attorney Paul Diamond, and St. Mary’s Anglican Church (Melbourne, Australia) Vicar, the Rev. Dr. Mark Durie, and was moderated by the Hudson Institute’s Center for American Common Culture Director John Fonte. The conference concluded with a keynote address and commentary on the topic “Where Are the Muslim Moderates?” from former Member of the Danish Parliament Naser Khader and Alliance of Iranian Women Founder and President Manda Zand-Ervin. Finally, in January 2012, the In-



*Prof. David Olson of Boston College Law School, pictured here speaking on the Intellectual Property Practice Group’s panel at the 2011 National Lawyers Convention on “IP and Parallel Importation,” has also recently participated in podcasts on the America Invents Act and the Supreme Court’s ruling on Congress’s power to grant copyrights to public domain works in *Golan v. Holder*.*



(right) Prof. Ann Shalleck, Director of the Women and the Law Program at American University Washington College of Law, discusses the topic “Law School Accreditation” on the Professional Responsibility Practice Group’s panel at the 2011 National Lawyers Convention. (below) Prof. F. Scott Kieff of The George Washington University Law School, who chairs the Intellectual Property Practice Group Executive Committee, discusses “IP and Parallel Importation” for the Practice Group’s panel at the 2011 National Lawyers Convention.



ternational group presented a Teleforum examining “Collateral Damage in Combat Operations” by Pepperdine University School of Law Prof. Gregory McNeal.

The Litigation Practice Group presented three Teleforum calls. The first one, on “The Death of Class Actions,” featured Vanderbilt University Law School Prof. Brian Fitzpatrick and Theodore Frank, founder and president of the Center for Class Action Fairness. The second call, presented by former acting Associate U.S. Attorney General Gregory Katsas, now of Jones Day, examined the constitutional challenges to the Patient Protection and Affordable Care Act before the U.S. Supreme Court this Term. Finally, in January, a third Teleforum, “Who Should Receive Unclaimed Class

Action Awards? The Tale of Cy Pres,” pitted Theodore Frank versus Patrick Perotti of Dworken & Bernstein and of the organization Ohio Lawyers Give Back. Messrs. Frank and

Perotti explained and debated the merits of cy pres awards when class action defendants have exhausted all reasonable means to locate eligible members of the plaintiff class to pay court-ordered awards and subsequently give the remaining unclaimed awards to assorted charities. The Federalist Society’s Pro Bono Center Director Margaret Little moderated this discussion.

The **Labor & Employment Law Practice Group** contributed an important *Engage* article, “The States and the NLRB: A Study in Comparative Sovereignty,” by Thomas Christina of Ogletree, Deakins, Nash, Smoak & Stewart. The group has also, with the **Michigan Lawyers Chapter**, scheduled a debate over the recent Right to Work

legislation in Michigan, and a similar program is planned with the **Indianapolis Lawyers Chapter**.

The **Religious Liberties Practice Group** contributed to the most recent issue of *Engage* with various articles. First, there was a point-counterpoint on the constitutionality of California Proposition 8, which defines marriage as a union between a man and woman under state law. In “*Perry v. Schwarzenegger: Is Traditional Marriage Unconstitutional?*,” Case Western Reserve

University School of Law Prof. George Dent, Jr. examines the decision of the federal district court in the Proposition 8 case and concludes that the law does not run afoul of the U.S. Constitution. In “*Perry, Same-Sex Marriage, and Federal Constitutional Guarantees*,” Capital University Law School Prof. Mark Strasser argues for serious consideration of the arguments against the constitutionality of Proposition 8 and looks at the potential impact of the district court’s decision striking down the law. In the remaining article, “Does Neutrality Equal Secularism? The European Court of Human Rights Decides *Lautsi v. Italy*,” Americans United for Life Senior Counsel William Saunders describes how the case *Lautsi v. Italy* illustrates the struggle between the ideology of “strict separation of church and state” in the European Union and the Council of Europe and individual countries’ incorporation of their religious influences and histories into public life and expression.

# INTERNATIONAL LAW & SOVEREIGNTY PROJECT

During the past few months, the Federalist Society's International Affairs Division had a robust outreach and programming schedule, which included hosting our European partners and friends at the National Lawyers Convention; taking part in meetings in Brussels with influential conservative and libertarian members of the European Parliament and civil society organization leaders; sponsoring events at the British Parliament and the French Senate in December; and participating in the first public meeting of the United Nations' new business and human rights working group in January.

In mid-November, the Federalist Society welcomed over two dozen prominent members of France's legal community, including Judge Jean-Claude Bonichot from the European Court of Justice, to the 2011 National Lawyers Convention in Washington, D.C. The members of the French delegation, led by Paris Chapter President Francois Briard, were joined by fellow Europeans Mark Boris Andrijanic from Slovenia's Academic Lawyers Association, János Bakó from Hungary's Common Sense Society, and Eugenio Briales, a Spanish attorney who is now based in Munich, Germany. The Federalist Society was honored to host such a distinguished group of attorneys and jurists from the other side of the Atlantic in 2011,

and we look forward to welcoming delegates from Europe in future years.

Later in November, Federalist Society Executive Vice President Leonard Leo; Jim Kelly, the Federalist Society's Director of International Affairs; and Ken Wiltberger traveled to Brussels to meet with



*Lord David Alton (left), who chairs the United Kingdom's Cross Party Parliamentary Group on Human Dignity, gathers with members of the Group and Federalist Society Executive Vice President Leonard Leo (center).*

conservative and libertarian members of the European Parliament (MEPs) and the officers of New Direction, a leading Brussels-based policy think tank. Over the course of two days, meetings were held with MEPs Jan Zahradil from the Czech Republic's Civil Democratic Party; Ryszard Legutko from Poland's Law and Justice Party; and Nirj Deva, Ashley Fox, Daniel Hannan, and Roger Helmer from Britain's Conservative Party. All are prominent members of the European Conservatives and Reformists, a group of political parties in the European Parliament that promote classical liberal policies and proce-

dures at the pan-European level.

In December, in cooperation with the London-based Henry Jackson Society, the Federalist Society hosted an expert panel discussion on the compatibility of Sharia with Western legal systems at the British Parliament. The panel featured USCIRF Vice Chairman Dr. Elizabeth H. Prodromou, Assistant Professor in the Department of International Relations at Boston University; Mr. Francois Briard; Lorianne Updike Toler, who is leading the Federalist Society's outreach at the University of Oxford; Leonard Leo, in his capacity as Chairman of the United States Commission on International Religious Freedom (USCIRF); and prominent British journalists and legal and public policy

leaders.

Following the event in London, Federalist Society Chairman and Northwestern University School of Law Professor Steven Calabresi, at the invitation of Francois Briard, spoke before the French Senate to provide his insights on the possible consolidation into a single national supreme court of what, in effect, are France's three existing specialty high courts.

In early January, Ken Wiltberger re-located to Brussels, where he will monitor and report on European Union affairs, network with local conservative and libertarian individuals and organizations, and

(at right) French delegates at the National Lawyers Convention meet with U.S. circuit court judges. (seated) (left to right) Judge Brett Kavanaugh of the D.C. Circuit, Judge Jean-Claude Bonichot of the European Court of Justice, Judge Thomas Griffith of the D.C. Circuit, and Judge Jeffrey Sutton of the 6th Circuit. (standing) (left to right) Paris Chapter President Francois Briard, Judge Carlos Bea of the 9th Circuit, Judge Jerry Smith of the 5th Circuit, Judge Frank Easterbrook of the 7th Circuit, and Paul Falcone of the Paris Bar. (below) Following his participation in an event at the French Senate on the judiciary, Prof. Steven Calabresi (bottom right) of Northwestern University Law School, and Chairman of the Federalist Society Board of Directors, attends a dinner with the event's organizers and speakers.



provide support for our Western European chapters in London and Paris. From Brussels, we will also work to maintain and build on the Federalist Society's already strong relationships in Central and Eastern Europe through regular visits to that region and by helping to facilitate joint programming.

At the end of January, the Federalist Society was represented in Geneva, Switzerland at the first public meeting of the UN Working Group on Human Rights and Transnational Corporation and Other Business Enterprises. The Working Group is charged by the UN Hu-

man Rights Council with identifying and promoting good practices and lessons learned on the implementation of the UN Framework and Guiding Principles on business and human rights, which "outline what States and business enterprises should do to ensure that human rights are respected by business, and to ensure access to effective remedies for those whose rights have been adversely affected by business activity." Through the Federalist Society's Global Governance Watch project, we will continue to monitor the activities of the Working Group and report on any resulting issues relating to national sovereignty, limited government, and the free market.

Looking ahead, in February, Jim Kelly and Professor Nathan Sales of George Mason University School of Law will travel to Tbilisi, Georgia, where Professor Sales

will lecture on the concept of originalism as understood in the United States at the Winter School organized by the Free University of Tbilisi and the Constitutional Court of the Republic of Georgia. While in Georgia, we will meet with government officials, members of the judiciary, and

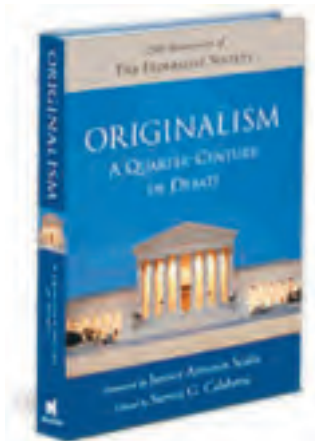
leaders of organizations like the Federalist Society who are working to promote the "First Principles" in their country.

Later, in March and April, the Federalist Society will co-sponsor the inaugural European Advocacy Academy, a two-part educational and training seminar aimed at young individuals who are interested in working at the pan-European level to promote the principles of subsidiarity, limited government, judicial restraint, and individual liberty. In classes taught by some of Europe's leading policymakers, judges, and other experts, EAA participants will have a chance to gain insights regarding the functioning of the different institutions of the European Union, the Council of Europe, the European Court of Justice, and the European Court of Human Rights.

The International Affairs Division is interested in receiving members' thoughts and ideas about its efforts in Europe. To share your comments, or to learn more about the work of the International Affairs Division, please contact Jim Kelly at [jkellyiii@fed-soc.org](mailto:jkellyiii@fed-soc.org) and Ken Wiltberger at [kenw@fed-soc.org](mailto:kenw@fed-soc.org).

The Federalist Society  
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