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The Federalist Society's 2001 National Lawyers Convention

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The Federalist Society's 2001 National Lawyers Convention

SHOWCASE PANEL I

JUDICIAL DECISIONMAKING: THE CASE OF LIFE, LIBERTY & PROPERTY IN THE MODERN TECHNOLOGICAL AGE

Sponsored by: Federalism & Separation of Powers

Professor Jeffrey Rosen, *George Washington University Law School*
Dr. John Eastman, *Chapman University School of Law*
Hon. Frank Easterbrook, *U.S. Court of Appeals, 7th Circuit*
Professor Nadine Strossen, *New York Law School; President, American Civil Liberties Union*
Hon. Douglas Ginsburg, *Chief Judge, U.S. Court of Appeals, D.C. Circuit (moderator)*

JUDGE GINSBURG: Welcome all.

The topic today is broad enough to open the discussion to a lot of different issues — Judicial Decisionmaking: The Case of Life, Liberty & Property in the Modern Technological Age. Note the phrase "Life, Liberty & Property". That is the original; of course, it was scratched out and changed to "life, liberty and the pursuit of happiness" in perhaps a printer's error.

We have four distinguished speakers who are going to address us *seriatim*.

We are going to hear first from Jeffrey Rosen. Professor Rosen teaches constitutional law, criminal procedure, and the law of privacy at the George Washington University Law School. He is better known to many of us as the Legal Affairs Editor of *The New Republic* and as the author of *The Unwanted Gaze — the Destruction of Privacy in America*. Professor Rosen is a graduate of Harvard College, of Balliol College, Oxford, where he was a Marshall Scholar, and of the Harvard Law School. After clerking for Chief Judge Abner Mikva on the court on which I now serve, he joined the law school faculty in 1997.

We will hear, second, from Professor John Eastman. Dr. Eastman is an associate professor at Chapman University School of Law, where he specializes in constitutional law and legal history. He is also the Director of the Center for Constitutional Jurisprudence, which is a public interest law firm affiliated with the Claremont Institute for the Study of Statesmanship and Political Philosophy. And on behalf of the Claremont Institute, Professor Eastman has participated as *amicus curiae* in the Supreme Court of the United States in several cases, including *Boy Scouts of America v. Dale*; *United States v. Morrison*; and, most recently, *Adarand Constructors, Inc. v. Mineta*. Prior to joining the Chapman Law faculty, Dr. Eastman served as a law clerk to Judge Michael Luttig of the 4th Circuit and to Supreme Court Justice Clarence Thomas. He also practiced with Kirkland & Ellis. He has a Ph.D. in Government from the Claremont Graduate School, as well as a J.D. from the University of Chicago Law School.

We will hear third from my old friend and classmate, Frank Easterbrook, Judge of the United States Court of Appeals for the 7th Circuit, and a senior lecturer at the Law School of the University of Chicago. Before and since joining the court in 1985, Judge Easterbrook has taught and written in the fields of securities, corporate law, jurisprudence and criminal procedure. In fact, I think his important book on the economics of corporate law, *The Economic Structure of Corporate Law*, came out while he was on the bench. He has published not only that, but two books and more than 50 scholarly articles; served as co-editor of the *Journal of Law and Economics*; and is a member of the Judicial Conference Standing Committee of Rules of Practice and Procedure. He is a graduate of Swarthmore College and the University of Chicago Law School. Judge Easterbrook is a member of the American Academy of Arts and Science, the American Law Institute, and the Mont Pelerin Society.

We will hear last from Nadine Strossen. Nadine is a professor of law at New York Law School. She has written, lectured, and practiced extensively in the area of constitutional law, civil liberties, and international human rights. Since 1991, she has also served as President of the American Civil Liberties Union. I dare say it is in that capacity that most of us know her best.

Professor Strossen's more than 225 writings have been published in many scholarly, as well as general interest, publications. She is the author of *Defending Pornography — Free Speech, Sex and the Fight for Women's Rights*, which was republished last October by NYU Press. She's also co-author of *Speaking of Race, Speaking of Sex — Hate, Speech, Civil Rights and Civil Liberties*.

Professor Strossen was graduated from Harvard College and Harvard Law School. Before becoming a law professor, she practiced for nine years in Minneapolis and New York City. In another branch of her career, she recently appeared in New York in *The Vagina Monologues*.

With that breadth of background, you know we are going to have an interesting discussion.

We start with Professor Rosen.

PROFESSOR ROSEN: Thank you so much. It is always an honor and a pleasure to speak to the Federalist Society.

So, what rights of life, liberty, property, and privacy should the courts protect in the technological age? This is the subject of our panel, and I want to begin by exploring with you a paradox.

It was, after all, the view that courts had illegitimately created privacy rights and unenumerated rights of personal autonomy that inspired the Federalist Society in the 1970s and '80s to its most righteous, and often convincing, heights of judicious indignation. The charge that the courts had acted in an unprincipled fashion was so influential that the work of people in the Federalist Society has changed the judicial debate. It is now considered illegitimate for courts to engage in expansive creation of autonomy and privacy rights.

By contrast, today, if we try to think of the issue that most united liberals and conservatives on the Supreme Court, and about which Federalists and the ACLU most agree, it is rights of privacy, conceived in Fourth Amendment terms.

We have a slew of influential opinions over the past couple years, from Judge Easterbrook's wonderful opinion in the Driver's Privacy Protection Act, to opinions like *Wilson*; the *Media Ride-Along* case; and, above, paradigmatically and centrally, the *Kyllo* case, Justice Scalia's groundbreaking opinion last year which provided a model for the sensitive translation of the Fourth Amendment into a technological age, in which he was joined by liberals, provides us a model for principled decisionmaking in the future. What can explain this apparent paradox? I think it is one that can guide the way we think about these issues as we look forward to the application of technology and privacy in the next century.

The Fourth Amendment cases are firmly rooted in text, history, and structure, and in the constitutional insight that the Fourth Amendment limits state power in ways that indirectly protect privacy. By contrast, the personal autonomy cases, although they may end up protecting a similar value — autonomy — are focused on individual rights, claims against the states, new rights of life, liberty, and property. These are proved to be far less convincing because people disagree fundamentally, in a pluralistic age, about what these rights consist in — when life begins and when it ends.

Guided by this distinction, courts can comfortably continue to translate the Fourth Amendment as a limitation on state power. But they should be hesitant on the right as well as the left — and I want to be firm with you Federalists who are inclined to use your new power on the courts to create new property and liberty rights in ways that conservatives, rather than liberals, favor. They should be hesitant to engage in this enterprise.

All right, so how can I support this distinction? Let's think about *Kyllo*. This is our paradigm. *Kyllo* answers a problem of translation, and that was that the Fourth Amendment was originally designed to limit state information gathering in a world where you had to break into people's house to spy on their private papers and their intimate affairs. But we now live in an age of what Whitfield Diffie has called "ubiquitous surveillance" in which it is possible to read someone's diaries or observe the intimacies of the home virtually through technology, without actually having penetrated the physical laws.

Justice Scalia answered Justice Brandeis challenge in the *Olmstead* case. In *Olmstead*, Chief Justice Taft had been a wooden originalist. He said, no trespass, no violation of privacy. Since you do not have to break into the home to tap the wires, no Fourth Amendment violation.

Brandeis, looking forward to the age of cyberspace, said ways may someday be developed by which it is possible to read an individual's diaries without breaking into the home. At the time of John Wilkes, in the 18th century, a far smaller violation of privacy raised constitutional concerns; surely the Fourth Amendment should rise to the occasion.

And Justice Scalia did rise to the occasion. He said that when cutting-edge technology not in current use is used to invade the intimacies of the home, a warrant is presumptively required. And in doing so, he translated the Fourth Amendment in order to protect the same amount of privacy that the framers would have taken for granted.

He recognized that applying the framers rule in the same circumstance would have shrunk the protective realm of the privacy of the home. Only through this act of translation to take account of an invasion that they didn't anticipate could this same amount of privacy be protected.

Now, Scalia's test may be a temporary or Pyrrhic victory because, after September 11, we know that as surveillance technologies proliferate and are increasingly politically acceptable, they may quickly become in general use and, therefore, the core aspect of privacy of the home that Scalia meant to protect might be eroded merely by the ubiquity of technology.

How, then, to think about things like biometric surveillance cameras on street corners and other intimate, invasive technologies that might peer into the home but quickly become ubiquitous? The courts might, in the future, say that there is some core of Fourth Amendment privacy not dependent on social expectations but on the normative amount of privacy that the framers insisted on protecting.

Imagine a world when our personal papers are stored not on our laptops or our C drives, but our diaries and such are typed in the home while being stored outside of it. The Court might say, even though this technology has been ubiquitous, we do not surrender our expectation of privacy by the mere fact that it's stored outside the home. The framers

meant to protect diaries. So, the court, in this new technological age, should as well.

This is an example of the challenge that Scalia issued in *Kyllo*, and it is a kind of defensible translation rooted in the text, history, and structure of the Fourth Amendment.

Contrast this Fourth Amendment model that I have tried to lay out with questions of personal autonomy. Clearly, the Court was most vulnerable in cases like *Griswold* and *Roe v. Wade*, when it declared a broad right to privacy because its constitutional roots were hard to discern. *Griswold* might barely have been justified as a case which involved barriers on state information gathering. You couldn't actually find the contraceptives without invasive searches of the home.

But as we all know, that narrow Fourth Amendment right in *Griswold* quickly morphed into a broad right of sexual autonomy that, in addition to having few constitutional roots, arose dramatic opposition. People disagreed broadly about exactly how much liberty we are entitled to expect. And the Court is least legitimate, most vulnerable to criticism, in cases like *Casey* and the partial birth abortion case about which each Justice wrote so powerfully, when it overconfidently expands these autonomy rights into a world where people continue to disagree about their scope.

Let's think about the right-to-die case, though, because it shows that liberals do not have a monopoly on the overly expansive effort to judicialize rights of personal autonomy. The right-to-die case, *Glucksberg*, a few years ago may have been an illusory peace because the Court seemed to find nine votes for judicial restraint.

As a model of the shifted paradigm of autonomy decisionmaking, not a single justice embraced the broad proposition that the Constitution protects a sweeping right to choose the time and place of one's own death. But nevertheless, several justices — most notably Breyer and O'Connor — signaled their willingness in future cases to create a right to be free from death at times of great pain and suffering, and they didn't specify a methodology for identifying this right.

They alluded vaguely to the traditions and conscience of our people, raising the specter of an illusory consensus, which at the current time doesn't exist and could preempt a debate which is now raging in the legislatures about exactly what the scope of our right to die should be.

I say this is not limited to the left because only last week we saw our attorney general engage in a similarly heavy-handed effort to federalize, if not constitutionalize, the right-to-die debate. It was not at all consistent with principles of restraint when the Attorney General implausibly interpreted the Federal Controlled Substances Act to forbid Oregon's Death with Dignity Law. Congress had considered and rejected an effort to expand the law in the way the Attorney General attempted to interpret it. And by heavy-handedly intervening in an example of Brandeis's vision of the laboratories of democracy at work, the Attorney General denied us empirical evidence of the effectiveness of these laws, and also thwarted the will of the people of Oregon, who were trying to express their own particular conception of what autonomy required.

The right-to-die debate is a reminder to all of us that there is no monopoly on activism in the left and the right. And these highly contested questions of exactly when life begins and when it dies should be left to the states. Let a thousand flowers or a thousand hemlock vines bloom.

The same approach, I think should guide our thoughts about future knotty and thorny questions about property and liberty rights.

Think about data protection. We have already had efforts to claim a property right in our electronic data. This is because the American Constitution does not have a very good vocabulary for protecting autonomy rights except in terms of property. That is our vocabulary, and several scholars have argued, powerfully, that the only way to protect us from invasive private data gathering is to create property rights in our data, which we could then barter or sell.

Opponents of these claims say that this would be a bad bargain. People might be inclined to sell their property rights cheap, as they do for example, they might authorize extensive surveillance in exchange for a free toaster. And once they have alienated their property rights and their medical data or their browsing data, they might not be able to get them back.

These are powerful arguments on both sides. My claim is merely that this property right should not be constitutionalized. This is a legislative debate that should be played out in the states and, perhaps, in Congress, with the benefit of empirical experimentation and proper respect for competing views on the subject.

And think, finally, about a subject that I know we will be discussing throughout this morning — questions of personal autonomy and cloning, and the thorny, knotty, difficult, fascinating questions about genetic privacy and stem cell research, and all of the difficult questions that are going to be facing us in the future.

Let's not constitutionalize this debate. We can well imagine a situation where Congress might embrace an authorization of stem cell research more expansive than President Bush recently endorsed, and courts will be offered arguments that they should put an end to this debate, that they should take it upon themselves to decide when life begins and when it ends.

It was in the abortion context that liberal scholars such as Jed Rubenfeld argued that courts can not plausibly intervene in the abortion cases without deciding when life begins. The same arguments might well be brought to the attention of courts in cloning and stem cell cases.

My hope is that courts will reject this invitation. The question of when life begins, as I have said repeatedly, is a highly contested question best left to legislatures. Judicial restraint should counsel staying judges' hand.

That is my counsel to you.

We have a Fourth Amendment tradition that we liberals and conservatives, Federalists and Libertarians, can converge around. It can be translated; it can be applied creatively in a disciplined fashion, with the paradigm cases of the American Constitution always in mind. But when it comes to rights of life, liberty, property, and autonomy conceived as claims of entitlement against the state, the appropriate baseline is judicial restraint.

Thank you.

DR. EASTMAN: I have a somewhat different view, as you might expect. I was puzzled when I was first invited to this panel. I'm an 18th century specialist. And for me, "modern technological age" invokes things like Eli Whitney's cotton gin and Gutenberg's movable type printing press, or perhaps I should say Thomas Jefferson's little contraption to make a copy of his own letters simultaneously as he was writing them, or George Washington's pressing maching, designed to create a copy of his own letters while the ink was still wet.

But then, come to think of it, those new technologies in the 18th century raised the very same issues that our new technologies raise today. Copying via the Internet requires that we find the right mix in protecting intellectual property, to provide the right incentive to create that intellectual property in the first place, and not so much protection that we would stifle the use of that intellectual property and ideas by others who would make further advances for humanity.

We should not be so arrogant—or rather, our judges and our legislators should not be so arrogant—as to presume that we can find that right mix, that very complicated balance, and get it right every time. Rather, we should be looking to adapt a rule — a default rule — that allows us to contract around whatever judgment or legislative pronouncement we issue on those kinds of balancing questions — the most private ordering or adjusting of the balance that that would allow, consistent with that rule.

That really is the essence of the Coase Theorem, isn't it? In a world of zero administrative costs, it doesn't matter what rule you adopt. But we do not live in such a world, and so it matters very much what rule we adopt. And we want to try and find the rule that lets us continue to adjust the balance. But I am going to leave that to the law and economics star on our panel, when he comes up.

I want to talk about something else. There is a caveat in the Coase Theorem that is relevant to the other piece of that 18th century new technology that I talked about, Mr. Whitney's cotton gin. Leaving things up to private ordering requires that all the parties to the contract be able to participate in the negotiations. It does not work—in fact, Coase himself did not even claim to have it apply—when there are third-party rights and interests that are involved.

You might think, what does that have to do with the cotton gin? The cotton gin provided us a temptation — a very strong temptation, as it turned out — to ignore third-party rights. We saw after the development of the cotton gin a transformation in the debate over slavery, from a necessary evil that we had to live with and get rid of as soon as we could to an outright positive good. It provided benefits to the community, indeed to society on the whole, and as a result, a very communitarian argument developed, an expediency that resulted from this invention of the cotton gin. Benefits to the society as a whole outweighed any in dividual harms and, therefore, we could overlook them. So, too, with our new biotechnologies.

In April 2001, when the Stem Cell Research Act was first proposed by Arlen Specter, he said that it was wrong to prevent research that might benefit millions. So, he would allow research to be conducted on those stem cells derived from embryos that would otherwise be discarded, as long as the researchers obtained the consent of the donor couple, and as long as the new research complied with guidelines to make sure that it was ethically conducted.

Now, this is a very interesting proposition. As long as we get the consent of the couple, we can conduct this research or derive these stem cells that actually kills this embryo. But consent of the couple could no more authorize the destruction of another human being than could a consensual agreement between Mr. Whitney and a plantation owner authorize the use of slave labor. We need to understand what other third-party rights and interests are involved in order to make the assessment on the validity of Senator Specter's claim.

Nor has ethical research ever been understood to permit experimentation on human beings without their consent, or experimentation that would necessarily cause their death. We have many provisions now in international law that recognize these provisions, coming out of the experiments in Nazi Germany; coming out of our own experiments in Tuskegee — the Nuremberg Code, the World Medical Association's Helsinki Declaration, the U.N.'s Declaration of Human Rights. All of these things say it's unethical to engage in human experimentation without the consent of the subject.

We are talking here about a subject who simply cannot give his consent. As a result, the couple who begat the embryo have no right to authorize human experimentation research, and neither does a vote of the whole majority in Congress, or even a majority of the whole United States voting in a national referendum, if we had a provision for such a thing. That could not make it right either, if the embryo is what some have claimed it to be.

So, you might say, "Look, I'm assuming simply that human embryos that are going to be destroyed in the stem cell extraction process are really human beings, and we have to have this fundamental rights notion applied to this new technology." Well, yes, in fact, that is an assumption.

It's a funny thing about our new technology, though. That same science that has given us the ability to do this stem cell research, that has made this benefit to millions possible that Senator Specter talked about, has also confirmed what we really already knew: That human embryos are biologically unique human beings from the moment of fertilization.

A recent medical panel writes, "The embryo is human. It will not articulate itself into some other kind of animal. Any being that is human is a human being. If it is objected that at five days or at fifteen days the embryo does not look like a human being, it must be pointed out that this is precisely what a human being looks like, and what each of us looked like, at five or fifteen days of development."

So modern science has given us this ability. But it has also reaffirmed this principle — a principle that we need to take seriously, if we are going to walk down this road.

One might say, wait a minute, we can subject this to a majority vote. Let's not let courts weigh in and say this defines human life and, therefore, one can't infringe on those fundamental rights. When we let courts define fundamental rights, they sometimes get it wrong. And isn't the very definition of when the fundamental right attaches something we ought to leave to the legislative process, as Professor Rosen has said? That's democracy. Let's vote on it; is this a human being, or is it not?

Well, I submit that we've already been down that road once before. That was the whole basis of Stephen Douglas' argument, his defense of the Doctrine of Popular Sovereignty. "It is not for me to decide whether slavery is right or wrong. The good people of Kansas and Nebraska can decide that for themselves; they are perfectly capable of making those decisions. That is what democracy requires. Let them vote up or down on slavery."

Abraham Lincoln's response was powerful then, and it is powerful now. "That is all well and good, if the slave is no different than a hog. But if he is, if that slave is a human being, then my ancient faith teaches me that it is not democracy to vote on whether we are going to recognize that human being's equal right to participate in the consent of this government. That is despotism."

And of course, that ancient faith to which Lincoln referred was the Declaration of Independence. All men — all human beings — are created equal. And we have these unalienable rights to life, liberty, property, pursuit of happiness. They cannot be taken away by a majority vote. One of the key roles of the judiciary in this society is to recognize those unalienable rights and to protect them.

Here is the real problem, and Jeffrey Rosen alluded to it. The courts aren't any better at getting this right than the legislatures are. What do we do when they get it wrong, as they did in *Dred Scot*t, by focusing on property rights of the slave owner rather than the liberty rights of the slave? Or, in *Roe v. Wade*, by focusing on the liberty or autonomy or privacy right of the mother and ignoring the life right of the child — what do we do?

We can focus on this tension between the courts and the legislature because we can take counter-majoritarianism to a fault, just as majoritarianism can be. Stephen Douglas took majoritarianism to a fault. We can vote on the definition of humanity and, therefore, exclude an entire class of human beings from the protections of liberty. We can vote on the humanity of the embryo and, therefore, exclude an entire class of human beings from the protection of life. That's taking majoritarianism to a fault. It is letting majorities do things that they can never legitimately do.

But we can take counter-majoritarianism to fault, as well, thinking that when the court makes a pronouncement that this or that is a fundamental right, then it must necessarily be right. But remember, the challenge to a wrong judicial decision on what constitutes a fundamental right can never be a mere appeal to majoritarianism. You cannot trump an unalienable right with a vote of the majority. The challenge has to be grounded in the claim that the court got the fundamental right analysis wrong.

So if *Roe* is wrong, it is not because the Court applied a fundamental rights analysis, not because the courts got involved in this question in the first place, but because the Court got the fundamental rights analysis wrong, that it excluded one half, and the greater half, of that equation in that analysis. That was Abraham Lincoln's best response, ultimately, to the *Dred Scott* decision — not that we'll have a different vote, not that I was elected President, so you must be wrong, but that the principle on which you would intrude is a principle that was contrary to that self-evident truth that we knew from our ancient faith.

Let me get to another of the new technologies that's raising new issues for us — issues that, in fact, were not addressed before, and that in many ways threaten the very foundation of our understanding of rights. Thomas Jefferson, in the Declaration of Independence, wrote that all men are created equal, that they are endowed by their *creator* with certain unalienable rights. This was a self-evident proposition for him because he understood the terms. Cloning raises very interesting challenges for the self-evidence of that proposition. We can now, or soon will be able to, create genetically superior human beings.

What if the case now is that we can no longer say it is self-evident that all men are created equal, if some have a genetically superior intellect or a genetically superior ability to run the hundred-yard dash? Well, it turns out that none of those superiorities contradict the self-evidence of Jefferson's proposition that all human beings were created equal. And maybe the new technology will force us to remember that.

But there is a different problem presented by cloning, as well, because the self-evidence of Jefferson's

proposition was based on the claim that we are all equally human in the eyes of a creator. What do we do when some of us become, ourselves, the creators of others of us? That destroys the self-evidence of the proposition, does it not? We give existence to a being not by what we are but by what we intend and design.

As with any product of our making, no matter how excellent, the artificer stands above the artifact, the creator above the creation, not as an equal but as a superior, transcending it by his will and creative prowess.

That's the threat that human cloning poses for us. It is a challenge to the very legitimacy of the proposition that all men are created equal and, therefore, a challenge for us on whether there can be any continued notion of rights that would allow us to say a court could strike down some act of the majority. It is a threat to the very foundation of this society. It is a very serious threat, and I think we need to keep in mind these moral-theoretical-philosophical problems with the new technology and not just focus on the issues of expediency that Senator Specter would raise, that it is immoral not to conduct human embryo research when the technologies might benefit millions.

It may well be the much greater and, in fact, the final immorality to let that happen without thinking seriously about these fundamental principles. They are not principles that ought to be, or ultimately can be, subject to a vote. No vote can make them right or wrong. They are principles that we have to think about, and the response to a court that gets this wrong is not just to have a vote but to have a reflection on why the Court's judgment is wrong, and ultimately to reinstate the proper understanding of those principles.

That's what Eli Whitney's cotton gin can teach us about the brave new world of our modern technologies.

Thank you.

JUDGE EASTERBROOK: The topic of this panel, Life, Liberty, and Property in the Technological Age, poses the question whether new problems imply new rules. How can a document more than two centuries old and speaking generally about liberty and property still be relevant?

One partial answer is that the Constitution does run out. It was a document for its time. For the ages, the framers gave us democracy. If new problems require new rules, then we have a living legislature.

No sound view of constitutionalism says that new solutions for new problems must be invented by judges, the of?cials with life tenure and thus the of?cials least likely to be sensitive to novel issues. Of?cials who are not elected periodically have the least authority to govern. To say that we need new solutions is to say that the problem is one for actors whose power depends on popular consent.

Nonetheless, I am here as the curmudgeon. Not that I dislike technology. To the contrary, I'm the one speaking from the screen of a computer equipped with wireless networking and able to transfer five gigabytes of MP3 files over FireWire to this iPod in ten minutes. What a terrific gizmo! It holds more than 100 CDs worth of music. If this panel gets boring, I'm going to tap into Rudolph Serkin playing Mozart's 20th Piano Concerto. Now that's a great invention of the 18th century.

So I'm a geek, but a geek who likes old stuff — classical music, good 18th century legal documents, and traditional ideas of property and separation between personal and public domains — a classic liberal, I guess. And I think that old ideas do just fine when dealing with high technology—better, really, than newly minted solutions.

These days technology is synonymous with information rather than hard goods such as blast furnaces. Humanity has sequenced its own genome. What avenues of longevity will this bring? We have cloned sheep and soon may clone *homo sapiens*. Public key cryptography allows more privacy, while the spread of trusted systems that are based on the very same algorithms portends more control. Liquid Audio will monitor how many times you listen to a new song and cut off access unless you pay extra.

All of these events seem so different from the world of the founders that we wonder how the same legal rules can apply. Why should copyrights or patents govern DNA sequences? Why should the 11th Amendment be applied to a patent infringement suit against a state government? How can the Constitution deal with thermal imaging that uses excess heat to identify marijuana growing inside a home? But, as a curmudgeon, I am a skeptic about the proposition that new problems imply new rules.

It is not just, as Madison said, that we should control rather than trust public officials. It is also that we know so little about the effects of today's intellectual property regime that it is silly to suppose that we have the information necessary to describe better ones. To claim that rules for the 20th century and high technology were made up in the 18th century by Madison and friends and are just being interpreted today by their high priests on the bench surpasses all bounds. Anybody who would say such a thing has no shame.

Patent law, copyright law, trademark law, and the law of contracts create or employ a very old device: property rights in information. They do this so that the producer of intellectual property can charge more than the small, marginal cost of use, and thus cover the total expense of producing and disseminating the works. Would-be consumers who value the work more than the marginal cost, but less than average cost, lose out. But if the law were otherwise, different consumers would lose out, and lose even more, because producers would not develop and distribute as many innovations, plays, drugs, and programs.

Just how much above marginal cost should the price be? Nobody knows. A patent gives the inventor the right to exclude competition for 20 years. Is that too long, too short or just right? Nobody knows. What's the right length of a copyright? Nobody knows. How much use, and by whom, should be permitted without compensation under the fair-use doctrine? No one knows. And by "no one" I mean more than just legislators and judges. The best academic students of the subject disclaim knowledge. If we do not know the answers to these traditional questions — questions that have been with us since the founding of the republic — how can we hope that a new set of rules for a new century, to cover a new generation of technology, will be an improvement?

Who can be trusted to come up with better rules? Should we rely on the academy? You can't pick up law review these days without encountering a proposal for revamping the law of information. But there is very little overlap between the authors of these proposals and serious students of technology or markets. Most good scholars realize that we do not know these answers.

Should we rely on inventors or industry, in general, to tell us what protections are needed? Most authors and inventors, like John L. Lewis, think that the answer is more, just as many consumers think the answer is less. Self-interest taints these answers.

Anyway, it turns out that inventors are lousy prophets. Most patented inventions are never sold in public: they never become the basis of an economic transaction between consenting adults. Similarly, most academic proposals wither on the vine. Although copyright law entitled authors of law review articles to hold up the *Harvard Law Review* and charge a steep price, it's no surprise that the royalty paid for most law review articles is zero, saying something about their value.

Perhaps, then, the development of legal rules should be left to the legislature. Information about rules' effects can come there, surely, but there is a serious problem of interest group fighting over the spoils. In the last century, most of the law of intellectual property was general law. Firms that were producers of intellectual property, like IBM, did not have a real desire to warp that law because they were also consumers. They received royalties but they also paid royalties. Many of the modern developments in the regulation of technology have seen the creation of industry-specific laws—special rules for plant variety protection and the like. And that has been the playground of interest groups. It breaks the equation between the producers and the users of intellectual property. And in that breaking lies the playground of interest groups.

Then how about the courts as the source of newer and better rules? Lack of information about rules' effects is as much a problem for judges as for other actors. Worse, really. Courts are run by judges, who were generalists. We spent all too much of our time on cocaine cases. Judges are isolated, rather than responsive, and, of course, law school doesn't fit judges for hypothesis formulation and empirical testing, nor does the Constitution authorize the exercise when it entails overriding the political branches.

I do not want you to despair, however. Ignorance is the normal state of humanity. What is the right price of wheat? What is the right substitution of automobiles and housing in a family of four earning $50,000 a year? These enormously complex questions lack right answers. But when there is no right answer and people bear the cost of their own actions, we rely on those affected to make their own decisions.

Markets make it possible for different people, at different times, with different information and different objectives, to make different decisions. Legal rules, by contrast, often deny them that luxury. Markets and the price system are at their best when knowledge is diffuse and hard to organize.

Let me give you a theorem. The more complex the problem, the more the right answer varies over time in the affected population; and the easier it is to address that problem by contract, the less we should attempt to resolve it by law. That theorem, though, isn't mine, and it has a famous name. You've heard it today already. The name is the Coase Theorem — if bargaining is costless, then the outcome of private bargaining will be a Pareto optimal solution and the rule will be irrelevant.

Now bargaining is never costless, but whether to bear the costs of transaction is itself an economic decision. Unless costs fall on third parties who aren't involved in transactions, then the private contractual solution is best. What really characterizes the world of information technology is that transactional costs in that world are low and falling, which improves the comparative advantage of contract over regulation.

Today people communicate cheaply and electronically. They can strike deals at very low cost. That's what trusted systems using cryptography do. So contract works just fine with new tech. Indeed, the newer the tech, the better private ordering works.

Still, I do need to say a few words about government. Consider, for example, thermal imaging by the police, the subject of *Kyllo v. United States*. This form of investigation is not consensual. How should we think about that kind of technological development? The answer — my answer: with old rules. The contents of one's residence are private information. Then just apply property law. The government has come up with new ways to get information about what is going on inside. This development does not alter the principle that the resident owns the information and that any intrusion by the state, even in enforcing the criminal law and even in waging a war against terrorists, must be reasonable.

Professor Rosen called Justice Scalia's opinion in *Kyllo* groundbreaking. I disagree. The point is that it

did nothing new and respected old property rights in houses and information, while the dissenters proposed new rules for new technology.

Now, I will confess, I have my doubts about the actual holding in *Kyllo* because it depends heavily on the proposition that only a warrant makes an intrusion reasonable. Well, what's a warrant? A warrant is some advance authorization given by a petty bureaucrat. I'm a bureaucrat; people who issue warrants are petty bureaucrats. And they'll rubber-stamp a ham sandwich, if you give it to them.

Why should there be a preference for a bureaucrat's prior approval? I should think that it is probable cause that makes a search reasonable — that is, after all, what the Constitution says — and that officers who lack cause should be made to pay damages.

The Supreme Court has wrongly departed from the original rules by creating immunity defenses. Immunity from damages, which makes it hard to collect from the officers who violate your rights, produces demands for new controls *ex ante*, such as warrants. I should like to see less reliance on bureaucratic approval in advance, and more reliance on damages paid to people wronged by their government. But that does not undermine the main point about *Kyllo*. Old rules work fine for new tech. The contrary view in *Kyllo* would have allowed the novelty of a snooping device to reduce privacy.

These, then, are my propositions: we live in a world of ignorance; we can expect ignorance about the full consequences and optimality of rules to be as prevalent in the 21st century as it has been in the past; we can expect academics, legislators, and judges to have, in the future, the same comparative disadvantages *vis-à-vis* the people they have had in the past; in a world of imperfect knowledge — that is, in our world — you can benefit from clear rules, from property rights, and from institutions that promote negotiation.

That's the old, and still the best, prescription.

Thank you very much.

PROFESSOR STROSSEN: Good morning. As always, I am delighted to address this convention, which has become kind of an annual event for me, and to which I look forward.

I think it would be a waste of my time to preach to the choir, and so I would be very delighted to speak to Federalist Society audiences, even if you did conform to some of the caricatures that have been floated about this organization since our last convention a year ago.

I was looking at some of the literature, and my favorite was from *The American Prospect*, which called you "right-wing dinosaurs" — talk about old technology!

Now, even if all of these scurrilous statements were accurate, I would, of course, still defend your free speech rights. After all, as Doug Ginsburg told you in his very kind introduction, I wrote a book called *Defending Pornography*. And that, of course, means dirty pictures or dirty words. According to an article in *National Review* this Spring, "Democrats hope to turn 'Federalist Society' into two of the dirtiest words in American politics!"

But I do want to stress that my defense of this important organization, including through comments that were quoted in that very same *National Review* article, goes beyond just championing the right to use dirty words, so to speak. I also wholeheartedly endorse some of your key founding principles, which are directly relevant to our topic this morning. And I always like to remind Federalist Society audiences of these very libertarian principles in your mission statement, which could come straight from the ACLU policy guide.

One of the articles that was written this summer in defense of the Federalist Society, as a response to some of the attacks, was by UCLA Law Professor Eugene Volokh. He referred to the statement of purposes, which I love to quote as well. He said, "I'd wager that most Federalist Society members have never read this statement, or read it once, but long ago, and forgotten it." So, let me do my annual job here of reminding you of pertinent principles directly relevant to this morning's panel.

"The Federalist Society is founded on the principles that" — and the very first one mentioned is, "The state exists to preserve freedom. Your mission statement also says that "the Society seeks to reorder priorities within the legal system to place a premium on individual liberties."

Now, I have to tell you that in 1994, I was on a Federalist Society panel with Irving Kristol, who is, I am sure, well known to this audience. As usual, I recited these libertarian tenets of your group, and that sent him into a state of shock — quite literally.

Our discussion was published, so let me read you his exact response: "I am shocked to discover that the Federalist Society seems to have said somewhere that the state exists to preserve freedom. The Federalist Society should call a meeting immediately and change that. You say that, and you get yourself in the kind of trap that Ms. Strossen has now sprung."

Well, every year, I re-read your brochure and your website with trepidation, worrying that you might have heeded Irving Kristol's advice. But so far, you haven't done that. So, once again, you are trapped by your own words when it comes to the topic of our present panel. And remember: it's not me who said that, but Irving Kristol.

Indeed, the essential role of the courts in protecting individual rights in the context of modern technology

follows not only from the portions of your mission statement that I've already quoted but also from others. Notably, "The separation of governmental powers is central to our Constitution." To my mind, these principles clearly dictate that courts must continue to play their essential role in our scheme of checked and balanced government powers to ensure that fundamental privacy and other rights are not eroded by new technology. In particular — and here I find myself echoing both portions of what John Eastman said and portions of what Frank Easterbrook said— courts must provide the ultimate safety net for these rights when the other branches of government sanction invasions upon them.

Unfortunately, we have just seen some significant new incursions of precisely this sort through the new so-called anti-terrorism legislation that President Bush signed on October 26. As Judge Ginsburg stated, I am probably best known in my ACLU capacity. And as the only full-time activist on the panel, I would like to emphasize that perspective to complement the marvelous scholarly perspectives we have had from many disciplines by the previous speakers.

The new anti-terrorism law continues an ominous trend that was already embodied in the 1996 anti-terrorism law of greatly expanding government power to engage in pervasive surveillance over personal, sensitive communications and transactions of innocent Americans who aren't suspected of any crime at all, let alone terrorist crime.

I was pleasantly surprised that Judge Easterbrook emphasized the individualized suspicion requirement of the Fourth Amendment because I, too, believe that is the essence of the Fourth Amendment privacy right. The warrant requirement is a secondary procedural requirement that is intended to provide some procedural mechanism for ensuring compliance with that central requirement that government may never intrude on our individual freedom or privacy without individualized suspicion.

By the way, it follows from that philosophy that the ACLU, along with Justice Brandeis, in the *Olmstead* case to which Jeff Rosen referred, believes that all wire-tapping is inherently unconstitutional. By definition, the communications that are swept up will necessarily include many, many of which there is no basis for suspicion. And the proliferation of interception of completely innocent communications has increased rampantly under the new so-called anti-terrorism law, specifically, and especially when it comes to online communications.

I think it is no exaggeration to say that all of us who are online now have a very high chance of having the government intercept our web-surfing and our email communications, especially if you use any computer in any public facility, such as a public library or a cyber-cafe. But, we can get into those details later.

The reason I refer to the law as the "so-called" anti-terrorism law is that it does expand government power so dramatically with respect to people who are not even suspected of terrorism. This new law also violates the warrant requirement, and it diminishes the already reduced role of the courts in providing a safety net to ensure that the individualized suspicion requirement is complied with.

One of the things that you should have in your background materials is a report that the ACLU issued on November 1. We had long been working on this report together with many academic experts to document the terrible reductions on judicial power to enforce individual rights, including privacy rights, in the face of new technology, through a series of laws that had been enacted in 1996. This phenomenon of court stripping, of course, becomes of even greater concern as that trend has been accelerated under the new anti-terrorism law.

I am not going to give you the details of the law, since you can read that in the report which I circulated to you and which is also on our website. But since separation of powers is one of the cardinal principles of your organization, and since it is the separation of powers group of the Federalist Society that is sponsoring this morning's panel, I think it's also important to note further incursions on separation of powers that have occurred even beyond the anti-terrorism law, just in the last few days.

This morning's *New York Times* has a headline on the first page, "White House Push on Security Steps Bypasses Congress — New Executive Orders." I think the best-known one is the Executive Order issued just a couple of days ago that would allow the creation of military tribunals. But there are others extending to various areas. And the *Times* quotes not only liberal Democrats such as Pat Leahy but also conservative Republicans such as Bob Barr, decrying this usurpation of the power of the legislature, as well as the courts.

And the most harsh indictment of this separation of powers that I've seen so far came from William Safire — surely, no bleeding heart liberal. And his statement is so harsh a criticism of the violation of separation of powers that it makes the ACLU statement look tepid and timid in comparison.

The headline says it all. It's, "Seizing Dictatorial Power." Now, he probably did not write the headline, so let me just read you a few bits from the piece itself. "A President of the United States has just assumed what amounts to dictatorial power to jail or execute aliens. We are letting George W. Bush get away with the replacement of the American rule of law" — by the way, rule of law is also one of your cardinal principles — "with military kangaroo courts. No longer does the judicial branch and an independent jury stand between the government and the accused. In lieu of those checks and balances central to our legal system, non-citizens face an executive that is now investigator, prosecutor, judge, jury and jailor — or executioner." That comes from William Sapphire, former speechwriter of President Nixon, who was not known to have a limited view of executive power. So, I think this is a very, very serious concern.

But let me just very briefly get back to the specific focus of this panel, and that is separation of powers and

checks and balances, and the essential role of the judicial branch, which I, and others on this panel, have contended is more important when we come to the area of new technology, far from being less important, as some have contended.

I was planning on citing the two Supreme Court Justices who have repeatedly now been invoked, first by Jeffrey Rosen and then by Frank Easterbrook. I am going to add to this distinguished group of Justices Brandeis and Scalia. I will add Judge Easterbrook because he endorsed — and I agree with him — the very same conservative principle rooted in constitutional language, tradition, and history that Justice Brandeis first explicitly invoked in *Olmstead v. United States*.

That, as you know, was the first case in which the Court had to grapple explicitly with the question: to what extent does the old constitutional language and the traditional fundamental freedoms and the traditional judicial role apply when it comes to new-fangled techniques for interfering with our fundamental freedom and privacy? Jeff did an excellent job of summarizing and paraphrasing what Justice Brandeis said. But I would like to share with your his exact language. It is incredible to me how prescient this is. He said, "When the Bill of Rights was adopted, force and violence were then the only means known by which government could directly effect self-incrimination. But subtler and more far-reaching means of invading privacy have now become available to the government. Inventions have now made it possible for the government, by means far more effective than torture, to obtain disclosure in court of what is whispered in the closet."

And here's the key point: "The progress of science in furnishing the government with means of espionage is not likely to stop with wire-tapping. Ways may someday be developed by which the government, without removing paper from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home."

From that accurate forecast, which continues to be accurate, Justice Brandeis reached the following conclusion — a very conservative conclusion: "To protect that right of privacy, every unjustifiable intrusion" — there we go to the individualized suspicion notion — "every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation."

I agree with Frank Easterbrook that what Justice Scalia did was to simply reaffirm that very important conservative adherence to old rights, old constitutional protections, in new-fangled contexts. But it is very important that he did that because there are so many pressures operating in the opposite direction — indeed, other Justices, including Justice Stevens, who wrote the dissenting opinion, voted differently.

I do think it is quite ironic and striking that Justice Scalia's opinion overturned an opinion by the 9th Circuit Court of Appeals. Here we have one of the arch-conservative Justices, known for strict construction of the Constitution, overturning the Court of Appeals that is reputed to have the most adventuristic, open-textured approach to constitutional interpretation. Let me just close with Justice Scalia's paraphrase of the same idea that Justice Brandeis and now, more recently, Judge Easterbrook, have also stated:

> "The question we confront is, what limits there are upon the power of technology to shrink the realm of guaranteed privacy. Obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion constitutes a search. This ensures a preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."

He then echoes exactly the notion that Justice Brandeis had voiced in *Olmstead*, forecasting what is going to happen in the future: "The rule we adopt must take account of more sophisticated systems that are already in use or in development."

I am going to end on that note. Again, your mission statement describes you as a group of conservatives and libertarians. So, I have cited a conservative justice and a libertarian justice. So now you surely must all agree. Thank you.

JUDGE GINSBURG: Thank you, Nadine.

Well, one of the many pleasures of this meeting every year is that it draws an audience that is as interesting as anyone on the platform. I have seen people coming in over the last hour to confirm that.

We have been joined recently by Dean Ron Cass of the Boston University Law School. I mention this in particular because two days ago, literally as I was making up my reading list for my seminar this spring, the mail arrived and in it was his new book, *The Rule of Law in America*. Obviously, since it just arrived, I haven't thoroughly studied it, although I did once see it in manuscript.

But I recommend it to you anyway, which reminds me of a drawing in *The New Yorker* many years ago: two dons are crossing a quadrangle and one is saying, "Read it yet? I haven't even taught it yet."

Now, I can't help but take the opportunity here to make an observation about the USA Patriot Act of 2001. Not surprisingly, with that title it passed by overwhelming margins. That Act provides, among many other things, that individuals detained by the Attorney General as terrorist suspects may file a habeas petition with any judicial officer anywhere, but the appeal of that case, if there is one, must be heard in the D.C. Circuit.

No one knows at this point whether there will be a substantial number of such cases, but I can tell you with some confidence that even a modest number of cases will outnumber the judges. We are down to eight active judges on a court with 12 authorized. If we don't have two more judges by this spring, we may be taking cases off the calendar regardless whether we get any cases under this new terrorist jurisdiction. I think we can agree that one important obligation of the government is to provide a system of justice capable of handling the flow of cases before it. So much for that advertisement.

We are going to engage in some cross talk here before opening it to the audience. We are going to go in order and let each speaker comment on what the other speakers had to say. Since technically I spoke first, I am going to speak first here.

Before the long knives come out, however, I am just going to ask Professor Rosen for a clarification of something he said at the outset of his remarks, which was, in distinguishing between the Fourth Amendment analysis and the privacy or personal autonomy analysis that arose first in *Griswold*, I take it — although I don't think you addressed it specifically — that you put *Roe v. Wade* clearly in the *Griswold* line, where one would expect it.

On the other hand, I thought I heard you describe those as cases of claimed entitlement against the state, as opposed to a claim to fence the state out. Now, I've never understood the right to abortion as a claim of entitlement of the sort one sees in the old Soviet Constitution, where there is a right to medical care. Rather, it is, I thought, a right to keep the state out of that decisionmaking.

So, I ask you to clarify that before we go on.

PROFESSOR ROSEN: This is it, and it's why, really, both the Fourth Amendment cases and the autonomy and the individual rights cases are concerned with the spheres of autonomy against the state and whether you perceive it as limitations on power or individual claims of rights. You end up in the same place.

Maybe entitlement is not the best phrase for the rights claim. But I used it in a perhaps unsatisfactory effort to distinguish the rights focus and the power focus. Although in both cases autonomy is protected, judges are much better at imposing firm limits on state powers of surveillance than on taking it from the other side and trying to define what liberty, what property, is fundamental. And that's what I want to press John Eastman about.

JUDGE GINSBURG: So, if I understand that, then the focus of the question being raised in the *Griswold* line is more analogous to clarifying the property rights in the residence when there is an eavesdropping case? In other words, one has to establish the certainty of property rights before one can ask whether there has been an invasion, with this new technology.

PROFESSOR ROSEN: This colloquy is interesting because it suggests why I slightly resisted Judge Easterbrook's notion that the core of the Fourth Amendment inquiry in *Kyllo* was property rights in the personal information. It seems more like a sphere of justifiable immunity from state prying, from state surveillance.

Once we begin this discussion about whether or not there actually is a property right in the diary, or whether the state shouldn't look merely because it's impossible to live as an autonomous individual in a state which reads our diary, then we're going to start disagreeing very vigorously.

I want to beg this question. I do not want courts to have to take a stand on exactly what the liberty and property right is. Better to take the paradigm case of immunity at the Fourth Amendment and focus on limiting state power.

JUDGE GINSBURG: Do you want to address one of the other speakers, Jeff?

PROFESSOR ROSEN: Well, the only thought was my response to Professor Eastman's powerful presentation — how lucky we are to have the other side put so strongly and eloquently. But I just can't begin to imagine how a democracy, our constitutional democracy, could actually have judicially enforced claims of natural rights that were ultimately divorced from popular judgments and positive law about what those rights consisted of. That was the point of the 18th century, right? There was a broad consensus about exactly which rights were natural and unalienable. They were in the state constitutions, they were cut and pasted into the Federal Constitution. We can all name them: the rights of conscience; the right to alter and abolish government; the rights of life, liberty and property. There was consensus about which were alienable and which were unalienable.

But, it was the positive law instantiation of those rights in the Constitution that made them judicially enforceable, and there was broad consensus, too, I think, that when we, the people, in our sovereign capacity, changed our minds about what those rights consisted in, we could alter and abolish government; we could amend our Constitution to recognize new national rights.

John Eastman was making the argument for natural rights claims supported by a minority — because he knows that in the court of public opinion, he's going to lose his claims. He already lost them because, if push comes to shove and we take a vote about which rights people consider natural, women are going to claim that their autonomy rights to be free from state control are far more rooted in nature than the rights of fetuses or stem cells to be recognized as having their life

begin at conception.

My claim is only that courts have not ever in American history resolved this debate in ways that thwart it from, ultimately, a positive law of popular judgment about what the rights consisted in. And I hope the Federalist Society won't go down this road. This is a choice you now face, right? We're going to start having this debate, and many of your judges are on the courts, and you made your name in the '70s and '80s. I took you seriously when you powerfully evoked the evils of judges enforcing natural law rights of property. That, I thought, was the basis of it; not the libertarian side, but the judicial restraint side of the Federalist Society. If you abandon this notion and begin to use the courts to enforce minority, highly contested visions of natural law that the majority of the American people reject, I think you will go down the road of *Lochner* and be just as discredited as those unhappy judicial predecessors.

DR. EASTMAN: Madison said — and Madison's picture's also in our mission statement — that we will always be ruled by the majority. But for the majority rule to be legitimate, it must be rightful.

One of the beauties of the separation of powers is that when the courts articulate a fundamental principle, a fundamental right that even a majority cannot infringe on, that is not the end of the question. But it forces that majority to now re-deliberate on its proposition. Hopefully, through that back-and-forth, that base majority first look at an issue is now elevated to a status of principle, that the majority ceases to be just the exercise of will and becomes an exercise of judgment. It becomes rightful in the process.

That is our hope out of separation of powers. We do not always get there, but I can almost ensure you that we will not get there, if we just say the end answer is whatever the plebiscite says it's going to be. We would have never gotten rid of slavery; in fact, we would have never even had any claim that slavery was wrong. We would have never had an appeal to get rid of Apartheid in South Africa or make a claim that it was wrong, if we didn't have this appeal to some higher understanding that is the ground for the claim that majorities ought to be legitimate in the first place.

The notion of consent of the governed that comes in the Declaration of Independence is not based on the idea that by getting 51 percent, you can outwill the other 49 percent. It is based on the claim that, as equal individuals, we have a fundamental right to have that be the outcome. Well, you cannot have a fundamental right to have majority rule be the outcome, to do something that undermines the claim on which you make that fundamental right.

Now, how in practice can you do that? In the end, even the courts have to answer to the majority. We put them on the court by Presidents who are elected in the majoritarian process. But it takes a long time to turn that judicial Titanic around. And in that long-time process, we hope that we no longer have just a transitory majority based on its own self-interest, but an elevated majority that has defended its claim, not just because we got to 51 percent but because our claim is right.

That is the beauty of separation of powers. That is what the founders understood they were trying to do with that separation of power. It requires both an appreciation of that balance by the courts and an appreciation of that balance by the legislatures and the majorities in order for it to get right.

But, we have to have, as the end, the ultimate claim that there are some rights that simply cannot be made right by a vote.

JUDGE EASTERBROOK: I think I'll pass. One of the drawbacks of being a bureaucrat — at least my kind of bureaucrat — is that when people start talking about issues involving stem cell research and the USA Patriot Act, I must abstain from the discussion.

I suppose it's okay for me to listen, but I've got to be very careful. When you heard my talk, I'm sure you were looking for anything specific in it and likely said, oh, where'd it go? Where'd it go? Silence about pending or impending litigation is one of the ethical obligations laid on judges. So I try as best I can to be general and abstract.

PROFESSOR STROSSEN: I'll yield my time to the audience, showing I really believe in free speech, right?

JUDGE GINSBURG: We have got microphones in each of the aisles. If you don't know the drill, please line up at the microphones. We will alternate between the two sides. And do try to ask a question, rather than making a statement.

AUDIENCE PARTICIPANT: I could not resist the remarks by Jeff Rosen just now. And it wasn't so much on *Lochner*; of course, he's wrong on that. But it was on his larger point that we subscribe to our original understanding of judicial restraint; that's what I've been trying to ensure over the years that we do.

When you speak of natural rights as divorced from popular consent, it's very difficult to conceive of judges enforcing such natural rights. I would give you, as an example of their doing just that kind of thing, the recent *Troxell* case, the grandparent visitation case, whereby you had a clear example of the Court standing athwart what appeared to be popular opinion.

If you take the Washington State legislature as having declared that there is no right of fit parents to control access to their children and that judges can override that, then the court said, no, this is one of these rights, unenumerated, in the Constitution, that the Ninth and the 14th Amendments and Privileges and Immunities clause refer to.

And indeed, Scalia, in his dissent, said as much. He dissented because he said the Ninth Amendment, although it's one of the unalienable rights in the Declaration, the unenumerated rights in the Ninth Amendment, the Ninth Amendment does not authorize him to say what those rights are, much less to enforce them. To which you can only say, well, then these are rights without remedies. In other words, we have these rights, but we don't have these rights, to which I finally say, what do I pay you for, if not to discover these rights?

So, I give you that example as one that, it seems to me, runs counter to your proposition.

PROFESSOR ROSEN: An excellent example. And you, of course, must have been especially disappointed that Justice Thomas, in his very interesting separate opinion, didn't rise to the occasion of his former natural rights instantiation and make the argument explicitly.

I think it is a sign of the times that no one quite had the guts to put it quite as crisply as you did. The Ninth Amendment makes people giggle after *Griswold*, to use the word the clerks did when they read Justice Douglas' first draft. And my sense is that the legal culture's changed because of your work here. If the Federalist Society did nothing else, it took that kind of unenumerated rights talk beyond the realm of respectable opinion. You can't go before a court and say it explicitly.

Now, Roger, you may be right that that's the best, or it's a more honest, defense of what the Court did. Maybe a narrower defense would have focused on the best interests of the child. I think we can conceive a narrower ground that didn't reach into the stars.

But just as a descriptive claim, which was the part of my statement that really set you off, I said that courts in history haven't done this much. And I stand by the claim that they will not do it today and in the future, at least not openly, largely because of the paradigm shift that you ladies and gentlemen have instantiated.

AUDIENCE PARTICIPANT: Thank you. I'm Todd Gaziano. I did borrow his copy of the Constitution, but I do question his trying to copyright it.

JUDGE GINSBURG: Watch out for the inkblots.

AUDIENCE PARTICIPANT: Nadine, I have a couple of questions for you.

First of all, as a member and in the leadership of the practice group that sponsored this panel, I will fight any change in the mission statement. So rest assured, I'm not sure that I, individually, would do much. But I don't think there's been any discussion to change that.

And I was sort of embarrassed, to tell you the truth, that I seemed to be agreeing with so much of what you said. But then you gratefully went off course.

This really isn't the main question, but I'm a little bit curious whether it's something in the ACLU guide that made you feel uncomfortable or decline to stand and pledge allegiance when we did.

But, the real substantive question I have is your assertion that the President's Executive Order on the military tribunals is a violation of separation of powers. In an introduction to a paper that we posted on the Heritage website on this question which I think the Federalist Society has reproduced, I express some misgivings about whether it's wise, prudent, for the President to do that.

But, there are three clauses in the Constitution, and maybe you should concentrate on those, that address any separation of powers concern in Article I, Section 8. The Congress, as you know, is authorized to create inferior trial courts, where you could have trials in normal Article III courts. It also authorizes the creation of military courts. And then there's another clause that's usually neglected, right before the Declare War clause, that Congress has the power to define and punish felonies committed on the high seas and offenses against the laws of nations.

In the Uniform Code of Military Justice, Congress has exercised this power and told the President expressly he can do it either way. He can try military people in military courts and, in certain cases, non-combatants. So, Congress has spoken. The President gets to make his choice. And then the courts will have a final say as to whether this is one of the type of cases that can be tried in the military courts.

But the preeminent authority that Madison and Hamilton relied upon here made clear that these are the kind of non-combatants — not all terrorists — that don't need to be tried at common law in the traditional court.

So, had you thought about that? Does that change your analysis of at least the separation of powers issue involved?

PROFESSOR STROSSEN: Those are interesting points, not all of which I've thought about. But for now, I still retain my

concerns. So let me answer both of your questions.

First of all, I go nowhere without my Cato Institute Constitution and Declaration of Independence — autographed by Roger Pilon!

Secondly, with respect to the pledge of allegiance, I am so patriotic. I really, really, really love this country. And I just was so inspired when President Bush spoke on September 11 on the night of the attacks — which hit very, very close to both of my institutional homes; they're just a stone's throw away from the World Trade Center. Those words that he said are burned in my brain, that this nation "is the greatest beacon for freedom and opportunity in the world. No one will keep that light from shining."

And I think my reaction to an enforced pledge of allegiance is very much like my reaction to a law against burning the American flag. I personally, in my heart and in my life, show that allegiance every single minute of every day, but I don't like the enforced act of patriotism. I don't recite the Pledge because — along with Justice Jackson, I think forced pledges diminish voluntary expressions of patriotism. I think we should who our support for our country's ideals completely voluntarily and in how we act, and not in some rote, symbolic pronouncement.

I don't say that to be at all critical of people who have a different view. I know we are all committed to what this country stands for — at least the libertarians among you!

On the separation of powers issues, part of the concerns of the ACLU and the many other critics of the Executive Order have a lot to do with violations of fundamental due process rights through these courts. By the way, the newly authored military tribunals are one step removed from the military courts that operate now and have far fewer due process rights than are afforded in those courts, with even the most basic deprivations of fundamental due process, such as the right to confront the evidence against you. These proceedings can be conducted completely in secrecy, with non-unanimous results required by the non-juror decisionmakers, with no choice in the lawyer who's appointed to represent you, with no rules of evidence in terms of hearsay and evidence that's procured in violation of constitutional rights. There are about a dozen ways in which the most basic due process is violated.

In terms of the separation of powers, first of all, to the best of my ability to research and that of the experts I have consulted, this would be the first time that military commissions of this sort would have been used in this country without an officially declared war. That's very significant because Congress' role is enshrined in the Constitution to —

AUDIENCE PARTICIPANT: The Civil War wasn't declared.

PROFESSOR STROSSEN: That's an interesting point. I also understand that the rationale that was offered for the many military commission proceedings during the Civil War was that there was such anarchy and such chaos that the civilian courts were not able to function.

So the separation of powers points also go to the failure to consult with Congress, which, by the way, as you saw in the press this morning, has been a major concern for members of Congress. Why weren't they consulted? You know, at least getting to that kind of back and forth process that John referred to.

JUDGE GINSBURG: I am going to interject with an observation. First of all, I think the Civil War point is really just a debater's point. It would have been utterly inconsistent with the position of the Union for the Congress to have declared war on what was viewed as a seceding state rather than another nation.

But I just wanted to add, Nadine, that to the extent that I have seen in the press objections from the Hill, from Senator Leahy in particular, they've been couched in terms of the failure of the Administration to consult with Congress, rather than any separation of powers objection. And, as you know, consultation often salves many wounds between the branches and is an effective balm, but it has no constitutional standing of which I know.

AUDIENCE PARTICIPANT: My name is Jim McDonald. I am from Arlington, Virginia. There has been some discussion of who gets the benefit of the fundamental rights. So this is mostly for Ms. Strossen, but I'm welcoming, of course, opinions from others.

Within the ACLU website, there's a statement, and I'll paraphrase it, that says that illegal aliens have a right to privacy. And of course, illegal aliens would include those with terrorist motives. I wonder if it makes sense that illegal aliens have a right to privacy, and would such a posturing and imposition of that policy on the U.S., did that create the environment that helped enable the events of September 11?

And also, given that policy, which to me clearly seems inappropriate, would that policy at some point, as now, trigger a response that might seem, appropriately enough, reactionary and corrective, and perhaps going further than you wanted, but would have to be anticipated?

PROFESSOR STROSSEN: First of all, I have to say the ACLU has an Immigrants Rights Project that I'm very proud of. It zealously defends — and by the way, with great success, including in two recent Supreme Court decisions — the fundamen-

tal due process rights of people who are here in an undocumented or illegal status.

Having said that, I have no idea what the statement is that you say you are paraphrasing.

AUDIENCE PARTICIPANT: Well, I'll just read it, then. I'll just read it.

PROFESSOR STROSSEN: Please.

AUDIENCE PARTICIPANT: This is on page 4 of 6, ACLU Briefing Paper #20, "The Rights of Immigrants". "Even undocumented immigrants," which I regard to be a euphemism — if you look at the statute, a much more appropriate term is illegal aliens. But, "Even undocumented immigrants have the right to freedom of speech and religion, the right to be treated fairly, the right to privacy and the other fundamental rights all U.S. citizens enjoy."

But if we have an invading army in here, those would count, I suppose, as illegal aliens and they would have some right to privacy.

PROFESSOR STROSSEN: This is why I ask for the context, precisely because I wanted to know if there was some specific aspect of the legislation, for example, or executive action that we were opposing on that ground. I am intimately familiar with every provision in the law that we have criticized as a violation of privacy. And none of them have anything to do with undocumented immigrants. And I'll persist in using that language. The only position we've taken with respect to those people is the one that was reaffirmed by the United States Supreme Court in three decisions that it issued this past June. Indeed, the Court went a step further in saying, not only people who are here illegally, but even such people who are convicted criminals, including convicted felons serving their time have fundamental due process rights under our Constitution.

For those who are concerned about being textualists and originalist and strict constructionists, it is very significant that the due process clause is written in terms of rights of "persons." It says that the government may not deprive any person of life, liberty or property without due process of law.

I assume that my co-panelists agree that does imply that there are certain fundamental privacy rights that cannot be denied on the basis of citizenship or non-citizenship, or whether you're here legally or illegally. But the important point for all of you to know about the surveillance provisions that we have opposed in these laws is that they apply to everybody — Americans and non-Americans alike.

People suspected of no crime whatsoever are equally subject to having not only their online communications but also financial transactions, credit reports, student records, many other personal records, subject to surveillance with no evidence coming anywhere close to probable cause, and no judicial oversight.

JUDGE EASTERBROOK: I would like to add a few words. I know nothing about the USA Patriot Act; I am saying nothing about the USA Patriot Act. But Professor Strossen is exactly right. The Constitution speaks of the rights of "persons." Rights under the 14th Amendment have nothing to do with a given person's citizenship. When we say "illegal alien", we're speaking of a person who has no legal right to remain in the United States. We're not speaking of a person who is disentitled to the normal incidents of humanity, including personal liberty and property and privacy and so on.

Privacy, in my view, is just a synthesis of a certain number of liberty and property rights. The word doesn't really add anything to our understanding of those rights; we must be speci?c. The Fifth Amendment says life, liberty or property — not life, liberty, property or privacy. So one can debate exactly what privacy rights are. But the federal government would have no right, for example, to confiscate, systematically, all the property of somebody who is an illegal alien just because they are not lawfully in the United States. All governmental acts must conform to rules of legality. So I think Professor Strossen is exactly right.

AUDIENCE PARTICIPANT: Well, we're just about through with the high-minded, well-thought out legal questions. So let me ask Nadine Strossen a more general, and maybe a political, question along the same lines that we just discussed.

One area where technology does seem to have changed is the technology of making war against the United States. And I don't think you would dispute we're in a national emergency and we really have no idea about even the extent of this national emergency. One could very easily argue that we are in the worst shape, in view of national security, that we have ever been in, in the history of this country.

I am curious, how do you make a judgment call? Essentially, the law enforcement agencies of the United States are coming forward and saying, we don't know how to protect this country right now from another attack that looks like September 11 or worse — biological, chemical, nuclear. We find we have a major difficulty here in protecting the citizens. Therefore, we want to take what are essentially, you might say, major changes in the way we've set out the rights and privacy in this country.

As a matter of national security in an emergency, (although not necessarily on a temporary basis, which

may require putting aside the issues of individual particularization, for example, for a wiretap), I'm sure they're not just trying to pick people politically or at random. How does the ACLU take this into your thought process as to whether it should oppose these rules because if we were to win, the country might go poof?

PROFESSOR STROSSEN: Yesterday, I was on Ollie North's radio show, among many others. And he said, "Nadine, I love having you on this show because the phones immediately all light up!"

I feel that happening here. But thank you for that excellent question because it gives me the opportunity to say that our approach to analyzing, issue by issue, proposals that are advanced in the name of anti-terrorism is one that we are undertaking in an extraordinarily, unprecedentedly broad coalition. So I'm speaking now not only for the ACLU but a coalition that came together and issued a press release in a press conference at the National Press Club on September 20, endorsing ten principles in defense of freedom at a time of national crisis.

I just want to tell you some of the organizations that have endorsed the same principles and the same approach so that you do not just stereotype this as ACLU, whatever your stereotypes about the ACLU are, and then I'll tell you what the approach we all endorse is.

This coalition includes not only the far left, or liberal organizations — Common Cause, People for the American Way — but also Phyllis Schlafly's Eagle Forum, Grover Norquist's Americans for Tax Reform, Paul Weyrich's Free Congress Foundation, the American Conservative Union, gun owner's rights organizations. Likewise, our colleagues in Congress have included some with very strong law enforcement backgrounds, the most well-known and outspoken example being Bob Barr.

The basic question that we ask is why is it that our government demonstrably, catastrophically, colossally failed in its most basic responsibility, to protect our national security and public safety? We have to analyze what went wrong. We cannot leap to the conclusion that what went wrong was an absence of sufficient surveillance, investigative, or prosecutorial powers.

Indeed, John Ashcroft himself, when he testified before Congress in support of this Act, said none of these "sweeping powers" — and that was his term, not mine — none of these sweeping powers would have prevented the catastrophe on September 11, and would not avert future terrorist acts, as is demonstrable because he has twice warned us of future attacks, even after the law was enacted.

So, we're very concerned about being stampeded into giving the government that expanded power which, as Barr and other conservatives have pointed out, has been sought by administrations, Democratic and Republican, for many years, not having anything to do with terrorism but to conduct the war on drugs, and ordinary law enforcement. Another reason I call this the "so-called" anti-terrorism law is that most of the provisions apply to any crime, not just those crimes related to terrorism.

It is not at all clear, according to national security experts, that there was not adequate — indeed, sweeping — surveillance power already extant, and that perhaps a better diagnosis of the failure on September 11 had to do with a failure of coordination among agencies' sharing of information that they had, implementation of powers that they already had.

You know, I think, a little bit, of Mark Twain, who said, if the only tool you have is a hammer, then all problems start looking like nails. The only thing Congress can do is pass laws. So, maybe that's why they diagnose the failure as a failure to have enough laws.

So, what we are trying to do is make sure that just because something is labeled "anti-terrorist" does not mean it is going to be effective, does not mean it is the appropriate balance between adding to our safety with minimal intrusions on our liberties.

That said, there are some provisions of the law that do satisfy that basic test, that do enhance our safety with minimal intrusions on our liberties. There are things that Congress could and should do that it hasn't done, that we think would be an even better balance in advancing our safety without intruding on our liberties.

In the whole area of aviation security, anybody who flies knows that what we have now is a joke. And enhancing aviation security is something that clearly could be done without violating our freedoms, but Congress has failed to act. So, it's just a little bit of healthy skepticism and analysis. Let's take this measure by measure, see whether it really is going to be effective, whether there's a less intrusive way of substantially accomplishing the goals — the same analysis that the courts use, by the way, to evaluate any liberty-infringing measure. It's not *per se* unconstitutional, but it's also not presumptively okay just because the Attorney General labels it as anti-terrorist.

AUDIENCE PARTICIPANT: James Glasebrook, a petty bureaucrat. The Attorney General of the United States has been pursuing Al Qaeda members in a number of Article III courts in criminal cases and miscellaneous matters throughout the United States, and it has for some time. Several were sentenced for the embassy bombings just a couple weeks ago in the Southern District of New York.

Can the President of the United States, who has been appearing as a litigant in these matters, essentially

divest the Article III courts of jurisdiction to continue or to handle this subject matter with minimal input, if any input, from the legislative branch?

PROFESSOR STROSSEN: Is that for me?

AUDIENCE PARTICIPANT: Well, perhaps the judges can't even answer.

JUDGE GINSBURG: Any takers?

PROFESSOR STROSSEN: Yes. One factual matter is — the gentleman from the Heritage Foundation who asked the question about the tribunals said that there would be judicial review; as I understand, there would not be judicial review by Article III courts, that they are completely removed from the entire process.

DR. EASTMAN: It seems to me there are two issues. To what extent did Congress already authorize this transfer to military courts; to the extent they already have, then Congress has authorized it.

For the other question, not surprisingly, I'll go back to Lincoln. He suspended the writ of *habeas corpus* and probably did not have any constitutional authority. If we try and rationalize that, we will find a way that makes it constitutional. We take out his real claim there, which was, are all the laws but one to go unexecuted, lest that law be violated? At some point, an emergency may cause you to ignore a constitutional provision. That doesn't make it constitutional; it may make it necessary.

I do not think we are even close to that, and I would certainly want to find some provision in the statute that would authorize a repudiation of judicial review. I think it probably is there, and we're talking about a war that has been declared in a very visible way, not by Congress but by our enemies. That means we act in certain ways as if we are at war, because we are.

JUDGE EASTERBROOK: I know nothing whatsoever about statutory authority for this, so I won't say anything about it. But I do think it was well for one of the questioners earlier to have pointed out that the Constitution itself allows Congress to punish offenses against the law of nations and to enforce the law of war. One of the understood attributes of the law of war — it has been this way for a long time — is that there is a distinction between uniformed and non-uniformed combatants. A non-uniformed combatant, called a partisan, is, under the law of war, subject to arrest and summary execution. We have done that to partisans on the other side in the past. The other side has done that to partisans fighting for causes we approve. It would strike me as very odd to say that the distinction between recognizable combatants and partisans has suddenly become unconstitutional more than two centuries after the Constitution was adopted.

So, to the extent this is just an enforcement of the distinction in the law of war between uniformed and secretive combatants, there's really no legal basis for the concern. One always has to worry about whether, between the legislative and executive branches, that power has been granted. But as between the political branches and the judicial branch, it seems to me, that has been settled by the law of war and the court of history.

JUDGE GINSBURG: Sir.

AUDIENCE PARTICIPANT: Eugene Volokh, UCLA Law School.

I am torn on this proposed bill, which is good because my opinion doesn't really matter. So it doesn't matter that I don't have an educated one.

On the one hand, I find it very appealing for a variety of reasons that were mentioned. But on the other hand, even if it is constitutional, I guess I worry a little bit.

Imagine that somebody were to say, "The war on drugs isn't just a war on drugs; it's a war against this enemy, all of these foreign drug cartels that are weakening our nation, killing more people, perhaps, every year than were killed in the World Trade Center bombings, and we have reason to believe that they are actually doing it intentionally because, in addition to just making money, they want to weaken the United States. But, this is all very plausible."

So, I wonder, is there a danger that when you talk about war on drugs, maybe a war on domestic terrorism, war on gun ownership. If guns are prohibited, perhaps there will be similar things. "Well, okay, it's true; this isn't exactly combatants in the traditional sense. But, you know, the Al Qaeda weren't exactly combatants in the fully traditional sense, so all we're saying that, isn't the war on drugs just as important as anything else?"

This is the kind of rhetoric that I think we've heard at times about movements that, for very good reason, were seen as important to national health, even if not literally to national security. So, do you feel that there is some risk that there might be this linkage, or do you feel that, there's no doubt that both the courts and the political process will maintain a very clear line between foreign invasion and foreign attack on the one hand and, on the other hand, perhaps domestic

terrorism, things like drugs, things like, again, possibly unlawful guns or a variety of things, that we want to declare war on?

DR. EASTMAN: I think one of the reasons why we have a separation of powers, when we get to things that are harder to define — and Eugene's always good at finding the hypothetical that makes it very hard to define — one of the reasons the power to declare war is given to Congress is because, then, we can have a consensus come around what it is we are going to do.

But, I think when you are physically attacked, like we were, that we're not even close to the gray area there. Responding to an attack has always been understood as part of the President's powers as commander in chief, with or without a declared war. I happen to think a declared war would provide greater clarity to the subject than we have right now. But, I don't think we're lacking clarity here, even if we can come up with other examples that might be lacking.

AUDIENCE PARTICIPANT: So, you think that if the drug problem becomes even worse than it is now and people, rather than leaning towards decriminalization or staying the course, decide that really something needs to be done, we will declare war on the foreign and domestic networks that are terrorizing America by unleashing the scourge that kills tens of thousands, maybe hundreds of thousands of people, every year?

Congress issues this declaration of war. Now we will have military tribunals for trying suspected drug dealers because, after all, it's hard to do in civilian tribunals; there's intimidation of witnesses, often the evidence is secret, gotten from informers — so you think that, at that point, the political process and the judicial process will step in to prevent it, or maybe should it?

DR. EASTMAN: I don't know. The other clause that Todd Gaziano referred to earlier says that Congress has not just the power to provide for conviction of violations of the laws of nations, but also to define the law of nations. It's a power we've given to Congress. We get to define that.

Now, I think you cannot do it just as a matter of positive law. It goes back to the point I was making earlier. You see, the law of nations was not a positive law thing, either. The law of nations was grounded in some underlying principle. And if they try to define just any old thing as a violation of law of nations, it violates that principle. They are on very tenuous ground.

But, part of this tension we have is when they try to do that, the courts will strike it down. But what do we do if the court strikes something down that, in fact, is appropriate for the Congress or President to do?

PROFESSOR STROSSEN: I'd like to weigh in on this. First of all, I'm happy to see Eugene here, and I hope you were here when I quoted you, and gave me an excuse to remind people of their mission statement.

Second, there is a really direct connection between the undeclared war on drugs and the undeclared war on terrorism, which is that these international terrorist networks are drawing a lot of their profits from the inflated prices of drugs that are due to the war on drugs. I think it raises an intriguing new argument for ending the war on drugs, and I see Manny Klausner in the first row nodding with me.

I suspect, though, that our government is going to use it in exactly the opposite way, as an excuse to step up the war on drugs, including in Afghanistan.

The most important point I want to make, though, is the idea of focusing on, as Judge Easterbrook did, people who are part of Al Qaeda and committing acts of terrorism from abroad against the United States. But this is not the limitation that is pertinent in the Executive Order that President Bush signed. That order would apply — and that was confirmed by a statement that John Ashcroft made yesterday, reported in this morning's *New York Times* — potentially, to more than 1,000 people who have been detained so far in this country, some of them since September 11, for questioning just because of who-knows-what kind of attenuated, speculative connection with those who are suspected of terrorism.

So, we are talking about casting the net very wide, indeed, and I think a real far cry from those Germans who came to this country in submarines and landed here only for purposes of committing acts of sabotage, who were subject to military tribunals in World War II. We're talking about people who have been living in this country, perhaps even legally. We don't know because the government just isn't giving us any information about those detainees.

But, the net has been cast very, very wide, indeed.

JUDGE GINSBURG: Please join me in thanking our panel for an excellent presentation.

SHOWCASE PANEL II

JUDICIAL DECISIONMAKING: THE CASE OF JUDICIAL OVERSIGHT OF THE POLITICAL PROCESS

Sponsored by: Free Speech & Election Law and Civil Rights

Dr. Abigail Thernstrom, *U.S. Civil Rights Commission*
Professor Nelson Lund, *George Mason Law School*
Professor Dan Lowenstein, *UCLA Law School*
Mr. Michael Carvin, *Jones, Day, Reavis & Pogue; Counsel in Bush v. Gore*
Mr. Joshua Rosenkranz, *President and CEO, Brennan Center, NYU Law School*
Mr. Paul Clement, *Deputy U.S. Solicitor General (moderator)*

MR. CLEMENT: Thank you and good morning. It's my immense pleasure to moderate, or at least attempt to moderate, this morning's panel on judicial oversight of the political process. Before I introduce our distinguished panelists, let me say that the events of the last year make amply clear why this particular topic was chosen as a Showcase Panel.

In fact, it was exactly one year ago to the day — November 16, 2000 — that the Florida Democratic Party and Al Gore filed a law suit in the 2d Circuit Court for Leon County, Florida. And, as all of you know, that lawsuit spawned two remarkable Supreme Court decisions. It managed to convert countless former Supreme Court law clerks into TV commentators and it made many of you, and many lawyers in Washington, D.C., to be sure, temporary experts on Article II, Section 1, Clause 2 of the Constitution, and the provisions in 5 U.S.C. It has had a tremendous impact on the Court and the judicial process and, presumably, the political process as we move forward.

Without further ado, I would like briefly to introduce our panel, and I will do that in the order that they will speak.

Abigail Thernstrom is a Senior Fellow of the Manhattan Institute; a member of the Massachusetts State Board of Education; and, most relevantly for this morning's discussion, a Commissioner on the United States Commission for Civil Rights. She is an author, as well, and occasionally a co-author with her husband. In that capacity, she's written a number of influential books, such as *America in Black and White*, *One Nation Indivisible* and *Whose Votes Count? Affirmative Action in Minority Voting Rights*.

Our next speaker will be Professor Nelson Lund, who is a professor and former Associate Dean at the George Mason University School of Law. Professor Lund has had a distinguished career in both academia and government. In Government, he served in a variety of capacities in the Justice Department, including in the Solicitor General's Office, the Office of Legal Counsel, and the White House Counsel's Office. In his academic career, he has written on a variety of subjects and, again most particularly relevant here, on topics involving election law.

Next, we will hear from Professor Dan Lowenstein. He is a Professor of Law at UCLA Law School. After graduation from Harvard Law School, Professor Lowenstein went to work for the newly elected Secretary of State of California, Edmond Brown. While working for Mr. Brown, he specialized in election law and was the main drafter of the Political Reform Act, which is the act that kicked off, with earnest, the initiative process in California, which we have all seen the results of over the years. He is currently, in his academic position, a leading expert on election law. He is a co-author of the leading textbook on election law, and he has represented Democratic members of the House of Representatives in litigation regarding reapportionment and the constitutionality of term limits.

Our next speaker will be Mike Carvin from the Law Firm of Jones Day in Washington. Mike, too, has had a distinguished career in government before going to Jones Day. He served in the Civil Rights Division. He served in the Office of Legal Counsel in the Justice Department. Of course, Mike played a prominent role in the litigation involving *Bush v. Gore* and some of the predecessor cases, most prominently in the Florida Supreme Court.

Finally, we'll hear from Joshua Rosenkranz. Josh is the founder and current President of the Brennan Center for Justice at NYU Law School. The Brennan Center does a number of things, but one of its principal areas of focus is on election law and election issues — everything from campaign finance to ballot access. In particular, the Center has represented people as diverse as Steve Forbes, John McCain and Ralph Nader in a variety of ballot access litigation.

Josh, before he came to the Brennan Center, had a distinguished career in the Appellate Defender's Office and clerked for a variety of folks, from Justice Brennan to Justice Scalia.

DR. THERNSTROM: I'm always delighted to be at the Federalist Society. Even though I am not a lawyer, I feel that this is one of my most important homes, so I thank the Federalist Society for inviting me.

As everybody in this audience surely knows, this past Monday, the *New York Times*, the *Wall Street Journal*, and other papers carried a long analysis of the million-dollar study of the Florida election returns that was con-

ducted by a consortium of eight news organizations. Voter error was an implicit theme that ran through all the stories. The *New York Times*, however, did not explicitly admit to the problem of voter mistakes. The consortium's analysis, the *Times* said, "illuminates in detail the weakness of Florida's system that prevented many from voting as they intended." In other words, the system prevented voters from casting ballots as they wished.

The black ballot error rate was more than three times that of whites, the consortium found. And that, by the way, is a figure that is much lower than what the U.S. Commission on Civil Rights continues to advertise.

The *Times* quoted political scientist Philip Klinkner, who wondered whether the voting system was "set up" to discriminate against blacks, to which the *Times* added its own editorial. "To sense the pattern of seeming discrimination raises suspicions," it said.

The story also quoted historian Alan J. Lichtman, who did what I regard as very shoddy statistical work for the report on Florida issued by the U.S. Commission on Civil Rights. "Not just disparate impact," Lichtman said, "but disparate treatment is what the Consortium's findings suggest."

There's no question that the rate of ballot error was higher for blacks than whites, for reasons that are not entirely clear. Education was one factor, the *Times* said. I suspect it was a much bigger factor than the Consortium believed. Blacks with less than nine years of school are likely to be elderly, basically illiterate; in addition, many may have been first-time voters. That, of course, is a small group. More important, years of schooling—that is, years spent warming a seat—which the Consortium looked at, do not measure actual literacy levels. And average black literacy levels are very low—suggesting a criminal failure on the part of American educators. At the end of high school, after twelve years of schooling, blacks typically read at a 7th grade level. That average, of course, means that half are reading below the 7th grade level. Ballot instructions are, in a way, a literacy test, and until we close the racial gap in academic achievement, black ballot error rates are likely to be higher than those of whites.

Neither the *Times* nor the U.S. Commission on Civil Rights, however, recognized the concept of voter error, as opposed to disenfranchisement. The Commission's majority report, in a masterful bit of obfuscation, declared that "persons living in a county with a substantial African-American of people-of-color population are more likely to have their ballots spoiled or discounted." Have their ballots spoiled by whom? A spoiler in the middle of the night? Jeb Bush; perhaps Kathryn Harris? It is a serious, and it is an irresponsible charge.

Needless to say, black disfranchisement was once all too real. In 1965 when the Voting Rights Act was passed, only 6.7 percent of eligible black voters in Mississippi were actually registered and it was not because they did not want to vote. But, with the passage of the Voting Rights Act, that problem was largely solved. By the early 1970s, the civil rights community, the courts, and the Department of Justice had moved on to the more controversial and complex problem of alleged voter dilution. Astonishingly, however, in the wake of the 2000 November election, disfranchisement, in the basic sense of votes cast and properly counted, has been resurrected as an issue, having lain dormant for more than 30 years.

Thus, today much of the media and those on the political left have circled back to the concerns of many decades ago when America was a very different place. Little has changed, they say; America is still a nation that denies the right to vote to blacks. The whole argument is symptomatic of a larger problem. When it comes to race, the left never moves on. It's always 1960 in Mississippi, wherever they look. But this racism forever and everywhere view is dangerously out of sync with reality. The past is not the present. We have been steadily moving forward. And nothing we saw in Florida can legitimately be called disfranchisement.

The courts obviously got dragged into the political thicket in Florida. But the problems that resulted in over-votes, hanging chads, and the like — none of them lend themselves to judicial resolution. Legislative action can make elections a bit more voter-friendly, perhaps. Poll workers can be better trained, maybe. But elections will never be perfect. Error-proof voters are a fantasy. Some voters will make mistakes. The problem will be particularly severe among black voters, I suspect, as long as black literacy rates remain so disproportionately low. And that suggests that better schools — not the courts and not Congress — may be the real remedy to the problem that most concerns those who studied the 2000 election: the high rate of black voter error.

Thank you very much.

PROFESSOR LUND: I am going to start with a very simple-minded idea. The federal courts should interfere in the electoral process whenever the law requires them to do so, and not otherwise. This simple point should leave the courts with a correspondingly simple question in every case: What does the law require? Answering that question will often be difficult, of course, but no more difficult than it is in a thousand other areas of the law. I see no reason at all for giving the electoral process some kind of special treatment, whether in the direction of special hesitation by the courts or in the direction of extra aggressiveness.

Bush v. Gore illustrates what it means to treat the electoral process issues like any other legal issues. And I should note at the outset that almost every commentator in America has misunderstood that decision. In the case of our friends on the left, that should be no surprise, since they misunderstand almost everything. What is more troubling, though, is how many prominent conservatives have been equally misguided about *Bush v. Gore*. Ever since the Federalist Society

was founded some 20 years ago, we have been aspiring to be more principled—and to have better principles—than the dominant left-wing legal establishment. I think our response to *Bush v. Gore* calls our success into question.

Fortunately for you, time will not permit me to remind you of all the fascinating details of the process that culminated in the Supreme Court's decision last December. I will just set the stage by very briefly summarizing the holding in the case.

After the ballots were first counted in Florida, Bush was ahead, but we had a statistical tie and Gore filed a lawsuit. The Florida Supreme Court eventually ordered a partial and selective statewide hand recount. At the same time, the court gave Gore credit for votes he had picked up in certain counties that had initiated complete recounts of their ballots. Some of those recounts had been finished while others had not.

The U.S. Supreme Court held that the Florida court order violated the Equal Protection Clause. That holding followed almost ineluctably from the Court's geographic vote dilution precedents, starting with *Reynolds v. Sims*, which established the one man/one vote rule. In *Reynolds* and other early cases, the Supreme Court had used the stuffing of ballot boxes as the paradigmatic example of vote dilution. What the Florida court did was simply a variant on that practice.

In Florida, the court ordered the *selective* addition of legal ballots, which has exactly the same effect as the addition of illegal ballots. Or, to put it another way, the Florida court devised a complex system of vote weighting, in which certain kinds of ballots were more likely to be counted as legal votes in some places than in others, thus discriminating for and against certain different groups of voters based on where they happened to reside. The complexity of the geographic vote dilution ordered by the Florida court did not convert it into something other than vote dilution.

In light of the precedents, then, this was an easy case. And one sign of just how easy it was can be found in the dissenting opinions. Not a single one of the dissenters offered any substantive criticism of the majority's legal analysis.

There *is* another way of looking at the case, though, which probably never even occurred to the dissenters. Even if this was an easy case under the precedents, it is not an easy case under the Constitution. Or, more likely, it is an easy case under the Constitution, but it should have come out the other way. I think that argument is almost certainly correct.

The Court's vote dilution decisions, beginning with *Reynolds v. Sims*, have no discernible basis in the Constitution. Now, this quaint idea of sticking with the Constitution rather than with the Supreme Court's bogus precedents has considerable merit if it means overruling *Reynolds* and all its progeny. The Court's critics, however, including its conservative critics, have emphatically not taken this approach, preferring instead to assert that the opinion in *Bush v. Gore* was unconvincing, or that it may lead to undesirable consequences, or that it is somehow inconsistent with some vaguely described conservative jurisprudence.

Now, suppose that the Court had gone back to the Constitution instead of the precedents in *Bush v. Gore*. I think that would have raised some genuinely difficult legal questions. First, you would have to ask whether the recount ordered by the Florida Supreme Court violated Article II of the Constitution, as Chief Justice Rehnquist, along with Scalia and Thomas, argued in a concurring opinion.

I believe that the conclusion Rehnquist reached is correct, but I do not believe that it is clearly or obviously correct. In the interest of time, let's just assume for the moment that Rehnquist was right. That brings us, I think, to what is the most difficult issue of all, which is whether the Court should have held that *Bush v. Gore* was non-justiciable under the so-called Political Question Doctrine.

Nobody on the Court contended that the case was non-justiciable, presumably because there was a very clear 1892 precedent to the contrary. But that does not mean they could not have revisited the justiciability issue, and maybe they should have. If they were going to revisit the 1892 precedent, though, I think they should have also been willing to take a hard look at the rest of the Political Question precedents as well. Very briefly, here is what I think they should have found, if they had done that.

There are lots of political questions that should be decided by institutions of government other than the courts. But the Supreme Court's Political Question Doctrine is almost completely useless in figuring out what those issues are. The Doctrine is at least as old as *Marbury v. Madison*, but its modern formulation came in *Baker v. Carr*. That case held, ironically though probably correctly, that geographic vote dilution claims are justiciable, thus paving the way for *Reynolds v. Sims.*

Justice Brennan's opinion in *Baker v. Carr* offered a legal test that I think basically boils down to something like this: Whenever we do not think it would be a good idea for us to perform what *Marbury* said was emphatically the province and duty of the judicial department, we will call it a non-justiciable political question.

In contrast to what the Court announced in *Baker*, the right way to analyze a Political Question issue is to ask whether the Constitution assigns the authority to make final decisions about an issue to some institution other than the federal courts. Under that standard, are the issues raised in Rehnquist's concurrence justiciable or not? I think that is a hard question. Article II and the Twelfth Amendment *can* be read to assign Congress the exclusive authority to rule on the validity of electoral votes. But that reading is not compelled by the text, and I am not entirely sure where an adequate analysis of the Constitution's history and structure would lead.

But I am sure that it would not lead down the road taken by Justice Breyer in his dissent in *Bush v. Gore*. Without quite making a non-justiciability argument, Breyer argues that the Constitution should be read to offer the courts a "counsel of restraint." He finds a few clues to this counsel in the Constitution and a few more in congressional practice. But he comes to rest, finally, on a self-serving political rationale. "*Above all*," he says, "in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the court itself." This politicized approach to judging makes explicit what I think was implicit in *Baker v. Carr*, and it is exactly this approach that the *Bush v. Gore* majority rejected.

It is also the approach that I had thought the Federalist Society was founded to combat. But when I see how few conservative commentators have endorsed both the court's decisionand its opinion, I cannot help wondering whether we have almost come to the point where someone could say that we are all Brennanites now.

Thank you.

MR. CLEMENT: We will next hear from Professor Lowenstein.

PROFESSOR LOWENSTEIN: Thank you, Paul.

I am going to talk rather generally about the question of judicial review, especially constitutional review, of election laws and procedures. To make it not too abstract, I will try to give some examples as I go along.

Most of my colleagues at UCLA would roll up their eyes with horror and/or disbelief at the thought that I might be to the left of center on a panel

My examples were not exactly chosen for this reason, but I am happy to say they are fairly well calculated to tweak the noses on the sea of conservative faces that I would be seeing, if I could see anything with this bright light that is shining in my face.

The most influential statement of the principles of judicial review under the Constitution is the famous footnote in the *Carolene Products* case. It was decided in the late 1930s, when the Supreme Court was rapidly bailing out on the practice of reviewing, in any kind of aggressive way, various forms of economic and social regulations. The general reason given for that was that these are matters that, in a Democratic society, ought to be decided through the political process. Those who did not like the regulations that were being adopted should find the remedy in the political process, not through the courts, the courts not being particularly qualified to resolve such matters.

But, footnote four gave three types of exceptional cases in which judicial review of a more aggressive nature might be appropriate. One — probably the least controversial — applies to cases where there is a pretty specific provision of the Constitution that decides the matter. If I understand Dean Lund's comments just now, he believes all constitutional cases come within that. I do not agree with that, for reasons I will mention in a minute. In some cases I do; but not too many.

In election law, I think the most prominent example is the *U.S. Term Limits* case, in which the Supreme Court struck down congressional term limits. Although that was a five-to-four decision in which the so-called conservative justices dissented, I think that is one of the easiest constitutional cases that has ever gone up to the Supreme Court.

Although the language of the Constitution itself is ambiguous, a study of the debates in the Philadelphia Convention and of early commentators on the qualifications clauses, and a remarkably unanimous body of precedent over a very long period of time in state and federal courts all make it quite clear that neither the states nor Congress can set qualifications for being elected to Congress, other than those that are set forth in the Constitution. Fortunately, by a five-to-four decision, the court got that one right under the law.

If you want to see details of that, I published an article going into exhaustive analysis shortly before that case was decided, I'm happy to say, in the Federalist Society's publication, the *Harvard Journal of Law and Policy*. It does not mean that the Federalist Society necessarily endorses the views set forth in that article.

The reason that, unlike Dean Lund, most people who study constitutional law do not think that most cases are so specifically decided by the Constitution is that most of them come up under portions of the Constitution such as the 1st Amendment and the 14th Amendment that are very, very broad in their wording, that are susceptible to a very wide range of legitimate meanings.

The second category that the court identified was those cases in which the political process disadvantages discrete and insular minorities. Obviously, that has been a very important aspect of constitutional law. There are some cases in which it comes into play in election law, but it has not been a predominant theme in election law. I am going to pass over it in the interest of time. If it comes up later, I can comment on it.

But the third one is the one that is most obviously relevant. And that is, they said, when restrictions on the political process may interfere with the ability of the political process to repeal or change laws that are unfair or that are bad in some way, then it may be the job of the courts to clean up the political process.

That is the approach that I want to criticize because it assumes that, whereas economic and social regulations raise questions that are controversial and that everybody is going to disagree on and that the only way to resolve them

is through the political process, that there is some neutral understanding — consensual understanding, perhaps — of what a properly functioning electoral process or political process is. And, therefore, the courts can apply neutral standards to fix it up.

Now, it's commonly said — and I certainly agree with this; I think most of us probably do — that the function served by our Constitution is not to impose a particular theory of government or society, but rather to set up a structure in which those who hold different views of society and government can debate those differences and work out their differences, either through compromise or persuasion. The simple point that I would make is: that should apply to people who hold different political theories, as well as those who hold different social and economic theories, because, in fact, if we look at the issues that come up in connection with the electoral system, whether they be districting or campaign finance or political party regulation — a whole host of issues — we find that people differ on those things, just as they do on economic and social regulation.

I will just mention this; I do not have time to go into detail. *Carolene Products* has been updated from time to time. There was an influential book by John Hart Ely around 1980, called *Democracy and Distrust*.

More recently, in my field of election law, the predominant view, which I think has been quite wrong, is that the key to election law, at least under the Constitution, is to prevent entrenchment or what one group of authors calls "partisan lock-ups" — conspiracies by parties to freeze out other parties. The analysis that these authors present, I think, is just superficial. I do not have time to do justice to the shallowness of these academic approaches. So, I will just state that in a conclusory way.

Now, because I do not agree with that prong of *Carolene Products* does not mean that I do not think there should be judicial review. I agree with Dean Lund. I do not think it should be approached especially differently when we are dealing with election matters than when we are dealing with other matters that come up under the Constitution.

But I do not think that we can say, "just apply the law," because the 1st Amendment and the 14th Amendment are too general to make that very helpful in most situations. I do not think there is a theoretical approach, such as *Carolene Products* or any of these modern variants, that is really going to help us. I just favor case-by-case adjudication using good judgment, using restraint, and using what we very rarely see — a certain amount of humility that the nine people in the Supreme Court might bear in mind: That they don't necessarily understand everything that is driving election laws, just as Peter Friedrick, as most of you probably know, made the point at great length that there is no one person who understands all the dynamics of the economic system, and that's a reason for caution with respect to regulation. The same is true with the political system.

Let me give one example, and conclude with that. Dean Lund talked about the principles that conservatives apply to these questions, and expressed some concern that these principles were not being applied by conservatives to *Bush v. Gore*. I would like to suggest that those principles are fraudulent; they are not fooling anybody in the population, and I would suggest that you give them up.

The example I will give is the racial gerrymandering cases, which is a two-fer because it exposes two areas of fraudulent claims by conservatives to principle, one with respect to judicial restraint and the other with respect to Federalism.

The racial gerrymandering cases — first of all, if we are going to say, just apply the law — as Dean Lund pointed out, it is pretty clear that the Equal Protection Clause of the 14th Amendment was never intended to apply to election matters or political rights. The racial gerrymandering cases, if we were to apply that standard, would go down on that ground. However, I do not favor that approach because, even though I think it is historically correct, I am nevertheless a supporter of *Reynolds v. Sims* still, there is nothing in the history of the Constitution that suggests the racial gerrymandering cases are in any sense dictated or suggested by the 14th Amendment. Furthermore, the use of precedent in the racial gerrymandering cases, particularly *Shaw v. Reno*, is simply laughable.

Now, what about what the cases do? Abby Thernstrom wrote a book in the 1980s. It was referred to in the introductions. In it she argued, to me not entirely but substantially persuasively, that there was a very strong case, that the federal government has gone much too far in mandating districts intended to reach certain results in terms of the racial or ethnic identity of the people who will be elected in those districts.

Quite logically, the question she raised was whether that mandate should be cut back. That is a sensible approach, which I think people can reasonably disagree on. It is not the approach that the Supreme Court took. By the way, Abby may have been shocked to discover that her book was not warmly embraced by what is known as the voting rights community.

And Abby's approach was not put into application by George Bush, Senior's Justice Department, which required an extreme version of this. So we got all these strange-shaped districts.

The Court, instead of saying the federal mandate was going too far, said there is a vice hitting the states from this direction; let's really put the squeeze on by coming from the other direction. The Court pretended that the states were obsessed with race when redistricting. In fact, the only reason the states were obsessed with race when they were redistricting was because the federal government was holding a gun to their heads. This was a classic case of blaming the

victims.

To impose a constitutional doctrine that so drastically interferes with a state activity that is so close to the autonomy of the states is anything but showing respect for Federalism; anything but showing judicial restraint; and anything but the so-called principles espoused by the conservatives who have so warmly welcomed those decisions.

Thank you.

MR. CLEMENT: Thanks. We may now hear a slightly different view from Mike Carvin.

MR. CARVIN: It is an advantage going last. I will tell you the areas where I agree and disagree. That might be the easiest way to go about this.

On the threshold question, I think Nelson makes a very valuable insight: it is important to distinguish the authority of the courts to decide political issues and how they analyze the merits of, say, the equal protection issue that is confronted by the court.

I think *Baker v. Carr* was correct in that political issues affecting voting and the like are justiciable. Dan makes a helpful point that, if anything, you want courts to be involved in these issues perhaps more than in other issues because one of the rationales for judicial restraint is that democratic majorities can make policy decisions.

If you have a situation like *Baker v. Carr*, where you posit that an entrenched minority is never going to allow the majority to make policy decisions, then the argument is perhaps stronger that the courts need to correct that injustice. At the end of the day, I agree with Nelson that I do not think it is a thumb on the scales either way, but I certainly would not come to the conclusion that the Court should stay out of the process of adjudicating voting rights disputes.

That is not to say, of course, that *Baker v. Carr* was correctly decided — that the equal protection clause mandates population equality among certain districts. But it is to say that the courts can apply equal protection principles in this context no less than in any other.

Let's turn to the most recent political decision of the court, the one that's engendered the most controversy, which is *Bush*, and ask ourselves, was this a proper object of Supreme Court review? Again, I think that the people who are arguing that the Court shouldn't get involved in that controversy are not really seriously arguing that this is not a proper subject for Supreme Court review, except for Nelson. I think what they are doing is expressing disagreement with the merits of the decisions.

To illustrate through an example, let's assume it was a different equal protection violation in Florida. Let's assume Florida said, we are not going to count ballots from precincts with black populations of greater than 90 percent. Or, in those precincts, we are going to use entirely different standards than we use for the white precincts. I do not think you would get 500 law professors in the *New York Times* saying the court should really stay out of that, follow principles of Federalism, state autonomy, and allow Maxine Waters and her colleagues in Congress to decide that Electoral College dispute. That's a facial violation of the Equal Protection Clause. It's a facial violation, it seems to me, of the basic democratic guarantee of the 14th and 15th Amendments.

So, what were the merits of the equal protection violation in *Bush v. Gore*? It was not as obvious, but it seemed to me, quite frankly, a fairly run-of-the-mill decision in terms of the equal protection clause and the Court's prior precedents. The Court said, when you are counting votes, you cannot throw them down the stairs. You cannot come up with a system that is inherently irrational, if you are trying to achieve something approaching an accurate vote count.

What the Florida Supreme Court had done was not only to authorize but mandate different counting standards, not only between counties but within the same county. We can get into the details, but that's clearly what they said would be the system for counting better. And, as Nelson points out, that problem is exacerbated by the fact that the counties selected were selected by one political party and the ballots were selected by one political party.

So, it is really no different than, in fact, I would argue it is worse than, a state law that said, for ballots cast in Dade County before noon, we will count dimpled chads as a vote, and for those after noon, we will count pursuant to a different standard. Or, votes north of Tallahassee will be counted one way and votes south of Tallahassee will be counted another. If this was a sheriff's race or a normal race, I do not think anybody would suggest that passed muster under basic rationality standards of the Equal Protection Clause.

The argument we have heard that Dan was advancing was: "well, wasn't that inconsistent with conservative jurisprudence?" We talk a lot about Federalism and deference to states and that sort of thing, and it is really improper for the court to override the state's decisions. But, I would suggest that's a cartoon version of Federalism that nobody in the Federalist Society or elsewhere endorses.

Justice Scalia does not say, you defer to states. He says, you defer to states unless they violate a provision of the Constitution. You do not defer to states when they are segregating schools or excluding black people from the polls. You defer to them unless and until they violate a constitutional provision, which was precisely what was going on here.

And even under the cartoon version of Federalism, I do not know anybody who suggests you defer to

state court. If anything, they are saying, we defer to state legislatures because they express the will of the people. And, if there was ever a court that was not entitled to deference, it was the Florida Supreme Court.

That was a personal observation. They weren't attuned to the nuances of the statutory scheme. And, of course, in this unique context under Article II, Section 1, which we are all now experts on, the Constitution mandates that you do draw a distinction between what the state legislature did and state courts did, because it gave the plenary power to the state legislatures to mandate the rules of Presidential election.

Now, having said all that, I do want to emphasize that there is, in my mind, a very serious departure from principles of textualism and principles of judicial deference in the voting rights cases, in particular. The problem is (I think Nelson touched on this briefly)that the Court has adopted one view of political philosophy and political theory and elevated it to that of constitutionally-mandated status. The Court is no more empowered to do that than it is to take one view of economic freedom or one view of cultural issues, like gay rights, and elevate that to a constitutional mandate, if the text structure and history of the Constitution does not require it.

What they have particularly done over the last 30 years is clearly say that political systems that help guarantee proportional representation are the constitutionally preferred system. Specifically, what they have said is single-member redistricting is preferable to an at-large system or a multi-member system and that it is constitutionally mandated. And it is constitutionally mandated in a way which insists that racial groups get a proportionate or fair share of those single-member districts.

This political theory issue has been debated for centuries. On the one hand, people have argued that you want a representative system where the representative represents everyone in the community (an at-large system). That makes him a better representative because he elevates the common good above parochial interests of particular factions within the community. And that is what you get from at-large systems. To use a simple example, that's what you get, allegedly, in the United States Senate, because each Senator is representing the interests of an entire state.

The other competing view, equally plausible, is you want to create a system where each group has its representative. So, what you do is carve out districts, for example, where a representative is beholden to that group, and then he will voice that group's concerns within the legislature and the factions will fight it out. Neither one is constitutionally proscribed, but certainly, neither one is constitutionally required.

The Court, I think, has made it clear that it has adopted the second view, the view from the House of Representatives as opposed to the view from the United States Senate, and said that this is the mandatory view because a group will not have proportional representation unless you carve out these ghettoized districts where their representative, beholden to them, is able to express their views.

There is certainly nothing in the Constitution that requires that as a general matter. And there is certainly nothing that requires it along racial lines. I would argue, the Constitution strenuously prohibits it along racial lines.

But that is what we have come to. And you have seen in this redistricting cycle a very interesting phenomenon because one of the problems with parochial, ghettoized representation is that it leaves the other representatives free to ignore those parochialized representatives. In this case, for example, if you create black majority districts, they will have a black representative, but the rest of the politicians can ignore black concerns because they do not have to answer to them anymore. In today's political climate, what that means, of course, is that you get more Republicans in the legislature because the districts adjacent to the black majority districts will become that much more white and that much more Republican, particularly in southern jurisdictions.

So, ironically, in this redistricting cycle there were a bunch of Democratic people who are now arguing for the virtues of the old system, where each representative represents the community as a whole, and we certainly do not want to create these little pockets of black majority districts because, obviously, that hurts the Democratic Party. So you have seen a dramatic shift. We have seen it play out in the laboratory, where you have seen a dramatic shift of Democrats now taking the old approach. Here again is an illustration of what happens when the Court injects itself into the political thicket and the law of unintended consequences.

I will end by responding to Dan's criticism of the *Shaw* decision. *Shaw* essentially said that, if you subordinate traditional redistricting principles for the predominant purpose of creating a black majority district, that violates the 14th Amendment. I would argue it violates the 15th Amendment, as well, perhaps, and that is no good.

Now, Dan again says that that's a laughable view because it does not take into account Federalism and state autonomy. It is always an interesting intellectual exercise to just reverse the races.

What if a state legislature came to the Justice Department or federal court and said, yes, we have created a spaghetti-like district in North Carolina, and our avowed purpose is to ensure that we have a white majority district where we have excluded, to the extent practicable, all black voters from being able to participate in the democratic process? Would it be seriously argued that that does not raise a cognizable equal protection concern since *Brown v. Board of Education*, I think it is clear that state action designed to separate the races, not simply to exclude the races from participation in government programs, is unconstitutional.

I do not think that reflects a judgment about political philosophy by the court any more than *Brown*

represented a judgment about educational philosophy. What it represents is a judgment about the government's use of race to distinguish among its citizens, regardless of the political or educational consequences. That is impermissible.

Thank you.

MR. CLEMENT: Last, but by no means least, we'll now hear from Joshua Rosenkranz of the Brennan Center.

MR. ROSENKRANZ: Sorry, Mike. You don't get the last word.

You know, Dean Reuter told me that my role here was to be the human pinata, but I thought that I was supposed to speak first before people beat up on me.

I am not here to pick a fight about *Bush v. Gore*. And I hasten to add that it isn't because I've counted the noses and realized that Dan and I are vastly outnumbered, maybe with Nelson, three to 854.

I am thrilled, by the way, to hear that we're all Brennanites now.

And I'm also happy that I brought my thousand pledge forms for all of you to fill out at the end of this panel.

I am not here to pick a fight about *Bush v. Gore* because I think of the case as so aberrational that it actually does not teach us very much about what the Supreme Court itself thinks about its appropriate role in political regulation. When Justices issue opinions that seem so vastly at odds with their own principles, I just do not think it teaches us very much.

What I want to do instead is step back, talk about some of the general principles about when it is appropriate for courts to enter the political fray, and then reflect on three more mundane areas in politics where the courts do get involved.

I, of course, begin where Nelson begins. But for the reasons that Dan describes much better than I could, I just do not think that gets us very far. You can find a constitutional command very easily, if you're clever enough, in the 1st Amendment, the 5th Amendment, the 14th Amendment, or any number of other constitutional provisions. When I think about the appropriate role of the courts, I focus on what areas the court is best suited to play: In what context do the courts play the most important role in the political arena. And I come up with a slightly different taxonomy than Dan's.

It seems to me, there are two major areas. One is that for which *Baker v. Carr* is the quintessential model. It is the situation where those in power have rigged the rules to make it virtually impossible, or in *Baker v. Carr* actually impossible, for those out of power ever to compete. The second is, when political regulation ends up potentially infringing on individual liberty. The quintessential example there, at least in theory, is the Court's role in scrutinizing campaign finance regulation. So, those are my two broad principles of where the court really ought to be involved.

The problem I have is with the execution of those principles, and I am a little schizophrenic about this. I firmly believe, obviously, based on these principles, that the Court has done a lot of important things in the arena of political regulation. In the past 10 years or so, however, I think the Court has gone astray. And it's all in, as I said, the execution. I think of this as Frankfurter's Revenge. So, there are three areas that I want to look at. They are campaign finance, third-party rights, and districting.

Campaign finance. Put aside for a moment what I think of as a bizarre constitutional framework that the Court generated a generation ago. That framework treats two brands of financial transactions — contributions, on the one hand, and spending, on the other hand — as if they are entirely different, when they are both directed toward political speech.

Look at, for example, most recently, a case the Supreme Court decided, called *Colorado Republican*, where it based a constitutional judgment on the premise that there existed a political animal - the political party that is independent of its own candidates - that no political scientist had ever heard of or even conceived of.

Third-Party Rights. For the better part of the last century, the two major political parties across the United States, state by state, have colluded to rig the rules to exclude competition from third parties, mostly by manipulation of ballot access burdens. To its credit, the Supreme Court said, yes, we have a role in scrutinizing these barriers. But the Supreme Court and the lower courts have essentially ceded the turf and rarely ever invalidate these very heavy burdens.

Now, contrast that with the ironic position that the Court took in a case called *Timmons* not too long ago. That case involved two political parties. They both wanted to nominate the same candidate, and each wanted the other to nominate the candidate. But there was a law that said they couldn't. And the Supreme Court upheld that law. Why? Because it accepted as valid the state's asserted compelling interest in protecting the two-party system, which seems backwards. Protecting it from what, by the way? The Supreme Court was never particularly clear about how fusion candidacies, such as the ones that we have in New York State, completely undermine the two-party system.

Finally, redistricting. There has been some conversation about this already. Again, I want to emphasize the premise of *Baker*, which is that the Court intervenes when the party in power rigs the system so the others cannot compete. Well, the race-based districting is the opposite proposition. That involves those in power for once—whether because of Federal law or otherwise—actually sharing power with those out of power. And the Supreme Court tells us you cannot do that.

And then there is this wonderful ironic twist that *Davis v. Bandamer* introduces, which Ralph referred to earlier. What now happens is that those who want to defend those redistricting lines walk into court and say: "No, no, no. We were not thinking about race; we were not thinking about sharing power with others. God forbid, what we were doing was protecting those who are already in power. We were protecting incumbents." *Davis* says, in essence, that is perfectly fine. So, yet another example of Frankfurter's Revenge, in which the courts seem to get things exactly backwards, and it is a trend that troubles me and that I hope the courts start taking notice of and reversing.

Thank you.

MR. CLEMENT: Thank you, Josh. And as those of you who have been here for a day already know, this is the part of the program where we move to questions. There are a couple of microphones set up for that purpose.

I am going to take the privilege of asking the first question. I am not quite sure who this is best directed to; maybe Josh wants to answer it. A couple of the comments focused on the question of when the courts should intervene in these election disputes. That theme is suggested by the title of the panel, which is "Judicial Involvement in the Political Decisionmaking Process". Is there a reason that courts should analyze that independently of the underlying constitutional right? The text of the Constitution does not talk much about the Political Question Doctrine. Could much be resolved by just looking at the nature of the claim that's brought — often an Equal Protection Clause claim — and saying, this is either an unbelievable loser, so the court will get involved briefly to say this claim is a loser; or, this is a serious claim and we will grant relief. Is there merit in a preliminary inquiry that's unmoored from the underlying constitutional claim, or at least somewhat decoupled, that asks the question of whether the Court should get involved?

MR. ROSENKRANZ: Well, since you directed the question originally to me — I think you are right. I may be expelled from Brennan circles, but I never understood the construct in *Baker v. Carr*.

I share the view that *Baker v. Carr* does not make a lot of sense in all the respects that have been described earlier.

It does not strike me as worthwhile to engage in a threshold inquiry whether the courts ought to be staying out, certainly when you have clear constitutional commands. But I agree with the premise of the question that it makes much more sense to go to the merits, and I've always thought of Political Question as a way of punting, when the court really ought to be going to the merits.

MR. CLEMENT: If nobody else wants to jump in on that one, I'll open it up to the floor.

AUDIENCE PARTICIPANT: Thank you very much. My name is John Curry. I'm a trial lawyer. I'm an elected Republican official in the City of Chicago, and an election official in the City of Chicago. I think I know something about voter irregularity.

I concur with the view that voter error is a non-issue, if not a disingenuous issue. And if we are going to look at election reform, we first must look at voter fraud. I think that is a more cancerous effect on the issue of what goes on in the election.

Frankly, if I would make a suggestion, I would open up judicial review. Keep in mind, I think *Bush v. Gore* made it patently clear there is a quasi-judicial effort that takes place, and that is the local boards of elections and commissions of election, which have tremendous power in this process, both administratively and in a quasi-judicial sense.

I think we ought to move towards true non-partisan or multi-partisan boards of elections around our country because, if they are dominated by one party, you are going to have these non-issues coming to the fore like under-voting. I would just like your reaction to that. Thank you.

DR. THERNSTROM: I am delighted that you brought that issue up because the U.S. Commission on Civil Rights, in its report on Florida, simply ignored the very serious problem of voter fraud. Also, practically all writing on this issue assumes that under-votes are spoiled ballots, that they are ballot errors. And yet, voters obviously often deliberately leave ballots partially blank. I am very concerned about any system in which ballots registering an under-vote, a failure to vote for any candidate for a particular office, are spat back at the voter, at which point some election official says, for example: "Did you really mean to leave the choice of President blank?" That would be, of course, an intimidating, coercive question about a private decision.

Since I have the microphone, let me just say one other thing in response to Josh. He said that race-based districting was aimed at the goal of sharing power. That's only true if you assume that black candidates cannot get elected unless they are protected from white competition. That is the point of safe black districts: protecting black candidates from the competition of white office-seekers who will not bother to run in a 65 percent African American setting.

Voting rights decisions have delivered an unmistakable and unfortunate message to potential black candidates: Do not bother to run unless you are protected in a safe black district. That message had not been andwas not in the public interest, or in the interest of black voters.

Thank you.

DR. THERNSTROM: Section 5 of the Voting Rights Act originally had a life of only five years. If it had been given a longer life, it never would have gotten through Congress. It would not have passed constitutional muster. It was considered an emergency provision, and yet, as the emergency subsided over the years, the powers of enforcement grew. It is one of the ironies of the Voting Rights Act.

My first book, *Whose Votes Count?* came out in 1987 and asked: Do we really want to herd black voters into these 65-percent, 75-percent safe black districts? Republicans were laughing all the way to the political bank, but it seemed dreadful public policy to me. It diluted the power of the black vote, for one thing. But I was called a borderline racist for even raising the question of pasting racial and ethnic labels on all voters and drawing districts accordingly.

Yet, as Mike said, it is very interesting that today the civil rights community and the Democratic Party are starting to say, wait a minute, maybe this isn't such a good idea at all. Even Adam Clymer of the *New York Times*, who wrote a vicious review of *Whose Votes Count?*, has now changed his mind on the question of racial gerrymandering.

MR. CLEMENT: Attorney General Pryor?

AUDIENCE PARTICIPANT: Yes. Bill Pryor, Attorney General of Alabama. My question is for Professor Lund.

I wonder whether you overstate the dependence of *Bush v. Gore* on *Reynolds v. Sims*, and whether you could conclude that viewing *Bush v. Gore* totally in terms of the Constitution, as opposed to what the Court has said about it — that it is much more difficult to say that *Bush v. Gore* is wrong than say it is *Reynolds v. Sims* that is wrong.

You can look at *Reynolds v. Sims* as a case about whether states can structure representation and legislatures on something other than just one person-one vote, a strict mathematical basis, and do something more akin to what the United States Senate is all about.

That is a different case from saying that when a state is conducting a Presidential election, the two federal offices in this country that we all elect, the state can tell its voters beforehand, all of your votes are going to be counted equally, and then do something completely different, as Mike Carvin said, it establishes a rule that we're going to count based on throwing the votes down a staircase. If you view that vote as a form of political expression and speech protected by the 1st Amendment, isn't there a better case for *Bush v. Gore* than even for *Reynolds v. Sims*?

PROFESSOR LUND: If I understand the question correctly, or the suggestion correctly, it's that *Bush v. Gore* could have been decided the way it was under the Constitution, even if *Reynolds v. Sims* had never been decided. I think it probably could have been, but I don't think it would have been correct.

I think the 14th Amendment just doesn't cover voting. It's quite clear, I think, both from the text of Section 2 of the 14th Amendment — that's the part on voting, and that's all it says about voting. And it is clear from the history that everybody understood that the 14th Amendment did not cover voting. It did not require black suffrage. If the 14th Amendment didn't require black suffrage, then I don't see how it can be applied to these much less problematic practices that we see in cases like *Bush v. Gore*.

Now, the idea of using the 1st Amendment also is a little doubtful under the Constitution, although I think it would be a better argument to use the 1st Amendment, as General Pryor just suggested. That would be a long story to see whether you could do that. It would require both an interpretation of the 1st Amendment and a consideration of the Incorporation Doctrine and its validity, none of which I'm going to inflict on all of you today.

AUDIENCE PARTICIPANT: Mr. Carvin, Article II, as we all know, says that the state legislature shall be responsible for appointing the manner of electors. From a textual decision, you've discussed the Florida Supreme Court; you said they were mandating a process regarding the recount, and you also later noted that the State of Florida's legislature had also mandated rules; you used the word "mandate." I guess I'm confused as to what the word "manner" means in the context of the Constitution, and how equal protection is relevant to an appeal of the Supreme Court, because it seems to me that the Florida Supreme Court was acting as if they were engaged in a manner of selecting electors.

MR. CARVIN: Yes, I think the equal protection analysis and the Article II analysis are two separate points. The Article II analysis point is that the Florida legislature had prescribed the manner for choosing electors. It had passed an election code. The Florida Supreme Court rewrote, by my count, eight different provisions of that code to get to the result they wanted. Most obviously, there was a seven-day deadline to get in your manual or any other kind of recount you were doing, which was missed by all but one county in Florida. It was missed by Broward, Dade and Palm Beach, and they extended that to 20 odd days. There were a number of other problems in their analysis, but that was the most obvious one, and that was the one that actually infected some of their later reasoning.

It was amusing to me during this entire debate. All the law said was, you may do a manual recount. You

must do it in seven days. Immediately, pundits, who could blithely tell you what McPherson meant in 1895 and could tell you about the equal protection clause, looked at that statute and said, gee, we can't figure this one out.

Does this mean if you take more than seven days, you can do it? It was about as simple an administrative law case as you could imagine, and the Florida Supreme Court violated it.

The Supreme Court gives them a second bite at the apple and says, look, this doesn't really square terribly with what we were thinking. The Florida Supreme Court issued the second opinion without even responding to the first USSC opinion. We mention that, obviously, very prominently in our brief. Justice O'Connor mentions it at oral argument. And then on the Monday afternoon after the argument in the Supreme Court, the Florida Supreme Court issues the opinion responding to the first Supreme Court opinion. It's sort of like, well, we've been going through our in-box here; we noticed that we had forgotten this. And then, our 18 references to the state Constitution — well, please ignore that; this was a very straightforward statutory interpretation. It was fairly obvious, at any minimal level of intellectual honesty, what they had done. They took the federal prescribed power from the legislature, which had set the rules prior to the election, and re-adopted them.

That is particularly troublesome, from a Federal statutory perspective, as well as from a policy perspective, because obviously there's a reason you want the rules of the election to be set before the election occurs. Nobody in Florida — Republican or Democrat — could put their hand on a Bible and say, my view of manual recounts versus machine recounts was wholly unaffected by my anticipated view of how it would affect the candidate I support. Of course, if you set the rules before the election, you can take a relatively honest view, which is preferable.

I think we all know, if the positions were reversed, Bush would have been arguing for the sanctity of manual recounts and Gore would have been arguing for the sanctity of machine recounts. It just illustrates precisely why, once the election has occurred and people can start toting up numbers to figure out the effect of various methodologies for counting votes and who will be a winner, that that's a system to be avoided.

MR. ROSENKRANZ: Well, having said that I am not going to pick a fight on *Bush v. Gore*, I just cannot resist. This is really a quibble; not a wholesale attack on what you just said, Mike. It is a quibble on how far that reference to the word "legislature" really gets you. It seems to me, it could not possibly be the case that the framers who wrote that word imagined a legislature unhooked from its moorings in a three-part governmental system. Certainly, it seems to me, a supreme court of a state is entitled to interpret what the legislature said and decide what it meant, especially in a context where, as here, the Supreme Court says it finds ambiguity.

That is at least the story the Supreme Court is telling itself. To conclude otherwise, it seems to me, is to go down a road where you're saying that, if a legislature passes a law related to this set of election issues and the governor vetoes it, then the governor is violating the Constitution.

MR. CARVIN: The question becomes whether or not under Article II the Supreme Court should do a *de novo* review of state law or give some reasonable deference to the Florida Supreme Court's interpretation.

My own view is the question is academic because there was no theory of deference that got you to the result that they were actually trying to interpret that statute, as opposed to rewrite it. So, the hypothetical I asked in the moot court was should they use the same method of statutory analysis that the Supreme Court used in the *Weber* case, where they rewrote Title VII. And if that's the standard, then I think they passed it.

But if there's any higher standard, then I don't think they did.

PROFESSOR LOWENSTEIN: I do not know if any of you noticed, but when Josh began his initial comments, he mentioned me as one who would be on his side on *Bush v. Gore*. I didn't say anything about *Bush v. Gore* and I have never talked to Josh about *Bush v. Gore*. I think the fact that he felt comfortable in making that assumption tells you a lot not only, as Michael pointed out, about how you could expect officials or judges, after the fact, to come down on these issues, but how academic commentators, I am sorry to say, came down on these issues.

In fact, on the merits, although one could improve on the way *Bush v. Gore* was written, I really do not disagree with the equal protection conclusion, I agree with that — and also the conclusion with respect to what the deadline was. I think that the Rehnquist concurring opinion is pernicious.

AUDIENCE PARTICIPANT: This is for Professor Lund.

You ended your talk with, I think, a very provocative query: Are we not all Brennanites now? It was so ironic and provocative that I didn't quite understand it.

Are you saying that the Justices on the Court are Brennanites in the sense that *Bush v. Gore* was a result-oriented decision, or are you saying the commentators are Brennanite because they wanted that decision, but now they are switching their commentary in a direction that might be more useful to them for other decisions in the future?

I would also like to ask you, speaking of quasi-Brennanites what you think of how Judge Posner came out

on *Bush v. Gore*. He concludes that it was basically a pragmatic decision. If you have two ways of interpreting the Constitution, one of which suggests a constitutional crisis and one of which does not, it makes sense to lean in the direction of the one that does not.

PROFESSOR LUND: The questions are actually related. I was referring to the commentators, not the majority of the Court. The majority of the Court, I think, acted in a principled and proper way.

It is the commentators, including the conservative commentators, that I was referring to. For example, Judge Posner takes the position that the majority's decision in *Bush v. Gore* was legally wrong, but we should be glad that they made this mistake because the practical consequences of letting the recount chaos continue would have been so bad for the country. That is the kind of politicized approach to judging that is reflected in Justice Breyer's dissent, though with different results. But it is the same kind of politicized approach to judging that the majority of the court properly resisted, and all of us should be praising them for it, not criticizing them for it.

AUDIENCE PARTICIPANT: My name is Dan Lungren. I was the Attorney General of California; before that, a member of Congress. I would like to ask a question on Federalism as it relates to pre-clearance.

There cannot be too many other examples of a violation of the general concept of Federalism in the pre-clearance requirement under the Voting Rights Act. And it is based on a factual determination.
In the 1980s, when Henry Hyde, Jim Sensenbrenner and I were on the subcommittee that dealt with the question of re-upping the Voting Rights Act, we did it on a historical analysis. We came in with the notion that this is a real hurdle over which we must jump in order to continue this aspect of the Voting Rights Act and we wanted to be shown proof that it was necessary.

There was a famous hearing down in Texas where Henry Hyde announced that he was going to support the extension, and many of us were with him because of the parade of horribles that had been exhibited in terms of actual practice.

As Attorney General of the State of California, I had to be involved in pre-clearance. Believe it or not, there are about five jurisdictions in California, five separate counties, that require pre-clearance, not because of actions from the old Confederacy but rather from minority language coverage.

And so, my question is this, to all the members of the panel: Do you believe that there is sufficient evidence of a parade of horribles at the present time that would support the continuation of the pre-clearance requirement? This not only is an invasion of the states' rights by the judiciary but through the pre-clearance concept by the Justice Department of the federal government. Second, is there a reason to continue the coverage for minority language jurisdictions under this Act?

MR. CLEMENT: Why don't we start on this end with Josh, and we will work down and give everybody a right to pass, if they like.

MR. ROSENKRANZ: I'll pass. I am not an expert on pre-clearance.

PANELIST: As we have mentioned, it is going to expire in 2007, and I hope that the second Bush Administration lets it expire. There are three prongs. First, you are distinguishing between the states, essentially, of the old Confederacy along with pockets of New York, California and others scattered around in the rest of the country. There is really no longer any empirical basis for suggesting that voter registration or election of minority officers, for example, in South Carolina or Texas, distinguishes those states from Michigan or Ohio or other places. So, just dividing the country that way, I think, is a very serious policy problem.

It also makes all the states come to the Justice Department without any judicial review and justify these redistricting plans. One thing that the *Shaw* case has vividly revealed is what practitioners knew all along. During the 1990s, all these folks from the Voting Rights Section — some of them are here — went around saying, "We're not looking for black maximization. And they would sit down at their computers and, for example, in the *Miller* case, there was a plan called Black Max. If you did not meet that standard that was drawn up by either the local civil rights groups or by the Justice Department itself, you were not going to get pre-clearance.

Legislatures in North Carolina, Georgia and Texas created extraordinarily ugly districts that departed from any reasonable system in order to satisfy people at the Department of Justice.

As to the real problems, the parade of horribles that apparently convinced Representative Hyde — we do not need this bureaucratic system to get at that. If there is a serious kind of voter intimidation or obvious scheme to deny ballot access, those are all quite reachable under Section 2. If it is a simple case, it is easily provable. Section 5 only comes into play in this gray area, where they can force the state legislatures to maximize through a gerrymander.

Now, given the *Shaw* cases, the state legislatures are in an impossible position because, on the one hand, they cannot subordinate redistricting principles to create black majority districts under the Constitution and, under Section

5, they must subordinate traditional districting principles to create the black majority district. So, it's clearly outlived its usefulness, in my mind.

DR. THERNSTROM: Section 5 has certainly outlived its usefulness but don't hold your breath anticipating congressional action before 2007, when the "emergency" provisions are due to expire once again, 42 years after the passage of the original act. Of course, the parade of horribles does not exist. In the wake of the *Shaw* decision, Ted Shaw of the NAACP Inc. Fund, predicted the near-disappearance of the Congressional Black Caucus. Its members, he said would soon all fit in the back of a taxi cab. But every black incumbent was re-elected. And that wasn't due to their status as incumbents; they were running in reconfigured districts.

The coverage of groups other than blacks was always dubious, in my view. They were depicted as black-like groups, although even with respect to Mexican-Americans, the analogy was shaky.

I am very critical, in my book, of Representative Hyde. He was an important player behind the 1982 amendment of Section 2—a grave mistake, in my view.

PROFESSOR LOWENSTEIN: When the original Voting Rights Act of 1965 was challenged constitutionally — it went up to the Supreme Court in *South Carolina v. Katzenbach* — the Court was unanimous in upholding all but one of the provisions of the Voting Rights Act. The one which was not unanimous was the pre-clearance requirement in Section 5.

Justice Hugo Black dissented, saying this was just too much of an in-road on Federalism. More significant than that is that the majority opinion itself recognized that the pre-clearance requirement was a very serious in-road into our federal system and said that, however, very dire circumstances justify strong medicine. That is not a quotation, but a paraphrase.

I personally believe that the majority was right to reach that result. But I think it is nonsensical to suggest that such dire circumstances exist today. The Supreme Court, in the past decade, has given signals that it is not about to go back and revisit whether Section 5, which was constitutional when it was passed, is still constitutional. Therefore, I do believe that Congress and the Administration, whatever administration it is, should look very seriously at this. But, I guess it was Abby who said "don't hold your breath".

If there is to be an effort to repeal the pre-clearance requirement, it requires very careful thought about how it is going to be presented. In 1981 and '82, the Reagan Administration came out and said, "we are going to oppose renewal of the Voting Rights Act", which I think was simply calculated to make sure that the Voting Rights Act would be strengthened. If there is a second Bush Administration, and if they do choose to take that on, they have got to be a lot cleverer about it. It will be very difficult to do.

Let me add one thing, in light of the identity of the questioner. I was at an election law conference at Stanford a few years ago, when you were Attorney General of California. And somebody on one of the panels made some uncomplimentary reference to something said by Dan Lowenstein. And there were two men standing behind me, and I overheard one of them say to the other, "What's he talking about?" And the other one said, "Something about Dan Lungren."

DR. THERNSTROM: By the way, Dan, I did not mean do not hold *your* breath; I meant don't hold your breath that it will be taken up before 2007. That was my point.

AUDIENCE PARTICIPANT: My name is Michael Patrick Carroll. I sit in the New Jersey Assembly. And with due respect to the gentleman from Chicago, we taught them all they know about voter fraud.

Our New Jersey Supreme Court is every bit as bad, if not worse, than Florida's.

We just went through the redistricting process on the legislative level. In part, because the Democrats have now adopted that unpacking scheme, they successfully took control of the New Jersey Assembly, picking up nine seats.

The Republicans lost a suit. They contended that they, in fact, did have to create more majority black districts. They did not get very far. The question I have: Is there no constitutional provision, other than strict equality of district size, which would enable a federal court or federal adjudicator to step in and set aside a legislative determination as to districts?

PROFESSOR LOWENSTEIN: The controlling authority on this question is *Davis v. Bandamer*, which is another one of these rather cryptic Supreme Court decisions. It held that a constitutional attack under the 14th Amendment against what is alleged to be a partisan gerrymander is justiciable. But what it says beyond that has been a matter of dispute.

I believe that if you look at subsequent decisions, mostly in lower courts and a summary affirmance in Supreme Court, which does not mean too much, basically the answer to your question is, no, there is no remedy for the major parties.

I have written an article about that. If you want, I can give you a reference to it. It is a rather long and

complicated argument. I believe, if you look at the lower court decisions, in practice, they do not go through the analysis, but that seems to be the position that they take. That it is essentially a dead-end.

SHOWCASE PANEL III

JUDICIAL DECISIONMAKING: JUDICIAL ENFORCEMENT OF THE BOUNDARIES OF GOVERNMENT POWER

Sponsored by: Federalism & Separation of Powers and Administrative Law & Regulation Groups

Professor Cass Sunstein, *University of Chicago Law School*
Hon. Kenneth Starr, *Kirkland & Ellis, former U.S. Solicitor General and former Judge, U.S. Court of Appeals, D.C. Circuit*
Mr. Elliot Mincberg, *Executive Vice President, People for the American Way*
Hon. Lee Liberman Otis, *General Counsel, U.S. Department of Energy*
Hon. David Sentelle, *U.S. Court of Appeals, D.C. Circuit (moderator)*

JUDGE SENTELLE: Good afternoon. If I may impose on your time just a little, as we come to follow Ted Olson, I was reminded a little bit of a few years ago when Dick Halbertson, the esteemed Chaplain of the Senate passed away.

At his memorial service, one of the eulogizers rose to point out that he had been forced to follow Billy Graham. And preaching after Billy Graham was not something the man wanted to do. Coming here after Ted Olson is perhaps not what we had in mind in, I hope, not too dry an academic discussion — Judicial Decisionmaking: Judicial Enforcement of the Boundaries of Government.

We once again have a panel that illustrates the diversity and breadth for which the Federalist Society aims, and for which we are at least internally known in our panel selection. In allocating position and time, I will remind you that we review federal agencies for being arbitrary and capricious. Nobody is reviewing me and I am arbitrarily and capriciously going to give each speaker about 12 minutes to begin with. Thereafter we will have their critique of each other or their discussion of each other, and then questions and answers, in such time as is left.

The order is equally arbitrary and capricious. I'll introduce everyone now so that we don't have the Punch and Judy Show, popping up and down. Introductions will be short because you largely know most of these people.

Cass Sunstein, Professor of Law at University of Chicago Law School, Professor of Jurisprudence. He also serves in a political science capacity, as well as the law school. Among one of his many accomplishments is that he worked for Ted Olson at the Department of Justice.

Kenneth W. Starr, of whom you may have heard. Ken worked with me on the United States Court of Appeals for the District of Columbia Circuit. He attended Duke Law School, which has the honor of being within 15 miles of a very fine law school and is at least one of the two finest basketball programs in the ACC; and whose wife probably has my picture on a dartboard for something else I got him into later.

Elliot Mincberg, who is the Legal Director for People for the American Way. You heard a quote from that group about the Federalist Society. I don't remember what it was. Previously, he was with Hogan & Hartson. He served on the Advisory Committee for the Center for Democracy and Technology, among a long list of other legal accomplishments and public service.

Finally — and you may have seen her come rushing in late — our fourth panelist, Lee Liberman Otis. If you know Lee, which most of you do, you know that the only time she's not late is when she does not show up at all. We're glad to have with us Lee Liberman Otis, the General Counsel for the U.S. Department of Energy, whose contributions to this Society and to public service are way too long to undertake today. So I will leave it at that, and we will bat in the order in which I have read into the record, beginning with Professor Sunstein. Cass.

PROFESSOR SUNSTEIN: It is a great pleasure to be here, and to see so many friends and some students and colleagues from long ago. The only people I cannot see are right there because the light is shining. It's a little like a Steven Spielberg movie.

I have an epigraph, which is from a very short speech by Learned Hand in the midst of World War II, which was a speech called "The Spirit of Liberty". And Hand wrote — and here's the epigraph — "The spirit of liberty is that spirit that is not too sure that it is right." Hand was a great critic of judicial oversight of the democratic process. He was nervous about judicial power, and there was a link between his caution about judicial involvement in overseeing what the political process and his conception of what the spirit of liberty was.

What I am going to offer substantively is a separation of powers perspective on Federalism. It is a cousin to a separation of powers perspective on individual rights, which perhaps will not be unfamiliar.

The separation of powers perspective on Federalism has two components. My first suggestion is, in the absence of clear authorization from Congress, the Supreme Court ought not to permit the executive branch to intrude on the powers of the states, at least if the intrusion would raise serious constitutional problems. My suggestion then is that the President ought to be required to have a clear mandate from Congress, if there is going to be an intrusion on ordinary

understandings of the federal structure. So, this is a plea for federal judicial protection of state autonomy in the absence of clear congressional permission.

The second part of the separation of powers perspective on individual rights is that, if the President and Congress have agreed, or if the Congress has clearly authorized the President to intrude on individual rights, and if the President has undertaken the task voluntarily with congressional permission, the Court ought not to intervene, unless we have a really clear or egregious basis for intervention.

Now, that separation of powers model of how courts ought to approach Federalism cases is easily transferred to the area of individual rights in a time when national security is at stake. In fact, it is, I believe, the subtext of Chief Justice Rehnquist's book on civil liberties in wartime. The upshot of this subtle and nuanced book is that courts ought to be very cautious about bucking the shared judgment of Congress and the President — yet not so cautious when individual liberty is at stake in requiring Congress to have spoken clearly if the President is intruding on what would otherwise be a constitutionally protected liberty.

So, what I am basically trying to do is give a conception of the judicial role in the domain of Federalism. It is a close cousin to the Chief Justice's conception of individual rights in a time when national security is endangered. I would like to highlight the distinction, which is emerging now, between cases in which Federalism has been intruded on without clear congressional authorization and cases in which Federalism has been intruded on with clear congressional authorization, I'm basically going to give you a map to what the Supreme Court has been doing over the last decade or so. I will try to make a sharp distinction, sharper than the Court has done thus far, between cases in which the Court has said the Executive Branch cannot do it because Congress has not specifically authorized the Executive Branch to do it, and cases in which the Court has gone much further and said the President cannot do it, even though Congress has specifically said the President can do it. That is the distinction I am going to be drawing.

In 1991, in an overlooked but very meaningful decision called *Gregory v. Ashcroft*, a sharply divided Supreme Court ruled that the Age Discrimination in Employment Act could not be applied to state judges, even though there was indication that the Executive Branch wanted to do that. What the Court said in this divided case was that the Age Discrimination in Employment Act probably is more naturally read to apply to state judges.

Justice O'Connor, writing for the Court, did not urge that she was following the natural reading of the statutory text. But she urged the statute is ambiguous, and in the face of ambiguity, we are not going to take Congress to have spoken in a way that would disrupt ordinary understandings of state sovereignty. So, she urged, probably Congress could impose an age discrimination act on state judges. But this would not be authorized unless Congress had been unambiguous. This is a clear statement principle – requiring Congress to produce a clear statement — in a way that would tend to reinvigorate political safeguards against insufficiently deliberative federal intrusions onto the states.

The second example is from last term, in another Federalism case, which is often grouped with the Federalism cases in which the Supreme Court has actually struck down enacted legislation. It involved a solid waste agency, of an interstate body of water, and the Army Corps of Engineers, in a landfill case, in which migratory birds went on to the water that was interstate waters. The question was whether the fact that migratory birds were involved was a sufficient predicate for exercise of federal authority by the U.S. Army Corps of Engineers. I hope that is a sufficiently clear statement of the factual situation.

A lot of ink was spent on the briefs on the constitutional question whether the federal government had the power, under the Commerce Clause, to reach migratory birds that were not on what were ordinarily thought to be navigable waters of the United States.

The Supreme Court, in an opinion by Chief Justice Rehnquist, urged that, because the statute was ambiguous, the Army Corps of Engineers would not be allowed to exert authority over this intrastate water — even though there was some possibility that if Congress had been unambiguous, the exertion of authority would have been constitutionally acceptable.

There's a little bit in this case which is exciting for administrative law types — and I do detect three of you in the room. That little bit actually has tremendous policy importance and legal importance, even outside of the administrative law domain.

There's an idea. It is called the Chevron Principle, which says, in the face of ambiguity, agency interpretations of the law prevail. That idea created a problem for Chief Justice Rehnquist because he acknowledged that the Army Corps of Engineers' assertion of authority was under an ambiguous statute. In a very important passage of the opinion, he suggested that, "We are not going to indulge this principle, allowing agencies to interpret ambiguous provisions, where the interpretation compromises the federal structure in a way that is constitutionally problematic." So, no matter what the Executive Branch says, we are going to require not just executive but legislative deliberation about a question of the borders of constitutional authority with respect to Federalism.

Now, just a little notation about the grandpa of these cases. It is an old decision called *Ken v. Dulles*, in which, during the Cold War, the Attorney General of the United States tried to stop a Communist from traveling abroad. The Court ruled in that case not that the federal government lacked the authority to prevent a Communist from traveling abroad

under those circumstances, but that Congress would not be lightly taken to have authorized the Attorney General to deprive an American citizen of the right to travel because of his political convictions. Hence, the Court would not allow the Attorney General to do that without congressional authority. The Court subsequently made it clear that where there was congressional authority, the restriction on travel would be just fine.

Now, what may be emerging here is that the principle I am discussing — which is a requirement of congressional and not merely executive authorization for an intrusion on the federal structure — is a non-delegation principle. The non-delegation doctrine is familiarly thought to be dead. But this idea is real life in the non-delegation principle.

I am not speaking of the idea that Congress has to delegate with detail, the old non-delegation doctrine, which has little life now. I am speaking of a new Non-Delegation doctrine, which says that where the Executive Branch is moving up against a constitutional boundary line, congressional, and not merely executive, deliberation will be required on the point in question. In fact, the Court, in abandoning the non-delegation doctrine last term, has reaffirmed the narrower non-delegation doctrine, which I am now endorsing.

Those are the cases I mean to approve. But a different approach is taken in the case *United States v. Lopez*, the first case since the New Deal in which the Supreme Court struck down a statute under the Commerce Clause. This came, in a way, as a shocker because it seems as if the Court would not be limiting congressional power under the Commerce Clause. But there is a lot of reason for us to approve the *Lopez* case because the relevant statute, the Gun-Free School Zones Act, was passed without even a congressional nod in the direction of limits on its own constitutional authority. There were no findings; there were no hearings. There was nothing. There was basically just a vote.

The Court took a shot across the bow, insisting that ours is a national government of limited authority and that there has to be, at a minimum, some kind of legislative deliberation about the connection between what it is doing and interstate commerce. For the Court to indicate that is different, but not so terribly different, from the requirement of clear congressional authorization I mean to approve.

In a very different category is a trilogy of cases from recent years, in which the Court has struck down statutes that have commanded bipartisan approval after extensive congressional investigation of the issues of fact and law involved. As an example in chief, consider the *Boerne* case, in which the Supreme Court struck down the Religious Freedom Restoration Act, passed by a unanimous House of Representatives, approved by 97 of 100 members of the Senate, reflecting a recognition of the Constitution that the Court itself had endorsed for decades — reflecting a recognition of the Constitution that four members of the Court now believe is correct. And this reflected the view of a bipartisan consensus of academic observers, including Professor McConnell, President Bush's nominee for the Court of Appeals (one whom we hope, those of us who know him and love him, will be confirmed shortly).

For the Supreme Court to strike down that statute was an act, I submit, of hubris, when Congress was purporting to act under Section 5 of the 14th Amendment.

In the same camp as the unfortunate decision in *Boerne* are two recent decisions involving 11th Amendment immunity, one involving the Age Discrimination in Employment Act and the other involving the Americans with Disabilities Act, both of which the Court held were not legitimate exercises of authority under the 14th Amendment. Justice Thomas, I believe, took the correct route in the Age Discrimination in Employment Act case, finding not that the Act was beyond constitutional power but, in accordance with the decisions I mean to approve, that Congress had not clearly indicated its intention to apply the Act to the states. Justice Thomas took the narrower, more cautious route. The Court's majority, nonetheless, invalidated the statute.

In invalidating the Americans with Disabilities Act, as applied to the states, the Court rejected congressional judgments that reflected, over 13 years, over 300 examples of cases in which state government had discriminated against people with disabilities, including cases in which state governments had refused to employ people with cancer on the theory that coworkers thought that people who had cancer were contagious. There, Congress had really done its work. Where there is a plausible congressional judgment on the facts, based on extensive hearings and findings, rooted in an objectively reasonable view of the meaning of the Constitution — indeed, one that many of the Justices accept, and we could easily imagine a responsible Supreme Court itself accepting — where those conditions are met, it is exceedingly aggressive for the Court to intervene. And all three of these decisions, I suggest, are incorrect.

If we think that the Supreme Court of the United States or Article III judges have no monopoly on wisdom, including constitutional wisdom, the level of aggressiveness manifested in this trilogy of cases is extremely disturbing. We might make a nod here towards James Madison who insisted not on principally judicial but mostly broadly institutional checks to protect Federalism.

If we believe, with Learned Hand, "The spirit of liberty is not too sure that it is right," we might hesitate before continuing in the path indicated by the latter cases and maintain faith with the more cautious and modest path signaled by the *Army Corps of Engineers* case.

JUDGE STARR: Let me begin at a very high level of generality, and return, as appropriate for this Society, to the founding

itself.

The construct within which I would like to present some thoughts is the construct or idea of balance so important to Mr. Madison. It is what, more modernly, Robert Jackson, in his concurrence in *Youngstown*, called "equilibrium" — equilibrium within the government.

The idea at the founding, as we in this Society know is the importance of structural protections, most prominently, separation of powers and Federalism. But other important ideas are prominent, including bicameralism and the Presentment Clause and the like. Madison so vigorously emphasized this quite persuasively in The *Federalist*, and, particularly, *Federalist* 51.

We have over the years, and especially by virtue of the Warren Court's decisions, increasingly become a constitutional culture built upon what Mr. Madison deemed parchment barriers — the enumeration of individual rights receiving judicial protection, and then those almost universally accepted, such as the institutions of marriage and parenting that fit comfortably within the protections of the common law, running back to ancient times. The results, however, of the growth of this constitutional culture of individual liberty is a somewhat reduced sensitivity within the legal culture, generally, to these structural arrangements and foundational principles, seen as more reliably protective at the end of the day of human freedom.

In my judgment, *Morrison v. Olson*, which I blame much more than I do Judge Sentelle. Judge Sentelle was only doing his duty, acting arbitrarily and capriciously in the process.

But there is no such excuse for *Morrison v. Olson*. It does represent, to me, a painful example — a quite personally painful example — of the impoverishment of our culture of care and respect for structural principles. If I may be forgiven this broadside, even a court that says that it's sensitive, even in the constitutional arena, to principles of *stare decisis*, swept away at the alter of balancing. So weak was the structural principle of separation of powers, the appointments clause, and the like, that even that which was solidly within *Humphreys Executor* was swept away, along with *Myers v. the United States*.

My point is that deference can be quite dangerous to our constitutional order because, at the end of the day, it promotes congressional supremacy. That, of course, is a system of parliamentary Democracy; a perfectly fine system, but it's not ours. We did not think well of it at the time of the founding, and thus far there has been no cry for a constitutional convention to rearrange our structure so that we can have a Parliament and have question time and have a jolly good time watching C-SPAN, rather than endlessly boring stuff that we see on our current separation of powers version. But that is our system and we love it well. The system, we believe, has served us quite impressively. I point to *Chada*, and *Boucher v. Synor* (phonetic) from yesteryear. Both are seen as useful policing devices as increasingly dated but reassuring examples that the police, the cops, are on the street to prevent congressional supremacy and other forms of what, could be viewed as structural disequilibrium. By the very thinnest of delicate five-to-four margins — and Professor Sunstein has ably pointed to the issue broadly — Federalism lives. Three cheers for it, in my judgment. It is Federalism triumphant by virtue of the police being on the street and, in fact, doing their job — achieved, as we all know, by the slimmest of five-member majorities willing to carry out their policing function, and saying what the law is, including the law of Federalism. I think it is undilutedly a good thing.

And I cheer unapologetically when the Court stands for the vindication of these principles, at least when it is in the context of a *bona fide* Article III exercise of power in a real, live case or controversy. It is, in short, emphatically the province of the judicial department to say "no", and to say "no" with some regularity, and particularly to Congress. See, once again, the warnings of Mr. Madison and the Federalists.

There are many doubters in our midst. They are, like Professor Sunstein, who is somewhat agnostic, quite formal in their critiques of the Court's muscular exercise of the police power. And so, drawing from Professor Sunstein, my reference is the Kennedy-O'Connor concurrence in *Lopez*, that dramatic departure from the past. The gun-free zone — who can be opposed to gun-free zones in and around schools?

Justices Kennedy and O'Connor searched openly — quite eagerly — for a limiting principle. If Congress could, by virtue of the strength of the Commerce Clause, as interpreted since the New Deal, control the evil (and let there be no mistake that it is an evil) of violence in and around schools, then it could, under a *Wickard v. Filburn* kind of analysis, control all of education. If it can control and regulate the evil of the violence against violence then it can control the law of marriage, divorce, child custody and the like.

Now, we hear either the response, oh, you've got to be kidding? A reasonable Congress would never do that. Parliament doesn't take leave of its senses, and that sort of thing. It just is not going to happen here. Suffice it to say that is unsatisfying. That will not do. Imagine what Mr. Madison might think of the United States Code as it presently stands, much less the Bank of the United States.

If the latter troubled him, then you can imagine what the Deadbeat Dads Act would do to him or, more commonly, that this really is more appropriately a matter simply entrusted to the dynamics of the political process. The message is — and justices have essentially made this argument: "Oh, we know they are no longer designated by the state legislatures, but trust your popularly elected United States Senators to protect the prerogatives of the states. Failing that, encourage Governor Keating and his counterparts to just spend much more of their time in Washington".

But, I think it's somewhat odd to bring up Libertarian-inspired visions of judicial policing of liberty. For example, policing to protect flag burning against congressionally ordained protections. I do not know why I always mention the cases that I lost. I should mention a case or two, if there is one, that I won. But nonetheless, to just entrust Federalism as, essentially, a political question and separation of powers in turn, as is not uncommonly articulated, as essentially an aspiration. It is something to bear in mind as we go about our work.

Now, I know that there is tension here. I feel it within myself, and some might, in fact, say we are downright schizophrenic. We want our courts essentially to invalidate that which we do not like. And otherwise, we want them to keep their powder dry. Say, if there is a taking or a violation of the First Amendment, we rise up in righteous indignation. At the same time, we want the political process to work. We want the foundational liberty, consistent with Learned Hand, of self-governance through representative democracies, to flourish and to prosper.

Now, if this is, as I think it is, the dilemma, then I think the answer — and it is an imperfect one, but it is our answer in a constitutional democracy — is calling upon our judges and justices to render sober judgments, designed even-handedly to protect both structural arrangements and individual liberty. It should by no means be taking a pass or submerging structure as too unimportant. It seems to me that tugs at not just the text but the structure, as well as the history, of the Constitution.

So, it means, by my lights, that the Court is pretty much getting it right these days, save, again, for its unforgivable lapse in *Morrison v. Olson*. Certainly, it is sensible to guard against oddly shaped interpretations of law, as in the Migratory Birds Act case, which Cass mentioned. And I think it is right to decline instinctively to defer to informal articulations of law, as in *Mead*, with all due respect to Justice Scalia. Chevron, after all, did clarify in step one that everyone is equally bound by the law, the great unifying principle of equality. Thus, we can echo the ideal of Rule of Law, and we are not going to allow law by bureaucracy without a perfectly aggressive muscular judicial check. And so, too, *Garrett*, with the ultimate meaning that non-consenting states may not be sued, even by private individuals in federal court, each individual having a very poignant and moving and sympathetic story. But unless Congress is acting under a valid exercise of the Section 5 power, as has been aggressively interpreted by the Court over the years, *Garrett* is, indeed, of a piece, as I see it, with *City of Boerne*. It is, as the *Garrett* Court put it, the responsibility of this Court, not Congress, to define the substance of constitutional guarantees. That is exactly our system, as I see it.

Is the Court willing to be the policeman? It did so in *Bush v. Gore*, and asserted its supremacy over a runaway state supreme court that was simply ignoring the structure of federal law, as well as a specific mandate in round one.

What we are left with is a question. Why don't we be satisfied if Congress gives adequate consideration, sort of an administrative law model, like Justice Stevens' dissent in Philalob [phonetic]. Let us be satisfied, if we know that Congress was deliberate and careful. I think that is good. We should hope that Congress will be deliberate and careful. For my part, I would rather the judiciary say, please, if you choose, be deliberate and careful. But whether you are deliberate or careful or not, do not violate the structure of the Constitution, and we are the police to tell you that.

Thank you very much.

MR. MINCBERG: To quote myself the last time I appeared at Regent University —

(end side 1; continuing on side 2)

MR. MINCBERG: (in progress) — reading into the simple text of the 11th Amendment the notion, even of the same state, cannot sue the state or a state agency for damages in federal court — a leap to sovereign immunity that was never intended by the founders.

But even if it were, (and this gets to the second problem, with *Garrett)* it is totally abrogated by a little technicality that many who talk about Mr. Madison often forget, which is, there were amendments that took place long after he left the pale. I cite particularly the 14th Amendment, which gives Congress the power to do more than what the original Constitution states. And a second serious problem with *Garrett*, as Justice Breyer points out in his dissent, is that even though the majority of the Court gives lip service to the notion that Section 5 of the Fourteenth Amendment allows Congress to go a little bit further than the Constitution does in prohibiting conduct that may violate civil rights, that lip service is very often only lip service indeed, once proportionality and congruence (coming from the *City of Boerne* case) are applied to the law.

And third, to refer again to Justice Breyer, the decision in *Garrett* really does treat Congress like an administrative agency that does not get any Chevron deference. The extent to which the Court reviewed, or purported to review Congress' findings, or lack thereof, was truly astonishing and reflects a lack of deference to our elected branches that I would think would trouble significantly those that are concerned with judicial constraint.

One foot that I should note, by the way, in *Garrett* that is little noticed but may give some people some pause. The Court says that the rule in *Garrett* applies only to state governments, not to local governments. So, for those who are concerned about Federalism issues as they apply to local governments, as I understand *Garrett*, the Court is suggesting they can be sued under the Americans with Disabilities Act, and that may take away some of the joy that those

who support the *Garrett* case will find in it.

Let me talk for a minute or two about the American Trucking Associate case that squarely presented Non-Delegation doctrine. Here the Supreme Court found that some of Judge Sentelle's colleagues on the D.C. Circuit went just a little bit too far in trying to re-invoke the Non-Delegation doctrine, involving an EPA statute that gave the EPA power to set standards requisite to protect the public health. That, according to the D.C. Circuit, was an improper delegation of power.

Justice Scalia, who wrote the majority opinion himself, pointed out the Supreme Court has approved many situations where administrative agencies have been given authority under much broader delegations, including, for example, a number of statutes that give agencies the authority to regulate "in the public interest". The fact that it was Justice Scalia himself who wrote that opinion I think gives a bit of pause to those who hope to use that particular tool to roll back the New Deal. Justice Thomas is still there to examine the Intelligible Principle doctrine, the doctrine that the Court has ordinarily applied saying that if there is an intelligible principle behind the words that Congress uses, it is not an improper delegation. Justice Thomas, in any event, is certainly willing to consider or reconsider that doctrine in the future.

Another interesting sidelight I thought about in that case was the notion that, even if an administrative agency interprets a statute in a way that would clearly not cross the Delegation doctrine, Justice Scalia's point, contrary to the D.C. Circuit, is that that is a decision for the court to make, not an agency to make. Here is another example of, clearly, giving additional authority to the court.

On the solid waste agency case, I agree in part and disagree a little bit with what Professor Sunstein suggested. I do agree very much with the overall principle that he suggested and that the Court was adhering to in that case, the principle that when action by the Congress or the Executive really does come close to encroaching on violating rights under the Constitution, be they individual rights like the First Amendment or structural issues like commerce power and separation of powers, that a clear statement ought to be required of the Congress or the Executive Branch before the Court will interpret the law in that way. That does make sense. It is a principle I use all the time in First Amendment cases.

The problem I think I have is the notion that in the solid waste agency case, the Court was, in fact, close to those boundaries. I commend the dissenting opinion in that case, which I think explains it, much better than I possibly could. What the Army Corps was doing in that case is the quintessential example of a situation where the benefits of action are local: creating a new landfill somewhere. But the detriments of that action are interstate: destroying habitats of migratory birds that go across state lines from one place to another. If there is a quintessential area where the federal authority ought to be exercised, it seems to me that is it.

Finally, let me say a few words about the *Mead Corporation* case, which does not quite fit into these paradigms, but is an interesting one, nonetheless, because of what it says about judicial review of administrative agencies. I really do not think that it is fair to say, as Justice Scalia tried to, that the majority of the Court in the *Mead* case was abandoning Chevron. Indeed, what I think the majority was doing was really, as Justice Souter explained it, trying to pay some attention to Congress' will, saying, yes, it is appropriate to defer to administrative agencies, but it is not one or the other. It is not an either-or proposition. It is not Chevron deference or no deference at all. There may be other kinds of deference that may be appropriate to administrative agency decisions, which depend — as it ought to — on Congress' intent in enacting the law in terms of setting up what it is that it expects an administrative agency to do. Is it rulemaking? Is it adjudication? What kind of action is it? What did Congress say? Those are important issues. But what, in fact, the *Mead* case has in common with some of the other issues is that, although it does defer to Congress' role, the body that ultimately decides what Congress intended is, of course, the Court.

And what all of the cases that we have talked about today and the others that my colleagues have talked about have in common, no question, is an assertion of significant judicial power to make the decision. That's an assertion that sometimes is an important one, that sometimes is critical to protecting the individual rights that our Constitution intended to be protected.

But, there is no question that there are also occasions — and I would count *Garrett* and some of the other decisions that Professor Sunstein talked about among them — where what the Court, by a narrow five-four majority in the last few years, has done is to significantly harm the ability of our elected branches to protect civil rights and liberties that are critical to our society. James Madison would have said it is perfectly appropriate for the elected branches to do without the interference of judges, who too often in these instances may be, in fact, substituting their own policy preferences.

Thank you.

HON. OTIS: I guess I'm going to start with something obvious and tedious in a certain sense, which is *Marbury v. Madison*. In a certain sense, I think that *Marbury* answers key questions. Also, people who understand *Marbury* will tell you a lot about where they're going to come down on a number of these questions.

I do not know what the vote was in the enactment of the Judiciary Act of 1789. I do not know how much deliberation there was on the question of whether to confer original jurisdiction on the Supreme Court over the categories that were at issue in *Marbury v. Madison*. And I do not think that Justice Marshall was the least bit interested in that question. You I do not think he cared whether Congress held hearings. I do not think he cared whether there was a lively

debate on the question. I do not think that he was interested in what the duration of the debate was. At least, none of that appears in any of the briefs that were filed in *Marbury*, and none of that appears in anything that Justice Marshall had to say in *Marbury*.

Justice Marshall thought there were two questions before him. But, in relevant part, he thought the question before him was whether, when the Constitution described the scope of the original jurisdiction of the Court, it had provided an exclusive list or whether it had provided Congress with authority to add to that list. It had not and, therefore, the act of Congress was unconstitutional. End of story.

In other words, he thought that this separation of powers question, like the other separation of powers question that he addressed in the case, was a simple matter of taking the Constitution as if it were any other kind of law, reading it and comparing it to see if it was consistent with the statute, and if it wasn't, figuring out which one carried the day. That, and not a lot of theories about institutional competence, was the basis of the decision in *Marbury*.

He also said that the Court should not get involved in what he called "political questions". By that, he did not mean questions that were controversial, quite obviously, because the questions that the Court addressed in *Marbury* were intensely controversial. Essentially, he was getting in the middle of a fight between the outgoing Administration and the incoming Administration about whether a judge had or had not been successfully appointed when his commission was signed but not delivered to him in the course of the appointment. And this was after the first big party fight in the history of the Country.

So, he did not mean things that were politically disputed. What he meant were things for which there was not a legal standard, things that were not of a traditional legal character. In saying that those were not his problem, what he meant was that he understood the judicial powers conferred by Article III of the Constitution to be the traditional judicial power: the power to make traditional legal decisions. The core of *Marbury v. Madison* is the proposition that interpreting provisions of the Constitution is just like interpreting other kinds of legal documents. Therefore, when the Court has a case before it, the Court is properly the decision-maker on what the Constitution does and does not require.

If it happens that what the Constitution requires is different from what Congress has provided, the Constitution wins, not because the Court says so but because the Constitution is the supreme law listed in the Constitution, and because justices take an oath to abide by it and, therefore, they apply the authorities in the order listed. That, I would submit, is basically the theory of judicial review for constitutionality of the decisions of other branches and, indeed, of any decisions that it is reviewing.

If that is the case, then essentially everything becomes pretty easy. There is not a question about whether the Court, if it has a proper case before it, should decide whether a statute was a proper exercise of Congress' authority under the commerce power. It follows from *Marbury v. Madison* that it should.

As to whether it should defer to Congress' judgment, if this is a question of law, like any other question of law, the custom is for it to give weight to congressional judgment. Congress knows something about the Constitution, too, and Congress takes the same oath of Office that the justices do in deciding what laws to enact. The Court should treat them seriously and with respect, as other people who have intelligent opinions and who are charged with a constitutional obligation, just as the justices are.

But at the end of the day, in deciding a case, they have to figure it out for themselves. They cannot just say, "There were lots of Committee hearings, and so that shows that they thought hard about it and that is good enough for us."

Learned Hand, of course, was a skeptic about judicial review. That is a respectable, understandable position. But he was a skeptic about judicial review across the board. The issue that Justice Marshall drew in *Marbury* is not an inference that is necessary. You could have a regime, and it could be, since the Constitution is silent on the subject, that the regime that was set up was really supposed to be a regime in which Congress was the arbiter of the constitutionality of its own actions.

But, I think on the whole, Justice Marshall has the better of that argument. And if he does, then the only argument is whether the Court is right or wrong in its conclusions about what the Congress power's limits are, and so on, which are questions about which reasonable people can disagree.

I think that the Federalism provisions are especially difficult in some ways. The limits on congressional power and the allocation of powers between Congress and the states are especially difficult legal questions in some ways because they are artificial. They were something that the Framers were making up with no background. And so, it is a little bit harder to figure them out than some other provisions. I do think *Marbury* answers this question.

Now, just a few words about Congress and the Executive Branch. I think the Delegation Doctrine question is really, and in a certain way a misnomer. And the reason that it is a misnomer is that the assumption behind it is that the executive power was intended to be a purely ministerial power. That is to say that we go to all this trouble of electing presidents and, you know, the most central activity of our life is democracy, only to have the President just mechanically carrying out congressional commands. That seems like an improbable construction of what the executive power is supposed to be.

Rather, one thinks that the executive power is more likely to have included some element of policy discre-

tion, as well, in which case there is nothing wrong with Congress enacting laws that leave the Executive Branch some room for exercising policy discretion, in which case the Intelligible Principles doctrine is probably the right approach. Really, the question is whether Congress has sufficiently made what it is doing clear to have legislated. But, if that is correct, then SWANU is likely wrong on the point that Cass is praising it for. That is to say, Congress probably did provide an intelligible principle in deciding that the EPA had authority over navigable waters — that is to say waters of the United States. There is some internal inconsistency with defining navigable waters as waters of the United States, but Congress is allowed to come up with artificial definitions of terms that are not impossible to understand, in which case EPA's interpretation of it was as reasonable as anything. And probably, the Court should have reached the harder question of whether Congress had the authority to act in this fashion.

I think I'll leave it there.

JUDGE SENTELLE: I want to thank all out panelists for the depth of their initial presentations. And now, they're going to have a chance to speak in reflection upon what each other said.

Cass, you had to go first. I'll make you go first again, but you can hit again at the end, if you like.

PROFESSOR SUNSTEIN: I thought this was an extremely good and quite remarkable discussion. I do not know if you picked up on the strands of the disagreements because they were kind of obscured by details.

During the height of the Warren Court, many people, defending that Court, said, "Well, look at *Marbury v. Madison*. It is emphatically the province of the judicial department to say what the law is. You oppose the Constitution to the practices that the Warren Court is invalidating, and the Constitution is supposed to be interpreted by the judiciary, and what's the problem?"

The critics of the Warren Court — and I count myself among them — responded by saying that judges have no monopoly on wisdom with respect to constitutional meaning. It does not work like that. You do not oppose the Bill of Rights to the practices the Warren Court invalidated and come up with easy, simple solutions. That is just not a plausible view of interpretation.

I do agree very much with Judge Starr in supporting an aggressive muscular judicial check in those cases in which it is clear that Congress has transgressed a constitutional boundary. And the *Lopez* case is plausibly an example of that. We do have a government of enumerated powers, and if Congress is creating agencies that unconstitutionally mix traditionally separated functions and there are not precedents that we need to respect that support that practice, by all means, strike it down.

Where the questions are serious ones are cases where there is a reasonable disagreement about what the Constitution means. And, if the spirit of liberty is that spirit that is not too sure that it is right, then we should not blink away reasonable disagreement. Now, we have to be particular about that poin6 to make it not fail in a cloud of abstractions.

Think about the *Boerne* case, where the question is whether a practice that discriminates against someone's religious practice has to be justified by reference to a legitimate reason, even if it is not intended to discriminate. Now, four Justices of the Supreme Court believe that discrimination against religion has to be justified, even if it is not intended to discriminate or facially discriminatory.

A unanimous vote of the House of Representatives — pause over that one, if you would — a unanimous vote of the House of Representatives said that justification is required. Now this point is not rendered irrelevant because Chief Justice Marshall didn't investigate the congressional record in *Marbury v. Madison*. What the House vote shows is the considered view of people who have also taken an oath to uphold the Constitution. Ninety-seven members of the Senate thought the same thing. Four Justices of the Court thought the same thing. And the Court's doctrine had been, for decades, the same thing. And, commentators thought the same thing. For the Court to strike that down in the name of — what? — the Constitution, suggests a kind of monopoly over constitutional meaning, which is the most cartoonish picture of the abuses of the Warren Court. That is not something we should be celebrating, if we believe in democracy and liberty. We're talking about the Religious Freedom Restoration Act, mind you.

It is a little harder, but I believe the *Garrett* case was exactly the same case. We are talking about the Americans with Disabilities Act, which Congress applied to states, not on a whim but on a basis of factual findings that in 300 instances documented, there was discrimination against disabled people, including against people who had cancer. I am sure there are people in this room, by the way, who have had cancer. That is a very safe statement. And there are people in this room who are doing just fine, having had cancer. There are state governments that would not employ them because they were afraid of coworkers. This point was not just made up by Congress; it was a fact found by Congress.

In cases in which discrimination against handicapped people is based on nothing other than prejudice and animus, the Supreme Court itself, by an overwhelming majority, in a case called *Cleburne*, said that violates the Equal Protection Clause. The Congress tried piggy-backing on *Cleburne* to adopt a prophylactic rule saying that states are going to have to stop discriminating on the basis of handicap. This was a judgment about the meaning of the Constitution that was reasonable, as a matter of fact, and also reasonable as a matter of law, because supported in the Supreme Court's Cleburne

opinion. But the United States Supreme Court, by a hubristic five-four majority, struck it down.

The big authority here is certainly not me and it is not the Warren Court. It is Chief Justice Marshall in his greatest opinion — not his second greatest opinion — *McCulloch v. Maryland*. What I fear in the enthusiasm for a muscular judicial role in a context in which there is reasonable disagreement about the Constitution's meaning is that we are identifying the meaning of the Constitution with what five members of the Court think. And that is a mistake. That was the Warren Court's own mistake.

So long as Congress purports to be acting under an enumerated power and is making a reasonable judgment on both the facts and the law, and that judgment is reasonable by reference to constitutional history and the Supreme Court's own precedents, there ought not to be a problem.

JUDGE STARR: Several brief points. First, I believe someone owes an apology to Elliot. That cynical view — we are just kidding; we are just instrumentalists; we're just using arguments — that person Elliot deserves our heartiest disapprobation. That person is a shabby thinker. That person is a hypocrite and should be treated that way. But I do not think that is what is really going on. I hope that you will not think that that is what is really going on. I would like to think that is human frailty exposed in a very unfortunate way.

Point two, ATA and legislative delegation of power. This is the Court at its cautious circumspect self. Careful, not wanting to sail into waters that might prove to be treacherous, perilous. Knowing full well that they are within the safe harbor of arbitrary and capricious review, which gets them exactly to the same place — namely, EPA — is, once again, wrong.

Third, the ideal of deference to the representative branches, especially in light of the events post-September 11. I would feel remiss if I did not flag the customary and traditional deference that the Court continues to show with respect to the President. The President stands, as John Marshall said, as a member of the House of Representatives — the sole organ of the Nation in respect of external affairs. Then, with the modern-day insight of jurisprudential thinking embodied in Youngstown, with the gloss placed upon those powers by the influential concurrence of Robert Jackson, and seeing, as we have, the President reaching to the Congress of the United States and accepting a resolution thereby maximizing the power of the President in respect to the conduct of the war — as to that, the Court will have nothing to say and will be in its highest mode of deference.

Finally, with respect to the Warren Court, are we essentially saying we now, after having thought it through, after thinking that perhaps the Warren Court was simply neglective of certain individual rights, accept that it was right after all? This is very crude and primitive, but it seems to me that the gravamen of the complaint against the Warren Court was that it was imposing and not checking. It was, in fact, crafting rules, most dramatically in the arena of criminal procedure. It was not simply stating a rule or reaffirming a principle but fashioning a rule of criminal procedure in *Miranda*, saying even if the suspect in custody is John Gitti there is an irrevocable presumption that that person's will will be overborne. Legislating at its strongest — *Mapp v. Ohio* — so much for *stare decisis. Wolf v. Colorado* — gone, five to four. Five to four. And to what end? To impose an instrumentalist rule, an exclusionary rule, on the states.

It seems me to that *City of Boerne* is quite different from that; that rather, Congress stepped in there and said, "We, in effect, disagree with Smith, and we intend to supercede the rule articulated by the Supreme Court of the United States with a restoration of *Sherbert v. Verner* and the like." That strikes me as quite different than the world in which the Rehnquist Court has been operating.

Thank you.

MR. MINCBERG: Somebody left their copy of the Declaration of Independence and the Constitution up here, and I don't want to deprive whoever it was of it.

JUDGE SENTELLE: It is certainly worth fighting for.

MR. MINCBERG: Absolutely.

A couple of points. I do think it is interesting to hear Ken and Lee saying, it is one thing for the Court to start questioning the legislative branch but when it comes to the Executive Branch we really need to give them a lot of deference. I did not hear them saying that two years ago. It is kind of interesting.

But, to return again to the *Garrett* case, I think in a number of different ways, beyond what we said before, it proves the truth of my point about what in large measure is going on.

As Justice Breyer pointed out, the result in *Garrett*, far from actually meaning less federal involvement with respect to the Americans with Disabilities Act, could well mean more because the Court, by its analysis, allows injunctions, which are potentially much more intrusive than money damage judgments. It also allows federal agency enforcement, which again can be much more intrusive.

But second, I think what is really particularly troubling about *Garrett* in this respect — and again, Breyer

points this out very well in his dissent — is not only treating Congress like an administrative agency but treating Congress like a lower federal court. The Supreme Court says, "Our problem with these three hundred instances of proof (that Cass talks about), of the states discriminating against people with disabilities is that they do not meet judicial standards. You could not bring a lawsuit and prove that was an Equal Protection violation." Well, of course not. That is not Congress' function. Congress' legislative function is to determine, in that context, is there evidence that there are problems that warrant Section 5 enforcement power under the 14th Amendment? It is a critical mistake, it seems to me, for a court, in reviewing Congress, to hold Congress in its evidentiary capacity to the kinds of standards to which it would hold a lower court. Congress is not a court; it should not be a court. And if anything violates separation of powers, it is the Supreme Court essentially turning Congress into one, to say that is what Congress needs to justify actions that it wants to take pursuant to its enumerated powers.

Related to that, frankly, is the shifting standards we have seen by the Supreme Court since *Lopez*. This is traced again very well by Breyer and by Stevens' dissent, as I think I recall, in the case. First, you have the *Lopez* case, where, as Cass points out, it's at least arguable that Congress did not do too much in the record to prove the Commerce clause was being properly invoked. I may disagree, but at least there is an argument on that. Then, Congress, next time, tries to do better. In *Morrison*, there was extensive testimony put into the record relating to the relationship to interstate commerce. Well, that does not meet the Court's next standard. Then go to *Garrett*, where, again, there is extensive testimony; the appendix to Justice Breyer's dissent frankly is longer than the majority opinion. On the evidence adduced by Congress to prove its case that there in fact was justification for what happened, the Court shifts standards a little bit again and says, you know, that is not good enough. That kind of action, it seems to me, by the courts, invalidating successive acts of Congress that protect civil rights and protect civil liberties, I think undermines confidence in the courts as truly neutral arbiters of separation of powers.

Thanks.

HON. OTIS: It may be simple-minded to think that you can figure out that you can interpret words and figure out what they mean. But that is a simple-mindedness that is basic to the legal system. If you do not believe it, then essentially you are saying that you are relegated to the execution of people's will against you every time they purport to be interpreting a contract or interpreting a will or interpreting the Constitution. If you do not believe it, it is a pretty good argument for getting rid of judicial review because, really, there is no reason to have courts coming in and interfering with the actions of elected officials, if they are not capable of engaging in interpretation.

As to the fact that this can be hard, absolutely it can be hard. As to the proposition that people can be tempted to find what they want in words, rather than what the words actually say, I think that is impossible to argue with, too. But, either one thinks that those problems are so serious as to make the enterprise hopeless, or one does not. I do not think they are so serious as to make the enterprise hopeless. In that case, I think we retain judicial review, and we retain it in the classic *Marbury* form — assuming, again, there is a judicial step in there. But, I'll leave it out for the sake of simplicity.

I have no doubt also that people can disagree in good faith. It is easy to suspect the motives of the person that you disagree with, so it's easy to attribute to the Court, reaching various conclusions, bad motives rather than intellectual honesty.

I do not think there is anything obviously disingenuous about some of the decisions that Elliot is criticizing. For example, I think that the reason the Court does not worry about the length of the appendix about affecting commerce in *Lopez* is that the majority thinks that ii the wrong question. What it thinks is the right question is whether the object of the regulation is in any way a commercial activity.

One thing that's important to do is try to assume, in understanding a court decision, what the good-faith argument for it is and what the answer to that good-faith argument is, assuming that everybody is talking in good faith.

It is also true that the legal profession is a profession of advocates and, therefore, we should not be surprised if it turns out that attorneys, in their advocacy role, go into court and take what they like from decisions to argue for something that they are trying to achieve. That is par for the course for lawyers, but that does not mean that is an intellectually respectable way to go about interpreting the Constitution. It is not. It is not an intellectually respectable approach to doing any kind of law, and so we need to distinguish between our role as advocates and our role in honest efforts to understand what something means.

JUDGE SENTELLE: Thank you, Lee.

Now, while you are going to the microphones, I will give Cass a minute for rebuttal, since he had to go first both times. It is only fair he get a minute.

PROFESSOR SUNSTEIN: Thank you. I think this has been a terrific discussion and I am eager to hear what you all think.

JUDGE SENTELLE: Okay. We seem to have questions on this side of the room right now. So, Tom.

AUDIENCE PARTICIPANT: Thank you. I am somewhat surprised at the emphasis that is being placed on *Kimel* and on *Garrett* as 14th Amendment cases, when we realize that we still have the ADA, which is still federal substantive law. There has been no change in the way they apply to private-sector employers.

The only change with respect to public-sector employers is that one possible remedy, private causes of action brought for money damages in federal court, is unavailable. It seems to me they do not establish a great foundation on which to characterize a whole line of what the Supreme Court is doing, and I would like to suggest a different one.

The common thread between *City of Boerne*, *Kimel* and *Garrett* is that these are three areas where, before Congress acted, the Supreme Court had already addressed the issue and had already provided a rule of law. We already had the *Smith* case; we already had Supreme Court case law saying that age is not a suspect class, disability is not a suspect class. And so, when you talk about hubris, can't one very much look at this as the hubris of Congress saying, in the face of these decisions, that we reject that and we propose our own view?

JUDGE SENTELLE: Elliot, you want first bite on that one?

MR. MINCBERG: Sure. In terms of the history, it is certainly true that RFRA, the law in *Boerne*, was on the heels of the decision in *Smith* and was arguably most guilty of that kind of hubris. Although, I will say, as one of those who was involved along with Mike McConnell in putting it together, that some efforts were made to make clear that no one was truly attempting to restore the constitutional rule that was, we think, changed in the *Smith* case. But instead, it was an attempt by Congress to create new statutory rights that go beyond what the Constitution does.

That has been, until some of these recent decisions, the accepted rule of law: that Congress can, even with respect to the states, do things that the Constitution does not do in terms of their having to respect civil rights and civil liberties.

That, it seems to me, is what Congress was doing in all of those instances — particularly in *Garrett*, where it is clear that it was not a *quid pro quo*: Supreme Court issues a decision today; tomorrow, Congress comes along to tries to reverse it. Instead, it was a much more comprehensive effort by Congress to enact rules across the board that apply to disabled employees. Rules that say to the cancer victim that Cass is talking about, whether you try to work for a private company or for the state government right next door, you have essentially the same rights, and your rights should not vary from one place to the next, given the powerful evidence before Congress, that there was a problem to deal with. It was that appendix I was talking about, Lee; not any appendix in the Commerce Clause case.

JUDGE SENTELLE: Anybody else want to bite on that one?

If not, then, we will go to Roger.

AUDIENCE PARTICIPANT: Thank you, David. My question — I'll direct it to Ken Starr, because your remarks, Ken, were most on point. One of the things that concerns many of us who have supported the Court's new Federalism jurisprudence is that it is still a good ways from having gotten it right and, in a sense, that may undermine it in time. Then again, if it did get it right, it might undermine it, too, from a political perspective. That leaves us with a real dilemma.

Take *Lopez* and the part of *Morrison* that dealt with the Commerce Clause, because they are the two simplest examples. There, as you know, what Chief Justice Rehnquist did was try to square his holding with recent Commerce Clause or post-New Deal Commerce Clause jurisprudence by saying Congress had gone too far. And so he set forth a three-legged stool of the Commerce Clause, the third leg of which some would argue whether it affects commerce or substantially affects commerce (there's a debate over that).

But the real question is that others from the other side can come along and say, well, look, if it's a question of whether this activity substantially affects Commerce, who is in a better position to judge that? Congress or the Court, five people on the Court? You know the standard arguments.

Yet, if the Court gave us a theory of the Commerce Clause, which it should do — something like Justice Johnson did in his concurrence in *Gibbons v. Ogden* — then we would have to find the New Deal unconstitutional. Cass Sunstein would be apoplectic because he believes the Constitution began in 1937. And, you know, since the Constitution was not written in 1937, there's our dilemma.

How do you go about answering? It's a question I often get, and I'd be interested in going to school on your answer.

JUDGE STARR: The Court frequently engages in acts of judicial statesmanship.

AUDIENCE PARTICIPANT: A statesman-like answer.

JUDGE STARR: And I think therein lies the answer. They knew full well that there was a certain unsatisfying quality to the approach, and the best that they could do would be to point to language in *Gibbons v. Ogden* and *Wickard v. Filburn*, to the effect, 'but there is a limit, you know; Congress can't just do anything and everything.'

But, even Justice Thomas noted that it was unlikely at this late date and, thus, the barnacles of history and the heavy weight of history — which I happen to respect. I guess that's one of the reasons I accepted the assignment from Judge Sentelle.

JUDGE SENTELLE: I don't know whether he's saying I'm heavy or old.

JUDGE STARR: Neither — let me clarify.

I have been grossly misunderstood. Because you see, Judge Sentelle, the Court had spoken in *Morrison v. Olson*, and just as — Cardozo suggested, were the issue to come to him as a matter of first impression, he would doubt that the Due Process clause had substantive bite, but it was 40 years into the process and he, for one, was not going to be a judicial revolutionary. Respect, whether one agrees or not, forthe wisdom of the generation, is required unless one is convinced that it is profoundly wrong.

Roger, I happen to think you would say, they are profoundly wrong, so say it and get on with it.

SPEAKER: And amend the Constitution, if that is what you want to do.

JUDGE STARR: Well, to go back to Lee's point concerning the meaning of "Commerce." What is, in fact, the meaning of "Commerce,?" One can mount very reasonable arguments, it seems to me, that gives the word Commerce a very great reach.

JUDGE SENTELLE: Question to my right, in a directional sense.

AUDIENCE PARTICIPANT: Thanks. Todd Gaziano. Roger teed up my question very well, but I want to add that Cato didn't go far enough, so I'm representing the Heritage Foundation.

I want to take it much further.

Because he was a teacher and a recommender of mine, I want to defend Cass Sunstein's formulation. But because he's profoundly wrong — and dangerously so in what was implicit, I want to suggest how to undermine his results.

Even in Lee Liberman's brilliantly simplistic but correct formulation of a judge's role, there is room for a clear statement doctrine adopted as a prudential one by the Supreme Court that says, we will not reach constitutional questions unless we think Congress really meant to trammel on the states. I do not know that is compelled, but that seems to be permissible.

I also think that it was Madison who wrote about the duty of each coordinate branch to give comity to the others so that, if a truly reasonable interpretation of the Constitution's enumerated powers were reached by the two other branches, the third branch ought to think long and hard. But let me suggest two limits —

JUDGE SENTELLE: Suggest it quickly.

AUDIENCE PARTICIPANT: One, Congress need not find facts that a lot of constituents want, something they need to have engaged in a reasonable debate about the constitutionality. And that, Congress doesn't do anymore. They punt with severability clauses and they clearly say this is up to the Court.

Second, they've got to at least be close. And this is where I challenge Cass Sunstein. I think we're misguided about what the role of the Court is.

JUDGE SENTELLE: I would like to get one more, so if anybody would like to come in on what we've heard so far from Todd —

AUDIENCE PARTICIPANT: Can Cass identify two statutes that Congress clearly has debated as constitutional, that a court should strike down, that are unreasonable in interpretation of their power?

PROFESSOR SUNSTEIN: In the nation's history, that they've debated, that they should strike down?

Well, the Independent Counsel Act is not the worst candidate, and there was a constitutional debate about that; the statute that was invalidated in *Bowsher v. Synar* there was a constitutional debate about that. So, those are two reasonable possibilities off-hand. The Legislative Veto case is a third. We could go down the list, but you'd probably get really bored.

JUDGE SENTELLE: Okay, I was told to get through at 4:15. I'm going to take one more question, even though it is 4:15, and then we're going to close it out. One more question.

AUDIENCE PARTICIPANT: My question's directed to Judge Starr. If judicial deference to the legislature promotes congressional supremacy, then what safeguards are there to prevent judicial supremacy?

JUDGE STARR: Thoughtful appointments to the Supreme Court.
And we have seen some of those, but don't ask me to name them.

PANELIST: I think I would agree with that, but we might disagree on which ones are thoughtful and which ones aren't.

JUDGE SENTELLE: And no appointments occur without confirmation. Although I'm being handed notes about what fine people are in line, it is, nonetheless, a minute past the time when I was told I had to end, so we are going to call it quits at this moment.

SHOWCASE PANEL IV

JUDICIAL DECISIONMAKING: PRECEDENT AND CONSTITUTIONAL MEANING

Sponsored by: Litigation and Federalism & Separation of Powers

Hon. William Fletcher, *U.S. Court of Appeals, 9th Circuit*
Professor Caleb Nelson, *University of Virginia School of Law*
Hon. Diarmuid O'Scannlain, *U.S. Court of Appeals, 9th Circuit*
Hon. Timothy Flanigan, *Deputy Counsel to the President, The White House (moderator)*

HON. FLANIGAN: Thank you.

Our discussion this morning will focus on some issues of great importance in the area of constitutional interpretation. These issues are current, and they are debated in a very lively fashion. We have a good representation of viewpoints here on the panel, and I hope that in the presentations and more importantly in the question and answer period, that we will have an opportunity to explore these in a depth and to a degree that has not been done in a public forum before.

These questions include some subsidiary questions such as, does the mere passage of years dim a constitutional precedent? Many judges, even some law clerks, have had the thrill of working on a constitutional decision and believing at the moment they were chiseling their work into granite, only to find that they were writing in sand.

Recently, in our office and in the Office of Legal Counsel at the Department of Justice, we had the opportunity to visit such questions as: does a 1942 decision dealing with military tribunals still stand? The fact that it has never been challenged, never been overruled, does the mere passage of time dim a decision that is of great constitutional importance and clarity?

A second area deals with the erroneous interpretation of constitutional precedent where subsequent scholarship or subsequent judicial interpretation calls into question a longstanding interpretation.

These subsequent cases are said to undermine the constitutional precedent, but what is the role of settled expectations of litigants, of citizens in existing constitutional precedent?

Also of interest is the use of the "activist" label. Conservatives owned that label for many years and we attached it to the Warren Court, to the precedents of the Warren Court, to creating new constitutional rights out of whole due process cloth. That was activism. Now suddenly activism in common parlance means the new federalism, it means other challenges to existing constitutional precedents that are based on the view that they were erroneously decided. To what extent is a judge or justice bound by constitutional precedent?

These are the types of issues that we will explore with this distinguished panel.

Our first speaker will be Judge O'Scannlain from the 9th Circuit. Judge O'Scannlain was appointed to the Circuit Court by President Reagan in 1986. He received his J.D. from Harvard in 1963. He is an adjunct professor at Northwestern School of Law where he teaches seminars on the Supreme Court and appellate practice. He retired from the United States Army Reserve after 23 years of Reserve and National Guard Service, and I will say he has a good start on a family with eight children.

Our second speaker will be one of Judge O'Scannlain's colleagues on the 9th Circuit, Judge William Fletcher.

Judge Fletcher was confirmed as a United States circuit judge for the 9th Circuit on October 8th, 1998, and was sworn in on February 1st, 1999. He received a bachelor's degree from Harvard College in 1968 and a second B.A. from Oxford University in 1970. He has his J.D. from the Yale Law School in 1975. He was honorably discharged from the United States Navy in 1972, and I will note an item of interest, that he was in the Nixon Administration as part of the Office of Emergency Preparedness, a precursor to the Federal Emergency Management Agency. He clerked for Judge Stanley Wigell in the Northern District of California and later for Justice Brennan. He was a law professor at the University of California at Berkeley, Boalt Hall, from 1977 to 1999.

Our final speaker will be Professor Caleb Nelson of the University of Virginia School of Law. Professor Nelson received his undergraduate degree from Harvard in 1988, and his J.D. from Yale Law School in 1993. He clerked for Judge Stephen F. Williams and later for Justice Clarence Thomas.

With that, I will turn the podium over to Judge O'Scannlain. Our format will be approximately ten to twelve minutes of remarks from each of our panelists, and then a lengthy opportunity for lively discussion.

Judge O'Scannlain.

HON. O'SCANNLAIN: Thank you, Tim, for such a generous introduction. As the father of only eight children, one of whom is a lawyer in the audience today, I stand in awe of the father of 14.

Thanks also to the Federalist Society for inviting me to serve on such a distinguished panel, and thanks again to the Society for choosing such a challenging topic, precedent and constitutional meaning, one of the most complex contemporary questions facing judges, professors, and lawyers alike.

To use sure, there is still plenty of debate over the role of precedent in statutory construction and over so-called vertical *stare decisis* — the direction lower courts like the one on which Judge Fletcher and I sit should take in following the limited set of instructions that the Supreme Court gives us. But those are easier questions, at least to me. Both are answerable through straightforward fidelity to the prescribing authority's direction, be it Congress or the Supreme Court.

Today's panel is here to explore the much more difficult topic of horizontal *stare decisis* in the realm of constitutional interpretation, and this is an area riddled with plenty of doctrinal inconsistency and precious few clear answers, although my fellow panelists will doubtless strive to give some.

My brother, Judge Fletcher, will probably challenge the originalist view of constitutional interpretation and the notion that a single right answer exists, contrary, no doubt, to Society Board member and Professor Gary Lawson of Boston University. He is not with us on the panel today, but his familiar views will hover over our discussion, perhaps defining one endpoint of the debate.

I gather Professor Nelson, by contrast, would argue that there are some precedents that are demonstrably erroneous. His recent article on the subject in the *Virginia Law Review* argues for a form of *stare decisis* weaker than precedential purists might like, but still relatively robust.

To me, the debate over *stare decisis* is a classic example of giving lawyers or judges an inch and watching them take a mile. Once one admits that there is any room for deviation from the rule of horizontal *stare decisis*, once one admits that sometimes we must rethink some of the judicial glosses that we put on the words of our Constitution, even as those words themselves sit unchanged, then we risk merrily waving practically the entire camel into the tent.

If *stare decisis* is not to be an absolute command, if sometimes we judges are to make at least a few erasures in the Fed. 3ds and in the U.S. Reports, then some intelligible principles for deciding when precedents may properly be set aside are necessary if *stare decisis* is to retain any force or any legitimacy.

The Supreme Court has done its share of overruling in recent years, and as the topic statement for today's panel suggests, some of those rejections of prior precedent have, indeed, come in the service of the so-called federalism revolution with which the current Court is much identified. One of the favorite recent examples is *Seminole Tribe v. Florida*, which held that Congress may not use its Article I powers to abrogate state sovereign immunity, and in doing so overruled a plurality's contrary holding in *Pennsylvania v. Union Gas* just seven years before. One of the dissenters in *Seminole Tribe* went so far as to state in a subsequent sovereign immunity case that he is, "unwilling to accept *Seminole Tribe* as controlling precedent." But neither the overruling nor the resistance is anything new. The Court's interpretation of the Tenth Amendment in *National League of Cities v. Usery* lasted only nine years before the Court changed its mind — over another strong dissent — vowing that one day, the reasoning of *National League of Cities* would again attract a Court majority.

Of course, the Warren Court rethought some durable precedents in nearly every area of constitutional law, from school segregation to criminal procedure to electoral apportionment.

Nowhere in this long history, however, has the Court definitively answered the question of when and why. Its most comprehensive attempt perhaps comes in *Planned Parenthood v. Casey*, but *Casey* raised more questions than it resolved. It suggested that the Court's institutional legitimacy depended on its not reversing course in the face of popular opposition, rather a different view than the traditional argument for junking a precedent that proves unworkable, and rather the inverse of the Court's very recent statement that it would adhere to the *Miranda* rule because the *Miranda* warnings, "had become part of our national culture."

Muddying the waters still further is *Brown v. Board of Education*, one of the Court's most famous retreats from a prior holding. Yet *Brown* merely knocked the doctrinal props out from under *Plessy v. Ferguson* based on new-found learning, social science, and the peculiar status of child victims of segregation rather than taking on a perverse old decision and overruling it directly on its merits.

Serious inconsistencies thus remain in the treatment of these issues. Is a 19th-century precedent to be preserved because litigants have relied upon it for decades, or scrapped because our constitutional order has left it behind?

If a prior decision was based on a flawed reading of history but no circumstances have changed, should a subsequent court correct the error or respect its predecessor? Should dissenters feel themselves bound by the majority's decision the next time the same issue recurs?

If these inconsistencies have plagued the Court for this long, what simple answer can I offer you today? I think that the best I can do as an advocate of judicial restraint is to reiterate the importance of a meaningful doctrine of *stare decisis* as a force that preserves the legitimacy of the judiciary by constraining what could otherwise be seen as judges' unbounded discretion to make law. Indeed, the expanding role of the modern federal judiciary has made the need for some consistency in the application of the doctrine of *stare decisis* more acute.

The decisions of the Rehnquist Court and the Warren Court alike have asserted a judicial role in the resolution of a large number of questions that were previously left to the other branches, to the political process, or to the

states. Whether it is policing the equality of congressional districts or scrutinizing Congress' exercise of its Fourteenth Amendment enforcement power, the courts today play important roles in a large number of constitutionally significant disputes. It is all the more urgent, then, that such authority be responsibly exercised.

The late Justice William Brennan used to hold up one hand, fingers spread, to illustrate what he called the most important rule in constitutional law, the rule of five: with five votes, a Justice can do anything. Justice Scalia once implicitly criticized that approach as incompatible with an institutionally legitimate conception of *stare decisis*, saying that, "What would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support must be left in place for the sole reason that it once attracted five votes."

The rule of five in its pure form has something in common with a dissenting justice's vow to ignore the majority's decision in subsequent cases, what we might call the rule of four who hope to rule as five. Neither conveys to the public an image of a judiciary "bound down by strict rules and precedents," to use a phrase from *Federalist* 78. As the judiciary's role has grown, so too has the importance of the Court's abiding by the principle that ours is a government of laws and not of men, even men (or women) in black robes.

Stare decisis tells those five justices who can do anything that sometimes they must not do what they wish. Indeed, precedent has played this constraining role ever since the early days of the Anglo-American common law judiciary, and constitutional law, after all, has aptly been described as a species of common law.

As Professor Charles Fried has said, "In constitutional law, doctrine and precedent are merely different names for the same thing." This constraining role seems doubly appropriate in the constitutional realm, in which judicial decisions are virtually the last word, subject to external correction only in rare instances. Under such circumstances, *stare decisis* must be applied in a consistent and principled manner, or it risks appearing like a tool used by a temporary majority to lock in its victory for all time.

We are not quite a year removed from the Supreme Court's decision in *Bush v. Gore*, and that year has seen a remarkable quantity of academic vitriol flung in the direction of the Supreme Court. Just imagine the howls from New Haven and Cambridge if the majority opinion had blithely overruled a few venerable precedents in reaching the same result.

So I close having offered more questions than answers. Allow me to raise one more question. Concluding its lengthy examination of *stare decisis*, the joint opinion in *Planned Parenthood v. Casey* stated that the case before it was one of the rare instances when, "the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate." But as *Casey* itself, its progeny, and its cousins in other doctrinal areas made clear, the Court itself has not resolved its own inconsistent answers to when, how, and why *stare decisis* will guide its decisions.

So my final question is the one we are all left with: Will the Court ever settle its own divisions? I look forward to the answers that my fellow panelists will surely provide.

Thank you.

HON. FLETCHER: Thank you very much for the invitation to appear before you. This is my first appearance at a Federalist Society annual meeting. Depending on what I say, it may also be my last. Thank you also for your generous introduction.

My brother, Judge O'Scannlain, in his remarks, mentioned Justice Brennan and the five-finger rule. When I worked for Justice Brennan in October 1976, we were on the losing end. Among other things that Term, *Fay v. Noia* was overruled by *Wainwright v. Sykes*. Justice Brennan used to hold up his hand with the rule of five when he lost, not when he won. It might be that he held up his hand for the rule of five in earlier years when he won, but I wasn't there. In those days, Justice Brennan's reference to the five-finger rule was a protest rather than a justification.

The single constant I have been able to ascertain over the years is that those Justices who have only four votes are particularly fond of precedent.

The task we have been given today is to examine and evaluate the role of precedent in giving meaning to the Constitution. I will focus on the Supreme Court as it uses precedent to determine constitutional meaning.

The question in evaluating the role of precedent in giving constitutional meaning has to be "compared to what?" What are the alternatives? Original intent? The principles inherent in the scheme of ordered liberty? Emerging norms of a civilized society? Modern notions of desirable policy? Where do we find our constitutional meaning?

In some areas, constitutional meaning is clear. We have already heard this morning an interesting panel on the jury trial. The Seventh Amendment says that juries are guaranteed in civil trials where more than twenty dollars are at stake. We continue to adhere to twenty dollars even though most people think twenty dollars, in current values, is not what the framers meant. But that's what they wrote.

However, in most other areas – the contested areas – the words are not always crystal clear. And when they are clear, they are sometimes ignored. Let me begin with a story. It does not quite involve constitutional precedent, but something very close to it. The story concerns the Judiciary Act of 1789, the statute that first set up the judiciary. Section 34 of that statute was the foundation for *Swift v. Tyson* decided in 1845, in an opinion written by Justice Story. *Swift*, that

venerable precedent, was finally overruled by *Erie Railroad* in 1938.

Harvard Law School has a letter in its files, written by the famous lawyer John Davis to the equally famous legal historian Charles Warren, complimenting Warren for his great victory in overruling *Swift v. Tyson*. What had Warren done to get this letter? He had written an article in the Harvard Law Review revealing that he had discovered in his historical researches that Justice Story had gotten it wrong; that the original intent of Section 34 of the Judiciary Act of 1789 was not what *Swift v. Tyson* said it was; and that the original intent was what (although we did not know the case name yet) *Erie Railroad* would say it was. His article is cited in Justice Brandeis's opinion in *Erie*. This is Justice Brandeis, ever faithful to a close reading of the constitutional text and original meaning. I think it was his evil twin who invented the Brandeis brief.

Should it matter to us today that most people familiar with the historical literature think that Warren had the history wrong – that is, that the supposed original intent used as one of the reasons for overruling *Swift* turns out to have been wrong? I don't think so. I think *Erie* is right, even though it does not accord with the original intent of Section 34. The world has changed, the judiciary has changed, jurisprudential thinking has changed, and the world to which Section 34 was addressed has simply disappeared.

That is only one example, and an old one. Let me deal with three areas in modern law where original intent and precedent are in tension.

The first area is the Commerce Clause. I want to focus on *United States v. Lopez,* decided in 1995. *Lopez*, as we all know, cuts back on the reach of the Commerce Clause. If we talk about it in terms of precedent, it cuts back the venerable precedent of *Wickard v. Filburn*, decided in 1942. *Lopez* clearly takes a step back from *Wickard,* in the direction of the original intent of the Commerce Cause. Is *Lopez* for that reason a good decision? One way to evaluate whether it is a good decision, or even whether this current majority thinks it is a good decision, is to ask more questions. Is *Lopez* based on a general principle? How broadly does the principle apply? For example, would this Court apply the principle to medical marijuana?

Many states have medical marijuana statutes, allowing marijuana to be used for medical purposes, but federal law forbids the use of marijuana even for medical purposes. A great deal of marijuana is grown in California. What if, as could be easily provable in California, marijuana is grown within the state, exchanged within the state, and consumed within the state for medical purposes, without any money ever changing hands? Is it within the reach of the Federal Government to prohibit that growing, exchange, and consumption? *Lopez* suggests that the answer is no; yet I doubt very much that this is the answer the Supreme Court would give.

Of course, we had a medical marijuana case from California, in which the Supreme Court held that medical necessity did not excuse non-compliance with federal law. I think the Supreme Court on that point had it absolutely right. But no one has yet raised the question of *Lopez* and medical marijuana (I think because they think they know the Supreme Court's answer).

If the federal government can forbid the use of medical marijuana under the Commerce Clause, how much of *Wickard v. Filburn* has been overruled? Has it been overruled for federal control over guns but not marijuana? Is there a principle behind such a partial overruling?

The second area is the Eleventh Amendment. Over the last twenty years or so, the United States Supreme Court has been engaged in a protracted dispute over the meaning of the Eleventh Amendment. People of my generation and earlier never heard of the Eleventh Amendment as they went through law school, but it has now turned out to be a current battleground for federalism.

There is a consistent losing minority of four Justices. These Justices argue that the text of the Eleventh Amendment does not, in fact, speak to the federalism questions with which the Court is dealing; that the text has a very precise and very narrow meaning; that, in accordance with this text, the original intent of the Amendment was simply to repeal an affirmative grant of jurisdiction; and that when this grant was repealed, questions of sovereign immunity came to be governed not by the Eleventh Amendment but by background principles of constitutional law and by other provisions of the Constitution. The five-Justice majority that has won consistently in recent years has, by contrast, insisted that the text of the Amendment has a determinate meaning. But the majority has openly admitted that it has now abandoned that text-based meaning. Both sides, for somewhat different reasons, now pay no attention to the text of the amendment.

The dissenters do so because, in their view, the text does not speak to the relevant questions of sovereign immunity. The majority, however, does so because, in their view, precedent is more important than the constitutional text. To say it in a simple way, in their view, *Hans v. Louisiana,* decided in 1890, is the governing precedent, and they wish to spin out subsequent precedent from *Hans*. Concerning whether this is a proper or improper approach, I will be, for the moment, agnostic. I will just say that this is an attempt by the majority to say in this area that original intent, as expressed in the text, should not control. They prefer the combination of their vision of federalism and the precedent of *Hans v. Louisiana*.

The last area is standing. Justice Douglas – that spiritual father of the Federalist Society – invented the term "injury in fact" in his opinion in *Association of Data Processing Service Organizations v. Camp* in 1970. Prior to that case, "injury in fact" had never been seen as a constitutional requirement under Article III. Justice Douglas made it up.

The current Court has expanded, and emphasized, the injury-in-fact requirement. The current majority used injury in fact in *Lujan v. Defenders of Wildlife* in 1992 to strike down a citizen-suit provision in which Congress clearly granted standing to individuals to sue as private attorneys general. In the Court's view, because there was no injury in fact for the plaintiffs in *Lujan*, Congress could not confer a cause of action on them.

If we look at history, including the historical work of the conservative historian Raoul Burger, it is pretty clear that there is no discernible historical basis for *Lujan*. There is precedent decided in 1970 by our hero, Justice Douglas; but Justice Douglas' opinion is precedent, not original intent.

What are we to conclude from these three areas? I think we have seen enough to conclude that the current performance of this Court is not methodologically different from the performance of the Warren Court. That is to say, both Courts have had visions of what the law is, and what the law ought to be. Both Courts have overruled precedents. Both Courts have appealed to original intent when it has suited their purpose. And both Courts have tried to achieve their preferred notions of modern policy.

There are no saints here. But there are also no sinners. There are simply Justices of the United States Supreme Court, behaving as Justices of the Supreme Court have always behaved.

When I was a student, I greatly admired my professor of constitutional law, Alexander Bickel. I have come to admire him even more as time has gone on. Of the many things he taught me, the most important is that the only way in which the courts of the United States, in particular the United States Supreme Court, can justify their anti-democratic role is their reliance on principle.

The word "principle" is ambiguous. To make the word less ambiguous, Herbert Wexler added the word "neutral," and succeeded only in making "neutral principle" ambiguous. Yet there is something that can be called principle, even neutral principle. It goes beyond original intent, beyond precedent, and beyond emerging policy consensus, but that nonetheless includes all of them. This is what the Supreme Court aspires to, and should aspire to.

The Supreme Court of the United States is a wonderful and peculiar institution. The framers, at the time of the framing, were very proud of themselves for having invented federalism. They thought it was simultaneously their most original and most beneficial invention.

I think this is true, but with the following qualification: They also invented the United States Supreme Court, with the authority to interpret our written Constitution. The Court has been an equally original and beneficial institution. But the Court can never be a simple institution, and no amount of wishing or pretending can make it so.

Thank you.

PROFESSOR NELSON: Almost no one in America favors an absolute rule of *stare decisis*, which would categorically forbid American courts of last resort from overruling their past decisions. Instead, the doctrine of *stare decisis* is almost universally understood to establish only a rebuttable presumption against overruling past decisions. So the important questions are, what is the scope of this rebuttable presumption, and what should it take to overcome the presumption?

When people talk about *stare decisis* at the level of the United States Supreme Court, they often suggest that there should be a pretty general presumption against overruling all past decisions, including even past decisions that the current Court is convinced were erroneous. On this view, members of the Supreme Court should not vote to overrule a past decision just because they think it was wrong; they should vote to overrule it only if it is also causing other, more practical problems.

The modern Supreme Court itself sometimes takes this position. As Judge O'Scannlain suggests, it is not entirely consistent about what it says about *stare decisis*, particularly in the constitutional realm. But the joint opinion in *Casey* was joined on this point by Justices Stevens and Blackmun. Five Justices agreed that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."

Even Justice Scalia has sometimes suggested something similar. In one 1995 case, he said that the doctrine of *stare decisis* "would be no doctrine at all" if it did not require overruling judges to "give reasons … that go beyond mere demonstration that the overruled opinion was wrong."

I want to suggest that this conclusion does not necessarily follow. If we accept Justice

Scalia's premise that it is sometimes possible to "demonstrate" that a prior opinion was wrong, no matter what our theory of interpretation is at the moment – let's bracket that for now and consider *stare decisis* on the premise that we can sometimes demonstrate that a prior opinion was wrong -- we don't necessarily have to indulge a presumption against overruling those opinions. In fact, we could have a perfectly coherent doctrine of *stare decisis* that said, when the past decision is demonstrably erroneous, we apply a presumption *in favor of* overruling it. That presumption could be overcome by things like reliance interests, but we could have a rebuttable presumption in favor of overruling demonstrably erroneous precedents, just as we have a rebuttable presumption in favor of adhering to precedents that are not demonstrably erroneous.

That doctrine, in fact, could extend beyond constitutional cases. It need not be limited to constitutional cases. It seems to me that it might be perfectly capable of achieving the purposes that we want a doctrine of *stare decisis* to serve.

One of those purposes, and the one I'll focus on here, is sometimes called the "rule of law" idea. People fear that if judges could overrule a past decision just because they would have reached a different conclusion as an original matter, then there would be wild fluctuations in judicial decisions. The first set of judges will decide a case the way they think it should be decided, but the next set of judges will have a different set of opinions, and their successors will take yet another position. If each court could give effect to its own view about how the case should come out without abiding by precedent, then there might just be an endless series of reversals.

That is certainly a concern, but we should think about exactly what kind of a doctrine of *stare decisis* we need in order to respond to that concern.

I want to start by imagining something that could never exist. Suppose we were in a world in which all legal rules came from statutory codes, and suppose that these statutes were both completely comprehensive and completely determinate. They provide a single determinate answer to every legal question that could conceivably arise. In a world like that, you might well think we do not need *any* doctrine of *stare decisis* in order to get enough consistency in judicial outcomes. Even without help from *stare decisis*, the underlying rules of decision are themselves going to produce pretty consistent outcomes, you might think. Sure, courts are sometimes going to make mistakes about what the statutes mean, but when subsequent courts correct those mistakes, you might think they are not going to trigger an endless series of reversals.

We obviously do not live in such a world. But we are often told that we *do* live in a world in which our written laws, whether they are statutes or constitutions, have only a limited range of indeterminacy. A particular provision might be ambiguous, it might be subject to a variety of different possible constructions, but the provision is unlikely to be completely indeterminate. It is unlikely to give interpreters unlimited discretion to establish whatever rule they please.

The *Chevron* doctrine from administrative law is based on that premise, that idea of interpretation. An ambiguous provision in a statute or other written law might lend itself to a variety of different constructions. A particular provision, for instance, might permissibly be understood to establish any one of three different rules — Rule A, Rule B, or Rule C. *Chevron* tells us that the interpreter has some discretion to choose among those three possible constructions, but the interpreter's discretion is limited. The interpreter can not read the statute to establish Rule D.

This framework might have some implications for how we think about *stare decisis*. When we talk about *stare decisis*, we are used to asking whether the current court should abide by a past decision that it would have decided differently as an original matter. That formulation, though, obscures a distinction that might be important. When a current court says that it would have decided a past case differently as an original matter, it may be saying one or the other of two different things. It may simply be saying that the prior court made a different discretionary choice than it would have made: the prior court picked Rule A when the current court would have used its discretion to pick Rule B instead. Alternatively, it may be saying that the prior court went beyond the range of permissible discretion entirely: it left the range of indeterminacy and it read the provision to mean Rule D.

If we are attracted to *stare decisis* because of concerns about the future stability and predictability of law, those concerns may play out differently in these two different situations. In the first situation, where the past court's decision was permissible even though the current court would have made a different discretionary choice, it may well make sense to have a rebuttable presumption against overruling the precedent. We may well want to have some kind of special reason, like the proven unworkability of the rule chosen by the prior court or the practical problems it is causing, before we let the current court substitute its own discretionary choices for the discretionary choices made by the past court. Otherwise, you really might have an endless series of reversals.

But in the second situation, you might not be so worried about that problem. If the prior court adopted an impermissible construction of the provision, if it went beyond the range of permissible discretion, then it did not just make a discretionary choice. It made what Justice Scalia would call a demonstrably erroneous decision. You might suspect that courts could correct that decision, could overrule that decision, without necessarily triggering an endless series of reversals. As long as the overruling court picks a rule within the permissible range — Rule A, Rule B, or Rule C — you might expect that rule to be relatively stable under this doctrine.

Another way of stating the same point is that a general presumption against overruling all past decisions may go farther than the "rule of law" purpose of *stare decisis* really requires. To the extent that the underlying rules of decision would themselves impose some constraints on conscientious judges, then the stability of the law that is applied in courts need not depend entirely upon *stare decisis*. The underlying rules of decision are themselves a source of stability, and our doctrine of *stare decisis* could reflect that fact.

The bottom line is this. The doctrine of *stare decisis* would indeed be no doctrine at all if current courts could overrule decisions simply because they would have reached a different conclusion as an original matter. But when the current court says, "we would have reached a different conclusion as an original matter *and the prior court's decision was demonstrably erroneous*," it is saying something more than just, "we would have reached a different conclusion as an original matter." It is saying: "Not only would we have reached a different conclusion as an original matter, but the prior decision goes beyond the range of permissible discretion."

The doctrine of *stare decisis* could sensibly take account of the difference between those two statements. The court could recognize a rebuttable presumption *against* overruling decisions that it thinks are *not* demonstrably erroneous while simultaneously recognizing a rebuttal presumption *in favor of* overruling precedents that it thinks *are* demonstrably erroneous.

There are a lot of possible objections to that idea, but if you accept the concept of demonstrable error, as I suspect at least one or two people in this room do, I think it is possible that this weaker version of *stare decisis* might seem attractive to you.

In a sense, in fact, this version of *stare decisis* has already stood the test of time. For much of American history, I would argue, from the founding until at least the Civil War, most American courts and commentators did not indulge a presumption against overruling decisions that they deemed erroneous. This does not mean that they had no doctrine of *stare decisis*. To the contrary, Frederick Kempin has identified this period as the critical years for the growth of *stare decisis* in American law. But they did not extend the doctrine of *stare decisis* farther than the basic purpose of the doctrine seemed to require. When they were convinced that a past decision was wrong, they would overrule that decision unless there was some special reason to adhere to it (such as the need to protect reliance interests, say). The presumption favored overruling precedents that were erroneous, not continuing to follow them.

If you look at the discussions of *stare decisis* from these years, you will see innumerable references to what Alexander Hamilton talks about in *Federalist* 78, the need to avoid "an arbitrary discretion in the courts." People were concerned that in cases where the underlying sources of law did not dictate a single answer, each successive judge might give effect to his own peculiar opinions, and there would be no stable rule.

If you wanted to cast that concern in modern terms, you would say that Americans embraced *stare decisis* as a way to restrain the discretion that the indeterminacy in the underlying rules of decision would otherwise have given to judges. I think that's the gist of what Judge O'Scannlain was talking about in his remarks.

But many people who defended *stare decisis* on this ground were equally clear about the limits of the doctrine. When the underlying rules of decisions were not so indeterminate and the precedent had simply gotten them wrong, then the reasons for presumptive adherence to the precedent, in their view, did not apply.

It has not yet been proven that this version of *stare decisis* is clearly worse than the stronger version that many people talk about today.

Thank you.

HON. FLANIGAN: In the interest of time, I think we will move to questions from the audience, and I will identify people from the audience if you would be so kind as to raise your hand with your questions and direct them to the member of the panel.

SPEAKER: My question is, to what extent should the amount of respect that a case receives as precedent depend on the amount of respect that it gave to precedent? For example, if we take the case of *Fay v. Noia*, which Judge Fletcher mentioned, it ran roughshod over *Daniels v. Allen*, effectively overruling it without saying it was doing so or explaining why it was proper to do so.

Is that a proper factor in a subsequent court's deciding to return at least in part to the earlier rule of law and overrule the precedent?

HON. FLETCHER: If that is directed to me, my answer to you would be "yes." This is particularly true in habeas, which is a special kind of case. Prior to the adoption of AEDPA, the Anti-terrorism and Effective Death Penalty Act, the Court, over a number of years, changed its concept of habeas in response to the conditions it perceived. *Fay v. Noia* was decided during the period when the Supreme Court thought that the Southern courts were behaving very badly and were not enforcing the newly created constitutional rights in criminal procedure.

By the time of *Wainwright v. Sykes*, decided in October Term 1976, the world had changed. The Supreme Court was no longer substantially at variance from what the state courts were doing. Both precedents were either both right, or both easily defensible, at the time they were decided.

AUDIENCE PARTICIPANT: Judge O'Scannlain made reference to *Pennsylvania v. Union Gas*, and I believe you referenced the lead opinion there as the plurality opinion and some portion of it as a holding of the Court. I would just like to focus on that. Where you have a four-one-four decision where the one Justice in the middle joins only in the judgment and expressly disavows joining in the reasoning of the lead opinion, can you call that either a holding or even a plurality opinion of the Court?

HON. O'SCANNLAIN: Well, that theoretical issue faces us from time to time, but one has to recognize that there was a five-judge decision. To the extent that fewer than five judges joined in the rationale, we simply refer to that, of course, as a plurality. We are not stuck with the notion that it is a holding, but at least it is a statement that represents the dominant view of that particular panel, and to that extent, I think we have to give some credence to it.

The technical status of that, of course, becomes rather blurred because at some point there is going to be a new case with a slightly different context which may permit one to distinguish it. So I think one has to do what one can to recognize that the plurality at least controls so far as that case is concerned.

AUDIENCE PARTICIPANT: Jonathan Adler. Case Western Reserve University.

I was wondering if any of the panelists would like to comment on the recent debate over what to make of unpublished opinions and their precedential effect.

As I think many people know, beginning in the 8th Circuit, there has been the suggestion that Article III can't countenance appellate decisions that do not have binding effect and that cannot be cited by litigants.

HON. O'SCANNLAIN: I will be happy to offer a reference to Judge Kozinski, who I believe is here in the room, or at least was earlier. He has just written an opinion for our court that rejects the 8th Circuit, or at least the, 8th Circuit panel approach, and reinforces the validity of our rule.

I like to approach it on a very practical basis. The fact of the matter is that Judge Fletcher and I sit on a court that has now about 10,000 filings per year. Some of those cases go away for failure to prosecute or whatever, but we are issuing on the order of over 4,000 dispositions on the merits every year.

Now, neither one of us, I am sure, would say that we read all 4,000 cases that our fellow members on the court decide. Most of us do not even read the roughly 600 or 700 of those 4,000 that are actually published and therefore, precedential. So it seems to me that we have no choice but to be somewhat responsible in the amount of new precedent or precedent bearing cases that we issue every year, and I am one of those on the court who has very serious concerns about whether we do a good enough job policing our own precedents.

One of the corollaries to that, of course, is that we probably have the highest percentage of en banc activity simply because we are on a court of 28 judges with the possibility of not only nine panels, but, with our senior judges, perhaps as many as 15 panels meeting simultaneously, there is a very, very difficult problem. In theory, every unpublished disposition follows either an existing Supreme Court precedent or a previously published precedent of our own court, and if there is a problem, it is up to the parties to bring it to

the attention of that panel or off-panel people with an interest to bring it to the attention of the court through the existing rules.

PROFESSOR NELSON: This is one that the 9th Circuit, I think, has gotten absolutely right. I think Chief Judge Arnold's opinion for the 8th Circuit is premised on the idea that if a court does not issue opinions with precedential effect for the future, it is not exercising the judicial power within the meaning of Article III. That seems to me to leave federal district courts, whose decisions have not hitherto been thought to have formal precedential effect, in a fairly precarious position.

HON. FLANIGAN: Thank you very much. Please join me in thanking the panel.

Vice President Richard Cheney

Thank you very much. I appreciate the warm welcome. I realize you've adjusted your schedule to accommodate mine, and I thank you.

Secretary Chao, thank you for the very kind introduction. It's good to see a member of the Cabinet in person. It's good to see anybody in person these days. Lynne and I don't get too many visitors at the cave.
This is the second time I've had the privilege of addressing the Federalist Society. I was here as Secretary of Defense in 1990 — then, as now, filling the role of your token non-lawyer. Not that I have anything against lawyers. Looking around the room,

I'd guess that a year ago, about half of you were down in Florida.
A lot has changed since my last appearance here. I've been a corporate CEO, national candidate, vice president — and now a recurring character on Saturday Night Live. I've been watching a tape of the guy who plays me on the show — Darrell Hammond. He's got the voice down. He's pretty good at the mannerisms. But he's not quite there yet, and I doubt he'll ever capture the real me. You just can't fake charisma.

I do have a lot of friends here this evening. It's nice to see all of you, and I bring with me the good wishes of a man we're all very proud of, President George W. Bush.

There are many members of the Federalist Society in our Administration. We know that because they were quizzed about it under oath. We're especially proud to have two of your founders at the Department of Energy — the general counsel, Lee Liberman Otis, and Secretary Spence Abraham.

The Federalist Society was formed to bring balance to the debate in our law schools and in the legal profession. You were founded in the conviction that the state exists to preserve freedom — that the separation of powers is essential to the operation of our government — and that judges are charged with interpreting the law, not inventing it.

In advancing these principles, you have changed the debate, while gaining the respect of people across the ideological spectrum. The Federalist Society has been a model of thoughtful, reasoned dialogue. You've helped bring a spirit of civility to Washington, D.C. Even more remarkably, you've managed to bring it to some of the law schools. Your spirit of honest, fair-minded debate hasn't always prevailed, as Judge Bork can attest. But against great odds, this organization has become one of the most influential in the world of law and public policy. I commend you for it.

Tomorrow at this conference, our Solicitor General will inaugurate an annual lecture series named for his wife. Barbara Olson will always be remembered for her sharp mind, her kindness, and her cheerful presence. It's hard to think of Barbara and not see her smiling. We miss her. And we will always remember the grace and courage of Ted Olson, from that day to this.

America will never forget what happened on September 11, and who is responsible. Nor will we lose sight of what is at stake. We are the target of enemies who rejoice in the murder of innocent, unsuspecting people. We are fighting now, to defend freedom and law against force and tyranny. We are fighting to save ourselves and our children from living in a world of fear. We are fighting — and we are winning — because we will not permit a small group of vicious, violent men to impose their will on America and the world.

The President and I have often said that the war on terrorism will be fought on many fronts. The government of the United States is fully engaged in this battle, and let me tell you how.

We have given intelligence and law enforcement officials the new tools they need to hunt, capture, and punish terrorists. We are tracing terrorist communications and movements as never before, with new statutes that take account of the modern communications that terrorists use. These new laws met with overwhelming, bipartisan agreement in Congress, because they uphold and respect the civil liberties guaranteed in the Constitution.

We are finding the terrorists' financial supporters and stopping them. Already we have blocked millions of dollars in assets of persons and organizations involved in supporting terrorism.

A new federal task force is at work tracking foreign terrorists. We will deny them entry into our country, detain those who are here, prosecute as needed, and deport the rest. Those who plot against our country will not be allowed to abuse our protections or our freedoms.

Furthermore, as the President deems necessary, non-U.S. citizens suspected of terrorist activity — whether captured here or abroad — will face trial by military commission. The mass murder of Americans by terrorists, or the planning thereof, is not just another item on the criminal docket. This is a war against terrorism. Where military justice is called for, military justice will be dispensed.

On the civil defense front, we are taking every measure to improve both our prevention capability and our response capability. Under Governor Tom Ridge, the Office of Homeland Security is leading the effort to detect and frustrate the plans of terrorists.

In everything we do, we have to be realistic. We have to proceed on the expectation that those who

have already harmed our country will try again. The terrorists who gave the orders on September 11 have themselves promised it. They have called for the killing of Americans, Christians, and Jews.

Whenever the President has evidence of a credible threat, he will alert state and local authorities, and the American people will know as well. But a terrorism alert is not a signal to lock down your life. It is a sign that we are vigilant. When Americans hear of an alert, they can know that the government is on watch and taking action against the threat.

That is how we are working to protect our citizens. But wars are not won on the defensive. Wars are won by taking the fight to the enemy. America is not waiting for terrorists to strike us. In the places where they hide and plot, we are striking the terrorists.

There is a price for aiding and abetting terrorists, and the Taliban regime is paying it in full. Our military has destroyed training camps. Their communications and air defenses are in ruins. Their defenses are being systematically eliminated. Whole cities are free again. A large portion of the country can now celebrate the Taliban's departure from their lands and from their lives. The rest of the country is counting the hours.

The battle is not over in Afghanistan. There's still a long way to go. But as we speak the Taliban are high-tailing it to safer ground. They will find none. No matter how long it takes, Afghanistan will cease to be a haven for tyranny and terror.

Success in Afghanistan is only the beginning of our efforts in the world. We are going to find the leadership of the Taliban and the al Qaeda network, and we are going to stop them. This is not about one country, and in this struggle there is no neutral ground. As the Bush Doctrine makes clear, those who harbor terrorists share guilt for the acts they commit.

It bears repeating that ours is not a campaign against the Muslim faith — indeed, the innocent victims of these terrorists include many Muslims. This is a struggle against the evil of a few. That is why people in every part of the world, and of all faiths, stand together against this foe.

We cannot know every turn in the battles to come. Yet we know our cause is just. We have seen enemies like this before. We have defeated them before. We will defeat them again.

This crisis has brought our country together, uniting the political parties and elected branches of government in ways few would have thought possible. There are still honest disagreements on domestic priorities, and the war has not erased those. But this is a moment of real opportunity, with the leadership of both parties sincerely looking for common ground.

We hope Congress will act, and act soon, to pass an economic stimulus package. President Bush's plan gives immediate help to those out of work, reduces income tax rates, and will create new jobs throughout the economy.

We hope Congress will attend to America's energy needs. It is only more urgent now that we find new supplies and make this country less dependent on foreign oil.

And we hope the United States Senate will speed up the confirmation of federal judges. There is a dual responsibility here that we all understand. The President has discharged his duty by nominating well-qualified men and women to the federal district and circuit courts.

Yet there are today more vacancies on the federal bench than there were the day we were inaugurated. The pace of new vacancies is actually faster than the pace of confirmations. Barely one in four of President Bush's nominees have been given a hearing and a vote. This should be unacceptable to anyone concerned about the administration of justice in our country.

Some reply that this is merely the normal state of affairs, regardless of who is President or who controls the Senate. History does not support that claim.

Traditionally, a new President's judicial nominees during his first year are confirmed almost as fast as their nominations reach the Senate. In 1993, for example, 19 judges were confirmed on a single day in November, many just a few weeks after their names had been submitted. In each of the previous three administrations, almost all judicial nominations submitted before the first August recess were confirmed by the end of the year. That has held true regardless of whether the Senate and the White House were controlled by opposing parties. The only exception to the rule is a single Clinton nominee who was confirmed the following year.

In 2001, President Bush submitted 44 nominations prior to the August recess. By all rights, each of these should come to a vote by the end of next month. Yet almost half of them have not even begun the journey to a floor vote.

Overall, President Bush has submitted 64 judicial nominations. That's more in the first year than any other recent president. And this has been done for a reason. There are at present more than 100 vacancies on the federal bench, 38 of which have been classified as judicial emergencies by the nonpartisan U.S. Judicial Conference.

Another vacancy is expected next month on the Sixth Circuit Court of Appeals, which serves four states and one in every nine Americans. At that point the Sixth Circuit will have eight judges and eight vacancies — a fifty percent vacancy rate, the highest anyone can remember on a federal circuit court. Here again, the President has fulfilled

his responsibility. He has already submitted six nominations for that Court — and all six await hearings.

The deliberate slowing of the confirmation process is unworthy of the United States Senate, and an injustice to the men and women whose names have been presented. These are good people — each and every one of them selected with care by the President himself.

The President announced his initial eleven nominees on May 9 — more than six months ago. Yet of these only three have had hearings. Those still waiting include his choices for the D.C. Circuit. The first is John Roberts, the former deputy solicitor general and a lawyer of the highest reputation. The second is Miguel Estrada, who as a boy came to America from Honduras, graduated with honors from Harvard Law School, and served in the Justice Department under presidents of both parties.

These nominations are not being held up for lack of support. On the contrary, few doubt they would be swiftly confirmed by the full Senate, if only given that chance. By any standard of judicial merit, they are fully qualified to serve. And by any standard of fairness, they deserve a hearing.

In that spirit — simple fairness — and in the interest of the nation, I appeal to the Senate Judiciary Committee to proceed without further delay in filling the vacancies on our federal courts.

I'm confident that this matter will be resolved, and the interests of the nation well served in the months to come. As I said, this is a moment of opportunity. All of us have been given a new perspective on old differences, and perhaps a better sense of the great things we can achieve together.

America is passing through a time of testing. We have every right to be proud of our fellow citizens — proud of the great heroism we've seen — proud of the honorable conduct of our military. In so many ways, adversity has brought out the best in our nation. The attacks brought terrible grief down upon us. But we love our country, only more when she is threatened. And instead of weakening us, our enemies have only made us stronger.

In ways too numerous to mention, President Bush and I have counted on the friendship and good counsel of many in this room tonight. And we have never been disappointed. You have our respect, and our gratitude. Thank you very much.

STEVE FORBES

WHAT NOW FOR DEMOCRATIC CAPITALISM IN THE WORLD TODAY?

Mr. Steve Forbes, *President and CEO, Forbes; Editor-in-Chief, Forbes Magazine*
Hon. Edwin Meese, *Ronald Reagan Distinguished Fellow in Public Policy; The Heritage Foundation; former U.S. Attorney General (introduction)*

HON. MEESE: Thank you very much, ladies and gentlemen. It's a pleasure for me to participate in this 15th anniversary of the lawyers conference. It's hard to believe that we're at age 15 already for this part of the Federalist Society, but it's always a pleasure to participate in Federalist activities.

The Establishment of The Federalist Society is one of the most significant events in the legal profession that has occurred since I became a lawyer. So, it's great to see all of you and to have this opportunity, particularly to have the honor of introducing our guest speaker.

We're privileged to have, literally, one of the great economic and policy thinkers in America today. Steve Forbes is President, as you know, and Chief Executive Officer of Forbes, and Editor-in-Chief of *Forbes* Magazine. *Forbes* is more than just a magazine. It is a conglomerate of financial, economic and policy ideas and information. They have a number of publications, in addition to that magazine, in the field of business.

In 1997, looking ahead to the future, *Forbes* entered the new media arena with the launch of Forbes.com. And since that time, it has grown to become one of the most important sites on the web, receiving an average of 4 million visits a month. It is a leading destination, particular for business decisionmakers and for investors.

Forbes also contributes — and this is something that has been particularly of interest to our speaker — to American history and culture. And for that reason, Steve is chairman of the company's American Heritage Division, which publishes *American Heritage* Magazine (which I point out to protect him, has no relationship to the Heritage Foundation that I represent) and two quarterlies, *American Legacy* and *American Heritage of Invention and Technology*. So again, they are on the cutting edge.

Steve is not just a publisher who sits in an ivory tower and counts the money, but is also a writer himself. He contributes an editorial to each edition of *Forbes* Magazine, under the heading of "Fact and Comment," and it's always the place that I turn to first when I get the magazine because it has pithy and witty commentaries on what's going on in our nation and in the world today.

I think one of the most interesting things I've found out about him is that he is a widely respected economic prognosticator. I didn't know there were widely respected economic prognosticators until I learned about him, because the old joke that I learned was that economic prognosticators make weathermen look good.

Steve, however, has managed to rise above that and, as a matter of fact, received four times what is known as the Crystal Owl Award — for wisdom, of course — for being the financial journalist whose economic forecast for the coming year proved most accurate. I'm not sure whether he'll include any economic forecasts in his talk today, but I can assure you that it will be a very important talk, and a very interesting and worthwhile talk, because Steve is a man of ideas.

He has run twice for the Presidency, not because he necessarily wanted political office, not because he wanted the prestige of the office that he was seeking, but really so he could inject into the policy thinking of America some of the most important ideas which are necessary for the future — ideas like the flat tax, like medical savings accounts, like a new social security system to protect working Americans, like parental choice of schools for people's children, term limits and strong national defense — ideas such as this.

And so, we're particularly happy to have him with us today to talk about, "What Now for Democratic Capitalism in the World Today?" Please join me in welcoming Steve Forbes.

MR. FORBES: Thank you. Thank you very much, General, for those very, very kind words. I liked how you said, "He doesn't stay in an ivory tower counting money." We don't have an ivory tower for offices, but I wouldn't mind, in this recessionary environment, to be counting money.

I also was very pleased that Ed was very diplomatic in making reference to my attempts to make a mid-life career change. He just glided over what happened to those attempts, which is why I'm here and not in another place in Washington right now.

But, it is a great honor to be here, and I just want to say, personally, how grateful I am to have been introduced by one of the most courageous and principled men in American public life, Ed Meese. You're a remarkable man.

As for forecasting, I was delighted that Ed thought economists could even come close to weather forecasters. From the very beginning, weather forecasters have been very smart. They have said that there's a certain percentage probability; you know, 20 percent, 40 percent. Numbers meant nothing, but the forecasters gave themselves a perfect escape

hatch. They never said 100 percent probability, so they always had an out.

I should remind you of a favorite saying of my grandfather, who founded *Forbes* Magazine. He was an immigrant from Scotland at the turn of the last century, one of ten children, with a grade school education and very little money. He said that while growing up there were more mouths in the house than money. In Scotland, that really meant something.

But like millions of others, he came to this country with dreams and ambitions, and he started *Forbes* Magazine. And when asked about financial markets, the stock market, my grandfather would invariably respond, "You make more money selling the advice than following it." You're all on notice. That's full disclosure. Just because my name appears on a magazine...I have to reveal to you that we do count on the short memory of our subscribers sometimes, in some of the things we say.

But your coming together — and Ed mentioned the 15th birthday of the Federalist Society — I think underscores one of the great strengths of this country in this extraordinary time. It's one that's been noted before, but I think it's still a marvel today.

Alexander de Tocqueville noted it when he came to this country from France, 170 years ago, that is, what was then called voluntary associations. He'd never seen anything like this in Europe, with its medieval background. People voluntarily coming together for a shared purpose: professional activities, sporting activities, cultural activities, for education, for hospitals, religious activities, whatever. People coming together.

We take it for granted in this country that, as you become older, you go on committees. We all know about committees. We always have one or two ramrods making sure that everyone else gets some work done. But people do come together, whether for problems or opportunities. They pursue them, and that gives a great strength to this republic.

Tocqueville said that this is how people learn to be citizens in a republic: taking on individual responsibility, learning self-governments, working together. We are a nation of individualists, but we are also a nation of extraordinary cooperation, primarily because we are individualists and are accustomed to taking things into our own hands.

You are coming together to stand against the legal assaults — the seeming legal assaults against our system and our principles. I hate to call it counter-Reformation, because what the trial lawyers and others have done I wouldn't call a Reformation. A distortion, a perversion, I think, would be more accurate. But here we are today, after September 11 — the proverbial crossroads — at a time of extraordinary opportunity and extraordinary danger.

All we have to do is to look back to the beginning of the last century, the 20th century, a time of enormous optimism. A lot of people, particularly the in United States and Great Britain, felt the 20th century would be a glorious century. It would seem not only great material and scientific progress but also the advance of the rule of law and democratic principles. After all, even the most seemingly backward of European nations of great power at the time, czarist Russia, was lurching — haltingly, but in an unmistakable way — toward something resembling a constitutional monarchy, with the Stilepin (phonetic) Reforms and others that came along.

By 1914, the time of the First World War, Russia had the fastest economic growth rates of any Western nation, including the United States. It also was the greatest grain producer in the world. But then came the First World War, with the seemingly senseless slaughter on the Western Front and elsewhere. And that, of course, undermined the faith of many in the principles of Western civilization. It made possible the rise of Communism, Fascism, and Nazism. The chance for a durable peace was thrown away at Versailles.

Then followed the catastrophic economic mistakes of the late 1920s and early '30s, particularly the Smoot-Hawley Tariff. After all, Adolf Hitler never could have come to power had it not been for the Great Depression.

Following the Second World War, we saw where policymakers began to get things right, with the Marshall Plan, Bretton Woods, NATO and GATT, now called the WTO. We did things more right than wrong, and laid the foundation for waging a successful Cold War.

Now we face a new threat. But this threat is also an opportunity, and that's what I want to touch on today. It is an opportunity to advance democratic capitalism. I say "democratic" because I want to distinguish it from state capitalism of the varieties that we saw in the last century. I think we need to remind ourselves that capitalism has a moral foundation. It is not simply a Faustian bargain with greed and exploitation in exchange for a higher standard of living.

America's founders, particularly Alexander Hamilton, understood that under democratic capitalism, people have an opportunity to develop and advance their own talents and, at the same time, actually help other people. Even if you think you're only helping yourself, success in a capitalist society also means enabling others to advance. It is not a zero-sum gain.

Human ambition can be used for good things and bad things. Human nature has the capacity to do great things. But it also has an evil underside, as we were reminded on September 11. Democratic capitalism channels human ambitions in a constructive direction, because to succeed in business in a free society, one has to produce something, a service or product, that others are willing to buy. In other words, you are forced to pay attention to the wants and needs of other people. If you have a terrible personality, the kind that makes babies cry and dogs run away in horror when you walk down the street, if you're a grouch and a terrible person to be around, you're not going to succeed unless you have the power

of the state behind you. You're not going to succeed unless you're meeting the needs and wants of other people.

Ours is a remarkable system, and it's engendered extraordinary trust and cooperation, webs of trust and cooperation, that we take for granted. We get up each morning, do our thing, and we're part of a system that no one directs from above, that brings about extraordinary products and services around the country and the world, and no one forces us to do it. If you don't show up for work, you might lose your job, but a Commissar is not going to come around and blow your brains out. It's a remarkable system, and that's why we broke the bounds of medieval thinking, that society was a zero-sum gain.

Democratic capitalism has been a most benign system. Is business perfect? Is capitalism perfect? No, because human nature isn't perfect. But it is the best system possible, given the imperfections of human nature. And it is because the Founders created this commercial republic, the most commercial entity in the world of global history. But we are also the most philanthropic and charitable nation in history.

You always hear the phrase, "Give back". If you've done well, you've got to give back, as if you took something in the exploitative sense. But, if you think about it, commerce and philanthropy are opposite sides of the same coin — learning to pay attention to the needs and wants of other people. So, it's about as benign a system as you can have.

The real capital of this society, something others have a hard time grasping, is not physical things. It's not piles of gold; it's not jewelry; it's not large amounts of land and having large armies that can go on conquests. It's really not physical; it's metaphysical. That's the true capital and wealth of this society.

We saw it after World War II, with Europe and Asia physically destroyed. But because the knowledge was there, their cultures were rebuilt, and they made a very quick physical recovery. That is metaphysical capital.

You see it in the Middle East today. What is oil? They call it a natural resource. There's nothing natural about that resource. In and of itself, oil is simply glop; goo; icky stuff. You can't eat it; you can't drink it; you can't even feed it to camels. What makes it valuable is the human inventiveness that has turned this glop into something that is now an integral part of our lives.

You see it in the high-tech era that we're now in. Yes, high tech has taken a hit, but that's just temporary. Just remember, we've had 300 automobile manufacturers in this country in the last century; we only have 2-1/2 today. But there is no shortage of automobiles or SUVs or trucks. And even Al Gore's been seen riding in one once in a while.

Sorry, some modes are hard to get out of... But what this underscores is that these things do have ups and downs, but technology in a free society moves forward. Think about the basis of high-tech. It's still the chip. And what is the chip based on? Sand. And whoever thought, when you were growing up and slopping about on the beach, that those grains of sand could literally be used to bring the whole world to your fingertips? Not by just putting a shell to your ear, but literally bringing the whole world to your fingertips? Silicon — it's amazing, and only in a free society could something as strange as that come about.

This brings us to the world we live in today. How do we, in this environment, advance what you might call democratic capitalism? The nice thing is that any society can adopt it. Fifty years ago, we had people in the State Department saying that Japan would always remain a nation making cheap manufacturing products and be dependent on subsistence agriculture. It didn't have the culture to advance. They said the same thing about the rest of Asia. Well, we've seen that with democratic capitalism even so-called traditional societies can make enormous advances.

The same thing can happen in the Middle East, if we create the right environment. And that leads to the question, "How do we create the right environment to advance democratic capitalism?" We should take heart from what happened after World War II. Yes, Europe was part of the West, but the Germans and French, for example, have been at each other's throats for a thousand years. Teuton and Gaul. Today, it is inconceivable that Germany and France would go to war — absolutely inconceivable, yet they've been at it for centuries. It's inconceivable today because of the institutions the U.S. encouraged and helped to set up after the Second World War.

Obviously the Mid-East will require far different kinds of foundations from those that worked in Europe and Japan. But there is no reason why, over time, that Middle Eastern societies couldn't begin to evolve, if encourage economic freedoms were encouraged. You don't have to have a full-blown Jeffersonian, de Tocqueville kind of democracy and republic. Just look at some of the nations that made transitions while we were fighting the Cold War. Look at Chile, look at Taiwan, South Korea, the Philippines, even South Africa.

These nations had authoritarian or semi-authoritarian governments but they make the transition. They didn't do it overnight, they started with economic freedoms — allowing people to be able to set up businesses to learn commerce. Then they started to develop a middle-class that then wanted to have more control over their lives. And the political reforms followed in their wake.

So, it's possible for these things to evolve. But how do we create an environment where this can happen? Well, obviously, we have to win this war against terrorism. And it is a war. If this attack had to come, thankfully it came now. If it had come, to be blunt, a couple years ago, we wouldn't have had a global war against terrorism. If it had happened a couple of years from now, it might not have been just the kamikaze hijacking of passengers. The terrorists could have used radioactive devices, even if they weren't nuclear. If one of those devices had exploded, it could have contaminated the whole

area, just as happened in Chernobyl 15 years ago. So, the weapons of destruction could have been of more ghastly scale than those we experienced on September 11.

Now the gauntlet has been thrown down, and we've shown, even with our brief victories in Afghanistan, that a little bit of determination and willingness to fight can go a long way in changing the terms of debate and combat. We have a long way to go. We have to take care of Iraq. We have to go after Syria and others. There are ways to do it, which we can maybe discuss during the Q and A.

The fact is, if we see this thing through and break up there terrorist cells, yes, there will be the occasional mad bomber, a Unabomber type who can wreak some destruction. But it will not be the kind of systemic assault, potential systemic assault, on our values that we saw exemplified by September 11. There are other, more peaceful things we should be doing, as well. We need to start encouraging some of these authoritarians in Pakistan, Egypt and Saudi Arabia to start liberalizing. Even if it's only economically. Then the liberalizing can take on a life of its own.

We have to do something about an agency — this will sound very mundane but it's a very destructive agency — called the International Monetary Fund. If anyone's here from the IMF, I apologize in advance. But Ed's my friend and I see that exit, so I can get out of here. But the fact of the matter is, we're in a recession. Even both parties on Capitol Hill are talking about tax cuts, tax relief. They have very different means, but none of them are proposing big tax increases. Unfortunately, the International Monetary Fund routinely recommends massive tax increases and major currency devaluations to countries that get in trouble .

What the IMF is to economics is what doctors were to medicine 200 years ago. If you got sick then, doctors would bleed you. That, of course, got rid of your pain and suffering because it got rid of you. It was a very simple matter. The IMF today routinely harms its patients. Increasing taxes — we tried that in the Great Depression; it didn't work. It makes things worse when a country is in trouble.

Look at Argentina. It's about to have a major default, spiraling out of control. Why? Because in the last three years, the government has routinely enacted one tax increase after another. The economy contracts more and more as these tax increases go into effect. No wonder Argentina can't handle its debts. Argentina's debt in proportion to their economy is not out of line — it would be easily handlable if Argentina had a modicum of growth. When you're contracting, debts become unsustainable, especially in a deflationary environment.

And what does devaluing your money do? The IMF thinks it will improve your trade balance, give you more hard currency to create more capital, pay your debts. In the real world, what happens when you devalue a currency is inflation. You get a higher cost of capital, you get flight capital — after all, who wants to hold money that's depreciating? You want to get rid of it. So, it leaves the country; real capital leaves the country. Devaluing the currency destroys wages, which undermines the moral order.

Read Kane's *On Inflation* — he understood that deflation undermines a sense of moral order, a sense of cohesiveness and economic and social and civic life. These things do have consequences. But the IMF continues to devaluate currencies and raise taxes. And look at the IMF's miserable record. It almost destroyed Mexico in 1995, the Pacific Rim and Russia, and earlier this year, Turkey, critical secular Moslem country, was going through terrible financial throes because of the IMF's misbegotten advice. You are going to be reading more about Brazil and Argentina.

As we saw with the Great Depression, politics and economics are intertwined. If you don't get the politics right, the economics can go askew and create political repercussions, as we saw with Nazi Germany in the early 1930s. Remember — in1928, Hitler got only two percent of the vote. Three years later, the Nazis were the largest party in the Weimar Republic. So, these things do have consequences, but we can get them right.

Let me give you five principles of economic progress and growth. They will sound very simplistic, but it is amazing how often, even today when we're facing a great threat to our civilization; how often these seemingly simple, simplistic principles are violated.

One, of course is, as you can well appreciate, the rule of law, particularly individual equality before the law and individual property rights. If you do not have individual equality before the law, it's very hard to have an entrepreneurial economy. The strong can crush the challengers. In this country we take property rights for granted. When you buy a house, you get a mortgage, you sign 900 pieces of paper. As you know, property law goes back to England during the plague in the 14th century. We take for granted when you buy something in this country, you can hypothecate it; you can use it as collateral in any institution. Everyone recognizes it, no matter what part of the country you come from. Property law's so bloody boring, if you're not in it and making money off of it, that most people pay no attention to it. Yet it is extraordinarily important. Just look at it economically. What is the biggest source of money for new businesses in this entrepreneurialcountry? Not venture capitalists, not Wall Street. Mortgages are the biggest source of money for starting a new business. Taking out a mortgage or refinancing a mortgage or taking a second mortgage. That's a huge source of capital.

In most parts of the world, they don't have the kind of property rights we have in this country. If you go to Third World or formerly Communist countries, you go to these shantytowns outside the cities. In those neighborhoods, everyone knows who owns which plot land. But it's not recognized, not codified, so you can't get a mortgage on it. You can't get services for it.

Through Hernando de Soto, a Peruvian economist, and others at *Forbes* Magazine, we've estimated that 4 billion people around the world own $9 trillion — not billion — $9 trillion worth of real estate. Because of imperfect property laws, it's dead capital. Dead capital. Imagine mobilizing and bringing to life $9 trillion.

The second basic principle is sound money. You know, money should be like a ruler. A foot is 12 inches. Imagine building a house if you floated the ruler each day like you do with money. Twelve inches one day; 18 the next; seven the next. It would be hard to build a house. You'd have to get futures on it; you'd have to hedge against the fluctuation in order to build it. It would complicate things.

The third basic principle is taxes. Taxes are not just a means of raising revenue; they are a price and a burden. The tax you pay on income is the price you pay for working. The taxes you pay on profit and capital gains are the price you pay for being successful, for being productive, for being innovative, for being willing to take risks. The proposition is very simple. Lower the price on good things like risk-taking, and you get more of them; raise the price, you get less of them. We need a genuine tax cut in this country. A real one, like the Reagan and Kennedy tax cuts.

The fourth basic principle is what you could call government non-interference in the setting up and running of a business. Again, it's fairly easy in this country to set up a business. In many countries, it is almost impossible to set up a legal business, if you don't have the time and means to deal with all the bureaucracies, all the agencies, all the bribes, all the things you have to deal with. If you're politically connected, you can short-cut the system. And goverments wonder why there are big underground economies. Well, it's the only way people can survive.

And finally, there is free trade. Reduce the barriers to trade, and people will trade more.

So, seemingly, five simple principles: The rule of law; the creation of sound money; low taxes; government non-interference in the setting up and running of a business; and reducing trade barriers. Seemingly simple stuff, but pick up the paper tomorrow and read about Argentina, and you'll see the dumb things that are being done and are undermining the basic principles of democratic capitalism there.

So, here we are. Enormous opportunities; enormous dangers. We did it wrong in the early part of last century. We started to get it right in the latter part of the century and saw the benefits that came from it. I'm an optimist, as I think you are Ed. I think we will get the reforms right, and ultimately, I think, the premise of democratic capitalism, as Alexander Hamilton and others sought, will triumph. We will show the world that the best of human nature will triumph and move forward.

Thank you very much.

HON. MEESE: Steve, thank you very much. I think the audience has indicated their appreciation for those excellent remarks. I understand we have time for a few questions, so if anyone would advance to the microphones on either side, we will entertain questions until the leaders here take us off the stage.

AUDIENCE PARTICIPANT: Good morning, Steve. John Reposa. I'll decline your invitation with respect to Syria, but I will ask you to address, if you've thought about it, the necessary transformation of Saudi Arabia, which I view as creating, possibly, a much greater threat on an ongoing basis internationally.

MR. FORBES: Well, I don't blame just them. We entered informally into the relationship with Saudi Arabia. We chose to ignore their financing of groups they shouldn't have been financing, through various front organizations, in return for their nominal support and making sure the oil continued to flow. That wasn't just the Saudis' fault; we entered into that bargain.

During the Cold War we had to do a lot of things we might not have wanted to do. You have to have allies in a war. We are doing things in the war against terrorism that in an ideal world, we wouldn't have to do. During World War II, we had an alliance with a hideous regime, the Soviet Union. But you do those things and keep your goal clear.

In the case of the Saudis, I think the time has come to tell them that the old way of doing things is not going to work. Their legitimacy is being undermined, even though they try to pay extortion money to everyone who shakes a fist at them. It's not viable, long-term. And one way they must start doing it is by liberalizing internally. They have a terrible problem with finding employment for younger people. They don't have the money anymore to pay everyone off with the oil revenues.

As you know, the crown prince, apparently doesn't much like America. But what got him in trouble with the other members of the Royal Family was not his blatant anti-Americanism or alleged anti-Americanism. It was that he wanted to start examining expense accounts of the thousand or so princes. It was outrageous.

So, they can't continue that way. Bahrain has shown that Arab states can make democratic reforms. And I think Saudi Arabia us going to have to do so. They can start on the economic side, but they're going to have to make the painful realization that eventually, they're going to have to do it on the political side as well. Otherwise they're going to suffer the same fate the monarchy did in Iraq in the 1950s. A monarchy doesn't last very long if it doesn't renew a sense of legitimacy. I think all of these regimes, each of them I've mentioned, and others, are going to have to reform. Some, are recognizing it and smelling the coffee, so to speak, faster than others. One thing I want to mention is that one country we

should be utilizing as an ally is Turkey — a secular Moslem nation that made a firm tie to the West after the First World War at the behest of a general who fought the West in the First World War. He said, this is no future.

One good thing that might have come out of September 11(one can always hope, and try to find these silver linings) is what we are seeing now in Texas with Mr. Putin and Mr. Bush. If Putin follows through on what looks like trying to tie Russia to the West, that'll be a momentous event. A Russia not feeling that it can be isolated, or that it can make an anti-U.S. alliance with China, as it did with Germany against the West in the early 1920s.

For years, as you know, Germany was always torn between East and West. The war made the firm decision: It is tied to the West. If the Russians do that, that will be a huge, huge, positive long-term event. So, with Saudi Arabia, they've got to change the status quo; it is not tenable, and I think some of them are beginning to wake up to it. It doesn't mean they can't survive — they may not have as much money as before — but, you know, these regimes can morph in a positive way, if the leaders let it happen.

HON. MEESE: We'll limit our questions to the two people currently at the mics.

AUDIENCE PARTICIPANT: Thank you. As an American, Mr. Forbes, I wish to thank you for being such a proud and capable defender of democratic capitalism. You can tell you're in a room of conservatives, because I'm sure that everyone would have risen to their feet in addition to the nature of the applause you received. I really appreciate your remarks.

I wanted to ask mostly for the kind of ammunition you've already given us, if you can respond to the kind of intellectual response to democratic capitalism of late, which has been that you can't be spread around the world without inevitably spreading Walt Disney with it, without trampling the other cultures of the world. In other words, without Americanizing the world. And it's now the pseudo-colonialism. And we're no better than the British empires were.

MR. FORBES: Well, the criticisms that others make of us is not our civic life or democracy or republic. They don't like parts of our culture. Lo and behold, I think there are a lot of people in this room, including the gentleman beside me who are not very happy with our culture. One of the good things about a free country is that you can say, "Hey, something has gotten out of line. This is not right." And I think one of the things that is going to happen after September 11 (these things take time; they never happen overnight) is a new seriousness. There is a little less sense of frivolity. I think we are starting to see the essence of what is true and what is just glitter and false.

In terms of countries fighting a culture, if they have ideas to do it, not the way the Taliban did it, but ways of putting pressure on providers of culture to clean up their act, we would be open to it. People like Bill Bennett and others have been fighting by putting pressure on the purveyors. You can't stamp the underside of human nature out, but at least you can make it not respectable.

So, if you get something trashy, it's something that a decent company shouldn't be associated with. You shame them. Have advertisers put pressure on them; that gets their attention. And there will be cries of censorship. But one of the things we're learning now is that the freedom to express an opinion or to write something or to create something doesn't mean you have to endure the consequences of having that opinion or writing that thing.

And if people shun you or shake their fists at you, so be it. You can express it, but don't expect everyone to roll over and pretend they agree with it, or think, your view is interesting and is as worthy as everyone else's. If somebody thinks you're full of B.S., be prepared to take the heat.

So, in terms of culture, yes, we're fighting culture wars. But bin Laden doesn't have the solution to it. I think a free society has the solution to it, of saying we're once again going to have a sense of standards.

HON. MEESE: Yes, last question.

AUDIENCE PARTICIPANT: Yes, Richard Painter of Illinois.

You spoke of both political and economic reforms in the Middle East. And my question would be, which comes first? It seems that our experience with Germany in the 1920s and '30s was that a democratic political system without the economic foundations can lead to disaster. Could that be true if we push countries like Pakistan and Saudi Arabia too quickly to representative democracy without laying the economic foundations first?

MR. FORBES: And it's not just economic foundations. It's what you might call "civic life foundations," where people are accustomed to doing things. One of the things that made our Revolution not go the way of the French Revolution, in addition to the Great Awakening, was, we were quite accustomed to handling our own town affairs, local affairs. One of the amazing things about British colonialism in North America was the vivid contrast with French colonialism in North America. Paris — the French — were very rigid in their colonial policies in North America, great regulations, lots of detail emanating from the homeland. With Britain, it was sort of haphazard. Sometimes they paid attention to what we were doing over here; other times, they didn't. And so, it was this kind of ad hoc approach, non-systemic approach, that allowed us to learn a bit

of self-government.

So, were were prepared. A lot of countries weren't. You can make a case, you can cite countries in which democracy came first, and then economic reforms came with it, or you can go backwards. I mean, Britain, after the war, went backwards economically until Mrs. Thatcher came along.

But, you can find a model for either one. The key thing is to have a sense that to be authoritarian to suppress any dissent and hope for the best and pay off those who could do you harm, is not going to go very far. And whether the Arabs use the Turkish model, or abruptly try to sweep away the past and create the seeds for more liberalization; or whether they do it the Taiwanese way, which was economic, and then move up to the point where, today in the Taiwanese national legislature, they don't just debate; they throw chairs at each other and fists at each other: a very, very vigorous debate. There are various ways to do it. Especially if Turkey goes with us into Northern Iraq and sets up an autonomous Kurdish region, having Turkey play a prominent role in this fight against terrorism, would give the fight great legitimacy. Even though Turkey has very real shortcomings, it is light years ahead of what you see in that region.

And you can say that if the Turks went through what they went through in the last century and some of the horrible things that have happened there, if they could make the transition to more representative and open society, by golly, Saudi Arabia, Pakistan, et al. should.

Why didn't Egypt, an ancient civilization make the kind of transitions that Japan and others made as the West rose up? It still can; that's the nice thing about high-tech. You can leap forward. It does give you the chance to make up for lost ground. So, there are various ways you can do it. The key thing is to say, we have got to start doing it. Each one may be different, but the status quo does not suffice anymore.

Before Ed and I get thrown off, we will pretend that we voluntarily left, and say thank you very much, and bless you in your good work.

Barbara K. Olson Memorial Lecture

Solicitor General Theodore Olson

As you have been told, the Federalist Society envisions that the Barbara K. Olson Memorial Lecture each year will address the ideals and principles that the Federalist Society holds dear and that Barbara cherished: limited government, liberty and freedom.

I felt that it would be fitting to inaugurate this series with some words about Barbara, why she died, and how much of her life and death were interwoven with those very principles that will animate the lecture series in her name.

On September 11, 2001, Barbara Olson and thousands of other Americans were murdered.

There were victims from other nations that day as well, but they were accidental casualties. Barbara and her fellow Americans were the targets; selected at random to be slaughtered that day precisely because they were Americans.

And the places of their deaths were carefully chosen for what they meant to America, and to the world about Americans, and because they were unique symbols of America's vitality, prosperity and strength.

The World Trade Center Towers were an emblem of America's largest and most prosperous city and an internationally recognized symbol of America's leadership in commerce, free enterprise and international trade.

The Pentagon was an even more fitting target for the perverted minds that planned this day of terror. Construction on it had begun precisely 60 years earlier, on September 11, 1941, as America was awakening to the nightmare of Adolph Hitler and Nazi terror in Europe. Since its construction, the Pentagon has stood for the power, strength and seeming invincibility of a free people. It has been the place from which America, again and again, sent its men and women to fight and die to save not only our own citizens, but millions of others as well, from tyranny, oppression, brutality and murder.

One additional symbol of America, the Capitol I believe, was spared that day only because the brave Americans on that fourth aircraft did what Americans instinctively do when their lives and their country are threatened. They fought. They died, but they saved the lives of countless others and averted an even greater and barely imaginable tragedy.

Barbara Olson had less time, and maybe not as many resources, as the heroes on United Flight 93 that was brought down in Pennsylvania short of its target. But the moment her flight was hijacked, she began to try to save herself and her fellow passengers. She somehow managed (I think she was the only one on that flight to do so) to use a telephone in the airplane to call, not only for help from the outside, but for guidance for herself and the flight crew in the battle that she was already undertaking in her mind. She learned during those two telephone conversations that two passenger jumbo jets had already that morning been turned into instruments of mass murder at the World Trade Center. So she knew the unspeakable horror that she was facing — and I know without the slightest doubt that she died fighting — with her body, her brain and her heart — and not for a moment entertaining the notion that she would not prevail. Barbara died therefore not only because she was an American, but as one more American who refused to surrender to the monstrous evil into whose eyes she and her fellow countrymen stared during those last hideous moments.

September 11, 2001 was unprecedented in our nation's history. Our country has been attacked before. Our soldiers and innocent citizens have been the victims of terrorism before. But never before in our history have so many civilian citizens, engaged in the routines of their daily lives, who neither individually nor collectively had done anything to provoke the savage attack that they were to experience that day, been brutally murdered for the simple reason that they were Americans, and because they stood, in their countless individual lives, for all the things that America symbolizes.

As President Bush immediately recognized, September 11 was an act of war. But, as he has also explained, it was much more than that. It was also a crime, an act of pure hatred and unmitigated evil. It was a ruthless, brutal, intentionally malignant attack on thousands of innocent persons.

Think of the sick calculation that gave birth to these acts. The victims were persons of all races, backgrounds, religions, ages and qualities. They had one thing in common. They were Americans, Americans who believed in the values that their country stands for: liberty, democracy, freedom and equality. Their lives were cruelly extinguished because they were the living embodiment of the aspirations of most of the world's peoples. The people who killed them, and who planned their death, hate America and Americans for that very reason. They despise America and the beacon that America holds out to people who are impoverished, enslaved, persecuted and subjugated everywhere in the world. The men who planned the savage acts of September 11 cannot prevail, they cannot even long exist, as long as American ideals continue to inspire the very people they hope to tyrannize and enslave. Hence they have declared war, in fact they have declared hatred, on this country and the values that we hold dearest.

It is a cynical lie that the animals that killed our loved ones two months ago were motivated by Islam, or because this nation of ours is anti-Islamic. Among our most cherished values, enshrined in the First Amendment to our Constitution, is freedom of conscience, liberty of expression and the free exercise of religion. This continent was populated by people who surrendered their homes and crossed a terrifying ocean to reach a rugged and inhospitable frontier in order to escape religious persecution and to seek religious freedom.

From its birth, this nation and the American people have offered sanctuary and shelter to persons of all faiths. Our Constitution — always with the support of our people — has again and again extended its embrace to the unpopular, the unusual, the unconventional and the unorthodox. We protect not only those who will not salute our flag, but those who would spit upon it or burn it. We regularly pledge our allegiance to a constitution that shelters those who refuse to pledge their allegiance to it.

Far from tyrannizing those who worship a particular God or embrace a particular religion, we protect those who worship any God - or no God. Indeed, Americans have defended with their lives persons whose religious convictions preclude them from taking up arms to defend the same Constitution that gives them the right to refrain from defending it.

It is true, I suppose, that there are many in the Middle East who hate this country for its support of Israel. But how tragic and misguided to despise us for extending comfort and defense to a people who have so long, and so recently, been the victims of indescribable ethnic persecution. Nor has America's support for Israel ever been rooted in or manifested by hostility to the Muslim faith or those who practice it. The terrorists and their apologists have lied about these things, but what is another lie when their goals and tactics are so vastly more evil?

So, while the terrorists of September 11 invoke the name of Islam, that is simply a mask for their hate, envy and despicable ambitions. The terrorists who seek to destroy us do so because America and Americans are everything that their hatred and motives prevent them from being. They are tyrants, and so they hate democracy. They are bigots and religious zealots who persecute Christians and Jews and Hindus and Buddhists and women. So they must hate America because America stands for tolerance and freedom and respect for all races, all religions, and all peoples, regardless of their sex, color, national origin or accent. They are despots who will not permit children to go to school. So they must hate the nation that commits vast resources to the education of its children, and whose Supreme Court has said that free public education cannot even be withheld from those who are in this country illegally.

These terrorists can succeed only through corruption, cruelty and brutality. Thus they hate and must tear down America and its system of laws which shields its people from those malevolent acts. And these terrorists can enslave the people they wish to subjugate only by keeping them poor and destitute, so they must undermine and discredit the one place in all the world that stands the most for the rule of law and individual liberty and that allows its people - and the people who flock here daily by the thousands — the opportunity to rise above all those conditions.

Abraham Lincoln was paraphrasing our declaration of independence when he characterized our nation as having been "conceived in liberty and dedicated to the proposition that all men are created equal." That revolutionary document set down our collective belief in unalienable human rights to liberty, freedom and equality, the proposition that governments derive their powers from the consent of the governed, the principle that tyrants who would oppress their people are unfit to be rulers of a free people, and the right to the pursuit of happiness. How can these terrorists ever prevail if these American ideals are not only allowed to be expressed, but to succeed so dramatically, and to inspire so many people throughout the world for so many centuries?

The answer is simple, the terrorists of September 11 cannot prevail in a world occupied by the Declaration of Independence, the Constitution and its Bill of Rights, the Emancipation Proclamation, the Gettysburg Address, the Statue of Liberty, the World Trade Center, the Pentagon, the Capitol, the Supreme Court, and the White House. They cannot co-exist with these ideals, these principles, these institutions and these symbols. So they cannot survive, much less prevail, in the same world as America and its people. So they must try to destroy America, and the principles for which it stands.

We do not claim that America has been or is today without imperfections and shortcomings. Our constitution was undeniably flawed at its origin. Implementation of our lofty ideals has never been without error, and some of our mistakes have been shameful. But the course of our history has been constant, if occasionally erratic, progress from the articulation of those lofty ideals to the extension of their reality to all our people - those who were born here and those, from hundreds of diverse cultures, who flock to the American soil because of those principles and the opportunities they promise.

Reflect on the fact that there is no segment or class of the world's peoples who have exclusive claim on the term "American," and no segment of the world's population to whom that claim has been denied. We welcome 100,000 refugees per year into this country. Over 650,000 people immigrated legally to America in the most recent year for which we have reliable statistics. Over 5,000,000 people are in this country today who were so desperate to come here that they did so illegally.

There are more Jews in New York city than in Israel. More Poles in Chicago then any city in the world except Warsaw. America is home to 39 million Irish-Americans, 58 million German-Americans, 39 million Hispanic-Americans and nearly a million Japanese-Americans. And there are seven million Muslims in America, nearly the population of New York City.

How tragic it is that the agents of the September 11th terrorist acts were people whom we welcomed to this country, and to whom we extended all of our freedoms, the protections of all of our laws, and the opportunities this country affords to everyone to travel, work and live. But, we welcome immigrants because nearly all of us are immigrants or descendants of immigrants who came here to enjoy America's freedoms, rights, liberties, and the opportunity, denied elsewhere, to pursue happiness and prosperity. People from all places on the globe give our country its identity, its diversity and its

strength.

Ronald Reagan often said that "every once in a while, each of us native born Americans should make it a point to have a conversation with someone who is an American by choice." "A few years back," he said, "a woman who had fled Poland wrote a letter and said: 'I love America because people accept me for what I am. They don't question my ancestry, my faith, my political beliefs . . . . I love America because America trusts me.'"

President Reagan was also fond of quoting from a letter he had received from a man who wrote, "You can go to live in Turkey, but you can't become a Turk. You can't go to live in Japan and become Japanese, [and so on for Germany, France, etc.] But . . . Anyone from any corner of the world can come to America and be an American."

So it is particularly sad and a bitter irony that the 19 savages who took the lives of thousands of Americans on September 11 were able to come here because we welcomed them, and trusted them, and allowed them to learn to fly our airplanes and the freedom to travel. And they took these precious gifts and turned them into instruments of hatred and death. How perverse and twisted. How incredibly sick they must have been - that not one of them had a moment of conscience after all that time in this beautiful and free country. Everywhere they looked they saw Americans and immigrants to America, at work and at play exercising the freedoms and opportunities that this country offers unstintingly to everyone, including them. But their hatred was so intense, their malignancy so advanced, that they never, as far as we know, even for a moment, paused to reconsider the despicable, unconscionable and evil acts they planned to inflict on the people they were walking, working and living amongst.

It has, I suppose, always caused some resentment that we believe so passionately and so unquestioningly that freedom, equality, liberty, democracy and the rule of law are concepts and rights that should belong to all people. But how can that be seen as arrogance, as some have called it? I simply cannot accept that. What can possibly be wrong with the aspiration that moved the founders of this country to believe that people are entitled to self-determination, the right to chose their system of government, the right to freedom within an orderly and secure society, and the maximum liberty to pursue happiness and fulfillment? We know that these are enduring values. We can debate nearly everything else, but we don't need to debate that. We know that these principles lift everyone up. And we know that these principles are only questioned by those who would seek to advance their own twisted agendas by withholding freedom, liberty and prosperity from others.

We have now been reminded, in the most horrible way, that there are those who not only hate our principles, but who would dedicate their lives - and surrender their lives - to banish those ideals and the incentives they provide for tyrannized and impoverished people everywhere to do what Americans did in 1776.

We have tragically learned again, in the most unthinkable fashion, that our values and our principles are neither self-executing nor self-sustaining, and that we must sacrifice and fight to maintain what our forebears sacrificed and fought to bequeath to us.

And now the rest of the world is learning again that Americans will not flinch from that fight or tire of it. Americans will fight, they will sacrifice, and they will not give up or leave the job unfinished. This war is for all living Americans. It is for the parents, grandparents and great grandparents that fought and sacrificed to come here. And it is for our children and generations to come. And it is for those who choose to become Americans in the future.

America will not lose this war because we cannot tolerate, we cannot contemplate, we cannot even consider that we will lose what centuries of Americans fought to create, improve and maintain. We cannot, and we will not, betray the people who gave us this glorious heritage. We cannot and will not, dishonor or wash away the memories of those who somehow clawed their way out of poverty, tyranny and persecution to come to this country because it was America, and because they were willing to risk death to become Americans, and to give their children and grandchildren the opportunity and freedom and inspiration that makes this place America. Americans could no longer call themselves Americans if they could walk away from that legacy.

People who write regularly for newspapers and who offer opinions on television, or who send advice to us from other parts of the world, sometimes say that America is too rich, lazy, complacent, frightened, soft and enervated to fight this fight. That we have no stamina, strength, will, patience, or steel. That we will collapse.

They are so wrong. We will prevail for the very reason that we have been attacked. Because we are Americans. Because the values that made us free, make us strong; because the principles that made us prosperous, make us creative, resourceful, innovative, determined and fiercely protective of our freedoms, our liberties and our rights to be individuals and to aspire to whatever we choose to be. Those values and those characteristics will lift us and will defeat the black forces who have assaulted our ideals, our country and our people.

The very qualities that bring immigrants and refugees to this country in the thousands every day, made us vulnerable to the attack of September 11, but those are also the qualities that will make us victorious and unvanquished in the end. These dreadful, despicable people have hurt us, but they can never conquer us.

So let me return to Barbara Olson. So many people loved and admired Barbara. But whether you loved and admired her values, her spunk, her energy, her passion, her courage, her unconquerable spirit, or her incredible warmth, whether you knew it or not, underneath it all, you admired and were captivated by Barbara because she was pretty darn close to being a quintessential American.

Barbara was a Texan, from a family whose ancestors came to this country from Germany. She went to the all-American University of Texas and also a Catholic college, St. Thomas in Houston. She became a professional ballet dancer in San Francisco and New York because of the beauty of dance, the rigor of its discipline, and because you have to be extraordinarily tough and ambitious to do it. And Barbara was extraordinarily tough and ambitious.

But she always wanted to be a lawyer and to be involved in politics. In order to afford law school, she invented a career out of whole cloth in Hollywood because that, she determined, was the fastest way to earn the money she needed. It did not matter in the slightest to Barbara that when she went to Hollywood she knew absolutely nothing about the motion picture and television industry. And, in fact, it really didn't matter because, as she later explained to the unwitting producer who gave her her first job, she was a fast-learner.

And, of course, she succeeded. She turned down the last job she was offered in Hollywood because she had finally earned enough money to go to law school, and they were offering her so much money she did not want to be so tempted to forego her dream to be a lawyer.

She went to Cardozo Law School at Yeshiva University in New York, not necessarily the obvious choice for a blond Catholic girl from Texas. She was even told that she would never fit in, and that she would be miserable. But the people who told her that really did not know Barbara. She thrived at Cardozo as she had thrived at St. Thomas and in the ballet and in Hollywood. She loved the people, the classes, the professors, and she was a huge success, popping up for one reason or another with embarrassing frequency on the cover of Jewish Weekly.

Barbara created a Federalist Society chapter at Cardozo because she believed in the Society's principles - and it only served to goad her on that almost no one at Cardozo shared her political views. In her third year of law school, she somehow managed to finesse herself into an internship with the Office of Legal Counsel at the Department of Justice in Washington. And, as a very brassy and gusty intern, she managed to be the only employee of the government of the United States willing, feisty and fearless enough to personally serve the papers on the PLO mission to the United Nations in New York announcing that it was being expelled from this country — because they were terrorists. How Barbara loved to tell that story to her friends at Cardozo!

She turned down jobs with the finest law firms in new York to come to Washington where, it seems, she was always destined ultimately to be. In rapid succession, she succeeded as a lawyer in private practice, as a hot and very successful federal prosecutor, as Deputy General Counsel to the House of Representatives, and as a top Congressional investigator, television personality and lobbyist.

It was typically Barbara that when Al Regnery suggested that she write a book about Hillary Rodham Clinton, she literally jumped at the chance. She told me at the time that she wasn't sure that she was a writer, but a friend of ours told her that she didn't have to be a writer to be an author. So, with her legendary energy and limitless self-confidence, she poured herself into the book, finished it in nine months and, against seemingly insurmountable odds, without any previous experience with serious writing, climbed onto the New York Times best seller list during the heaviest competitive time of the year, and stayed there for nine weeks. Ten days ago, her second book, written in about six months and finished just days before her death, opened at number two on the New York Times bestseller list, ahead of Bill O'Reilly, Jack Welch and Tiger Woods. Not bad.

Barbara was everywhere in Washington. A witness for Clarence Thomas at his confirmation, a co-founder of the Independent Women's Forum, hosting Federalist Society members from all over the country in her home, at the epi-center of the travel office and filegate investigations, and the China campaign contributions investigation, the second-most invited guest on "Larry King Live," appearing on MSNBC, FOX, "Meet the Press," "Cross-Fire," "Geraldo," "Politically Incorrect," you name it. Ready to talk about any subject, ready to face down any adversary. She always had an opinion. And she always had that smile.

I could tell you Barbara stories for hours, and I think that you would be glad to listen. But, in short, Barbara partook of everything life gave her. She saw no limits in the people around her and she accepted no limits on what she could accomplish. She could be charming, tough, indefatigable, ferocious and lovable. And all those things at once.

Barbara was Barbara because America, unlike anyplace in the world, gave her the space, freedom, oxygen, encouragement and inspiration to be whatever she wanted to be. Is there any other place on earth where someone could do all these things in forty-five years?

So, sadly, and ironically, Barbara may have been the perfect victim for these wretched, twisted, hateful people. Because she was so thoroughly and hugely an American. And such a symbol of America's values, ideals, and robust ambition. But she died as she lived. Fighting, believing in herself, and determined to succeed. And, if she was the perfect victim, she is also a perfect symbol of what we are fighting for now and for why we will prevail.

I know, and she knows, that her government and the people of America will win this war, however long it takes, whatever we have to do. We will never, ever forget or flinch. We will prevail for Barbara and all the other Americans we lost on September 11. And for the American spirit for which they stood and their lives embodied. And, most of all, we will defeat these terrorists because Barbara and those other American casualties of September 11, and our forebears, and our children, would never forgive us if we did not.

BUSH V. GORE

A ONE YEAR RETROSPECTIVE

Mr. Phil Beck, *Bartlit Beck and Bush Legal Team*
Mr. Ronald Klain, *O'Melveny and Myers and Gore Legal Team*
Mr. Joseph Smith, *Bartlit Beck (moderator)*

DEAN REUTER: Good afternoon, ladies and gentlemen. Thank you. Good afternoon and welcome. It is great to see so many of you here for this program.

Almost a year ago to this day, those of you who were not in Florida may well have been sitting in this very room listening to Governor Frank Keating offer some observations about the many events that were unfolding in Tallahassee and Miami Dade County at that time. He had just returned from the center of legal and political activity which was attracting unprecedented, but I think, well-deserved national attention.

This afternoon, we have the benefit of being able to sit back and take in a retrospective of those events some twelve months ago. Such a retrospective is worth having, in our view, because *Bush v. Gore* and its surrounding events were a historic moment in the life of American law, and a fitting testimony to the vitality of the rule of law in this country which, in my view, has rightly made us the envy of the world.

Few nation states in human history have survived such deep disputes over the succession of power. We did it. Not without a ripple or without a bruise, but always without a doubt that the values of this great country would endure and see us into and through the 21st Century; that we would not just survive, but continue to thrive.

To introduce our speaker and preside over the exchange, I would like to call upon Joseph Smith, who offered us the idea of sponsoring this afternoon's program. He serves as a partner in the Denver office of the law firm of Bartlit Beck, where he maintains a general and complex litigation practice.

Thanks, Joe, for being with us this afternoon.

MR. SMITH: Thank you, Dean. It is a pleasure to be here, a pleasure to introduce our panel today and to moderate this panel, and especially to do so before basically the same group that Senator Lieberman described as the ugly angry Republican mob. It is good to see everyone once again in full riot gear. You look nice.

Today's panel should be interesting, not just because our participants were on the front lines for Bush versus Gore, not just because they were involved from different sides, but also because they have different personal perspectives. Phil Beck is a trial lawyer and Ron Klain has had a distinguished career in government and is more of an appellate lawyer. By way of more detailed introductions, Phil Beck, after law school at Boston University, clerked for the D.C. Circuit. He then became a trial lawyer at Kirkland & Ellis, where he was for 15 years before founding our firm, Bartlit Beck, in 1993. In 2000, of course, he served as trial counsel for George W. Bush, and more recently, as all of you know, he has been chosen by the Department of Justice to replace David Boise as trial counsel in the Microsoft case. Funny how those things happen.

Ron Klain, after law school, clerked two terms for Justice Byron White. He then served in a series of positions for Democrats in Congress, and then in the Clinton Administration he was chief of staff and counselor to Attorney General Janet Reno, chief of staff and counselor to Vice President Gore, and assistant to President Clinton. He was general counsel of the Gore-Lieberman Recount Committee, and now he is a partner at O'Melveny & Myers here in Washington, D.C.

So thank you very much, all of you, for being here, and I will first ask Phil to make some remarks.

MR. BECK: Thank you.

Most of the discussion of the 2000 election litigation has focused, of course, on the Florida Supreme Court and the United States Supreme Court decisions. I thought for a couple reasons I would focus on something else, and that is what happened at the trial.

One is because that is where I was involved, and the other is because as I thought about this group, I thought there are probably 2- or 300 people who are better equipped than I am to discuss the Supreme Court issues.

But I did have a worm's eye view of what happened in Florida during the campaign and the litigation over the campaign, and it did have very important consequences for how the case eventually got litigated in the Florida and United States Supreme Court. So I thought I would talk about one main issue that had interesting fallout as we went forward, and that is the role of expert testimony in the litigation in Tallahassee.

I think almost everybody in this room probably shares my view that a principal constituency of the Democratic party is now the plaintiff's trial bar, and probably also you share my view that one of the plagues on the legal system over the last ten or 15 years has been the increasing use of junk science in litigation.

What I found down in Florida was a fascinating irony that I thought generally went unremarked upon, and that was that the death rattle of the Gore campaign was a piece of litigation in which their case in chief consisted entirely of junk science, and it was my happy duty to cross-examine the experts that they called.

The case morphed over time as it got to the appellate level, but as it started out in the courtroom in Tallahassee, the Democrats had made a technical choice that they were going to ask for a recount only of four counties, all four heavily Democratic, and not ask for a state-wide recount.

So they had to come up with a rationale. Ron can correct me if I am wrong, but their real rationale, I assume, was that they thought that those four counties, if they could get a recount going there because they were heavily Democratic, would put them ahead, and then momentum would be on their side and there would be tremendous political pressure on the Bush team to concede.

But they needed a legal and factual rationale for selecting those four counties to limit the recount, and the rationale that they came up with was that in these four counties, there was in use these punch-card voting machines, charmingly called the Vote-a-Matics, and they said there is something wrong with these machines. What they said was wrong with the machines is that somehow or another, even though people consistently were able to record votes for every other race on the ballot, they were not able to record their votes for president.

So the theory underlying the case for why there should be recounts in these four counties was that, yes, people were able to vote for congressmen and dog-catchers and all kinds of other races without apparent difficulty, they were able to punch through those chads, but when it came to that first column, Column A on the far left-hand side, where Al Gore's name and George Bush's name were, they were somehow unable to punch through, and that there were large numbers who were only able to leave dimples or to dislodge one of the four corners of the chad.

So this was the theory, and their theory was sponsored at trial by two expert witnesses. One was named Kimbel Brace. He was a demographer by trade who had done a lot of work over the years for the Democratic party in reapportionment disputes. And because he had been around the country involved in a lot of different elections, he was willing to hold himself out as an expert in the mechanics of the punch-card voting machine.

They really had a two-part approach to their theory. One was the mechanics of what goes wrong with these machines; and the second part was a statistical analysis to back up the theory that there must be something going wrong.

So Mr. Brace said, here's what's wrong with the machines. First of all, these machines are used for a lot of different kinds of elections, school board, union elections, that sort of thing, and there is always somebody in that first column that you're voting for, where as there might not be as many races in the subsequent columns. So over many years, when people push the stylus in the first column, the rubber gets hard from the stylus impacting it over and over and over again, and so therefore it's understandable, so said Mr. Brace, that people would be able to punch through in Rows B, C, D, E, F and G, but not be able to punch through in Row A because the rubber got hard, and that was his theory.

We actually called a polymer chemist, and I met with this polymer chemist for a day or so before the trial started, and he said this was an utter fabrication, complete nonsense.

So really the cross-examination of Mr. Brace on this score was directed toward establishing that he did not know things such as whether there are different kinds of rubber, whether the rubber used in the voting machine was natural or synthetic rubber, whether the kind of rubber used in the voting machine gets harder or softer with age, gets harder or softer with heat, gets harder or softer with being impacted by a stylus. So this theory was something somebody cooked up, not Mr. Brace, but he was willing to sign onto it, and it had no substance at all. His fallback theory was my personal favorite, and that was the chad build-up theory, and this theory was that as people voted for Al Gore in particular, the chads would fall down and start forming a little pile, and eventually the pile would get all the way up to where the ballot rested and people would be unable to push through the chads and they could only leave a dimple.

I asked him how many chads it would take to make such a pile, and he didn't have any idea. The answer is thousands, and these machines are only used by hundreds of people per election.

But then also, remember his theory was that this phenomenon occurs in Column A but not in Columns B, C, D, E, F and G. And so I said, well, have you ever actually looked at the ballot? And he said, I'm not sure that I have. And so we looked at it and there was one race in Column A, and that was for president. So you're only going to be dislodging one chad in Column A unless you're from Palm Beach and are confused.

In which case some number of people are going to dislodge two. But it was very funny because -- and I thought it proved that God is a Republican because as you went down the ballot, sure enough, in Column 2, there were two races, and people did not vote any more frequently for president than they did any other races, so that in Column 2, you would have two chads, so I said, well, then you would expect more chad build-up in Column 2 than Column 1, and he said maybe so.

Then we moved to Column 3, and sure enough, there were three races in Column 3, so there would be three chads; and there were four races in Column 4. And so I said, well, then this chad build-up, you would expect it to work the opposite of what your theory is, that people would have a harder time voting in the middle of the ballot than on the end. And

he said, "Well, what you're overlooking, Mr. Beck, is that, as I said before, these machines are used in many elections and in school board and union elections, there are always somebody in the first column and they don't clean these machines out all that often, so over many years and many different elections, there is going to be more chad build-up under Column A."

That's when I had a lot of fun because I asked him whether, when they picked up these machines at the end of the elections, they carefully walk them to the warehouse so as not to allow the little piles of chad to fall down or whether, in fact, they picked them up and they put them in the suitcase and they bounced along and they put them on the truck and all the chads would fall to the bottom. And he reluctantly agreed that that, in fact, is how they did it. So there was no basis on the mechanical side for their theory of chad build-up or hard rubber.

But then they called Professor Hingardner, who is a professor at Yale, and he was a statistician, and he came to give a statistical analysis where his basic story was, I don't know how or why this happens, but there's something wrong with Column A where we are not recording the votes in Column A. His theory was, he looked at an off-year election from 1998 and what he found is that in Palm Beach County where they used the Vote-a-Matic machines, more people voted for governor than for senate, whereas in the rest of the state, more people voted for senator than for governor. So he said this is a statistical anomaly and there is no reason why the people in Palm Beach County should be any more interested in the governor race than the senate race, and so what could account for this?

Then in his sworn affidavit, he said a closer examination of the ballot reveals the explanation, and that is the senate race is in Column 1 and the governor race is in Column 2, so there must be something wrong with Column 1; that's what's revealed by a closer examination of the ballot.

In fact, he never looked at the ballot. We sent somebody down to get the ballot and what we found out, to Professor Hingardner's surprise, was that both the senate and the governor's race were in Column 1.

So the statistical case evaporated as well.

I want to divert and tell a story. I was just talking with Judge Kozinski. One of his former clerks is a younger partner of mine who was down there helping along with another one of our younger partners, and we had an agreement with the Gore team that we would depose one another's experts the night before the trial was to start, but we had some kind of time limit -- I don't remember what it was; like 45 minutes -- for each expert deposition.

So I said to Sean Gallagher and another one of our young partners, Shawn Fagan, "Why don't you guys take the deposition?" So this was exciting because they are going to take the depositions of the experts in the presidential election case. And I said, "there's only one thing: I already know that Professor Hingardner has screwed it all up on this ballot story, and I already know that Kimbel Brace has it all wrong about rubber and chad build-up, and my only fear is that through this questioning, you will alert the other side to what we have on the two experts. So your job is to take the worst depositions ever taken in the history of America."

And these two guys, they are both former Supreme Court clerks and Type A personalities, and so they come back and it's a great competition to see whose deposition was worse.

Sean Gallagher said, "Well, I took Mr. Brace's deposition", and Shawn Fagan's saying, "Yeah, yeah", and Sean Gallagher said, "I spent all 45 minutes asking him about the reapportionment cases from 1990."

And so then the other Shawn says, "I took Professor Hingardner's deposition and I spent all 45 minutes asking him what textbooks he used in teaching his classes at Yale."

So in the spirit of the times, we declared it a dead heat.

It was interesting later, though, I had dinner with David Boise in the midst of the trial. Everybody would go for dinner and drinks at the same place, and David and I were talking and he said, "Gee, you did a nice job." And I said, "Did you know what was coming?" And he did not do the examination himself of the statistician, and he said, "No, but I knew that we were going to have problems." And I said "why?" And he said, "because when I asked the guy who did do the examination what is Beck going to do on cross, he said, 'I'm not sure, I think he's going to ask him about the textbooks that he used at Yale.'"

So David said, "No, he's not going to do that."

In any event, at the end of the day, because of the nature of the case that the Gore team chose to put on, we were able to show that there simply was no scientific basis for their theory that was the initial rationale for selecting those four counties instead of asking for a state-wide recount.

A consequence of that was that when they got to the Florida Supreme Court, which I believe was trying to dictate the outcome of the election, the Florida Supreme Court had to improvise Plan B, because the four-county recount approach just had no substance to it at all. That's when they found themselves ordering a recount that no one had ever asked for, a state-wide recount, but only of the undervotes and not of the overvotes, and putting in a lock box for Al Gore the undervotes that had already been counted in the four Democratic counties and refusing to have a standard to evaluate the ballots that would apply across the state, and even refusing to have a mechanism in place so that there could be time for judicial review of the results from the different canvassing boards.

Because they had to improvise that recount procedure, then I believe the United States Supreme Court not only acted properly, but really had no choice but to put a stop to what was an absolutely crazy procedure that was going on

down there in Florida.

So as I said, others in this room can do a much better job than I describing the doctrinal bases for the Supreme Court decision. I kept thinking, as I was watching what was going on in Florida, there must be someone in Washington looking at this and saying, "We have to stop the madness." I always thought that was the fundamental basis of the decision, and I was pleased, as I'm sure most of you were, that they did come to that result.

Thank you very much.

MR. KLAIN: Well, I recognize I start off with a little lighter support in the room than Phil has.

But I thought I would have a different perspective, not just because I come at it differently, but, as Joe mentioned, because my role in the case was more on the appellate side than on the trial side. But for me, I think that the whole experience in terms of reflecting on it one year later is an amazing experience and a reminder once again of how when you are involved in history, sometimes you don't really appreciate how historic the events are as they are unfolding.

The epitome of that was on the night of December 12th when the Supreme Court decision came down, I'm sure like many of you, obviously we were very anxious to get it and we were having trouble, in Tallahassee getting a hold of the Supreme Court's opinion, and the Court's clerk had called and had described this very divided lineup. It really wasn't clear to us what it meant.

So finally, someone got a hold of the copy of the opinion and started faxing it, putting it over the fax line page by page, and I would get it and I had Vice President Gore on the phone and I would read through each page and summarize what it meant and so on, so forth, and finally got near the end of the opinion and it was pretty clear what it meant and we ended the call. And, as everyone knows, the next day, the Vice President conceded.

So a couple weeks later, I was doing an interview for one of these many books that had come out about the election and the reporter doing this interview asked me about that night and went through the story and he said, "Well, when you hit the moment when you got to that seminal decisive part of the opinion, what did you say to Vice President Gore?"

I was thinking in this interview, well, you know, this is kind of my moment in history here. I said, "Well, I don't remember exactly, but I think what I said was, 'Mr. Vice President, I'm afraid our quest is at an end.'" And the reporter said, "Well, you know, that's funny, Ron, because there was someone in the room with you as you were doing it, and he says your quote was, 'Damn, I think we're hosed.'"

Somehow, I don't think that's going into Bartlett's any time soon. Well, I'm not going to attempt to engage Phil on the question of the trial and the evidence at the trial. As I said, my role was more on the appellate side of the case.

From time to time, I would walk into this large room where our trial team was meeting and going over how we were going to handle the case. I would take a break from writing briefs and whatnot, and I would walk into the room and listen to this incredible cacophony of witnesses being deposed and experts and this and that and the other, and finally, at the end of one of these things, I pulled David Boise aside, who was running our trial team, and said, "David, What is our trial strategy?" And he looked at me and he said, "Lose fast."

Okay. And as Phil noted, they frustrated us in even doing that, unfortunately. It took us a whole damn week to lose in Judge Saul's courtroom, try as we might.

I do want to talk a little bit about the appellate issues, legal issues raised by *Bush v. Gore.* Like Phil, I am humbled by the fact that there are probably 200 or 300 people in the room who could do a more articulate job than I, but unlike Phil, there would probably only be one or two who would share my point of view.

So I will take a stab at it.

On the main issues in *Bush v. Gore*, I think partisans on both sides have done the case an injustice because the main issues in the case were actually extremely, extremely close, and by that I mean the Article 2 issue and the equal protection issue. I think they were very close, very close calls, and I think it is no accident that of the 16 appellate judges who heard the case, eight sided with us and eight sided with Governor Bush. Unfortunately, Phil got the better alignment of the judges. But nonetheless, I think those issues were very, very close issues.

What from my perspective still is rankling about the case and still difficult about the case and the Supreme Court's handling of the case is not their ruling on the Equal Protection Clause, in my opinion, but was three aspects of the way the Court handled the case that I think were unfortunate.

The first, from my perspective, was the decision by the Court to stay the counting of votes in Florida. I understand, obviously, I am in a distinct minority on this in this room. But I think what you have to keep in mind is that at the time the Court acted on that Saturday to stay the vote count, the Eleventh Circuit had already stayed Kathy Harris from changing the certified vote total in Florida. So there could be no readjustment of the parties' legal rights without any further judicial proceeding to consider the legality of the vote count. So the only thing at stake in the counting of votes at that moment was the perception of which candidate was ahead or behind. I found it then and still find it hard to believe that that possible shift in perception could have created the kind of irreparable harm that would justify a stay here.

Secondly was the Court's decision in the case itself to determine that December 12th was the deadline under Florida law to stop the tabulation of votes. I always found that troubling because that was classically a question of

Florida law, and let's be fair here, I thought both sides, frankly, were full of a lot of hot air on the federalism issues being flung back and forth.

I found it ironic that a lot of progressives were running around arguing that the selection of the president of the United States was essentially a matter of state law and a lot of conservatives were extolling the virtues of the Federal courts to resolve civil rights disputes.

But I think one thing that is unquestionably a matter of federalism is that Florida law is for the Florida courts to say and the decision by the U.S. Supreme Court that December 12th was the deadline here I found ironic. It was especially ironic because when the case actually came back from the U.S. Supreme Court on the 13th of December in a little noticed action, the Florida Supreme Court issued a remand decision on the 23rd of December, and in that opinion, Justice Shaw, one of the three justices who actually voted with Governor Bush when the case came through the Florida Supreme Court, wrote a concurring opinion saying it was his view that December 12th was not the deadline under Florida law. So what the Florida Supreme Court would have done with the deadline question if the Court had remanded it will always be an unknown.

I think that the Court's opinion, on equal protection grounds was justifiable. But the Court did itself a disservice by limiting its opinion to these facts and these cases.

Clearly one of the most important elements of judicial restraint and of our system of judging is that the validity and the wisdom of judicial decisions are tested by their application and precedent and in different circumstances, and to limit *Bush v. Gore* to the case itself, I think the Court did itself no favor at all.

As for the equal protection ruling, as I said before, I think it was a very, very close call, and maybe in the questions and answers, we can get into that. I think that there was no question of inequity in the kind of recount that was going in Florida that Saturday. It was not a fair kind of count, it wasn't a count that either side had asked for in the litigation, and I think the only way it could be justified was as a remedy of other inequities that had happened on election night.

You know, Phil made fun of our punch-card rubber theory, which I will concede certainly had some problems with it, but the flipside was that, in fact, voters in Palm Beach County and Broward County were four times less likely to have recorded a preference for president than voters in adjacent counties, and I don't really believe that there is anything about those counties that suggests those voters were four times less likely to have had a preference for president, be that Vice President Gore or Governor Bush.

In the end, let me just close by saying obviously it was disappointing as a political partisan and as a lawyer to lose a case of that significance and to see my candidate lose and to see my client lose. People often ask me, what was the greatest lesson I learned in Florida? I learned many fantastic lessons. I practiced with an amazing group of lawyers and we were opposed by an incredibly, incredibly talented team. I think both sides acted professionally and responsibly and represented their clients extremely well. But the greatest lesson I learned actually came from a collateral piece of litigation that I am pleased to say that we beat the vaunted Bartlit Beck team on, and that came the Saturday that the vote counting was stopped, and Phil knows where this story is headed. The Saturday the vote counting was stopped and David Boise and I did a press conference afterwards and we talked about some aspects of the vote counting, and I relayed my view that based on the data we had, we had gained 58 votes in the vote count.

Near the end of this press conference, a reporter stood up and said, "Well, Mr. Klain, haven't you just violated the section of Judge Lewis' order that said there shall be no release of partial vote counts during this tallying." The truth is, having spent the night working on appellate briefs, I hadn't been in Judge Lewis' court when the trial team had been there and this order had been formulated and I was unaware of it, and so I hurumph'd some answer and walked out of the room and went back to work on all the briefs we had to file the next day. The briefs and the brief in the Eleventh Circuit all had to be done in twelve hours.

About an hour later, the phone rang and it was Judge Lewis' clerk saying, "You know, there is going to be a contempt of court proceeding involving you in Judge Lewis' courtroom in 15 minutes." Well, this is kind of bad, you know.

Well, get me this order, I've got to see this order. So I read the order. I thought that the fair reading of the order was that the limitation went to the county canvassing boards not to release the partial totals, not to the lawyers, the parties, so I thought I was in no legal jeopardy. But still, this is kind of embarrassing.

So I sent off some folks to go deal with Judge Lewis' courtroom and thought to myself, well, the one good thing about this is, as embarrassing as this is, this is the Saturday that vote counting has been stopped in the presidential election, no one who I know is ever going to hear about this. I had the TV on and the local news in Florida came on and the local news said, you know, one of Gore's lawyers goes on trial this afternoon.

I thought, well, okay, you know, it's local news in Florida. Who is going to hear about that? And two minutes later, my phone rang and it was my mother, and she says, "Your cousin Andrea who lives down in Jacksonville says you're going to jail. And what am I going to do?" I said, "Mom, don't worry, don't worry."

Okay. Well, all right, my mom knows, but at least none of my friends and colleagues in Washington know. And five minutes later, John King was covering the story for CNN, starts to say, "The courthouse in Leon County is the site of a proceeding involving one of Gore's lawyers this afternoon."

Ten minutes later, the phone rings and it's Al Gore and he says, "Well, you know, Ron, Tipper is in the kitchen baking a cake with a file in it; we'll take care of you." I thought, okay, all right, well so now my client knows and my mother knows. But the one thing I knew for sure was it was a Saturday afternoon and my mentor, my senior partner, Warren Christopher, the chairman of my firm, O'Melveny & Myers, he doesn't watch CNN on Saturday, the only thing he watches is the network news. I was confident that, of course, with all that had gone on in the world that day, the network news wouldn't cover it.

I turned on the TV, and sure enough, network news, Nora Campbell: I'm standing outside the Leon County courthouse where the Ron Klain contempt trial has just concluded.

The phone rings and it's, of course, Secretary Christopher. This is great. We're on the verge of losing this case, I'm going to have lost this huge case, and I'm going to get fired, because I was pretty convinced that in the distinguished 135-year history of O'Melveny & Myers, no O'Melveny partner had ever been sent to the clink in Leon County.

It's not the kind of thing that a distinguished lawyer like Warren Christopher would think that highly of.

So Chris said, "I hear you've had a little trouble down there, Ron."

I said, "Well, that's right, sir." He said, "You didn't learn the first lesson of law practice?" I said, "Zealous advocacy of your client, is that it?" He said, "No, it's if someone is going to go to jail, make sure it's the client, not the lawyer."

Thank you very much.

MR. SMITH: There are two microphones if anyone wants to stand up and ask a question. I will ask the first. I was a little surprised no one made any remarks about the media recount that has just recently concluded with, of course, the shocking news that George W. Bush won in Florida.

MR. KLAIN: Or could have lost.

MR. SMITH: Or could have lost. I was going to ask Ron if there was, from Gore partisans, any second-guessing or Monday quarterbacking about having not requested a recount of the overvotes, which I guess would have been the one avenue for Gore. Then if either anyone wants to comment on what the Wall Street Journal has described as the missing ballots issue. I think that's an interesting one as well.

MR. KLAIN: Well, let's be clear. We never asked for an undervote-only count. That was a construct created by the Florida Supreme Court and, as Phil said, not at the suggestion of either party. In the counties where we asked for recounts, we asked for both undervotes and overvotes to be counted, and I was always troubled by the fact that an undervote-only count was going to be inherently inaccurate and limited.

We ended up defending the Florida Supreme Court's decision to order that kind of count before the U.S. Supreme Court because at the time we were up on appeal. And that was really the only place we could be; but it certainly wasn't our sense of the best way to do this.

Vice President Gore proposedon the first Wednesday, the first full week after the election,on national television that both sides drop all their lawsuits and there be a complete state-wide recount of every single ballot in the state. I still believe that would have been the best way to resolve this dispute and, I think that would have put to rest a lot of the controversy over which ballots got counted and why they got counted and how they got counted.

But absent that, we did the best we could with the very limited legal rights we had under Florida law. Florida law at the time was a Swiss cheese on these issues and we got the counts we could.

The last point I will make is I think the media recount proves very, very little in this sense. Much to Phil's chagrin and somewhat to ours, too, the way those counts were going on Saturday was very haphazard. Some counties were, in fact, counting overvotes, arguably contrary to the decision of the Florida Supreme Court but perhaps not. I think you could actually read that opinion as being somewhat ambiguous on what they were supposed to count.

So to go back and to suggest that now you can know what would have happened had that count proceeded, you just can not. In my view, it's like stopping a football game in the third quarter and then coming back three months later and saying, okay, now we'll put the same two teams on the field and see what would have happened if the game had played the fourth quarter. You just don't know that it's going to be the same.

The bottom line was the media sorted through 170,000 ballots, and on one count Gore won by 200, and on one count Bush won by 400, and that is well within the margin of error of any of these tabulations.

MR. BECK: I agree with that last point emphatically. The case was always, in my mind, too close to call and no one could know with absolute certainty who had more votes. All you could do was apply the law that provided for mechanisms for resolving this. Our problem down there was that the law as had been enacted by the Florida legislature had mechanisms that, when they were applied, led to a victory for then-Governor Bush and the Florida Supreme Court kept trying to rewrite those provisions.

But I do think that when it comes to the actual counting of the ballots, I was remarking over lunch that the first day I got down there, I met with our statistician and I asked him, who really won. And he said, "That's a silly question. All you can do is say at what point do we accept the count and what basis, because the margin for error under any mechanism for counting exceeded the margin of victory, and that's just a fact of life and people have to accept that." And I think that's what was confirmed by the media recount.

It was interesting to me that having invested a million dollars and eleven months on this project, the media felt like they had to give tallies that showed Bush winning under certain scenarios and Gore winning under other scenarios, and it was never until you got off the first page and got halfway through the reporting on the inside page that they would finally have a quote from the fellow from the organization that actually conducted the counting where he said none of these numbers mean anything.

MR. BECK: And that's what I think the teaching of it was.

PANELIST: You say that no one could say with actual certainty who won the election. Of course, the news media did three times within 24 hours.

MR. BECK: Yes.

PANELIST: And each time was reversing the earlier call. And now with the recount, we can say each prediction was correct.

MR. SMITH: Yes, sir. Could you identify yourself?

AUDIENCE PARTICIPANT: Yes. My name is Frank Shepherd.

I would like to follow up on something that Mr. Klain said. My understanding, Mr. Klain, is that you were most disappointed that the December 12th deadline was established and held in place. I have a recollection during the first Supreme Court argument of Charlie Wells, Chief Justice Wells, trying to figure out how fast he had to get an opinion out, asked what is the deadline for counting votes and Mr. Boise said, December 12th, if I recall correctly.

I guess what I'm wondering is doesn't that kind of bind the client and the appellate lawyer and were you disappointed in Mr. Boise?

MR. KLAIN: Your recollection is correct and to go back to that time, that first argument was on the 20th of November, I think, which was twelve days after election day, and David was asked if this proceeding, went on until December 12th, was that enough time, which at that point in time was 22 more days. After having been done there for twelve days with the country kind of on the edge of its seat, it seemed inconceivable even that it would go on 22 more days.

You know, I thought the answer was a good answer given at oral argument in that proceeding, and I thought it was the right answer under the circumstances, and, indeed, maybe, it very well would have been the decision of the Florida Supreme Court to hold us to that on remand.

My point was that the Court, with the institutional competence to decide what the deadline under Florida law was in that state, whether or not the deadline was set by the statute, by prior precedent, by us waiving our rights to extend it by virtue of the answer he gave in oral argument, whatever basis you want to use, the Court with the institutional competence to reach that conclusion was the Florida Supreme Court, not the U.S. Supreme Court.

MR. SMITH: Yes, sir.

AUDIENCE PARTICIPANT: My name is David Levine, and I would like to not leave unchallenged the claim that the Supreme Court ruled five to four in favor of Bush. At best, they could claim they ruled five, two and two, and if you look at the difficulties if not impossibilities of the Florida court correcting the cited defects, ultimately it was realistically seven-two in favor of Bush.

MR. KLAIN: You know, the only thing I will add to that is, as I said in my remarks, I thought the equal protection in the case was, in fact, very close and, indeed, was a seven to two vote. But certainly on what was the disposition of the case, it was five to four and the two Justices who voted with the majority on equal protection and against the remedy styled their own opinions as dissents, not as concurrences.

MR. SMITH: Professor Volokh.

AUDIENCE PARTICIPANT: So let's say four years from now, three years from now, there will be another election and the

results can be pretty much the same. There is going to be a close poll somewhere. It doesn't seem that likely -- but it certainly could happen. So now what we've got is a precedent that when that happens, we just Sue.

So what, if anything, can be done to try to make sure the next time this happens, it is going to be less agonizing for the country, or does anything need to be done?

PANELIST: What do we do? The machines are not going to become foolproof. I can assure you that. In fact, just as an aside, I read that there was an election since the presidential election in Palm Beach and the rate of undervoting there was close to zero, and the reason was because if there is one machine in the world that everybody now understands how to use when voting, it's the Vote-a-Matic.

PANELIST: So, of course, the one machine that everybody can operate perfectly because they've been educated to death on, they are now being sold on E-bay as souvenirs -- so that they can switch to another method which has its own problems, as Ron knows.

I don't know that there is any answer at all to that. I think it was unfortunate that this got into litigation, but I just can't imagine that in today's world, that the losing side is going to resist the temptation to invoke whatever judicial remedies they may think they have.

I was hopeful, actually, soon after the litigation ended, that there would be at least a movement in the states to take a look at their election codes and to revise them to provide greater clarity. I think that is one practical step that could be taken, but it hasn't happened at all.

I won't spend a lot of time on it, but those of us who were down there realized that one of the big problems was that the election code in Florida was not written with a presidential election in mind and that none of the remedies made any sense in terms of the presidential elections, and so they had to make it up as they went along. I think that that's true throughout the country, and I think that unfortunately, state legislatures have just failed to reexamine their own election laws to make the rules clearer and give better guidance and to avoid the kind of fiasco we had down in Florida.

PANELIST: I would like to add to that. It was an unpleasant, unfortunate event, but I think good is coming out of it. I think greater care is being taken to see how ballots are drawn up and how they are counted. The media is certainly taking steps to see they don't make the mistakes, the egregious mistakes they made the last time around.

I would also like to point out what an extraordinary election it was. I mean, I think it's unlikely, it's, of course, possible, but it's unlikely we are going to see anything like that again in our lifetime. It wasn't just the presidency; the Senate split 50 to 50; so many races. The country was a 50/50 country, it seemed. It was just very unusual.

MR. SMITH: Yes, sir.

AUDIENCE PARTICIPANT: Nelson Lund from George Mason Law School.

I don't have time to take issue with all three of Ron Klain's criticisms of the Supreme Court's decision, so I will just take the one that has already been touched on, namely the claim that the U.S. Supreme Court mistakenly decided a question of Florida law with respect to the deadline.

The Supreme Court accurately reported that on December 11th, the Florida Supreme Court had said that December 12th was the deadline, and the Court did not remand with instructions to dismiss the case; therefore, it seems to me the Florida Supreme Court was legally permitted to decide afterwards that the U.S. Supreme Court had misinterpreted its December 11th opinion or even overrule its December 11th opinion.

They weren't given the chance to do that because the Gore team didn't ask them to, but is there anything actually in the opinion, in your view, that precluded them from doing that if they had been asked to do it?

MR. KLAIN: Nelson, I agree that the opinion did not preclude the possibility that the Florida Supreme Court could have had a remand proceeding and could have determined that the Supreme Court's conclusion in its opinion that the December 12th deadline was wrong. I absolutely agree with you that that possibility was open, and, in fact, on the night of December 12th, a number of us on the Gore team stayed up all night and wrote just such a brief inviting the Florida Supreme Court to do just that.

I think as a practical matter, though, in this context, our view was that the Florida Supreme Court had gotten, you know, two increasingly intense candygrams from the U.S. Supreme Court and the second one seemed to have the word "stop" written on it in really big letters. It was our view that the Florida Supreme Court, which had divided four-three the past time around, was really not that interested in seeing us there one more time.

So I take your point that as a legal matter, it was open to the Florida Supreme Court to write an opinion that said, "we know the Supreme Court said December 12th was the deadline, we know everyone in America thinks this is over now, but in fact, December 16th is the deadline and we're going to start the counting again." You know, it just seemed like the

Supreme Court was sending a very strong signal not to do that.

PANELIST: I actually thought there was another issue lurking in there. I thought there was an Article 1 issue lurking in there if the Florida Supreme Court had attempted to do that. I think that at some point, it becomes an issue of Federal law on what is it that the Florida legislature decided in terms of specifying the manner in which electors will be appointed, and so we would loop back to that same Article 1 issue that I thought all along doctrinally was the strongest ground in the first place. But if they had interpreted Florida law to say that it was December 12th and then the recount was stayed and the Florida Supreme Court came back and said, "We've changed our minds, the legislature did not adopt December 12th as a drop-dead date and, in fact, it's December 18th," I think that would have put in high relief the Article 1 issue about the extent to which the Florida Supreme Court had the right to keep reinterpreting the statute in ways that were fundamentally inconsistent with what the legislature had in mind.

MR. KLAIN: Could I just say one more thing very quickly? I think there are a number of law professors, Professor Lund and others in the room. What this case always raised to me at a very abstract level was the impossibility of crafting neutral rules once a dispute is underway.

You know, something Phil and I, I think, absolutely agree on was there simply were no rules in Florida for this sort of dispute. The election law was written unquestionably with county elections in mind and a set of procedures designed to resolve at the county level with an indefinite period of time the ability to resolve an election dispute. The last election dispute they had in Florida went on until March. In March, they removed the mayor of Miami, you know, six months after the guy had been in office, and we didn't really see that as a viable option in this case.

There was just no process. So both sides were struggling with the question of how can we draft rules for a dispute that has no preexisting rules? And I talked with Phil at lunch. You know, as much Phil had the experience with his statistician, every day I was in Florida. I would get an e-mail from a political science professor or statistician that would say, "You stupid lawyers think someone won. When will you recognize that statistically, this is a tie and why don't you propose to just split the electoral votes with Governor Bush?" Well, there are 25 electoral votes in Florida; we needed four to win, they needed 21. You know, I was for the split any time.

That's just the kind of rule that you might be able to write *ex ante*, but you certainly aren't going to write, you know, on the 1st of December, and that, I think, was the fundamental conceptual problem here.

MR. SMITH: Yes, sir.

AUDIENCE PARTICIPANT: This is a question primarily for Mr. Klain. This is Todd Zywicki, George Mason Law School.

Even if Gore had won the recount, I don't understand how he could have won the election after Governor Jeb Bush had sent the certificate of ascertainment giving the electoral votes initially to Bush. As far as I could tell, what would have happened is, at best, there would have been a fight over which slate would have been recognized in Congress. In the event of a stalemate between the House and Senate, the state would decide, in which case my sense is that as soon as the certificate of ascertainment was given to George Bush, it was checkmate at that point and that there were a huge number of insurmountable hurdles that Vice President Gore would have had to overcome before he could have actually won the election even if he won the recount.

MR. SMITH: Ron, what was the Gore end game?

MR. KLAIN: I think the Gore end game was fairly simple. I think it was always our view that if there was a recount in Florida that was determined to be lawful, consistent with the Constitution and showed that Al Gore had gotten more votes, that we really couldn't conceive that someone would take office contrary to that.

Whether it was through Governor Bush withdrawing or through a judicial proceeding that ordered a retrieval of the certificates of ascertainments and rival certificates being issued, you know, I just didn't -- I never believed that either candidate, notwithstanding the machinations in the Florida legislature and everything else that was going on there, was prepared to take office contrary to the outcome of a recount that was determined to be legally valid. I just don't think that would have happened.

MR. SMITH: Anyone who doubts that might think of Senator Carnahan's election, which was procedurally unusual. But consistent with what you're saying.

Yes, sir. Last question.

AUDIENCE PARTICIPANT: I think to most of the public at large, the low point in the entire process had to do with the effort to keep military ballots from being counted, you know, from overseas ballots, that had already been held to be valid or a

consent decree.

Do you think -- I mean, how did that play into your strategy

MR. KLAIN: Well, I think the military ballots has been one of the most controversial aspects of this both ways. Let's be clear. We're not talking just about military ballots, but ballots that came in from overseas from people whether they were military or not, and it was our effort to simply apply what we thought Florida election law was. In fact, the principles we armed our folks with were similar to the principles that the Republican member of the Statewide Board of Canvassing, Jim Smith, had articulated the same day until the politics on this shifted.

There certainly was no effort in the Gore campaign to systematically root out military votes. In fact if you look at the counties where there were heavy concentrations of the military, a much higher percentage of overseas absentee ballots were counted in those counties than in counties that had heavily Democratic people overseas, like the southeastern Florida counties.

In the end, after all the controversy about it, the New York Times ran an investigation where they concluded that far from having lots of legal ballots for military people excluded, there were hundreds of arguably illegal ballots that were included. These were supposed to be overseas absentee ballots. Some of the ballots that got counted were ballots where the affidavit was faxed from Maryland, I mean, all sorts of irregularities.

It is a difficult problem when an election is this close to apply rigorous rules and to try to determine which ballots count and which ballots don't count. We tried to do it fairly, and in the final analysis, when we filed our election contest and there was evidence, ample evidence that there had been over Thanksgiving weekend a couple hundred ballots that did not meet even the most generous, legal standard, counted, largely to Governor Bush's benefit, Vice President Gore declined to authorize us to put that claim in our contest and instructed us to make no legal effort to exclude those ballots, and as a result, those ballots were included and could well have been the difference, the margin of difference depending on how a recount had gone forward.

I think the Vice President did the right thing in that regard. It was a very difficult situation all the way around.

PANELIST: One of my favorite stories concerning the election litigation has to do with the military ballots. There was a judge down there who did not get as much attention as the others, but his name is Bubba Smith, and I appeared in front of him concerning the military ballots in one of the counties. The Democratic lawyers and the Republican lawyers and the lawyers for the Secretary of State and all the various intervenors all agreed on one thing, and that was that under the Supremacy Clause of the United States Constitution, a consent decree that had been entered into between the State of Florida and the United States Justice Department had provisions that trumped some of the provisions of Florida law concerning absentee ballots. And to a group of Federalists, you will like this: Bubba Smith, Judge Smith, declared *sua sponte* that that notion was unacceptable and unconstitutional, and that this was a matter for the Florida statute, and that's all he was going to look at. And so we all threw our hands up and walked out of the room.

ADMINISTRATIVE LAW & REGULATION

WHAT NEXT FOR NEGOTIATED RULEMAKING?

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Professor Philip Harter, *Director of the Program on Consensus, Democracy and Governance, and Visiting Associate Professor of Law, Vermont Law School*
Hon. Boyden Gray, *Wilmer, Cutler & Pickering and former White House Counsel*
Professor Michael DeBow, *Cumberland Law School, Samford Law School (moderator)*

PROFESSOR DeBOW: It is a pleasure to be here, and to introduce our distinguished panel.

Jay Lefkowitz is currently the General Counsel of OMB. Before joining the Bush Administration, he was a partner in the Washington office of Kirkland & Ellis, where he specialized in commercial and appellate litigation. His prior government service includes two stints in the first Bush Administration where he was the Director of Cabinet Affairs and the Deputy Executive Secretary of the Domestic Policy Council, as well as a delegate to the U.N. Human Rights Commission.

Philip Harter is currently the Director of the Program on Consensus, Democracy, and Governance at the Vermont Law School, a title I like very much, and a visiting professor of law there. Mr. Harter has been very active in the ABA section of administrative law, served as its chair during 1996 - 1997, and also as co-chair of its Task Force on Regulatory Reform. He is widely recognized as the principal architect of the Negotiated Rulemaking Act, and speaks and writes often promoting the use of negotiated rulemaking.

Boyden Gray is certainly no stranger to any member of the Federalist Society, having been instrumental in the founding and growth of the organization. He is a partner with the Washington law firm of Wilmer, Cutler & Pickering. He is a former clerk to Chief Justice Earl Warren, served as White House counsel in the first Bush Administration, and will speak last.

To begin our discussion, I will give a brief overview of the negotiated rulemaking procedure under the Federal Negotiated Rulemaking Act. Negotiated rulemaking really springs from the dissatisfaction that was widespread with informal rulemaking as practiced under the Administrative Procedure Act in the late 1970s and into the 1980s.

As most people in this room know, traditional informal rulemaking proceeding begins with an agency's staff drafting a proposed rule. A notice of proposed rulemaking is then published in the Federal Register soliciting public comment. On receiving the public comment, the agency analyzes the public's reaction to the rule. In some circumstances, they may revise the proposed rule to take account of some of the public's objections or suggestions. The final rule is then published, and is subject to the possibility of appellate litigation challenging it.

Negotiated rulemaking is an attempt to improve the substance of the rules that are adopted through this informal procedure and thereby reduce the likelihood of appellate challenge to the rules adopted in this manner. Negotiated rulemaking attempts to promote these goals by changing the process followed by the agency prior to the publication of the notice of proposed rulemaking. It does this by bringing representatives of affected interest groups into the agency's pre-NPRM decisionmaking process.

Procedures for this are provided for in the Negotiated Rulemaking Act passed in 1990. The Act commits the decision of whether to use negotiated rulemaking to the agency's head, who may use the procedure if he finds that the public interest will be served. This question is guided by a list of seven factors that are listed in the Act.

The Act is in your CLE materials, by the way. If you want to follow along with the seven factors, they are listed there. We might discuss at greater length today how that decision actually gets made.

In reaching a decision about whether to use the procedure, the agency may use a person called a convener to help answer this question, a neutral person to help the agency sort out its options.

If the agency head decides to use negotiated rulemaking, that decision itself is published in the Federal Register. The notice describes the subject and the scope of the rule to be developed and the issues to be considered and also contains a proposed agenda and schedule for the committee's work.

The notice lists the affected groups that the convener in most cases has helped identify, and also lists the people who are proposed to be representatives of these groups in the committee's work. Normally, the committee is composed of from twelve to 25 members, including the representative of the government agency. The maximum number is 25.

The notice also asks for comments on the proposal to establish the committee and on the proposed members, and gives the procedures to be used if there are interested parties out there who think they will not be adequately represented by the people who are so nominated.

If the agency, after receiving comment on this notice, decides to proceed with the negotiated rulemaking procedure, then a person known as a facilitator convenes and chairs the meetings. The committee is a federally charted advisory committee pursuant to the Federal Advisory Committees Act and the procedures it follows are procedures that are

outlined in the Federal Advisory Committee Act. This Act prescribes notice of meetings and the ability of the public to attend the meetings, but less in the way of formal record keeping of what transpires at the meetings than you would have in an informal rulemaking procedure.

A consensus is defined as unanimous agreement, unless otherwise agreed at the outset by the committee. If the committee reaches unanimous agreement on the rule they would like to propose that the agency announce, it is sent forward to the agency head, who can use the draft rule as a basis for a notice of proposed rulemaking. The typical informal notice and comment procedures pick up at that point and are carried through to the conclusion in the same way that they would have been in a traditional informal rulemaking proceeding. In the event the committee fails to reach a consensus, the agency may use standards of informal notice and comment procedures.

The statute says that the agency rule is supposed to be the consensus suggestion of the committee to the maximum extent possible, consistent with the agency's legal obligations. While that does not bind the agency to use the committee's recommendation, it does certainly indicate some obligation to use the committee's recommendation as the basis for the rule proposed in the notice of proposed rulemaking.

Nothing in the Act changes the scope of judicial review of the rule as eventually adopted. Any agency action related to the establishment, assistance, or termination of a negotiated rulemaking committee is not itself subject to judicial review. Otherwise, there aren't any changes made in the scope of the judiciary's ability to review rules adopted through the negotiated procedure.

We have had ten years of experience under the Negotiated Rulemaking Act. There continues to be some criticism of the Act and practice under it, in particular a debate about whether or not negotiated rulemaking actually delivers on the improvements that it promised, and there have been objections to the nature of the informal process followed by the committees and the possibility that the use of negotiated rulemaking committees may be at odds with the APA's promotion of public participation and openness in the informal rulemaking process.

With that said, I will turn things over to Jay Lefkowitz.

MR. LEFKOWITZ: Good afternoon. I probably, by order of experience with negotiated rulemaking, should be speaking third, after the real author and creator of the concept and after the gentleman who probably advised the President to sign the law. Negotiated rulemaking is actually something that I am relatively new to.

I imagine that negotiated rulemaking, when I was in the White House the first time ten years ago, was an agency coming into the Competitiveness Council suggesting a regulation, and then Boyden negotiating with the agency until he was comfortable with the proposed regulation, and then it would be published.

We do a lot of negotiating when we go through the rulemaking process, but formal negotiated rulemaking under the Act is a relatively rare occurrence. From just taking a quick look at some statistics, I think that agencies have used negotiated rulemaking in less than one-tenth of one percent of all of the rules since the Act's inception, so it is a little hard to get a really good baseline on its effectiveness.

The Department of Transportation and EPA used it more frequently than other agencies, although EPA has used the process a lot less frequently in recent years.

I think that it is fair to say that there are at least some people who view negotiated rulemaking as a kind of solution in search of a problem. Again, my experience with it right now at OMB and for the first several months until John Graham came on board is that we just don't see it right now. And so we are certainly open to discussion and considerations of whether we should be trying to encourage the agencies to engage in it more frequently. It is obviously a voluntary program.

Some of the critics have noted that negotiated rulemakings are very resource-intensive, both for the agency and for interested parties; that they do not actually shorten the rulemaking process and may, in fact, lengthen it because agencies have to appoint a facilitator, conduct all of these formal public meetings. And I am not sure that there is any evidence that it has, in fact, reduced litigation.

We at OMB right now are attempting to address some of the same issues that I believe the drafters of the Act were trying to deal with, in terms of openness, in terms of transparency, in terms of reaching the appropriate consensus. We have a policy that we will try to meet with any and every outside party who requests meetings. Our communications with outside parties are disclosed to the public and they are now posted on the OMB Web site.

All written materials that are received by OMB are retained for public inspection in OIRA's public docket room. They are forwarded to the rulemaking agency for inclusion in the rulemaking docket. We always invite representatives of the relevant agencies to come to these meetings with interested parties.

Let me just say a few words to frame a little bit of the way this Administration is looking at regulations generally. Regulations, as I am sure everyone here knows, are an enormous financial burden, a financial drain on the economy and on the taxpayers. I think our most recent statistical estimate is that the total costs of federal regulations right now on an annual basis are roughly half a trillion dollars. If you include transfer costs, which would be redirection of

resources from one area of the government to another, it probably rises to close to about $800 billion dollars.

We have, at OIRA, cleared some 700 rules in the last twelve months. We obviously only clear rules that reach a certain standard. We are not an administration that is anti-regulation as some people have suggested. We look at regulations much the way we look at proposed legislation. There are some regulations, like there are some pieces of legislation that make sense; there are others that do not make sense. But we look at all of the regulations with a screen: number one, fidelity to the statute; number two, compliance with APA procedures; number three, the costs and the benefits of the rule; number four, whether the proper economic factors have been considered. Are the agencies using the appropriate discount rate? For example, are they looking at risks in a linear way if, in fact, there is no evidence that it is linear risk? And indeed, we are encouraging the agencies to conduct risk analyses of their own which we at OMB and in OIRA are conducting as well as we are reviewing these regulations.

Over the last nine, or ten years, almost no rules were sent back. In fact, I do not know that the prior administration sent back a single rule to an agency. We have sent back probably 15, 20 rules already. We send them back if the regulatory standards adopted are not justified by the analyses, if the rule is not consistent with Executive Order 12866, if the rule is not compatible with other executive orders or statutes.

We do not necessarily send them back because we are opposed to the draft rule. We send them back because we want them closed back or perhaps withdrawn. It is up to the agency to review them, work with us, and then bring them back if they can satisfy the appropriate criterion.

We are also getting much more serious about looking at unfunded mandates, looking at the federalism concerns, looking at Paperwork Reduction Act violations. So from an enforcement perspective, although we are working very cooperatively with all the agencies, I think it is fair to say that OIRA is taking its regulatory responsibilities very seriously.

In addition, there are occasions when OMB believes that there are certain potential regulatory actions that are, in fact, worthy of exploration for a new regulation. We recently sent prompt letters out to a couple of agencies. We sent a prompt letter out to the Department of Transportation to look at potential regulation for the defibrillators. We also sent a prompt letter out to HHS to encourage them to think about whether or not it might be appropriate to take a look at a regulation in the area of trans-fatty acids. So we are working with the agencies, again in a sense being neutral, but always skeptical of proposed regulations.

One area, though, that I think merits considerable attention (and certainly when we have an opportunity, I would like to solicit any thoughts from Boyden and Phil and from all of you) is the way in which agencies often bypass the proper regulatory process by issuing guidelines. Guidelines are obviously much less burdensome for agencies to issue. They can bypass the intra-agency internal review process, they can bypass an interagency review process as well as OIRA review. There is no public comment. They can avoid the statutory requirements imposed by the Unfunded Mandates Reform Act and the Congressional Review Act. It is easy to amend guidelines, and at least until this last year when the D.C. Circuit stepped up to the plate, it was easy to avoid judicial review.

One of the things that we are looking very hard at is how to make the regulatory process more fair. We are looking at whether, if you are a regulated party, you are happy with a particular regulation or not, and whether your beef is with the agency or with the statute that has in effect authorized and dictated where the regulation should go. I think it's important from a fairness perspective to make sure that the government abides by the proper rules and procedures.

Guidelines tend to be a shortcut that some agencies are inclined to take and in a sense, when agencies do that, they lose their Chevron deference, so they are in a sense more susceptible to judicial review. On the other hand, there is a way in which they can do this sub-rosa without any advance notice and the regulated community often finds that it is being regulated and strangled by these types of guidelines. So that is an area that we are looking at, and certainly the Appalachian Power case and Judge Randolph's decision for a unanimous panel is very instructive.

We cannot take all this and move it aside all at once, but it is an area where I think we need to take a long, hard look. We have already made in some areas some movement in the direction of a more fair and open process.

In the area of negotiated rulemaking, I am very interested to hear the discussion and the debate, and we would certainly consider encouraging agencies to explore that option, although my initial review of the history of negotiated rulemaking is that it may be a more cumbersome process that does not, in fact, address the perceived problems that it was set out to address.

PROFESSOR HARTER: I want to begin by simply responding. The fact that criticism exists does not make it so, and I would think the current administration would be sensitive to that. So let's review some of the actual performance of negotiated rulemaking here.

I especially love the criticism, "Gee, it has only been used for a small percentage of rules; therefore, it does not work and it is cumbersome." There is no question that negotiating a rule is a resource-intensive effort. There is a footnote to that, though: agencies that have actually clocked the difference in cost between doing a reg-neg and a traditional rule find that doing a reg-neg is half as expensive. But I will get to that in a second.

What reg-neg is used for are rules that are extraordinarily complex and extraordinarily controversial. You are basically getting all the parties around the table to work out a truce in a war of attrition: these are the rules that are difficult for agencies to get out the door. This is a hard point to teach in administrative law because students, and, alas, many professors, think that agencies waive a magic wand and issue a rule. I think that everybody in this room understands that is not the case. It can be extraordinarily controversial and the agency just can't get done. It is in those instances that reg-neg has proven extraordinarily successful.

Let me go down a list of some of the ones that have been done: The rule on the reformulated gasoline; Congress imposed an extraordinarily short period of time to develop a proposed rule, and it was just a war waiting to happen. From start to finish it took five months to develop the rule that basically governs gasoline in the major cities now. That is a remarkable accomplishment.

A war had been going on for 15 years between the National Park Service and the FAA on sightseeing flights over national parks. The agreement reached in the reg-neg not only regulates how those flights work now, but it formed the basis for a revised statutory provision. Indeed, flight duty time — the amount of rest pilots have to have — something that the FAA had tried for 20 years to revise as pilots got older, planes got bigger, distances got longer was a negotiated rule after the FAA itself was not able to get it done. The rules that are really just very hard have proven successful, and in every instance that I have looked at, probably not with the intensity that OIRA has, the rule ends up being more stringent, actually achieves its overall goal, but is cheaper to operate and implement, because the people who actually have to make it work on the ground are there designing it. They have the ability to determine where we can get the biggest bang for the buck. So the rule can be tailored to work with a minimum of dislocation.

I also will address some of the recent criticism that says it does not fulfill its mandate. If you look at what agencies were seeking to accomplish when they undertook a reg-neg, it shows that the process comes out to be fully a third faster. Reg-negs shave a little over a year off the rulemaking. Let me give you an example of the problem with the research underlying the recent criticism.

In calculating the amount of time expended in the reg-neg let's look at gasoline. The final rule didn't come out until four years after the committee met. But EPA published a notice of the standard in the Federal Register that issued was six months after the committee completed its work. The actual rule didn't matter until it was actually effective, but the oil companies had to know years in advance so they could design and build new refineries. So there is a three-year sitting-on-the-shelf period that was not taken into account. If you just measure Federal Register notices, the criticism may be right, but this is Washington. That is not what the agency was doing. And, in fact, the agency accomplished its goal in an astonishingly short period. There are four or five others that are the same way that effect that.

Then also look at the judicial review. A recent article alleges, "Well, gee, it didn't reduce the incidence of judicial review." Remember the Clean Air Act requires that if you are to have any kind of judicial review, you've got to file within a very short period. So in order to preserve your ability to work out any of the kinks, you have to file a notice of appeal. But, there has never been a substantive judicial review of a rule that the agency issued that conformed with the agreement. And remember, these are the hellaciously hard ones.

So, if you want to count docket entries my colleague from Harvard may be right. But, if you want to calculate what really was going on, you need to look deeper. There is a reason that the distance between political science and Washington is measured in lite years -- that's l-i-t-e – since they just don't understand what is really going on.

I turn to an article that looked at the only statistically valid empirical study that compared reg-negs with equivalent rules. It found, and I'm going to quote – "along virtually every important qualitative dimension, all participants, whether business, environmental, or government, reacted more favorably to their experience with negotiated rules than did participants in conventional rulemaking."[1] Actually, it resulted in much greater legitimacy, a feeling that better science was used, and better economics. So there is criticism, but there is also fairly hardheaded rebuttal to it.

Let's now turn to the current topic: What is the current status of reg-neg; what is its future? As Jay mentioned, EPA was clearly. Bill Rosenberg, the Assistant Administrator for Air, understood, as they say, "the art of the deal." He understood that if you get everybody in a room, you can achieve a huge amount. And he did. He was extraordinarily successful in getting very, very controversial rules out.

Interestingly, the Clinton Administration's EPA used it in precisely zero rules even though there were several presidential requests and directives to do it. None.

DOT has continued to use it, as have other agencies, although clearly its incidence is probably not as much as it was five years ago.

To a very real extent all agencies now engage in some degree of stakeholder involvement or public participation and, indeed, Jay's proposal — let's get the people in here and we'll talk to them — really derives from the whole idea of the negotiated rules since it legitimized talking to people. We'll look back to that at the end.

In order to figure out currently what's happening and make some suggestions of what might happen in the future, I would like to review a couple cases from the last five years. Start with one in which an agency wanted and had tried on two occasions to get out a notice of proposed rulemaking and each time it was crammed down their throat; once by one

side, the other time by the other side, and so the agency simply could not get the job done. The issue had been on the agency's docket for more than 15 years! The reg-neg committee was impaneled and reached full consensus across the board. The rule ended up being much broader and much deeper than was originally proposed to the committee. The level of insight was really extensive. During the deliberations, the agency was represented by no fewer than three people at all times sitting around the committee table. The head of the agency himself signed off on the consensus. The agreement was then turned it over to the agency, and it spent the next four years rewriting, just taking a pencil and changing the language.

As one observer who was not a member of the committee — importantly not a member of the committee, so it wasn't defending a decision he had made — said that the agency's rewrite of the rule was both unintelligible and affirmatively dangerous. He continued to say, it will kill a lot of people.

The committee prevailed and basically persuaded the agency to put Humpty Dumpty back together again and reissued the rule as originally developed. Another agency was directed by a senior agency official to use a reg-neg to resolve an absolutely bitterly intractable dispute. The staff put together a very brief notice of intent to form a negotiated rulemaking committee for the Federal Register. The staff took one year to clear a seven-page typewritten document that took two pages in the Federal Register. We tried to get the agency head to intervene again, but somehow phone calls didn't get returned. One year. You can imagine what that does to a momentum. It also goes a long way to causing the private parties to doubt the commitment of the agency.

Once it got going, the assistant to same guy who urged the use of reg-neg but then wouldn't follow through, directed that the agency not say a word during the deliberations, so nobody knew where the agency was, nobody knew what is going to happen afterwards. You have no information; no way of learning what the agency itself wants to get out of the process.

But even with that, the committee, while it did not reach a full consensus, came up with a proposal. The agency then drafted something that totally disregarded the proposal, treating it as if it did not exist. Why did the committee mess around for a year to do it? Its work was just rejected. The controversy was sufficient, however, that the agency did not get that out on the street and the controversy remains. Interestingly, however, the communications that were established through the dialogues have helped alleviate some of the problems in the field.

At two other agencies, high senior officials who thought that they had a major fight on their hands wanted to use negotiated rulemaking, publicly announced it, and went through a full convening. The staff said, "No, we're just not going to do it." End of story. Neither of those rules are out, by the way, and that's three years ago.

Another agency had issued a rule that had been reversed by two separate courts of appeal. The industry had gone to Congress and had riders inserted in its appropriations that the agency was could spend no funds to issues the rule. The agency met every single Monday morning for two hours to wring their hands as to what they were going to do about this.

Well, of course, nothing was happening. And so they decided to do a reg-neg, and from start to finish, from the first meeting to final rule, not proposed rule, final rule, was six months. I absolutely loved hearing a public speech in which the staff complained it took too long. Six months. That's regulatory warp speed.

What's going on here? What happened and what lessons can we derive from this in the waning days of the Clinton Administration.

A number of these reg-neg experiences evince a clear trend towards the middle-level staff, below SES, as simply not wanting to share decision-making authority. "It's our turf". A kind of "We know best" syndrome. And it may be that they do not want to give up or do not want to share power, and yet the irony of it is if you look at the cases we are talking about, they don't have the power to get the rule out of the door in the first place. So it is a fear of giving up power that you don't actually even have, so it's almost worrying about being perceived that way. Whereas they would see if they actually participated in one , you actually get a huge amount of leverage, both in terms of information and actually achieving your overall goal.

I think there is no question in this instance that there is a difference in perspective between the staff and the political level, each wanting to keep the other away and manipulating the process.

I think another lesson, and this emphasizes the point that Jay made, is a lack of appreciation for the benefits of process, benefits of procedure. There appears to be a feeling that you don't need to do all this machinery so that you can slough off this and you can slough off that and it won't matter. But, it does.

Let me respond to the proposal as to what OIRA was doing: We're talking to people. I talked to A and I talked to B and I talked to C, and then I talked to A again. But this is a consultation, not a negotiation. Notice that each of those is coming as a supplicant trying to persuade somebody who is going to decide -- in this case, OIRA.

God forbid that A and B might ever meet and try and bring their respective insights and discussions together. Notice that this is a way of saying, I'm glad to talk to you, but I'm controlling the pencil and also, gee, I know what you want since you explained it, so I can write it.

The inattention to detail and taking shortcuts really has affected reg-neg. It means that they are not as public, they are not as open, and the committees are not set up in a way that will encourage them to reach consensus.

Let me give you an example of the benefits of consensus. Gasoline is really a perfect example. The industry wanted this big high number and the environmentalists wanted this real low number. You kept talking and pretty soon, we as the facilitators went to the industry and said it seems pretty clear you can do it. And the answer was, yeah, we can do it, but not gallon for gallon, not across the board. There are too many variables, as they explained. And then the answer was, well, can you do it on the average and work that out? Yes.

So then the proposal comes back basically at the environmental low number, and then what I think is really a neat thing, the environmentalists said, well, wait a minute, if you can meet that low number on the average, doesn't it really mean you can better it by ten percent? Yes. We want the ten percent, but figured into the average.

You cannot do that if it is not a consensus process. You can't say, I'll give you A if and only if you give me B, because you're really not sure you will get B but I would still have to give you A. And so consensus really is where you can deal with the quid pro quo to work it out, and the rule has been phenomenally successful.

There has been a lack of the attitude that we're going to see this through, we're going to get this done, we're going to put this rule out, and we are going to hold people accountable. That I think means the White House needs to hold the agency accountable, which in turn needs to hold the staff accountable for actually getting out a final rule that works, meaning withstands judicial review.

In times past, there has been too much bouncing around and saying that we the agency are going to do this and we're going to do that, but without actually doing it and without being held accountable for it -- almost the crisis du jour effect, with senior level officials running from place to place.

I think overall, there has been a fear on the part of agency staff of staking out a position publicly and working through and discussing it, of seeing this level of the government turning into itself and being afraid to talk to those on the outside, afraid to discuss their concerns, their issues. I am not quite sure why that is, but I think it is a lack of confidence in what they are proposing and a fear of being second-guessed on it by senior agency officials.

So where do we go from here? The first part is to recognize that the reg-neg really can be a powerful tool, and to take a look at the agency's experience and talk to the people that have done it.

Then I think management needs to set guidelines, provide resources, and follow through with commitments. Nobody likes to be second-guessed or harangued: "You didn't do it right", or to get bounced around.

For some reason, there is also a bias against such processes: "This is an illegitimate rule or an illegitimate government decision because you cooperated with industry", even though it was a very public process, even though the other side was there equally and you really talked about it, but there is this perception so that lower level staff may need protection against some of that kind of attack. To a certain extent we need to change the mind set on it.

There is no question that the White House, if it is interested, can play a major role, both by encouraging it and saying, "we're going to hold you to it." But also it can assist on the mechanical part. We have probably all observed that hell has no fury -- there are two furies that are greater than hell. One is a labor union that's being organized and the other is a regulator that's being regulated, and both of them fight stridently.

As a result, it is clear that agencies really hate FACA because they have to go with hat in hand and ask permission from OMB and GSA to put together a committee of ten people to give some advice. The administrator thinks, "I can impose a billion dollars of costs on the economy, but I can not talk to ten people. This is nuts."

Moreover, historically, there has been a lot of tension of getting FACA charters through. So, if there is interest in really talking to the people through the reg-neg process, then you're going to have to make sure that the FACA committees get through easily and straightforwardly.

Second, there has been a lot of confusion as to where OIRA is on all of this. The agency may well be concerned, let alone the committee members, that if the reg-neg reaches an agreement and the agency issues it as a Notice of Proposed Rulemaking, is it going to get pulled apart, second-guessed, and torn up as part of the review process? Some inside of agencies think they need to go to OIRA and get pre-clearance for conducting a reg-neg. Sometimes we hear from some OIRA folks that they are in favor of reg-negs, but at other times we here from budget examiners and the green eyeshade group that they really oppose them and will carefully scrutinize anything that emerges from one. There is a lot of confusion both inside agencies and by those who would encourage the use of more reg-negs over OMB's receptivity to them.

So it strikes me that addressing some of the management perspectives can go a long way. We are also talking about a broader issue, and it is really one of the relationship between the government and the private sector. It is one in which at least I would like to envision with the government setting or stimulating broad goals, and then charging the private sector to achieve it. But then holding them accountable if they don't, and then on the correlative side, having the private sector hold government responsible for making those goals appropriately.

Take a couple examples. Project XL at EPA. It looked very interesting, being able to modify some of the environmental regulations with a focus on achieving the overall goal via non-traditional means; but so far it has produced a very large yawn as far as performance goes.

Another one that I find interesting -- I have no idea exactly how it works -- is the Microsoft settlement, having a committee that is overseeing compliance. I have not seen any of the actual documents, but the press has been very

vague as to how it is working. Is it really going to hold the Company accountable in being able to enforce it? I think we need to look at alternative regulatory approaches like environmental audits and quality assurances — more flexible approaches, all of which I see as part of this.

When you look at the history of reg-negs or sitting down with all the various people, you can generate a huge amount of insight into the issue that is not achievable by the agency acting alone. It is the story of the five blind men and the elephant: It is only together that they can describe what that beast is.

MR. GRAY: I think Phil has given a very good history and what I want to do primarily is to talk about the biggest agency, EPA, and why it perhaps is no longer doing what it once did in the late 1980s and early '90s.

The history goes back originally to then-Vice President Bush when he was chairman of the Task Force on Regulatory Relief. The idea was that we had to change so many rules, that we did not think we could get through it all, especially without a lot of legal challenges. To the extent that we could reduce the time and the litigation, everybody would be the winner.

We did have some successful reg-negs and the gasoline rule is the best. That did not come until after the Clean Air Act of 1990 was passed, was implementing key provisions of that Act.

I would like to mention that the Act itself, Title IV, the acid rain program, which is the largest single pollution reduction program ever attempted by any country, was basically based on a negotiated allocation of baseline during the legislative process. The key players, the utilities, were thrown into a room and told not to come out until they had agreed on what year they would take as a baseline. The environmental groups were thrown in there with them. It was like a bunch of scorpions at each other. But six weeks in Mitchell's conference room was enough to cook the deal, and the Act started getting implemented right away and without any litigation, basically, and it has been a great success.

The same is true of the formulated gasoline rule. I think in the summer of 1995, after the first round went into effect, California had a 40 percent reduction in ozone exceedances. That is a big success.

Now, why might EPA have abandoned something that was working so well? I don't know, but I have a few guesses. In part, of course, Bill Rosenberg had no peer, and he loved to cut deals. Reg-neg was just up his alley. He was not a lawyer, and so he did not feel he wanted to take the lottery of the D.C. Circuit or the litigation. To him, it was a lottery because he did not fully understand how it would play out. So he much preferred to get it done, and that was part of his motivation.

But the premise of much of the Reagan-Bush years, I think you could say also of the current Bush 43. It is to use clear, transparent performance standards. Then you are looking at how many tons hit the atmosphere, not who gets screwed doing what, and not what kind of cotton you poke into the smokestack. You are looking at how many tons get through whatever it is you put in there, and using market incentives to try to reduce the cost and to increase the yield and efficiency.

EPA has a rule of thumb that for command and control regulation, they get a yield or what they call an RE factor, rule effectiveness factor, of approximately 80 percent, point-eight-zero. Point-eight they call it. In the acid rain program, Title IV, for SO2, for much of the decade of the '90s up until about 2000, the program was 160 percent ahead of schedule. That is, people were over-controlling by that much. So you were getting a yield of 100 percent and it doubled the yield for what was about a tenth of the cost.

Now, you would think that any agency that got a doubling of the yield of a regulatory goal at a tenth of the predicted cost of that goal would say, "Gee whiz, this is an interesting thing, let's see if we can extend it." But EPA has made it impossible to extend it. And there is a relationship, I think, between the use of market incentives and performance standards that let the regulated sector figure out how to do it and put the agency in the role of referee rather than micro-manager. There is a relationship between the two of them.

I think Phil Harter put his finger on it, that when they got into the gasoline rule, "Oh, you can't do it on a gallon-per-gallon basis or barrel-for-barrel basis, but across the board, yes". "Well, then, give us ten percent more". "Okay, fine". They probably would have given you 50 percent more if you had asked just to get away from the nickel and diming by the agency. But let's face it. The agency likes to nickel and dime. And why do they like to nickel and dime? Well, what else are they going to do?

I am quite serious here. You would think that an agency like the EPA would ultimately like to see as its goal a self-dissolution, that it succeeds in eliminating pollution and it can go out of business. That would be the logical thing, and as we reduce pollution over time, we continue to show great reductions.

You wouldn't know it reading the press and hearing them, but we do have a rather dramatic reduction in all pollutants over the last 30 years, even as vehicle miles traveled have doubled and the economy has quadrupled or whatever. It is really quite astonishing to look at the inverse relationship between the economy and pollution.

You would think that therefore the EPA staff might have shrunk, contracted. No. It grows and grows and grows.

I see my esteemed dear law school classmate in the back row. I grew up in the South and went to law school

at the University of North Carolina on the old saw, God bless the man who sues my client.

This is a lot of that motivation. It is part of public choice theory: one lawyer in a small town will starve, but two will do quite well, thank you very much.

EPA has to have a problem, and if they were actually to clean the air and declare a victory and go home, then what would they do? So there is an element of that there. They like to maintain control. It's sort of like a funny reverse delegation problem. They like to be delegated all of the authority without any strength by Congress, but they truly do not want to turn around and say to the private sector, "Okay, you figure out how to get there".

They are very fond of granting what are formally called waivers, but those of us in the private sector sometimes refer to them as regulatory indulgences.

And you cannot grant an indulgence if you have a market trading system where property rights are vested. You can not grant indulgences where the private sector has been forced to agree that this is what I will do and this is what you will do. What is EPA to do when you have already set out the baseline obligations, then you are out of a job and you cannot yank people around? I think that is what is at stake here.

It reminds me that maybe there is a connection between Barbara Olson's book, *The Final Days*, and why EPA has never done any market incentive or reg-negs since 1992. I hope that Jay can turn this around with the current administration.

I should point out EPA's track record in court in the last eight to ten years. (I don't want to pick 1993 as the beginning date of this track record, but that happens to be the fact if you look at the facts. Data can always be manipulated depending on what year you start with) EPA's track record for eight to ten years in the D.C. Circuit: they have lost more than half their cases. Maybe, depending on the way you identify a win or a loss, maybe as many as two-thirds of the cases. Now, it makes you wonder what *Chevron* means if an agency loses that many cases. It's really an astonishingly bad track record, and you would think the agency would wake up and say, "God, you know, I think we ought to do a little reg-neg and get these rules into place and get the ball rolling". But that is not what they enjoy doing, I think.

Let me use as an example their prime rulemaking goal now. Bear in mind, I am talking about the EPA because roughly half the rulemaking burden in the country is EPA, and roughly half of that to two-thirds of that is the Clean Air Act. That is why I am talking so much about EPA.

All of the regulatory reform efforts over the last ten to 15 years have as their target EPA. People do not say that, but that is really what they are talking about. It is the U.S. energy policy. We do have energy policies with the Clean Air Act. There was an old joke about John Harrington when he was Secretary of Energy in the second Reagan term. He would have staff meetings going over his day. He would ask, "all right, who is coming in at eleven o'clock?" "Well, X, Y, Z coming in to lobby you to lobby Lee Thomas, the EPA administrator", and he said, "Why does everyone come in to lobby me to lobby Lee Thomas? How come no one ever comes in to lobby me to lobby me?" And the staffer said, "Because Lee Thomas has all the power."

So PM2.5, 5 in particular, what is it? That's really the first question. You go, what in the hell is this stuff? I mean, you can measure it, but who contributes to it? And EPA won't tell us because if they told us, then they might be forced into a reg-neg to figure out, which industry, utilities, refineries, cars, trucks, buses, airplanes, trains, barges, who is going to take or a paint company is going to take what share of what is the ideal for figuring out a reg-neg?

But then EPA loses control once all those people have sat in a room and said, all right, we will agree to do 12.5 percent or whatever, or even worse, if you allowed the private sector to trade between the precursors of PM2.5, whatever it is, then EPA would be gone because then everyone would be off to the races, people would be glad to do twice the reductions required by EPA if they could just go about and do on their own rather than be yanked around by EPA. I think EPA just loves to yank people around.

So then I will go to the final flowering. The renaissance flowering of the medieval ethos is the new source review enforcement talk about doing rules by guidance. EPA has hijacked the entire Clean Air Act by enforcing. They tried to do a rule to change a 1992 rule called the Webco rule, which implemented Title IV of the Clean Air Act. They tried to change that by rulemaking in 1998, couldn't do it, and so then started the NSR, new source review enforcement program, the minute they lost the petition for rehearing on the ozone and PM2.5 rules in the D.C. Circuit. Basically the Clean Air Act does not exist anymore.

The only thing that exists are dozens of enforcement actions around the country. They are totally delinked from public health, totally delinked from common sense, and only the genie at EPA knows what they are trying to get at. There is no openness, there is no transparency, there is no understanding of what is in the enforcement box. It is the ultimate in discretion, of course, bringing criminal enforcement actions. That is the ultimate in discretion extortion.

I remember that the main thing EPA contributed to the 1990 amendments was not. "here's what we ought to do for acid rain", or "here's what we ought to do for air toxicants", or "here is what we ought to do for formulated gasoline". That all came out of the Public Health Service or the White House or other parts of the government.

Their main contribution was, how many criminal provisions can we pack into the enforcement side of the house. And I spent a great deal of my time ferreting out little vicarious liability provisions that were sprinkled all throughout,

none of which would have produced a single reduced ton of pollution.

Reg-neg is a great discipline because it isn't always useable. In fact, in most cases, it cannot be. But when you have multiple parties, not too many all at each other's throats, with a lot of jockeying for position, and the agency is up to its eyeballs in stakeholders who are all screaming because they think they should disadvantage their competitor, that's when you ought to throw them all in a room and lock it and not let them out until they have resolved their differences. Then you've relieved Judge Sentelle of having to go through all of this on a cold record. It does work, it is a great discipline, and I hope that it can be revived by the current administration.

PROFESSOR DeBOW: Thanks, Boyden.

We have plenty of time and I think a single microphone in the middle of the room if you have questions for the panelists. I will assert the chair's prerogative and ask first if anybody on the panel wants to respond to anything anyone else has said or ask a further question.

MR. LEFKOWITZ: I would just point out I think a lot of the concern that folks at the agencies and people at OIRA have with the reg-neg process is that it is quite cumbersome. I could not agree more with Phil about the best way to reach consensus.

I don't know that consensus for the sake of consensus is necessarily the ideal, because sometimes that just leads to the lowest common denominator approach, and obviously there is policy that you want to effectuate here.

On the other hand, I have found in the last several months that whether it is dealing with stakeholders who are interested in coming in and pleading their case or dealing with different agencies that have a different view about a particular regulation that might affect more than one industry, it is often far superior to get both of them into the room at the same time and to be dealing with both of them at the same time, and hearing each other deal with an issue than doing it in a seriatim approach.

I am not sure that you can't achieve a lot of that consensus-building in an informal way that might be less cumbersome. Obviously the D.C. Court Sierra Club decision makes clear that the APA does not require on-the-record proceedings. Obviously we disclose all of the meetings that take place, we provide copies of all the paper, but not on the record in the way that the Federal Advisory Commission Act would require.

So I think in spirit, we certainly agree about the best way to proceed in complex rulemakings from a substantive approach. I think the jury is still out and it may be that we just do not have enough of a database to work from, and it may certainly be worth exploring as we go down the line.

PROFESSOR HARTER: Let me respond. Two issues were raised here. The first was that consensus leads to the lowest common denominator. People often say, "Gee, you're going to go after consensus. Would you want it if you got it because of the lowest common denominator?" I have to say that the hair on the back of my neck goes up when I hear that because it is so diametrically contrary to what actually happens in practice. To understand why, you really need to look at what happens. Take a look at all these hellaciously complicated rules that are mentioned. These are the ones that the agency could not get out the door. But the results of the reg negs are all extraordinarily tightfor these complex rules.

As Boyden talked about, look at the effect on the air in Los Angeles of gasoline. That is not a lowest common denominator, I assure you. And let's look at why. You can walk into a room. Reg-negs are held in a room like this, a table in the middle and audience all around. Gasoline almost always had 200 people in the room with varying interests.

You can walk into that room and know — you can feel it — whether the rules of the game are to get to consensus or whether this is reg-neg lite: "We're going to do a little consulting, but nobody is going to have to really agree because there's nothing at stake if there's not a consensus."

If you have a consensus, now, all of a sudden, instead of having disparate groups, you have one group with a common problem. We are not going to unlock the door until you agree. You can feel the difference between the committee working toward a consensus. I mean, I think you can all feel the difference when you go shopping for a car. Just looking -- let's talk about price as opposed to let's negotiate a price. There is a major difference in the level of commitment and information and understanding that goes on in the process. Further, if the rules of decision are consensus, you have to deal with the concerns of the others and cannot simply roll them because you have the votes; as a results, the issues get thoroughly vetted. Each party to the negotiations will be looking to improve their position over what would occur without the negotiation — the famous BATNA — and hence at least one party would object to any backsliding in a proposal towards a "least common denominator" since by definition the result is less than other options. Simply put, those who assert the results are wimpish are those who have not examined them in comparison to what would have occurred without the negotiations.

As for cumbersome, it strikes me that to a very real extent, the cumbersomeness is self-inflicted by the government intselt. FACA is a pain to be sure. No doubt about it. It is one of the world's dumb acts because you can really make it a performance standard without having the inhibiting "Mother, may I?" part. But, an agency's asking to charter in a FACA committee ought not be a seven-month process. It is at this end of Pennsylvania Avenue that the problem lies.

Putting a notice in the Federal Register that you are going to hold a public meeting and anybody who is concerned about it is invited to attend is not terribly cumbersome. I do not understand the cumbersomeness if the process is going to have to develop a lot of very complicated information and to resolve a political problem that the agency has not been able to resolve in two decades. It gets it done; and it gets done fully a third faster than if the agency uses the traditional APA process, if indeed the agency is able to make any decision. And it is traditional notice and comment rulemaking they results in , at least frequently, the least common denominator or, to put it in the terms of Public Administration, the goal there is to "satisfice" which is to make everyone a little bit happy so they will get off the agency's back.. A very quick review of any result will show that.

AUDIENCE PARTICIPANT: I want to ask a question about why there is very little, if any, negotiated rulemaking in the health care arena, particularly as applies to Medicare and Medicaid? These are highly detailed regulations and part of the statute is highly detailed. Frequently the regulations are exceedingly complex and they are put out by people, while no doubt well-intentioned, who simply do not know the area in which they are regulating well enough. If you take it in a big picture, many times regulations they put out are completely devoid of common sense.

PANELIST: I will take a stab. One of the problems with the current regulatory regime is it is not even remotely performance-based, performance standard-based, or market-based.

There is a big push to doing a drug benefit, if you will, as opposed to the hospitalization stuff. Not the existing Medicare system, but to do a new drug benefit that would be totally market-based. Then I think you would see the kind of things you would like to see.

But if a regulatory regime is not market-based or performance-based where you are guided by outcomes and not by process, then it's very hard to deny the agency the arbitrariness of the discretion, which they just love

MR. HARTER: I will start with a semi-controversial response, I think. I want to emphasize that there are certainly problems at the staff level, senior staff and SES level, but there is also a huge problem at the political level, at the management level. That was what both Boyden Gray and I emphasized. Bill Rosenberg was wildly successful. His successors haven't even tried. Others haven't either. I think it's not fair to aim solely at the staffers. My own view is that if the political level wants to set the goals and hold people accountable and provide the resources, I think we have seen enough examples that it actually gets done.

I think using these processes on some of the civil service rules is probably a good idea, but I, for one, having been there myself in the past, in all due respect, am somewhat on the other side.

PANELIST: Much as I obviously don't like some bureaucrats, it is the posture they are put in by the incentive structure of the regulatory setup. Individually, they're well motivated people. It's just that the incentives that they are given makes them act in irrational ways.

PANELIST: Certainly there is a lot of reform to the civil service system that we could look at in terms of being able to promote people, not to be lock-stepping everybody across the board. There is a whole agenda in terms of performance standards in terms of civil service reform.

But the problem with regulatory issues tends to be a problem sometimes of political will, not so much real career intransigence. There are always some career people who may be wedded to a particular policy, but at the end of the day, they are not at the top of the chain.

We could all do a better job, any administration could do a better job, with the tools that they come in with. Sometimes you go through a lot of exercise to come up with a new regulatory process for doing your work and you get a new edifice, but you haven't actually changed the way you do the work because the problem isn't really with the structure, the tools that you have; the problem is in terms of the will.

AUDIENCE PARTICIPANT: I wonder if you could comment on whether or not you believe that a reg-neg process worsens the potential abuse whereby a will work through the process and get a solution that is uniquely beneficial to them but detrimental to their competitors.

MR. HARTER: I will jump in, I guess as the one who has seen these happen. Actually, I think that reg-neg probably lessens that on a couple grounds. First of all, if it's convened right (and this is one of the reasons why I think paying attention to detail ends up being important) you find those things out up front. You will talk to not just one party, but you will talk to a couple others and say, well, you know, this one over here has this concern. You end up having an on-the-ground understanding of a lot of the political dynamics, which may be exactly as you say, and so you want to make sure that there are going to be other people at the table to counter that.

In addition, I want to emphasize that these are open meetings. The committee will be inhibited for about half an hour, and then you forget about it. And so everybody is there seeing what is happening. So in a lot of ways, it actually makes it more difficult for that to happen.

One of the aspects of negotiated rulemaking that is a little bit different than traditional notice and comment is that there is an affirmative outreach up front. So if there is a concern with the effect on small business or some other kind of competitors, if done right, you will make sure that somebody representing that view is at the table to counter right up front, whereas they may well not participate in a traditional regulatory notice and comment. They may be aware of it, they may not think that their comment is going to be effective afterwards, whereas the big guy who is going to get the rents, as Boyden said, is going to have every incentive to go meet with everybody up the chain or to skew the notice and comment version all the way up. So in my view, it actually lessens that effect.

PANELIST: I would second that completely, and that's one of the great values of it, because, like market incentives and other performance standards, it does level the playing field and eliminate the chance that someone is going to hijack somebody else.

When I was in the government, if you went into something that was either reg-neg or something like that where we were trying to get people in a room to agree, that it wasn't a formal regulatory negotiation, I could always tell in advance that if it was not going to work out, which company was going to screw it up and which environmental group was going to screw it up. Without fail, I could guess it 99 percent of the time.

MR. HARTER: Let me just add one other aspect about it. Your question also emphasizes the need for the agency really to participate in the discussions, so it indicates, it signals where it's going, because everybody is going to negotiate in order to make yourself better off always. So you have a feel where this 800-pound guerilla is likely to sit so that you can judge what proposals are in your interest.

If this company that is seeking this indicates that it is likely to lose and the agency is going to go ahead and rule it, that may be an important part of it, to say, you know, you're not going to succeed in forestalling the rule. So the agency really has to be very clear: We're going ahead if you don't meet your deadline.

AUDIENCE PARTICIPANT: In the wake of the September 11 attacks, a couple of interesting things have happened in the administrative space. One of them is, of course, the airline bailout bill, which contains an administrative procedure for compensation of victims of the attacks in New York and in Washington replacing the judicial system; and the second, of course, is most recently, the President's proposal for military tribunals also to supplant the judicial system in some respects.

It seems to me that this turns some of our traditional notions about administrative versus judicial on their heads, and I was curious as to the panel's thoughts on that particular topic.

MR. LEFKOWITZ: Well, on the airline side of things, the airline bill, the bailout bill and the assistance bill which in effect had two principal financial components --a $5 billion cash grant, then $10 billion in available loan guarantees -- also included a victims' compensation fund. Both the victims' compensation fund part of that bill and the loan stabilization program required regulations to be written to implement that. We literally had 14 days from the date of the passage of that bill to get the loan stabilization regulation written, and we did.

Theresas a lot of question as to whether we would make it on time and whether we would punt, but I think the feedback from the airlines and from people who have been watching it have been very good. We have got a program now out there, we are taking applications from the airlines for loan guarantees. We put together a program that is going to encourage airlines to make good business cases. We put in a series of preferences for how the stabilization board will evaluate loans so that we are not just giving out the $10 billion to whomever comes in; there has got to be some security behind this. Again, that demonstrates that when the government needs to act quickly and put out regulations quickly, we can do that.

We are working right now on the other aspect of that, which is regulations to implement the victims' fund compensation program, which is hand in hand with the part of the statute that capped the airlines' liability at their insurance. People will now have the opportunity, if they want, to waive their right to go into the tort system to try to collect whatever they might be able to collect if they could get a judgment. It would all be consolidated in Federal court in New York in any event. But they are free to go after what they can get in the tort system or they can come into a compensation program which we are writing as we speak.

We have put out for public comment a series of questions which we expect to get answers to in about ten days, and then, by statute, we really have only another several weeks to get this out the door and to have an up-and-running victims' compensation fund.

AUDIENCE PARTICIPANT: What is the deadline for those regs?

MR. LEFKOWITZ: I believe December 21.

AUDIENCE PARTICIPANT: So the entire time from inception to promulgation was three months? Four months?

MR. LEFKOWITZ: Yes, about three months. And during those three months, the first two weeks were taken up writing those airline loan stabilization regulations.

AUDIENCE PARTICIPANT: That's an impressive incentive system. Thank you.

MR. HARTER: I think the quick answer, you were talking about the adjudicatory side and we've been talking about the rules. There are lots of examples of Congress or the body politic using administrative tribunals. Workers' compensation to a certain extent, andsocial security are probably the ones where you have a huge number of small cases.

AUDIENCE PARTICIPANT: I would introduce my question by saying that I have had the privilege of sitting on some three or four reg-neg panels. Unfortunately not too many of them actually came to fruition. But that is actually just something that happened. Sometimes you can not reach consensus, sometimes perhaps the wrong subject area was chosen for a reg-neg. But nonetheless, I think it is a great tool.

I think that political will is a very important part of whether or not it is used and used successfully. But I am also wondering if there isn't something else, whether FACA needs to be amended, whether or not there are some policies that come out from OMB to have some consistency amongst the agencies or to help educate them on what are the appropriate subjects to try out a reg-neg. I am wondering if there are some other tools that we can use to try to push them and make them more successful.

PANELIST: It strikes me the one that we shared was a perfect example of the agency lacking the political will to follow through. They adjourned 14 months ago; it still hasn't made up its mind.

PANELIST: I certainly do think that political will is important I mean, it's the White House, it's the President ultimately who has the obligation to see that the laws are executed, and if he wants to see this done and sends the word down through OIRA, through OMB, through the CEA, the counsel's office, whatnot, he sends it out to the Cabinet through Cabinet Affairs, I think you will see more success. It does require some pressure from the agency.

PANELIST: In this particular one, there was a huge divide between the staff and the political level that is still going on.

PANELIST: Between the staff and the political level?

PANELIST: Yes.

PANELIST: Well, that's not really helpful at all.

PANELIST: Right.

AUDIENCE PARTICIPANT: If my memory serves me correct, I believe there was a change in the language between Executive Order 12201 and 12866 from the benefits needing to outweigh the cost of regulations to the benefits needing to justify the cost. How has that perhaps increased the number of proposed regulations coming out of the agencies? Similarly, to what extent is reg-neg affected by that?

PANELIST: I don't think the two executive orders really differ on substance. How much they've been enforced, again, politically is another issue. But basically, the notion that, statutes permitting, you want the marginal cost to be in line with marginal benefit, I think that is something that there is a consensus about. But whether or not the political will to force people into a paradigm that will actually execute that, -- at EPA, it's lacking right now -- has been, anyway, for the last few years.

AUDIENCE PARTICIPANT: I identified with your comment. Actually, all around, I identified with your comments, although I would sound that funny or ironic note that's always there. While I agree with your macro conclusions, and both you and Boyden introduced the reformulated gasoline example as really where reg-neg had cut its teeth correctly, gone to the dentist and got it done right. Of course, the Erin Brokoviches of the world wouldn't agree with that.

I happen to come from a state where MTBE happens to be at the very head of consideration, and believe

me, I don't come here to celebrate Erin Brokovich. We have the trial lawyer's version of the dream team that works on MTBE now coming to our state to convince all these unfortunate people who have a horrible taste and perception problem from MTBE that they are all going to die tomorrow, and they all have to sue over this.

So it is only really the unintended consequence I was more reflecting on.

PANELIST: Let me just respond to that. I think that it would not have made a wit of difference if EPA had used regular rulemaking because we simply did not know at the time that MTBE had such a water problem. It wasn't there. It was totally focused on its effect in combustion and its effect on air and there wasn't any information.

PANELIST: We should not be drinking the stuff, anyway.

AUDIENCE PARTICIPANT: People do not care whether Ford Motor Company is doing well and they do not care how the big electric utilities are doing. But they do not have an effective voice at the table, and I would argue that AAA is not it. There is not an effective voice for that other kind of public interest at this point.

If it is clear that reg-neg is the way it's going to go, those voices will emerge. I am not being negative to neg-reg, but I am looking at your outreach on that.

MR. HARTER: In the gasoline negotiation, you're right, we simply did not identify people who were interested in a cheap car, although the comment was made, "gee, if they wanted it 50 percent lower, they would go for that."

But in that case, it was very clear. The gasoline rule, just to put it in perspective, is a $10 billion-a-year rule.

It's a good portion of what we are talking about, $10 billion a year, and everybody knew it going in, that's how much it was going to be with a very healthy capital cost up front. It is just a footnote there. The way where you're talking about it, it's Monopoly money. But two weeks after the committee reached agreement, the front page of the Wall Street Journal reported that an oil company invested $800 million dollars in a new refinery. All of a sudden, it became real.

So we were concerned about people who were worried about the cost of gasoline and yet nobody is going to have an incentive to spend six months of their life looking Exxon in the nose in order to save $200 a year.

AUDIENCE PARTICIPANT: That's exactly my point.

MR. HARTER: So it's a considerable amount of effort. You need a surrogate in order to do that. In fact, I actually walk through my class and we play these games and their first answer always is Ralph Nader. I said, hey, you know, the word cost is not in his vocabulary.

And then they say, AAA, and that was our next call, and they were not interested in participating because they had other things they were doing.

But, you need somebody. Perhaps only because of my advanced age now as opposed to ten years ago, if I had to do it over again, I would ask AARP -- all those RVs headed South, clearly well organized, clearly concerned.

But actually we found a group of small farmers — they need to be small farmers because the big farmers use diesel-power tractors -- that were certainly well organized, certainly politically sophisticated, and the cost of gasoline is a significant part of their doing business. So they were on the committee, and their explicit charge was to worry about the cost of gasoline to the farms in the areas surrounding the big cities. The Department of Defense, which also consumes a lot of gasoline, also participated.

So we did do that. We did not include somebody who was looking for the cheap car, frankly because nobody raised it during the discussions or in any of the inquiries.

PANELIST: But bear in mind that in those kinds of situations where you could use market incentives, what you are trying to do is use the reg-neg to decide how you allocate baseline burden, and then the marketplace kicks in, the competitive marketplace kicks in to produce the highest yield for the lowest cost. Then you have it inherent in the incentive structure that the consumer will be vindicated and that rent-seekers, that is, companies seeking to profit by fattening their margins off of the consumer, will loose. That's the whole point, that the consumer gets the benefit of the arbitrage.

The reason you run into trouble and can't do it is because there is a rent-seeker out there thinking that they can get a huge advantage over somebody else if they screw it all up, and that's what happens.

PANELIST: I'm talking about the implementation phase of the new ozone and particulate rules that inevitably follows on our failure to convince the court that the non-delegation doctrine should be around. What I have noticed even in the phases of arguing about setting the levels for those, and that was a notice and comment process, so this isn't a criticism of neg-reg per se, is that you had the larger collected constituencies making the arguments. For instance, the power companies made arguments in general towards the implementation phase that the burden and even the level sets should anticipate the

burdens potentially being dispersed onto automobile owners.

You know, as somebody who has fought about the IM240 program significantly, I don't consider myself a consumer advocate. I would no more stand with Ralph Nader than Bill Clinton. But I do find that there are public interests, there is such a thing as public interest groups. I just don't think Ralph Nader personifies that.

PANELIST: You raise a good question. When and if the rule comes out (and I think the D.C. Circuit has indicated there will be some rule for PM2.5) whether it's the level that EPA proposed, I don't know. That is very much up for grabs. But something will definitely come out, and at that stage, what EPA has got to do is throw all the people into a room who are supposed to contribute to this stuff and have them come out of the room saying, my allocation of the burden is X, Y and Z.

But EPA is unwilling to identify who they are because then they would loose all power to yank whoever it is around. If they can hold under their vest who is actually responsible and bring enforcement actions when they want to against whoever they want to rather than have it all done out in public. In the regulated community the automobile industry is going to be shooting at the utility industry which is going to be shooting at X industry and so on. Put them all in the room, have them shoot at each other, they all fall down dead, and then they end up with an allocation, and then they have to all go out and trade it out in the marketplace and their CFOs take over from their. Then you will actually see the cleanup start when the CFOs take over from the lobbyists, and that is what you want to have.

PROFESSOR HARTER: It is always dangerous now when you have a former student stand up.

PROFESSOR DeBOW: This will have to be very brief. We're right on the edge of our time limit.

AUDIENCE PARTICIPANT: I could not resist the chance to ask Professor Harter a question, especially as a former student. Actually, a brief two-part question. All three of you have provided, an excellent view of how the agencies have responded to reg-neg. But I wonder if you could briefly talk about the regulated community, and especially now where the certainty to the regulated community would probably be a very valuable thing that could come out of the reg-neg process with things as uncertain as the Clean Air Act, for instance.

Certain industries, the automobile industry, the power industry, know they are going to be regulated. Were reg-neg to be used, there would be a greater certainty in what they would have to prepare for down the road.

The second part to my question would just be, do you think any of the language in the recent Supreme Court decision in *Mead* would have an effect on the products of a reg-neg rulemaking with regards to *Chevron* deference?

PROFESSOR HARTER: Let me answer the first one. The empirical analysis that I talked about and studied shows the industry was strongly in favor. If you look at it, a number of the regulated entities have strongly encouraged the use of reg-neg. The one that I have been doing a lot of work with recently is OSHA. Several of the industries and unions petitioned OSHA to use it and develop standards.

As for *Mead*, I'm teaching Ad Law next semester. I will give you an answer later.

PROFESSOR DeBOW: Our time has expired. Thank you all for coming.

[1] **Jody Freeman and Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit,* 9 NYU Env. L. J. 60 (2000)**

CIVIL RIGHTS

THE FUTURE OF RACIAL PREFERENCES: IS THE ISSUE ON THE BRINK OF RESOLUTION AT LAST?

Professor James Coleman, *Duke Law School*
Professor Gail Heriot, *University of San Diego Law School*
Mr. Michael Rosman, *General Counsel, Center for Individual Rights*
Ken Lee, *Member, Executive Committee, Civil Rights Practice Group (introduction)*
Hon. J. Michael Wiggins, *Deputy Assistant Attorney General, U.S. Department of Justice, Civil Rights (moderator)*

MR. LEE: Again, welcome to the Civil Rights Practice Group Panel: The Future of Racial Preferences. My name is Ken Lee. I am one of the members for the Executive Committee for the Civil Rights Practice Group, and I want to introduce the moderator for this panel, J. Michael Wiggins.

Mike is the Deputy Assistant Attorney General at the Department of Justice, Civil Rights Division. Prior to joining the DOJ, Mike practiced in Atlanta, Georgia with Kilpatrick Stockton.

A 1993 graduate of the University of Georgia Law School, he served as a law clerk to the Honorable J.L. Edmonson of the 11th Circuit of the United States Appeals Court.

With that, Mike.

MR. WIGGINS: Thank you. It is a distinct privilege to try to moderate such a distinguished panel this afternoon, and I will do my best. But before I begin, I would like to ask you to join me in once again thanking the staff of the Federalist Society for again, year after year after year, putting on a fine program, one in which anyone who seriously has an intellectual curiosity in the law would have to admit they have put together consistently the finest legal panels that any group puts together at any time.

Please join me in thanking them.

We have three panelists. We will begin with Michael Rosman. He is the General Counsel for the Center for Individual which and has been involved, and Michael has personally been involved with many noteworthy cases having to do with racial preferences and civil rights. Among the most notable would be *Hopwood v. Texas*, with which we are all familiar.

Michael was also involved in *the United States v. Morrison*, which was the case involving Violence Against Women Act in which the Court held that Subtitle C of that act was beyond the scope of Congress' enumerated powers.

Michael graduated from the University of Rochester *summa cum laude* in 1981, Yale Law School in 1984, and he was named the American Lawyers Public Sector 45, which is the top 45 public sector lawyers under the age of 45 in 1997, and into the National Law Journal's 100 Most Influential Lawyers last year.

Also on our panel today is Professor Gail Heriot from the University of San Diego School of Law. Professor Heriot has been a frequent critic of racial and gender preferences. She has been published in numerous law reviews, the *National Review*, the *Wall Street Journal*, and the *Weekly Standard*.

In 1996, she was the co-chairman in California for the Proposition 209 campaign during the course of which she was a frequent commentator on television and radio in California. She received her bachelor's degree from Northwestern University and her law degree from the University of Chicago.

Our other panelist today is Professor James Coleman from Duke University. Before going to Duke, Professor Coleman practiced law here in D.C. as a partner with Wilmer, Cutler & Pickering. He began his law career as a clerk in the Eastern District of Michigan, and he served some time in the public sector. In 1976, he was the Assistant General Counsel in the Legal Services Corporation. He later served two years as Chief Counsel to the House Committee on Standards of Official Conduct, and in 1980, he was Deputy General Counsel in the Department of Education. He attended Harvard University, where he received his undergrad degree, and his law degree from Columbia University.

MR. ROSMAN: Thank you. Thank you, Michael. I want to thank the Federalist Society for inviting me here to speak at the National Convention. It was almost 20 years ago, in the fall of 1981, that, roaming the halls of Yale Law School, I first saw the sign on the wall that said, "Conservative? Libertarian? Hayekian? Come join a new student group next Tuesday at noon." I remember my reaction. I looked at the sign and said, wow, what the hell is a Hayekian?

So I went and I met such luminaries as Steven Calabresi, who it turns out was the nephew of my torts professor, and a group of others that turned out to be eventually the Federalist Society. And I also learned in very short time that it was the only organization at Yale Law School that would have someone like me as a member.

In the 20 years that has transpired since, that much really hasn't changed. It is still the organization that would have someone like me as a member, and I still don't know what the hell a Hayekian is.

I have done a lot of speaking over the years for the Federalist Society chapters, but this is the first time I've been asked to speak before the National Convention. Perhaps after what I have to say, it may be another 20 years. And before I say it, let me put down the usual litigator's caveats. I am speaking today solely for myself, not anyone else at CIR, some of whom might disagree with some of what I am going to say, and I am certainly not speaking for any of my clients.

Today's topic is "The Future of Racial Preferences: Is the Issue on the Brink of Resolution at Last?" I'm afraid I don't have much good news for you. The answer is no, the issue is not on the brink of resolution. The future of racial preferences — raceconscious decision-making is a less tendentious phrase I sometimes use — looks okay. This is a fairly remarkable thing, I think, because the one thing that has taken place over the course of the past ten years or so is a remarkable decrease in the general popularity of race-conscious decisionmaking.

Earlier this year, the *Washington Post*, along with the Kaiser Group and Harvard University, conducted a poll that asked the following question:

"In order to give minorities more opportunity, do you believe race or ethnicity should be a factor when deciding who is hired, promoted or admitted to college, or that hiring, promotions and college admissions should be based strictly on merit and qualifications other than race or ethnicity?"

In answering that question, 94 percent of the white people said that hiring, promotions and college admissions should be based strictly on merit and qualifications other than race or ethnicity. Remarkably enough, 86 percent of the African-Americans who answered the poll gave the same answer. Eighty-eight percent of the Hispanics and 84 percent of the Asians gave precisely the same answer.

Now, naturally, the *Washington Post* being the *Washington Post* ran the article under the headline "Misperceptions Cloud Whites' View of Blacks."

And the entire article went on for three pages, virtually ignoring these results. They were mentioned towards the very end of the article. The exact numbers were not given for African-Americans, and nothing at all was said about the response of Hispanics and Asians; you had to go to the *Post's* website and look them up.

The article said that the result of the question I gave was not particularly important because, quote, "Hard preference programs are vanishing fast from the scene, either ended by judges who ruled these programs constituted reverse discrimination or abandoned by their besieged sponsors." End quote. "Rather," according to the article, "corporations and colleges are just doing outreach." So, according to the *Post*, the answer to the question posed in today's panel is an easy one: racial preferences are, quote, "vanishing fast."

Well, I probably don't have to tell this audience, but just in case, don't believe everything you read in the *Washington Post*.

They are not vanishing fast. They are with us and likely to be with us for the foreseeable future. Their sponsors may be besieged in some instances, but trust me, they are tough and they're hanging tough.

This is a classic case where you have a committed minority -- I don't mean a racial minority, but rather a democratic minority -- who were able to achieve their political ends because the majority simply does not have the same intensity of preference. Also the minority, the democratic minority, has control of certain institutions like colleges and universities. As wildly unpopular as race-conscious decisionmaking may be outside the universities and colleges, if you believe the *Washington Post* poll, they are just as popular within those institutions.

I will tell you the same thing that I've told my employers. Lawsuits alone will not end race-conscious decisionmaking by public actors. Not by a long shot. There are too few lawsuits, and in cases like the ones that CIR litigates involving higher education, those attacking the racial preferences are wildly outmatched in terms of resources. The University of Michigan must spend ten times what we do on cases up there. For one thing, they pay their lawyers. The number of amici on their side is much larger. The number of law firms representing those amici are much larger. It swamps the number of amici law firms on the side against race-conscious decisionmaking. And in an area where the law is at least somewhat unclear in some instances, that is going to make some difference. In any event, there is only so much lawsuits can do in a democratic society.

I am going to digress for just a minute and provide a definition of race-conscious decisionmaking, race preferences, whatever you want to call them. Race-conscious decisionmaking is where race or ethnicity is used as a criteria in decisionmaking or where the criteria themselves are set and motivated by a desire to reach some racially or ethnically defined end.

Let me just explain that last point. If the University of Michigan Law School institutes the 100-meter dash as an admissions criteria for law school because it thinks that certain minorities will do better at the 100-meter dash, and it wants more minorities admitted to law school, that's race-conscious decisionmaking. If the State of Texas decides to automatically admit the top 10 percent of graduating high school seniors from each school because they want to increase the proportion of minorities at the University of Texas, that's also race-conscious decisionmaking, pure and simple.

Let me be clear on this point. I've never been one to suggest that admissions officers can consider only grades and test scores. I think standardized tests can and frequently are over-emphasized, and I have no objection to their deemphasis if they are deemphasized because their value as an admissions criteria has diminished in the eyes of university

officials or admissions officers. But if they are deemphasized in order to achieve a racial result, that's pretty much race-conscious decisionmaking.

So lawsuits without the political will to enforce the results will often end up only changing the form of race-conscious decisionmaking, making them less conspicuous, and you can go back to *Bakke* where Justice Brennan, I think quite accurately, accused Justice Powell of preferring Harvard's system over the evil quota system at the University of California at Davis simply because Harvard's system achieved the same goal in a way that was less visible to the public. I think Powell's opinion, frankly, is a bit worse than that, worse than simply elevating form over substance and preferring stealth over candor. That would be bad enough. Unlike Brennan, though, Powell didn't even bother to emphasize or retain the one really valuable element of the Davis system. The special admissions system at the University of California, Davis, medical school was limited to those who were economically disadvantaged. The racial preferences at Harvard that Justice Powell espoused had no such limit, and neither do most of the systems we have today. That, of course, at least explains part of why they have become less popular.

One of the primary functions of the lawsuits, in my opinion, is public education. It is an extremely important function, or at least it was. It is as CIR and other groups have publicized the admissions system, as people have become more familiar with how they operate, that they have become as unpopular as the poll that Kaiser, Harvard and the *Washington Post* published this summer suggests.

But if the figures in the *Post* article are to be believed, there is not a great deal of public education left to be done. To ultimately eliminate race-conscious decisionmaking, what we need are political leaders who are willing to harness the dissatisfaction over preferences in this country and turn it into action. It will take political courage to do so because the political minority, as I've said before, has strong and intensive preference on this issue.

I don't want to assail their motives. God knows they like to assail mine, but I do not return the favor. I think most of them really believe -- well, actually, I must say I don't think many of them really believe the diversity stuff that Justice Powell espoused in the *Bakke* case. But they do believe that there was a great historical wrong against certain groups in our country, and that historical wrong calls for strong societal remedies towards the groups that were injured, and they believe this very strongly.

So we will need strong political leadership and political courage to resolve the question of race-conscious decision-making. If you think we have that in America today, I'm afraid you're mistaken. And if you think we're going to get it from the Bush Administration, I suggest you ask Mr. Wiggins during the Q&A what their position is on the Michigan case or race-conscious decisionmaking in general.

It's not just them, though; it's us, too, if we readily accept racial preferences as the price we have to pay for tax cuts or vouchers or whatever other political goals we might ask of our political leaders. And if you quietly root for Mountain States or Pacific Legal Foundation or CIR in their battle against racial preferences or race-conscious decisionmaking, but make sure you don't get associated with it too closely because you might not get tenure, well, that's part of the problem, too.

The issue of racial preferences, race-conscious decisionmaking is not on the brink of resolution and it will not be if Mountain States and PLF and CIR and the Fifth Circuit are out there on their own, and it is not going to happen any more than the Supreme Court could on its own end segregation in the South. The forums will change, the lawsuits will pick off some bad systems here and there, and the law can and will move slowly towards the ideal of racial neutrality, but resolution will require political will, and as of yet, I don't see it.

Thank you very much.

MR. WIGGINS: Professor Coleman.

PROFESSOR COLEMAN: I also want to thank the Federalist Society for inviting me here to give me an opportunity to participate in your discussion of this important issue.

We were told that we were going to have about ten minutes, ten to twelve minutes for our remarks, and so, in light of that, I am also going to cut out the long discussion that I had planned about my involvement with the Federalist Society over the last 20 years and get right to the discussion. Although, I probably also should just sit down in light of Mike's remarks about the future of race-conscious decisionmaking. It looks like my side is ahead and I don't want to do anything to hurt that. But I've got the time, so I'm going to go on anyway.

I want to focus on racial and ethnic diversity in public higher education. There sometimes is a tendency to try to lump together all race-conscious public policies in a single discussion, and I think that is misguided.

The assumption of those who oppose race-conscious admissions to institutions of higher education is that the state ought to be indifferent to whom it admits to public schools, beyond admitting the most highly qualified. That assumption, however, ignores why the state supports public education in the first place.

A race-conscious admission policy must be judged against the purpose of public education. The threshold question, then, is what is the purpose of public education? And beyond that, is race-consciousness necessary to

achieve that purpose?

There is an important distinction to be made between affirmative action efforts involving public education and those involving employment and public works. The latter efforts are rooted in anti-discrimination concerns. As a consequence, past and present discrimination is a proper concern in examining the constitutionality of such remedial programs.

Anti-discrimination, however, is not the principal motivation of race-conscious higher education admission policies. Rather, the justification for such policies can be characterized as diffusion of knowledge so as to spread, in the words of the Massachusetts Constitution of 1780, "the opportunities and advantages of education in the various parts of the country and among the different orders of the people."

The diffusion of knowledge is the democratic and compelling purpose of public education at all levels, and by definition, in a multiracial democracy, it requires race consciousness or may require race consciousness to achieve.

Every state has a system of public education, and many of them explicitly state in their constitutions or in their statutes that the purpose of the system is the diffusion of knowledge. The Virginia Constitution, for example, declares that "government rests, as does all progress, upon the broadest possible diffusion of knowledge and that the Commonwealth should avail itself of those talents which nature has sewn so liberally among its people by assuring the opportunity for their fullest development by an effective system of education throughout the Commonwealth."

The link between public education and American democracy was forged at the birth of the nation. As envisioned by Thomas Jefferson and others in the 18th Century, the goal of public education is inclusion, not exclusivity or concentration of learning.

Thus, Benjamin Rush of Pennsylvania observed that, "Where learning is confined to a few people, we always find monarchy, aristocracy and slavery. To achieve the purpose of public education in a democratic society, a primary function of the general plan of government must be removal of obstacles to the broad diffusion of knowledge."

In his time, Jefferson believed that the principal such obstacle was poverty. Consistent with that, he proposed a public education system for Virginia that had as its primary goal education of the poor at all levels. Jefferson argued that by eliminating poverty as an obstacle to the diffusion of knowledge, Virginia could claim those talents which nature has sewn as liberally among the poor as the rich, but which perish without use if not sought for and cultivated.

The broad diffusion of knowledge also serves to assimilate diverse groups of people into a functioning democracy. This essentially is the diversity rationale of affirmative action in higher education, as reflected in Justice Powell's opinion in *Bakke*.

In discussing his proposal for a national university, for example, George Washington argued that "the more homogenous our citizens can be made in these particulars, the greater will be our prospect of permanent union."

In this sense, diffusion of knowledge among citizens seeks to overcome those differences among them, such as religion, poverty, race and national origin, that may threaten democratic self-government.

The revolutionary leaders who believed public education was intrinsically linked to democratic government had in mind a society that was racially homogenous. As one scholar said, "it was a heady vision of the new world in which rich and poor, German and French, Protestant and Catholic, but not black and red, would take part in the great experiment." As a result, the founders had no occasion to consider the diffusion of knowledge in a multiracial democracy.

The exclusion of African-Americans from the heady vision of the new world was not inadvertent, but by design, and continued long after the former slaves were freed and became citizens.

One of the principal characteristics of American slavery was a systematic effort to keep slaves in a state of ignorance. As one defender of the system who was quoted as saying, "if you teach the black man how to read, there would be no keeping him. It would forever unfit him to be a slave. He would at once become unmanageable and of no value to his master. As to himself, it would do him no good but a great deal of harm. It would make him discontented and unhappy."

Following emancipation of the slaves, states continued the exclusion of African-Americans from its institutions of higher education in order to disenfranchise them and limit their ability to participate in self-government. This was done through policies that directly excluded them by race and policies having that effect.

It has been only in the last 25 years or so that state governments, through race-conscious measures, have made any systematic effort to educate African-Americans to the full extent of their talent and under the same circumstances that white students are educated. That is what diffusion of knowledge seeks to accomplish.

Diffusion of knowledge is not a remedial device, however; rather, it is the ultimate goal of public education. A concentration of education among non-minorities undermines that goal whether or not the concentration results from discrimination. It also subverts democracy, which was the very purpose of the discriminatory policies that were challenged in cases such as *Sweat v. Painter*.

By unlinking public education from its democratic purpose, the current debate about race-conscious admissions wrongly assumes that a public school's admission policy is a matter of individual rights. It is not. A race-blind policy would elevate individual interest over the fundamentally more important public interest in the diffusion of knowledge. In effect, the contention is that a multiracial democracy can survive with an education system that effectively concentrates

public education narrowly among non-minorities. Such a race-blind mission policy directly conflicts with core purpose of public education. And in a society that increasingly is composed of minority groups, such a policy in the long run undermines democracy itself.

To conclude, as Benjamin Rush said in 1786, "where learning is confined to a few people, we always find monarchy, aristocracy and slavery."

Thank you.

PROFESSOR HERIOT: When I was asked to speak on this panel, I was told that the topic was going to be "The future of racial preferences: Is the issue on the brink of resolution at last?" And I thought, do you really need me to get on the red eye and come out from California to answer that? The answer is no; I will send a postcard.

But I think as a Californian and in particular as a Californian who worked on Proposition 209 and is seeing what is happening out there on the West Coast, maybe I can make a valuable contribution to this panel.

Of course, two things can happen if the Michigan cases reach the Supreme Court or if, in fact, some other racial preference case reaches the Supreme Court in the next couple of years. The Court could determine that the University of Michigan's or whoever's practices are fully constitutional, in which case the spotlight is likely to go back to popular initiatives like Prop. 209 and Washington State's I-200. At the other extreme, of course, the Supreme Court could write an opinion that declares the Constitution requires no less than that which Californians and Washingtonians have already voluntarily adopted as to the initiative process. If that happens, then racial preference supporters will likely employ some of the same strategies that are being employed, legally or illegally depending upon your point of view, to soften the impact of Prop. 209 and I-200.

It is post-Proposition 209 California that I can tell you about. I do not know a great deal about what is happening in Washington State. But for every issue that Prop. 209 resolved, two more, perhaps smaller, but perhaps not, issues have sprung up in its place.

When Prop. 209 first went into effect in California during the Wilson Administration, there appeared to be a real effort on the part of the University of California to comply. Sure, there was some cheating, and maybe if we have time, you can ask me a question about some of the more interesting cheating that went on initially. There are some pretty funny cases.

But since then, California has become essentially a one-party state. All important offices are now being held by Democrats, the Democratic Party holds a lopsided majority in both houses of the California legislature, and the going for Prop. 209 has gotten particularly rough. Some politicians there have been anything but subtle about their insistence that the University of California do something in order to bring the number of blacks and Hispanics up to the pre-Proposition 209 levels.

As you probably know, if there is anything that strikes fear in the hearts of academic administrators, it is threats to cut the university budget. Since most academic administrators were not Prop. 209 supporters in the first place, it is not surprising that they would buckle to such pressure pretty quickly.

Two kinds of things are going right now. At some UC institutions, the pressure from Sacramento has meant ignoring 209 altogether. UC-San Diego recently started a multi-million dollar Millennium scholarship program. In a nutshell, minority students were given free tuition, guaranteed housing and course selection. These are minority students in the sense of underrepresented for the UC, and that would be African-Americans, Hispanics and American Indians. For White and Asian students with identical or better credentials, these scholarships were unavailable.

If a donor had come to the UC and said, I want to give scholarships to black and Hispanic students and not to White students, it would have presented some interesting legal questions that we could talk about here as lawyers. Can the UC accept such a gift? To what degree can the UC participate in the administration of such a scholarship? But that's not what happened. This program was financed mainly out of tax money, and with regard to the money that was raised from the outside, the program was proposed to the donors, the donors didn't come to UC and say, this is what we want to do. So it was a legal no-brainer.

That's why UC-San Diego did everything it could to keep the program below the radar screen. Unlike other scholarship programs, there was nothing on the University website about it, there were no receptions to honor the donors, recipients were not told that their scholarships were being awarded on the basis of race, and when pro-Proposition 209 faculty members inquired about rumors of the program, they were told that no such program existed.

When it was recently outed, the administration's response was to admit that yes, this is illegal, this is a violation of the California constitution, but to argue that they are now legally required to continue the program at least until the people who were awarded the initial scholarships have made it through their bachelor's degree.

But I don't want to spend time talking about -- or maybe I should just say whining about — the fact that, there are going to be people who were against Prop. 209 who are going to try to get around it in ways that are clearly illegal.

Sometimes they are going to be difficult to prove, but there are lawsuits to deal with that kind of problem.

The more interesting cases are those that do not involve a return to facial preferences based on race or

ethnicity, but rather take an indirect approach. These involve subtler questions of law and policy. There are two main such programs at the University of California today.

First, there is the already implemented 4 percent solution, as they call it, in which the UC commits to admit anyone who graduates in the top 4 percent of a California high school regardless of SAT score or other factors.

Second is UC President Richard Atkinson's proposal to phase out the SAT ultimately in favor of what he calls a more holistic admissions policy; and on Thursday, UC Regents voted 15 to 4 to authorize UC campuses to fashion such a policy if they so choose.

These plans raise real issues. Are they legal? Can opponents of the plans prevail in litigation? Should they try? Sometimes discretion really is the better part of valor. What effect will they have on the University of California? What effect will they have on education generally or on racial harmony generally?

Even if I could answer all of those questions, I suspect that Mr. Wiggins here would not allow me to because I don't have enough time allocated to me. So let me just go over some of this lightly.

What these programs have in common is a very significant de-emphasis of the SAT. What's driving them, however, is not a belief that the SAT is not a useful tool for determining which students will do well in college and which will not. No one denies that admitting a student regardless of his or her SATs will result, on average, in a class that performs less well while at the University of California.

Instead, what's driving this is a desire to admit more black, more Hispanic, and more American Indian students — to try to get the numbers a little closer to what they were prior to the passage of 209. Therein, of course, lies the problem. The evidence is overwhelming that the purpose of both of these programs is to produce an agreeable mix of students from the standpoint of race and ethnicity, and that they would not have been adopted but for that result.

You can see it also in other states that have been affected by the racial preference issue. In Florida, for example, when officials adopted a program somewhat similar to California's 4 percent solution, they considered 5 percent, 10 percent, 15 percent, before they finally settled on the 20 percent formula. They freely admit that for each variation, they ran the numbers through a computer model to see just how many minority students it would generate, and only the 20 percent figure gave them the figures that they felt necessary politically to go forward. California officials have been somewhat better advised by their attorneys on what they ought not to say and what they ought not say on this matter, but they've been only slightly less up front on this issue.

If it's wrong or illegal to grant preferential treatment to minorities directly, then it's also wrong to do so by indirection. Otherwise, all anti-discrimination laws from Prop. 209 to Title VII to the Equal Protection Clause of the United States Constitution would be essentially paper tigers, easily avoidable by hiding what is being done.

Sometimes it is easier to see that when the racial roles are reversed. For example, suppose the University of California had in some parallel universe been discriminating against African-American and Hispanic students by giving a 300-point preference on the SAT to whites and Asians. That is just the opposite of what they were actually doing prior to Prop. 209 where that 300 preference, of course, was for underrepresented minorities. And suppose, for example, the Federal authorities had come in and said, no, no, no, you can't do this, and then UC administrators had thought to themselves, well, we really have more African-American and more Hispanic students then we would like now, let's increase the weight that we give to the SAT beyond the level that it predicts student performance so that we can get more Asian and more white students. Few would doubt that that would amount to purposeful discrimination.

As many, many, many court decisions have recognized, intent is crucial when it comes to discrimination, whether one is making retail decisions about individual candidates or making wholesale decisions about criteria for selecting candidates. We can argue about the exact nature of the evidentiary standard that ought to be applied here, and by all means we should argue about it, but it seems very difficult to argue that changes in admissions policies that are mere pretext for racial discrimination can not be attacked in the law.

A good analogy would be to the political redistricting cases in which courts have been willing to intervene when they find that racial considerations were the predominant factor in selecting the political boundaries.

It is worth pointing out that UC administrators did not come up with these ideas all on their own. Shortly after Prop. 209 passed, a lawsuit had been filed against the UC demanding that the SAT be scaled back radically on the grounds that it was a civil rights violation.

The Clinton Administration, in the person of Assistant Secretary of Education for Civil Rights Norma Cantu, had attempted to strong-arm the UC, as well as other colleges and universities, into deemphasizing or eliminating the SAT on the grounds that, again, on average, African-American, Hispanic and American Indian students don't do as well on it as Whites and Asians. (Of course I am talking on average. This is subject to lots and lots of individual variation.)

The new plan for a holistic approach to college admissions has even deeper roots. Eighty years ago, Ivy League universities complained about being overrun with Jewish students. The problem, if one can call it that, was that Jewish students tended to do quite well on the college boards. It was difficult to turn them away without displaying obvious bigotry. A more subtle strategy had to be developed, and it was.

Harvard, Yale, other elite universities, announced that they were not interested in test-taking grinds, they wanted well-rounded students with good character instead. Some administrators were not the least bit shy about admitting that this change was the result of what they called the "Hebrew problem." To prevent a dangerous increase in the proportion of Jews, Harvard president A. Lawrence Lowell wrote that, "admissions decisions should be based on a personal estimate of the character on the part of the admissions authorities."

The jargon was a little different then. They used the word "well-rounded;" now they like new-age words now like "holistic," but the effect is basically the same. Somehow, the admissions officers in the 1930s found that WASPish preppies tended to be more well-rounded. The number of Jewish students at Harvard dropped dramatically starting in the late '20s and continuing into the early '30s.

Now history seems poised to repeat itself. This time, the complaint is there are too many Asian and white students, including white immigrant students, at the UC As before, nebulous standards will be arbitrarily administered and ultimately work to lower standards.

There is a real irony here. Self-appointed civil rights experts attempt to portray the SAT as the invention of malevolent forces out to harm minorities. Using neo-Marxist jargon, one such expert has described the SAT as a "highly effective means of social control serving the interests of the Nation's elite," and as a "tool for elites to perpetuate their class privilege with rules of their own making."

The truth is a whole lot closer to the opposite. The SAT was developed as a reaction against the WASPish elite and their corrupt admissions practices in the late '30s. Unlike earlier standardized tests, which tested for mastery of Latin, ancient Greek, and other subjects taught at exclusive boarding schools, the SAT was considered a breath of fresh air, emphasizing basic math and language skills. Its developers aimed to make higher education available to talented young people regardless of their background, and they were successful in part. More than one Idaho farm girl and more than one Postal worker's son from Newark has beaten out a scion of wealth and privilege for a seat at Harvard, Yale or some other elite university precisely because of the SAT.

Some have asserted that the SAT is full of sound and fury, but in the end, it signifies nothing about the likelihood of success in college. This, I'm afraid, is wishful thinking. Indeed, the arguments that are used to support it would make a statistician cringe.

Research has repeatedly found not an overwhelming correlation -- the SAT is not perfect -- but a moderate correlation that is valuable. It is not perfect; nothing is, certainly not high school grades which, after all, are just the subjective judgments of a group of high school teachers. But neither is the holistic approach that Atkinson is advocating.

The bottom line is that the SAT, when used in conjunction with other factors, provides useful information. It is a common yardstick, unlike the other things that are taken into consideration, with which students from very, very different high schools and backgrounds can be compared. Atkinson has proposed developing a California test that would be used just for the University of California. The problem with that is you tell me what result you want, and I can design you a test that will give it to you. I am afraid that's what Atkinson is thinking, too.

So far, there has been a real reticence on the part of Prop. 209 supporters and on others around the country to weigh in on this issue, in part because it appears to be a train coming downgrade, and getting in the way of such a train can be hazardous to your health. But I think it's a mistake.

This is the future of racial preferences. Perhaps the general lowering of academic standards that comes with the percent solutions and comes with the de-emphasis of standardized tests will turn out to be the price that was paid for *Hopwood*, for Prop. 209, for I-200, and for more cases in the future, but perhaps it shouldn't be.

Thank you.

MR. WIGGINS: Let me sum up while you are walking to the microphone. We have two panelists who have told us conclusively that racial preferences are not on the brink of resolution, and Professor Coleman seems glad about that and not wishing to rock the boat.

PROFESSOR COLEMAN: So we all agree.

MR. WIGGINS: I take it you concur with their judgment.

Let's go to the first question.

AUDIENCE PARTICIPANT: This is probably directed mostly to Professor Coleman. I am Joe McCue from Pittsburgh.

Assuming that there is an issue in terms of diffusion of access to higher education, and I think that's debateable, my question is why is race the right factor to take into account to address that problem? It sounded to me like what you were talking about was economic factors, not somebody's racial background.

As a hypothetical, why would a black woman from Scarsdale, upper middle class, receive a preference in admission to a college over the upper middle class white guy from White Plains? Why is race the right factor rather than

economic status?

PROFESSOR COLEMAN: Well, race is the right factor because diversity ought to reflect the racial diversity of our society.

Race is the correct factor because we are a racially diverse society, and the diffusion of knowledge among the different insular groups that make up the society is what the original idea was.

In Pennsylvania, for example, Benjamin Rush talked about the Germans and the French and the other people of that state who previously were loyal to different European governments. Today, many of the divisive distinctions among us are based on race. That is, we are different racially, and the purpose of diffusion of knowledge is to make sure that those who are educated by the state include people from the different racial groups that make up the society. Whether you take into consideration the race of a person from Scarsdale as opposed to someone from Iowa is a matter of admissions policy for the university, how they make up their class. I don't think that's a constitutional issue. I'm going to be the red meat here, I see.

AUDIENCE PARTICIPANT: Professor Coleman, I was going to say they have these sort of panels every couple of years and the pro-race preference person always gets the questions.

PROFESSOR COLEMAN: That's okay.

AUDIENCE PARTICIPANT: I would like to break that trend, and I will actually throw this out to the whole audience. By the way, my name is Alan Forst. I am from Florida.

You focused a lot in talking of diversity in terms of black and white, but a lot of the preferential treatment programs are not just black and white.

PROFESSOR COLEMAN: Right.

AUDIENCE PARTICIPANT: In fact, there are very few that are.

PROFESSOR COLEMAN: Right.

AUDIENCE PARTICIPANT: And one of the things that has really changed in the last 30, 40 years is the intermarriage and the determination of who's black, who's white, who's Hispanic? For example, I am married to a Hispanic woman and my kids look more like their mother. But she herself is a descendant of Spanish and French, so she's very Caucasian-looking as well.

Our household is very middle-class, White-American, to the extent there is such a thing as White America. How is diversity furthered by giving preferences to my kids? If this was my second marriage, and I was raising my children from the first marriage, they would be exactly the same as the other kids, and yet they wouldn't be entitled to such preference. How is diversity furthered in that instance?

A follow-up to that, when you start breaking things up into slices, how deep do you go? Do you have descendants from Spain given a preference rather than descendants from Brazil? What happens when the minority starts doing pretty well, such as Asian Americans in various things and African-Americans in other things? Where do you stop? How much do you slice the pie?

Again, getting back to the first part of the question, how is diversity furthered by extending it when you have so much intermarriage?

PROFESSOR COLEMAN: Well, certainly there is some intermarriage in this country, and the effect that will have in 20 years, I don't know. But I think we would be fooling ourselves if we fail to recognize that we are racially different, that we are a society of different racial groups and each state has a different makeup. Those racial groups that the University of Washington is concerned about in terms of making sure that they are part of education that the state provides may be different than Georgia or Alabama where it may be simply black and white, or Texas, which would include Hispanics, or California, which includes just about everybody.

AUDIENCE PARTICIPANT: Are we racially different? Are my kids racially different?

PROFESSOR COLEMAN: Well, I don't mean racially different in the sense that -- you and I probably have more in common than I may with some other people in the room who are also African-American. That is not what we are talking about. What we are talking about is that in a multiracial society, that in order for the democracy to work, we want to make sure that all of the people are included in the self-government. We have decided that public education is an important function of a democratic society for exactly that reason.

It would make no sense, then, to have a public education system that leaves out some group, some insular group that's identifiable, and not educate that group. I think that would undermine the democratic nature of our society.

I think the reason my two co-panelists are correct in their judgment about what will happen politically is because that is consistent with our democratic instinct, that we should be inclusive, not exclusive.

MR. WIGGINS: Another panelist?

PROFESSOR HERIOT: Well, I can say something here. One statistic I have is on African-American marriages. One in seven is now interracial among African-American marriages. Also just a personal note. Doing some genealogy on myself over the summer, playing around on the Internet, I found some evidence that I am Hispanic.

MR. WIGGINS: Eric.

AUDIENCE PARTICIPANT: Well, Professor Heriot, (speaking in Spanish). Actually, I was going to thank -- before you said that, I was going to thank Professor Heriot for finding the statistic that according to the University of California, Hispanic students should be given 300 extra points on the SAT. I am very excited to call my mother shortly after this and tell her I actually got 1800 on that.

I will ask a question for the panel, which is that despite the general or generic title of the panel, you seem to have focused on education and public education specifically. But I've gone to these dinners where the law firm pays $10,000 to sit at a table and go to a function where they give out awards for minority hiring in general counsel's offices in major corporations. I think that the things that Mr. Rosman said initially, which is that there is sort of a very focused and vocal democratic minority that wants to impose racial preferences on a system, is true of the private sector as well, but you don't have the same constitutional issues.

I wondered what your thoughts are on the racial preferences practices of private industry, which are in many cases more so than in public education, overt.

PANELIST: As a legal matter, there is not a tremendous amount of difference involved. I would say the law provides for some greater latitude for private parties to engage in racial preferences than the strict scrutiny standard for Federal and state actors, but not a tremendous amount.

We have imposed the constitutional standards on virtually every actor in America, at least insofar as this particular constitutional norm is concerned.

AUDIENCE PARTICIPANT: Thanks.

MR. WIGGINS: Anyone else?

PROFESSOR COLEMAN: I think there is a difference between race-conscious decisions in education and those in private employment and those that involve public works programs.

With respect to private employment decisions, I think that private companies are making the same judgment that was made about education in the 18th Century, which is that the quality of their services are improved or may be improved if their work force is diverse.

Not every company has made that judgment. I don't think, for example, that our profession has made that judgment, notwithstanding the $10,000-a-table luncheons that you described. I mean, more of them are paying $10,000 a table here than at some of those luncheons.

PROFESSOR HERIOT: I have one little comment, though, and that is I wonder how much of the gender and racial preference practices in private industry would disappear if there were not pressure from the Federal Government to ensure racial and gender diversity. If they think there is only legal danger from one direction, then the obvious thing for them to do is to protect themselves from that direction.

AUDIENCE PARTICIPANT: David Hill from Chicago.

I have two questions. To those on the panel who don't think racial preferences are going anywhere soon: Why do you think the Bush campaign paid such a heavy price insisting that they were strict constructionists when they were always being asked about the question of affirmative action, if you feel that they've backed down from that to the point that affirmative action is here to stay, at least with the Bush Administration?

And with respect to Professor Coleman, while it's a very noble thing to want to have diffusion of knowledge and diversity in the classroom, my concern isn't just with the admissions; it's with what happens after the admissions.

I just got out of the University of Illinois and I can tell you that from orientation where they have a special minority-only orientation through your career at U of I, which can apparently take up to seven years for an undergrad degree, they have special majors set aside to get the "special students," quote/unquote, through the school; all the way up to graduation where they have special minority-only dinners. They have special robes for the minority students to set them apart even at graduation from their class. It seems to me that you're defeating the whole point of affirmative action, which is supposed to increase the exchange of ideas and the quality of education if, for the entire time that minority students are at the institutions of higher education, they are being separated, though some would argue to protect them from the rest of us.

PROFESSOR COLEMAN: Well, I actually agree with your last point, and I oppose in-school segregation voluntarily or otherwise. I think the whole point of higher education is for students to learn together and to get to know each other and learn from each other. I think that's defeated when groups of students segregate themselves. So I am opposed to that and, it's fairly well known at Duke, that I am. So I don't disagree with you.

PANELIST: Well, I will go to the first question, and I am not sure I understood it. Are you suggesting that the Bush campaign during the campaign was a forceful advocate of race neutrality? I must have missed something.

AUDIENCE PARTICIPANT: Not by any means.

PANELIST: I must have missed something.

AUDIENCE PARTICIPANT: No, not by any means. But it seems to me that at just about every speaking event where there were public questions, there was always an African-American in the audience who got up to the microphone and said, are you going to take away my affirmative action? And George Bush's answer always was, well, I am a strict constructionist

PANELIST: Well, there's a clear response.

AUDIENCE PARTICIPANT: Well, for a politician, it was --

PANELIST: It was clear.

AUDIENCE PARTICIPANT: Well, as clear as I think you're ever going to get from a politician.

PANELIST: Well, there you have it. I don't think he's paying a price because I don't think he made his position as clear as you think. Listen, you know, we all hear what we want to hear and, you know, I could have sworn he said something about Scalia and Thomas being his favorite Justices during the course of the campaign, but I'm not sure I should believe that, either. I don't know how else to answer your question other than to say I don't think he has really moved much.

AUDIENCE PARTICIPANT: My name is Jeff Grabill, I'm from Sacramento, and I wanted to follow up on Mr. Rosman's invitation to ask Mr. Wiggins the position of the U.S. Government on his case.

MR. WIGGINS: I have no comment.

PANELIST: He's a strict constructionist.

MR. WIGGINS: I will say this, however. Justice Scalia and Justice Thomas are certainly my favorite Justices.

AUDIENCE PARTICIPANT: Hi. Yamm Burlach.

I had a quick question. You talked about doing away with the SATs and playing other games to get racial preferences or to do something to admit particular groups. To what extent does that affect academic standing, and assuming that it does affect academic standing, is the problem at least limited from going too extreme or to some extent a self-correcting problem?

PROFESSOR HERIOT: What do you mean by academic standing?

AUDIENCE PARTICIPANT: Well, if you look at U.S. News & World Report, they rank all the schools --

PROFESSOR HERIOT: So university rankings.

AUDIENCE PARTICIPANT: Exactly. So that if a school sees that they're going down in the rankings because they are doing these things, I would assume that most professors -- you know, more importantly than anything else is their intellectual position in colleges.

PROFESSOR HERIOT: I think there are some odd politics going on here. In the old days of affirmative action, universities thought that they essentially had a two-track system. They were going to get the best students in each racial or ethnic group. But the new form of racial preferences gives you less talented students all the way across the board. Of course, the very best students are going to get in anyway because they will have both a high GPA and high SATs, but quite a few talented students of all races will be excluded simply because they attended a very competitive high school were they did not rank at the top of the class and their SAT scores were not considered. There are a lot of people who were quite willing to sit still for the old two-track system who are getting up on their hind legs now to fight this de-emphasis of the SAT. We're starting to hear from faculty members in the Physics Department and the Chemistry Department and such.

It may well turn out that there will be more resistance to the regents' decision when it gets down to the individual schools deciding what they're going to do. They may not take it all the way. I think a lot of people in the Prop. 209 campaign thought, "Well, there are a lot of people in the public who are very strongly for Prop. 209 who don't seem to care about the SAT issue," the sort of Joe Six-pack who thinks, fine, character ought to be taken into consideration. And so they think that they're not as strong on this issue. But instead they're picking up support from the physics professors, from the chemistry professors. And so who knows what will happen.

Another point to make, though, is that when it comes to academic rankings of that sort, they are always 20 years behind. There is a really strong time lag in terms of the prestige of any university. U.S. News will try to come up with some objective ranking that seems to be more up to date, but it nevertheless weighs people's subjective valuations of that school very strongly, so it probably won't have strong immediate effects. But it's an interesting issue and we will have to see how it shakes down in the future.

MR. WIGGINS: Thank you.

PANELIST: Let me just comment on that last point because it's not exactly true. I mean, it's certainly true that it will take decades to change the reputation of a school like Yale or Harvard or Stanford. But in terms of the U.S. News & World Report, those things can change on an annual basis and schools rise and fall based on changes in the median LSAT score, which is a very big factor.

The fact that schools aren't moving in and out of, let's say, the bottom ten -- that is, five through ten and then below that -- the fact that there's not a lot of movement in there is an indication that these policies are not having a significant impact on those kinds of factors that influence rankings.

PROFESSOR HERIOT: Actually, one more point, and that is that there will be political pressure on U.S. News to deemphasize the SAT as well.

PANELIST: But they haven't done that. That's probably true, but that's irrelevant.

AUDIENCE PARTICIPANT: Hi. I'm Daniel Woodrin.

I have two questions for the panel.

My first question is, much of the discussion and focus today has been on preferences in higher education. Most of the states have a guarantee of a free public education for all K through 12 students, but they don't have that kind of a guarantee when you get into higher education.

Is higher education really where the focus should be on trying to disperse the knowledge base and increase the learning, or should the focus be on K through 12?

As a follow-up to that, isn't it true whenever we're talking about being inclusive, that if we're talking a zero sum gain, which is the only time it becomes an issue if you use race as a preference, you're talking about being not inclusive, but exclusive, because every time you include, you're excluding.

PROFESSOR COLEMAN: Well, yes, that's correct, and that's an issue because it's a zero sum gain. The question is how you have a diverse student body. And the way you have a diverse student body is to take a look at the race of the people who are being admitted.

You know, we're not talking here about qualification. For example, some of our top students coming in, in terms of LSAT scores and GPAs, don't finish that way. There are other factors that influence how well a student does. The LSAT certainly is a predictor of first-year grades, at least, but it doesn't predict how well a student will do throughout three

years of law school. Nor does it indicate how well a person will do once he or she leaves law school. That is what we ought to be concerned about. Whether we are educating people who are going to go out and make a contribution to our society. That's certainly what we try to do at Duke. Whether they're doing that in San Diego or some other place, I don't know. I can't speak for them.

AUDIENCE PARTICIPANT: If I could follow-up briefly on that. In Florida, there has been a debate going on about raising the bar passage rate. Most of the debate has not been over whether the bar passage rate should be raised, but over the impact it is going to have. It is going to use some language from this area: a disparate impact on minority students as far as first-time passage, significantly disparate impact.

At what point, if we are giving a preference in undergrad and if we're giving a preference in law school, at what point do you stop giving a preference or do you stop considering that as a factor?

PROFESSOR COLEMAN: I'm actually -- I'm bothered a little bit by our use of "preference" because I think we use it in a pejorative sense and we use it too broadly.

There are also white students who are admitted to law school and to college, for example at the University of Texas, who had lower grades and lower LSAT scores than the plaintiffs did in those cases, and they were admitted to serve some other goal that the University of Texas had, including keeping their alumni happy. So it's much more complicated. The assumption is that for all white students, the first 100, top 100, are the only ones admitted, and then for everybody else, it's pick and choose taking race into consideration. In fact, there is a lot of picking and choosing that goes on among all students, including students who are not members of any minority group.

Now, what is the effect of raising the bar passage? I don't know. And to the extent that your point is that somehow raising the standard of the bar passage rate will improve the quality of the practice of law, if that's true, then we ought to do it and then deal with the consequences. I'm not sure, though, that those two things follow, but that's a different issue.

PROFESSOR HERIOT: I wanted to make one comment there, and that is I agree with Professor Coleman about legacy preferences. A state university has absolutely no business giving preferences to students because their parents happen to have gone to that institution. I find that an outrageous practice, and I would like to point out that Prop. 209 supporters tried to get rid of legacy preferences. Ward Connelly did as a regent for the University of California. And you would be surprised at where the opposition to removing legacy preferences comes from -- it comes from the same people that didn't want to remove racial preferences.

AUDIENCE PARTICIPANT: My name is Bill Worthen. I am not quite sure how to introduce myself, but I work for you, Michael, in the Civil Rights Division.

MR. WIGGINS: It's good to meet you.

AUDIENCE PARTICIPANT: My pleasure. I wasn't quite figuring on this method of doing it. I was actually going to shake your hand first.

PROFESSOR COLEMAN: You two should get together and decide what your policy is.

AUDIENCE PARTICIPANT: And therefore we will say this is not the Department of Justice's position.

I want to address this to Mr. Coleman. With all due respect, it really doesn't matter, anything that you said. Why? It's very important to consider you have something called the Fourteenth Amendment. The Fourteenth Amendment makes the varied considerations on public education or employment or any of these considerations -- eliminates the prospect for using race as the determining division. That's why it's there. It's not there for all the other purposes that you're suggesting, and you've all kind of ignored it or pushed it away.

It doesn't matter that you feel better about it or that we have had 1,000 flowers bloom for the last 200 years and so great many problems in having people accept blacks as human beings and individuals. We passws this constitutional amendment to protect ourselves from considering all these other factors.

Gail, in response to your point, it may be incredibly stupid to have preferences for other things, like whether you gave money or not, or it may be incredibly wise, but what it incredibly is not is unconstitutional. That's the point I'm suggesting that we want to consider, and you, of course, get to respond to that.

PROFESSOR COLEMAN: Well, implicit in my remarks was that I think diffusion of knowledge is a compelling government interest, and if I am right about that, then it's consistent with the Fourteenth Amendment.

SPEAKER: Sorry. Can I just briefly comment on the last point? Which is I hope -- in my view, what Professor Coleman has been speaking on today is somewhat different than what Justice Powell spoke about in the *Bakke* decision.

I don't want to go into the details of that, but you should all, I hope, be thinking about what is a different rationale than the one that has been generally used to that decision.

AUDIENCE PARTICIPANT: Tony Conte from Boston. I would like to direct this question to Professor Heriot.

I appreciate Professor Coleman's statement of the goals of public education to spread knowledge and I certainly agree with that. But I've read, and I wonder if Professor Heriot could comment on the fact that post-209, the percentage of minorities admitted to the more elite schools in the California system declined, but the total number of minority students, when you count all of the different elements of the vast California higher education system, did not decline.

In fact, what has happened in the elite schools, while the admissions levels initially may have been higher pre-209, the graduation rates, because of the multiple failings of the lower public education system disproportionately affecting minorities, were that minority students were much less likely to graduate from those elite schools, whereas they were more likely to graduate from the less elite schools in the California public education system.

So Professor Coleman's goal of the diffusion of knowledge would, in fact, be more likely to be carried to fruition by having students attend schools where their prior preparation better prepared them for actual graduation rather than just admission.

PROFESSOR HERIOT: What a great question.

I just happen to have with me some numbers on this. When Prop. 209 went into effect at U.C. Berkeley, the percentage of the (for Blacks, American Indians and Hispanics) went from 23.1 percent down to 10.4 percent.

What you often didn't hear is that the number of black and Hispanic students at some of the other UC campuses actually went up, and sometimes quite dramatically, at UC Riverside and UC Santa Cruz in particular. At Riverside, black and Latino student admissions shot up by 42 percent and 31 percent. Santa Cruz' figures were somewhat less dazzling but nevertheless quite noteable. At schools like UC San Diego, the number of black students went down, but the number of Latino students went up.

Then something quite remarkable happened. I've got the numbers for UC- San Diego. Prior to Prop. 209, UC San Diego had exactly one African-American student doing honors work out of a total class of 3,268 while 20 percent of white students and around that for Asian students would have a GPA of 3.5 or better. It just was not true for the black students. After Prop. 209 went into effect, the performance of black students at UC-San Diego went up dramatically. No longer were black honor students a rarity there; instead, a full 20 percent of the black freshmen at UC-San Diego in that first year could boast a GPA of 3.5 or better, and that's higher than the rate for Asians, which was 16 percent that year (that's in part an artifact of the fact that Asians were more likely to major in subjects that give low grades, like physics) and pretty much the same as the rate for whites that year, which was 22 percent.

At the other end of the spectrum, which I think is actually more important, the bottom of the class also changed dramatically. Prior to Prop. 209, 15 percent of black students, 17 percent of American Indian students were in academic jeopardy while only 4 percent of white students were. Of those, of course, you don't know which students are in UC-San Diego on account of a preference and which ones were gotten in even without a preference. But either way, the numbers of students in academic jeopardy who were from underrepresented minorities was quite high. That collapsed after 209 went into effect. The failure rates just came right together. Black and American Indian rates stood at 6 percent after that. So it was really quite a success story, and it's something that makes me very happy to be a Californian.

I don't know if it's going to last. In fact, I don't think it will. But at least the numbers came in there for a while suggesting that students were learning better. It's not surprising. Some people out-perform their entering statistics; some people, of course, under-perform their entering statistics; but most students are going to perform in the range their entering statistics suggest, and anybody who thinks otherwise is engaging in wishful thinking.

What happens is minority students tend to be grouped toward the bottom of the class when they're given preferences. But lo and behold, when they are competing with everybody else, everybody is at the school that their entering credentials suggest that they are likely to perform well at, they do better.

AUDIENCE PARTICIPANT: Professor, if I could follow up on one point very quickly.

PROFESSOR HERIOT: You bet. You're my favorite questioner.

AUDIENCE PARTICIPANT: The issue of graduation rates, though --

PROFESSOR HERIOT: I don't have the numbers on that, but you can expect that if the academic jeopardy rates are the way

they are, that the graduation numbers are going to be the same. I've seen numbers like that in the past and it looks like there is an improvement.

MR. WIGGINS: One last question.

AUDIENCE PARTICIPANT: First, Professor Coleman, I just wanted to thank you for raising the issue of diversity in that I attended a civil rights luncheon here earlier this week, and as the sole participant, the sole attendee who has been pulled over for driving while black, I think that my perspective perhaps might have been different than other participants. So I appreciate that fact.

Also, I agree with a couple of the other people, the questioners that have come on about the importance and perhaps, I guess, with Abigail Thurnstrom earlier this week, who mentioned literacy and education K through 12 and the need, perhaps, to strengthen it for all students, actually.

Now, Professor Heriot, as an affirmative action student from the University of California, Boalt Hall, and also at Harvard Law School, who also managed to do quite well, in fact perhaps even better than many of the non-preference admissions, I wonder whether we should redefine what merit is. I didn't take the SAT because the white students that were in my class were told to go while I was told to go to the library, and I am sure that my LSAT and my grades were probably not sufficient to get me into Boalt Hall. But once I got there and also while I was at Harvard, I did quite well.

How would you redefine merit?

PROFESSOR HERIOT: Several questions here. One, sure, it's true, some people go into a school where their credentials are not quite what the other students are and they rise to the occasion and they do well; but for every such student, there are more students who don't, who don't manage to do better than their entering credentials would suggest. Sometimes they do worse.

So I do not think that the fact that somebody might perform better than their entering credentials would say, how do we know which students those are that are going to perform better than their credentials say? No way of knowing.

I think the only way to have a system that will work at a large public university like the University of California is to try to determine what factors really do influence performance in school. It is the only way to avoid the corruption of everybody thinking that merit means whatever makes them happy.

We can track the SAT. We do have some sense in the aggregate of how much that bears on GPA. There are some quite sophisticated studies on whether or not the SAT does, in fact, predict college performance. Anything else you want to give me that you think might predict college performance, I am willing to study it, but if it doesn't predict college performance, I don't think it ought to be used.

PROFESSOR COLEMAN: Could I just comment briefly on that, because I don't think that the end of public education is how well a student is going to perform in college. I think what we're really trying to determine is how well the person is going to perform in life, and if that requires that we take into consideration factors other than GPA and LSAT and SAT, I think we ought to do that and not rely on these administratively convenient shortcuts.

MR. WIGGINS: With that, we will conclude the panel discussion this afternoon. I thank you for coming.

CORPORATIONS, SECURITIES & ANTITRUST

DOES THE SEC BELIEVE IN FREE SPEECH?

Mr. Robert J. Giuffra, Jr., *Sullivan & Cromwell, former Chief Counsel, U.S. Senate Committee on Banking, Housing & Urban Affairs*
Mr. Paul Gonson, *Kirkpatrick & Lockhart, former Solicitor, Securities & Exchange Commission*
Mr. Joseph McLaughlin, *Sidley Austin Brown & Wood LLP, Goldman, Sachs & Co.*
Hon. Alex Kozinski, *U.S. Court of Appeals, 9th Circuit (moderator)*

MR. EDWARD FLEISCHMAN: This panel is titled "Does the SEC Believe in Free Speech?" Since it is about the SEC, at least in part, I will tell you that a couple of nights ago, at an SEC-sponsored conference just down the street here in Washington, the dean of Northwestern, who organized the conference, introduced the former chairman of the SEC, who introduced the present chairman of the SEC, who introduced the speaker equivalent to our moderator, Senator Sarbanes.

You are lucky. You get only one anonymous introduction of our moderator here today.

There are two introductions to Judge Kozinski. The formal one, which has been given to us by the Society itself, law clerk here to Circuit Judge Kennedy and Chief Justice Burger, a practitioner at Covington & Burling, legal counsel in the Office of President-Elect and then the Office of Counsel to President Reagan, Chief Judge of the Court of Claims, and, since 1985, Circuit Judge for the 9th Circuit.

His Honor has asked for a different introduction for those of you who are interested. He leaps tall buildings in a single bound, he is faster than a speeding bullet, and there was something about Lois Lane, but I have forgotten it.

More powerful than speeding locomotive.

Judge Kozinski.

JUDGE KOZINSKI: Thank you. I did ask only for the second introduction.

Well, good afternoon, ladies and gentlemen. To introduce the panel, it occurred to me that we have now what is probably on the First Amendment the most liberal, most First-Amendment-friendly Supreme Court in the history of the Republic. The liberals on the Court are pretty friendly to the First Amendment, and the conservatives really love it. Even commercial speech, which for a long time was out in the hinterlands, is being brought into the mainstream. The Court in case after case has shown great sensitivity, and I think rightly so, to government actions that restrict speech.

Yet we have an agency in the government that does nothing but restrict speech. I mean, they really do almost nothing else. They not only prohibit certain kinds of speech; they also compel speech, which we know from our First Amendment cases, like the fabulous opinion in *Wooley v. Maynard*, is something that the First Amendment prohibits. So it bans speech, compels speech, it prohibits speech even when it is truthful.

If there is one thing that the First Amendment greatly abhors, it is prior restraint. After a speech is made, sometimes we can litigate whether or not the speakers can be punished or sued, but it is horror of horrors to have government bureaucrats tell people in advance that they have to submit to them what they may say. Yet we have an agency, a big part of whose business is, in fact, to go over the speech that private parties plan to give and to censor it. You know, of course, we're talking about the SEC.

For many years, there were almost no First Amendment objections to, or issues raised with, SEC enforcement. It is now becoming more of an issue, and we have a really distinguished panel that is here to talk to us about it. I am going to make the introductions very brief because you want to hear from them.

The first one to speak will be Paul Gonson. He was the SEC's chief appellate lawyer between 1979 and 1998. He then served as the solicitor of the Securities & Exchange Commission. He left there about three years ago, and he is now a partner at Kirkpatrick & Lockhart in its Washington, D.C. office.

Next is Robert Giuffra. He is a partner in Sullivan & Cromwell's litigation group. His practice focuses on securities, white-collar criminal and commercial litigation in federal and state courts. Before going to Sullivan, he clerked for the Chief Justice of the United States, Chief Justice Rehnquist, and for Judge Ralph Winter of the 2nd Circuit. He graduated from a place in New Haven that pretends to have a law school.

MR. GIUFFRA: You spoke there several times.

JUDGE KOZINSKI: Yes, I have, and I hire clerks from there all the time, and they pretend to teach them law, too.

And then we have Joseph McLaughlin, who is to my immediate right. Everybody is to my right; that's unusual. He is a partner at Sidley Austin Brown & Wood in New York, and he was General Counsel of Goldman Sachs from 1976 to 1988. Before that, he was at Sullivan & Cromwell.

MR. GIUFFRA: A conspiracy.

JUDGE KOZINSKI: I think so. And he is an adjunct professor of law at NYU Law School, or he was between 1988 and 1992. Paul, you go first?

MR. GONSON: Yes. Judge, thank you.

When I was on the SEC staff and I would appear at programs like this, I would always give the required disclaimer of SEC responsibility. I would say that the views I am about to give are mine and not necessarily those of the SEC. I am now away from the SEC for about three years. However, I think I had better say that anyway. So these are my views and not necessarily the SEC's views.

The title here is, I guess, a provocative one, whether the SEC believes in free speech. I think that if you went into the SEC building and you roamed the halls and you poked into offices and you asked people, "Do you believe in free speech? Do you believe in the First Amendment?", you would get a puzzled answer. No one there really focuses on that question as such, and I think if they reflected on it, they would say, "Why, sure we do."

But what the SEC does is administer six statutes, all passed in the decade of the 1930s, collectively known as the Federal Securities Laws. These statutes are intended in the main to provide a lot of information to people who are asked to purchase securities and to the securities market. So while I would say the First Amendment is not on the agenda of the SEC as such, the SEC's three major agenda items are disclosure, disclosure, and disclosure.

Free speech cases are about, of course, information being available to the public so that this information can be known and can be debated, people can debate ideas, and this is exactly the name of the game of Federal securities regulation.

The Supreme Court has said that the First Amendment looks more kindly on regulation that requires more disclosure than the speaker might give voluntarily. So in that sense, the SEC probably is doing a very good deed. It requires disclosure in a number of areas, but just as a general introduction, I will focus on two of them. One is at the time the securities are offered and sold to the public, and another time is when securities which are already outstanding are bought and sold in the securities markets.

We will hear about a couple of cases today, one of them being *Central Hudson*. *Central Hudson* was a 1981 Supreme Court case in which the Supreme Court said that commercial speech was entitled to First Amendment protection, but to a lesser degree, and gave a four-part test.

One of the parts of the test was whether the government's interest in regulating speech was a substantial interest. A year later, in a 1981 decision, the D.C. Circuit said, referring to the SEC's, "marketplace laws of general applicability, beyond question, those laws serve a substantial public interest."

Our country's securities markets are the envy of the world. Every year, billions of dollars are raised by the securities industry to finance American business and foreign business, and there is no cliche which is truer than the one that says Wall Street is very close to Main Street. The majority of households in the United States own securities, and many, many foreign investors come to the U.S. markets to buy and sell securities.

Why is that so? That's so because the U.S. securities markets, in addition to being efficient, are also believed to be, and in my view are, fair and honest, and the substantial government interest in preserving this jewel of our nation's securities markets rests upon an intangible, a very precious commodity called confidence. If people have confidence in the securities markets, then they will use those markets.

In protecting these markets, the SEC both, as Judge Kozinski said in his introduction, compels speech and restricts speech. When securities are offered to the public, the law requires that the offeror give detailed information to the offeree about the securities being offered, its attributes, and about the company, its assets, and its earnings, in great detail. This is so because the offeree ought to be able to have information to make an informed decision.

If you go out and buy a refrigerator, or if you buy a car, you can look at it, you can test it, you can kick the tires, you can open the door. If you are asked to buy securities, you know nothing about it unless you can get some information about it. So the law is sometimes called truth-in-securities.

No Federal official passes on the merits of the offering. No one says, "Well, it's a good deal or it's a bad deal." The idea is to get all the information out. The investor makes his or her own decision, makes a good decision or a bad decision, but it's the investor's decision. So this is compelled speech, no question about it, in much more detail than would be voluntarily given.

The law also restricts speech in that you can not make this offer to the public, you can not give the prospectus out, until you first submit it to the SEC and the SEC staff has gone through it to make sure that, indeed, it does have full and complete disclosure. The SEC will then say it's okay to issue it. This is what Judge Kozinski referred to as a prior restraint; that is, the government will not let you make this speech until the SEC staff has approved it.

Much of these securities are traded on our nation's securities markets. The law then requires that these companies make periodic and detailed disclosure by filing documents with the SEC, annual and other reports, again

including a lot of required, detailed information. This information today is sent out instantaneously by computer to the securities markets so that buyers and sellers in these markets can make decisions about whether to buy or sell these securities based upon information.

There has been a small amount of litigation concerning the SEC and the First Amendment, mostly in the area of publishers and politicians, and we may talk about some of those cases.

As to business generally, there are virtually no First Amendment litigation challenges, even though these laws that I speak of have been on the books since the 1930s. That is because I believe that the securities industry, corporations, and the corporate securities bar have generally accepted the regulations as workable. That isn't to say that there isn't some grumbling, comments, and suggestions about them from time to time, but rarely on First Amendment grounds.

That is sort of a general overview as to how these laws work and what I think is the SEC's views about them.

JUDGE KOZINSKI: Thanks, Paul.

MR. GIUFFRA: Our topic today is, does the SEC care about free speech? And I think the answer is generally no.

But I don't think we should be too hard on the SEC, because if one asked 99 percent of the securities lawyers in America whether they care about free speech, the answer would be no.

I was at lunch at my law firm last week and asked several lawyers -- "Does the First Amendment have any application with respect to the securities laws?" And one looked at me and said, "Have you been speaking to Joe McLaughlin?"

If you were to walk into my law firm and do a survey of the lawyers there who were in the securities area and ask them, "Does the First Amendment apply to the securities laws?," virtually everyone would say no. You must start from that premise in considering today's topic. I suspect that the Framers would be surprised if they knew that we lived in a country where Larry Flynt has greater rights to decide what to put in Hustler Magazine, than if Bill Gates wants to speak about Microsoft.

Now, if we are going to have the best capital markets in the world, they must be free and open capital markets. Ten blocks from here at 450 5th Street, we probably have, as the Judge said at the outset, one of the preeminent censoring bodies in the world. At the SEC's headquarters, there literally are floors of government regulators who censor the speech of public companies. If you're the head of a Fortune 500 company, and you want to make an offer to sell your securities in writing, you can't do so unless you receive the SEC's approval. The SEC is going to review what you say, the agency will give you comments, and you will have to hire lawyers to respond to those comments. Professor Richard Painter is in the front of our audience. He used to do this at our firm, responding to the comments and making sure that every word is the way the SEC wants it. In fact, if you do anything without getting the SEC's approval, you can have big problems. You could lose your job or even go to jail.

If one were to guess, Wall Street law firms collectively earn billions of dollars every year from responding to the SEC's comments. We all have a vested interest in preserving and protecting this system of regulation

Now, why is it that the First Amendment is considered to be irrelevant to the securities laws, and why do we have a government agency reviewing corporate speech. If you are an oil company and you want to run an ad, you don't have to run it by the Department of Energy.

As Paul pointed out, the securities laws were enacted to protect unsophisticated investors. The Congress was concerned about fraud in the wake of the 1929 crash. Our securities markets are the envy of the world. Our securities markets date back to the Great Depression and the disaster that followed. Our securities laws have not been substantially updated since 1933 and 1934. At that time, there was no question that the First Amendment did not apply to commercial speech. In fact, it was only 25 years ago in the *Virginia Pharmacy* case that the Supreme Court first recognized that the First Amendment protected commercial speech. In that case, the Court held that consumers had an interest in the free flow of information.

Now, Paul referred to the *Central Hudson* case, and I think there is one prong of the *Central Hudson* test that's critical in thinking about the securities laws, and that's the prong that says the restriction should be no more extensive than necessary to serve the government's interest.

One interest the government clearly has is preventing fraud. There is no question that the First Amendment does not permit someone to make fraudulent statements in connection with the purchase and sale of securities. If the government wants to come and swoop down on someone who is making fraudulent statements about a public company, it can do so. If the government doesn't do so, swarms of securities lawyers certainly will do so. So there already exists substantial enforcement if someone is, in fact, making a fraudulent statement.

At the same time, the law is somewhat ambiguous as to what constitutes securities fraud, because there are cases that, depending on the circuit involved, require either deliberate recklessness or just recklessness to constitute

securities fraud. So public companies must be careful when they make public statements, because whenever a company makes an announcement of bad news and the stock price drops substantially, plaintiffs' lawyers will, in fact, sue that company.

It is up to the SEC and Congress to reinvigorate the First Amendment in the context of the securities laws. The vested interests in the private bar, and I'm part of it, will not rock the boat. The only Supreme Court case addressing the issue of the First Amendment and the securities laws is the *Lowe* case, where the majority of the Court tried to avoid addressing the constitutional issue. Three justices made quite clear that there is a First Amendment problem if you limit the ability of an investment newsletter to make statements that provide non-personalized investment advice to the public.

In sum, the Congress does not focus on the First Amendment, the SEC does not focus on the First Amendment, and the securities bar does not focus on the First Amendment, and we all need to do so.

Now, before I end I want to make clear, the securities laws do play a very important role in our economy, and some of the censorship and some of the compelled speech is, in fact, good.

We want to have efficient capital markets, and we want to reduce the cost of raising capital. What the SEC's rules do, although they need to be updated and reformed, and those rules need to take into account changes in the way information is communicated today, is provide, as Ralph Winter said in a speech that he gave about ten years ago, is a form of standard weights-and-measures for disclosures by public companies.. If an investor wants to know information about a public company, he or she can look in a 10Kor 10Q, he can look in an annual report, he can look in a proxy statement, and there is certain standardized information in those documents filed by all public companies. That standardized disclosure serves an important purpose, because if General Motors put out documents containing certain financial information and Microsoft put out documents containing other sorts of financial information, the cost of raising capital in America would be higher. It would be harder for investors to compare the performance of companies, for example. At the same time, the SEC should consider the First Amendment in fulfilling what is a very important task of protecting investors.

MR. McLAUGHLIN: Thank you, Bob.

Let me make very clear that what we are not talking about today is protecting fraud. Fraudulent statements are not entitled to First Amendment protection, and neither I nor anyone else has suggested anything to the contrary.

We are also not talking here today about mandated disclosure. Yes, the SEC is in the business of telling public companies what they must disclose, and that does serve an important function. As Bob said, it's a template; it makes it easier for analysts to compare companies. There are probably economists out there who might disagree with this proposition, but again that is not the issue before us today.

To orient ourselves in terms of what else is going on out there today, you will find in your materials an outline that we prepared that describes the First Amendment issues cases that will serve as the background for what we are talking about today.

In addition, there is an article that I wrote a couple of years ago called "The SEC's Coming Regulatory Retreat," which talks about the SEC's restrictions on speech and suggests that there are two reasons why those are likely to be challenged. One is the First Amendment, and the other is, in the international arena at least, the concept of subject matter jurisdiction.

To turn to why this is becoming more of an issue today, let me also refer you to a paper that was prepared by the other group -- I am told that on the Hill they say "the other side" or "the other place." Simultaneous with this meeting, the American Bar Association's Federal Securities Law Committee is meeting here in Washington. The committee sent a letter to the SEC a few months ago suggesting that the SEC ought to consider some fundamental reforms in the way in which it regulates speech related to securities offerings.

What kind of speech are we talking about? Let me outline three types of speech. First, if you're doing a registered public offering, an IPO, for example, the only permitted written material that you can use is the prospectus. Anything else is an illegal prospectus and creates all sorts of problems.

Second, if you are doing a private placement, even if you have directed that placement to the correct people, but you have somewhere trespassed and engaged in what the SEC calls a general solicitation, that takes away the exemption afforded to the private placement and again you have a lot of problems.

Finally, for offshore offerings, if the offering is sold to people outside the United States but somehow there occur within the United States what the SEC calls directed selling efforts, again you lose your exemption, with equally bad consequences.

Now, we got along fairly well for a long time in all these areas, but what is happening today? Well, two things: international offerings or globalization, and, two, technology, in particular electronic communication.

A broker who would pick up the phone and call his best customer upon being informed of his firm's participation in a hot issue, might say, "Paul, I've got a great deal here, it's the new Microsoft. Can I send you a prospectus?" That's perfectly legal. Let's assume, however, the broker sends an e-mail to Paul with the same words. Potential criminal violation and all sorts of bad civil consequences, including a one-year put back to the seller.

Electronic roadshows. We used to be able to have roadshows at the Waldorf, and we still do. We invite people to lunch at the Waldorf. But today, the technology permits us to invite people to see the roadshow on the Internet. The SEC says you can not do that: that is a written communication and it is an illegal prospectus unless you follow some particular rules.

How about a foreign company, or, for that matter, a U.S. company's website? It's up there during the course of the public offering. Is that going to be construed to be a written communication and therefore cause a violation of the Securities Act?

How about Bloomberg and similar services? They provide information to investors, but if the information relates to securities that have been offered privately, have you somehow lost your exemption?

These are some of the reasons that have led to the First Amendment, among other policy reasons, arising a basis for challenging the SEC's traditional command and control method of regulating communications in the context of securities offerings.

MR. GONSON: I think you all understand, if you are securities mavens, and others perhaps don't, that the law says that an offer to sell securities is subject to the restrictions that I talked about a little earlier, and Joe gives some variations on the theme.

Back in 1933 when this law was passed, the distinction between written communications and picking up a phone and calling your customer was a very well understood and very well-defined distinction. Today it is obviously much less so with the use of the Internet and the use of the e-mail.

Joe talked about a couple of things. First of all, he said that you have to use the prospectus and nothing else. Well, that sort of makes sense. If you do have a law that says that the SEC is supposed to look at what you are going to tell your offeree to make sure that it's honest and full and complete, to the extent that one uses writings in addition to or outside the prospectus, he undermines that regulatory effort. So the only-the-prospectus rule has been in effect a very long time.

The private placements Joe referred to is a system where there is something called a private offering, or it may more precisely not involve a public offering. In general, if the offerees are persons who can fend for themselves, generally affluent, they generally don't need the protections that a registration statement would give, then you don't have to go through this drill to register your offering and give a prospectus. But as Joe points out, if, in fact, offers are made advertently or inadvertently to the general public, the so-called general solicitation that Joe referred to, then you are back into the teeth of the statute again that says that if you're going to offer to the general public, you have got to comply with these laws.

With respect to the offshore, that was an effort by the SEC to take the sting out of these requirements by saying to U.S. offerors, if you are going to offer your securities only to offshore persons, only to foreigners, not residents of the United States, you don't have to jump through all these hoops. But there have been leakages back. So the SEC asserts its concern that maybe these are various kinds of schemes by which there are purported offers overseas, but then they float back into the U.S. and are being offered and sold to persons in our country without the protections of the securities laws.

The one-year put that Joe refers to is Section 12(1) of the Securities Act, that says that if you should have registered your securities with the SEC but you did not, then the purchaser has up to one year to get his money back. An absolute liability. That's referred to as a one-year put.

MR. McLAUGHLIN: I tell my clients I don't mind their selling puts to customers so long as they get paid for them. It's not a good idea to do it for free.

JUDGE KOZINSKI: I should say that the formal part of the program has finished, and I do want to invite statements and questions. So what you should do is sort of like an auction: catch my eye.

By the time the prospectus is given, there is already so much information about that offering available around the world almost instantaneously. So maybe some better way has to be found than was devised in 1933.

JUDGE KOZINSKI: Richard.

PROF. PAINTER: My name is Richard Painter from Illinois, a member of the New York Bar. There are just two tensions I want to explore here in more detail. I want to explore the tension between the '33 Act embargo on speech before a registration is filed in a registered deal on a private placement pursuant to the general solicitation rules, and the '34 Act requirement of continuous speech and continuous disclosure.

One of the things I find very troubling is that, particularly with some of the older releases, the gun-jumping releases under the '33 Act suggests that meetings with analysts are appropriate so long as you don't give the

analyst any piece of paper that could possibly be taken out of the room and given to the mere commoners who might read this material. Of course, we have Regulation FD where the SEC has said under the '34 Act, in effect, that this would be selected disclosure that we do not want to permit where you can talk to analysts and not to the world as a whole.

At least in that instance, there needs to be some revisitation of the gun-jumping rules, and this may require examining the general solicitation area under Regulation D to see if there is conformity with general disclosure requirements of the '34 Act. Not to say that Regulation FD is a good idea; it has its other problems.

The other is a tension of political speech. You didn't mention yet the *Long Island Lighting* case where Judge Winter wrote a very intelligent dissent. There you had a proxy fight over whether the company should be a nuclear power, going on side by side with a political election on Long Island on the exact same issue. It is true that the same parties were involved with the proxy solicitation as were involved with the general election and taking out advertisements in the newspapers.

But there was an advertisement that seemed to be strictly political. It was not addressed to shareholders at all, dealing with the nuclear power issue, and that's at the core of political speech under the First Amendment. Yet there was litigation over this under Section 14 of the '34 Act.

The 2nd Circuit, by majority opinion, over Judge Winter's dissent, refused to have any kind of a clear rule as to when a seemingly clear political ad that did not even mention the proxies is something that people should be able to do without Section 14 problems.

JUDGE KOZINSKI: I know that Bob Giuffra will want to disagree with Judge Winter.

MR. GIUFFRA: No. I learned never to disagree with my former judge.

I think that the issue that needs to be considered is, number one, the '33 and '34 Acts need to be substantially revised because they are antiquated laws that do not confront the present reality of an Internet age as opposed to what went on in 1933 and 1934 when you had communications that were by telephone. There were no faxes and no websites when the securities laws were enacted.

Beyond that, we must keep in mind that there already is a prohibition against fraud in the securities laws. If you engage in fraud in connection with the purchase or sale of securities, you are going to get sued. The SEC can come after you, there is no dispute about that.

But we also have another regime that has been put in place with respect to offers that imposes rules and requirements as a second layer of protection. It is hard to think of another area of commerce where you have as many regulations governing non-fraudulent speech as you do in the securities area. The question is whether this regulation is worth it.

Now, clearly it's worth it to have the weights-and-measures standardized disclosure, but are some of the hyper-technical rules that make it possible for Wall Street lawyers to earn a lot of money needed or necessary? That's the question.

PANELIST: Bob, there is another illustration which is similar to the *Long Island Lighting* situation. Recently Weyerhauser was trying to take over Willammette, and some employees of Wilhammet set up a website the address of which was, I think, rather catchy: Justsaynoway.com. They were trying to get people to oppose Weyerhaueser's tender offer, and the SEC is reported to have communicated with the Willammette employees and told them, "Sorry, you can't keep that website up there unless you prepare and file a Schedule 14(d)(9)," which is a particular SEC document, the estimated cost of preparing which would have been about $50,000. The employees, not having $50,000 lying around, shut down the website. That is an example, again, of how the SEC will prevent somebody from doing what I think is pretty close to core political speech.

MR. GONSON: We are dealing here in the proxy area now with the example that was given by the *Long Island Lighting Company* case and the Weyerhauser case, and the proxy area is a little different, really, because the securities laws give authority to the SEC to provide rules with regard to proxies.

I think all of you are aware that state law governs corporate law as to when there should be annual meetings, what should be discussed at annual meetings and who can vote and so on. But Federal law governs how the communications will go between the company and the shareholders and among the shareholders.

The Federal law with respect to proxies is not so much a law that relates to the offer to sell securities or trading in securities as it does to what we might call corporate governance. It also grows out of some of the abuses that preceded the laws in 1934. There were Senate committee hearings, and part of these hearings also governed abuses of this kind, and so it was a reaction to that.

I guess the point I might say with regard to both the *Long Island Lighting* case – the LILCO case, as we call it -- and the Weyerhauser situation is that if you do have communications that are going back and forth, those communications are subject to regulation by the SEC. To the extent that there is something also going on at the same time,

a dispute about nuclear power or labor relations or something, that still does not change the question as to whether at least from the SEC's point of view, these communications nonetheless should be subject to the requirements of the regulations.

PANELIST: I think it's important that people understand that in this LILCO case, a public company wanted to run a big ad in the newspaper.

No, the other side wanted to run a big ad in the newspaper, the dissent, and before they could run the ad, they had to get the SEC's approval with respect to what the content of the ad was going to be.

PROF. PAINTER: And it was not addressed to shareholders; it was addressed to the public about nuclear power.

PANELIST: About nuclear power.

MR. GONSON: Possibly the shareholders might read it nonetheless.

PROF. PAINTER: Yes. Absolutely.

JUDGE KOZINSKI: Larry. Larry Callahan.

MR. CALLAHAN: Yes. My name is Larry Callahan. I am left to ask the simple question concerning Section 12 '33 Act. I would hate to have to predict what is going on in the Commission, but under that strict liability standard, you have a public offering, even though it's an offering circular, irrespective of the fact that everyone that bought signed the subscription agreement and they were totally sophisticated. Under the one-year statute, you can still get all your money back. If you put it on the Internet it's probably going to be called a public offering.

Is there any feeling at the Commission that maybe public offerings could be redefined so we could make use of this increased technology?

MR. GIUFFRA: Joe is a better one, I think, to respond.

MR. McLAUGHLIN: Yes, I can speak to that.

I was on the the drafting committee for the ABA letter, and one of our main purposes was to fix this problem. Suppose a small company were to put an ad in the *Wall Street Journal* saying, "We need to raise $10 million. We can only sell to accredited investors," which is a particular kind of person that is deemed under SEC rules to have enough money and sophistication to be able to participate in a private placement, "but we can't find an underwriter who will work with us to go out and find these people. We are therefore putting this ad in the paper in the hope that accredited investors will respond and buy our $10 million of securities so we can go and build our new factory and hire additional people."

Even if the company completed the deal by selling only to accredited investors, it would in the SEC's view have engaged in a general solicitation. The transaction would then be without an exemption, resulting in a Section 5 violation, with potential criminal penalties and civil liabilities.

I guess the question, Paul, is if you were at the SEC and you were aware of a situation like this where the private placement had been completed after such an ad had been published, would you expect the defendant successfully to be able to raise a First Amendment challenge to your prosecution?

MR. GONSON: I doubt it. I think the staff would let it go as a practical matter. I do not think they would sue anybody or put anybody in jail. They would let it go. But it is a problem.

Another answer is that one of the proposals that has been made repeatedly is to change the format where no longer is the law subject to offers, but only to sales. That is, you allow your offer to go ahead and then you regulate at the point of sale. That is much easier to do on the Internet today than to try to regulate at the point of offering. And then you're tough at the point of sales.

MR. McLAUGHLIN: No one is objecting to being tough at the point of sale. Only the eligible person should buy.

MR. GONSON: Right.

MR. McLAUGHLIN: This morning, one of the senior SEC people said he anticipated some movement on the staff's part in this area, possibly within the next three years. So it's not a very high priority.

JUDGE KOZINSKI: I think that gentleman was next.

Fred.

MR. ANSON: Fred Anson. I would like to ask you a question not about securities law, but about another area of law. I would like to get your sense because I think this might bear on what you're talking about. The SEC is not the only government agency that prior restrains corporate America in what it can say and compels it to say other things.

If you make drugs and you want to advertise what your drug does, the FDA says what you can say and what you can not say. It says you have to warn of various kinds of side effects. Without regard to fraud, the FDA has banned even truthful information from being displayed to the public, fearing that we do not know enough to ask our doctors what kind of medicine we should be taking. That was the regime for a long time, and a lot of it still remains, but a lot of it was challenged on First Amendment grounds. The D.C. Circuit has handed the FDA its head on some of these kinds of rules, and now you see a lot more ads for drugs on television than you used to.

PANELIST: Do they still have to be pre-cleared?

MR. ANSON: There are still regs that say what you can say and what you can not say. I don't know that they actually review the copy. I don't know the answer to that. But there are regs. I don't know enough about prior restraint to know whether it's technically a prior restraint, but it might be. The government says what you can and cannot say, and it will go after you if you violate those regs.

But the point is that there was a regime that was very much like what you're describing in securities law. Part of it still remains and part of it does not. The FDA has not decided how to comply with some of these rulings.

I just offer that to you as food for thought.

JUDGE KOZINSKI: Well, is this a good thing? It is hard for most of us to relate to securities -- obviously there are securities lawyers here, but we know about drugs.

PANELIST: Drugs are more dangerous than securities.

JUDGE KOZINSKI: Drug ads on TV, First Amendment questions -- we buy and use drugs in our personal lives. Are we better off now that you get prescription drug ads in newspapers magazines, TV and the like? Putting aside the First Amendment question, sometimes the First Amendment can really cause harm, and sometimes we know it does and we live with the harm, because we are committed to its values. But it still should cause us to ask the question, does it move us in a better direction? I am not convinced that drug ads on TV are a good thing, but maybe the panelists have a thought on how this relates to securities laws.

MR. McLAUGHLIN: Well, I think I recall the case you're talking about. It involved off-label uses where a doctor could, for example, perfectly legally prescribe a drug for a use not contemplated by the label. But I believe the drug companies themselves were prohibited from helping doctors promote off-label uses, and that's what I believe was struck down as being contrary to the First Amendment.

JUDGE KOZINSKI: I'm sorry, we had a comment or question over here.

MR. FLEISCHMAN: Ed Fleischman from New York.

MR. GONSON: Former SEC Commissioner.

MR. FLEISCHMAN: Mr. Giuffra, you talked about the fact that there are no challenges. Would talk to this audience a little bit about whether it is, in fact, the agency affirmatively dispelling challenges, or whether there is something to the notion that simply the way the markets function, if people want to get their transactions done, they don't have time to challenge? And in anticipation of your answer, could I pose something to Messrs. Gonson and McLaughlin? With all that you've told us about the way it functions, I am sure the two of you have thought about how it could function in an alternative manner with less intrusion, less prior restraint. Would you talk to us a little bit about that? The proxy area, offering area, anything you choose.

JUDGE KOZINSKI: No pre-clearance?

MR. FLEISCHMAN: Alternatives to pre-clearance. There must be ways. Are there not?

JUDGE KOZINSKI: Good question.

MR. GIUFFRA: On the first question, I think there are no First Amendment challenges because no Fortune 500 company wants to go to war with the SEC, and the better way to deal with this is to work it out and address their concerns and essentially live with these rules.

You had a challenge in a newsletter case because the SEC's rules limited the very business conduct at issue.

JUDGE KOZINSKI: Well, but let's say we get a challenge and the Supreme Court, lo and behold, says it's just like requiring newspapers to submit their copy before they print it. So we're in that universe now. What would that universe look like?

Paul, you have expressed perhaps the strongest commitment to the current regime, and it is a very persuasive case. Would we live in the wilderness? Would people all over the world, including people in the United States, lose confidence in the securities markets? Is there an alternative market solution?

MR. GONSON: There probably are alternatives. It has been said that the atmosphere today in this country is much different than it was in the New Deal era when Franklin Roosevelt was elected President in 1933 and had to deal with widespread depression, closed banks, the 1929 market crash and the aftermath.

So one proposal that has been made is that large public companies today no longer should need to jump through those hoops. They have so many incentives as a practical matter to make complete disclosures anyway, they should just simply be left to their own devices, and there should only be policing for fraud.

With regard to new companies coming to market, what's referred to as initial public offerings or IPOs, some people say the focus should be on those companies only. There have been proposals of all kinds, and Joe is much more involved in this proposal business. He has served on committees that write these things, and he is much more knowledgeable than I am, and I am sure he will have something to say. But there have been many proposals that have dealt with ways in which this could be changed to be less intrusive.

The one that I mentioned before and the one that I personally like the most would be to abandon the whole idea of regulating offers and simply regulate sales, because nothing bad happens until the sale occurs, and all this apparatus that deals with the offers could then be largely eliminated.

MR. McLAUGHLIN: Paul is absolutely right. I think the least defensible current SEC practice is its regulation of offers in the context of private placements. As long as the securities end up in the hands of eligible investors able to fend for themselves, there is no regulatory interest in policing offers.

As far as prior review of offering documents is concerned, the European Union has a directive out that contemplates prior review of a company's documents where the company has not previously made a public offering and is therefore not yet in the reporting system. As Paul says, the typical divide among U.S. companies is those who are public companies and those who are not. So you would expect initial public offerings to continue to get prior SEC review.

I think people generally do not object to the idea of submitting the mandatory disclosure package to the SEC, because the comments are sometimes very helpful. What is disturbing is that if a public company -- General Motors, Procter & Gamble -- wants to register additional securities for resale, it runs the risk of being delayed because of an unexpected SEC review of its disclosure documents. What the staff really should have been doing all along was reviewing companies' periodic disclosure documents as they are filed, not just at the point where a company happens to be ready to offer new securities.

The ABA proposal that I mentioned, which is available on the ABA's website, draws a sharp line between IPOs, which do get prior SEC review, and offerings by seasoned companies where they file a registration statement, but essentially it's one for life. It becomes effective automatically, and the total focus is on the periodic reports on which the secondary market depends on a day-to-day basis.

MS. WACHTEL: My name is Bonnie Wachtel. In my day job, I run a brokerage firm.

It's Wachtel & Company, but you can't hurt me now.

MS. WACHTEL: NASDAQ, which is the second largest stock market in the world, has had the largest collapse of any stock market recently since 1933. An investor came up with the idea that the only reason he lost this money is because he read these beautiful analyst reports from Goldman Sachs and other places and got a buy rating on them. At the same time, he found out, that Goldman was getting investment banking fees from those companies. Well, of course they are, and there are so many conflicts of interest going on at all times in the securities industry.

There is no reason in the world to believe disclosure of that conflict would have made a difference to any buyer,

because the mutual funds understood completely what the conflicts were. They are the most sophisticated buyers. They couldn't get enough of those stocks at those high prices.

In the face of complaints from these investors the SEC responded by putting on this congressional hearing about this issue about not disclosing possible conflicts which is such a small non-issue, a non-problem. Setting that up in the wake of this huge market collapse, it makes it look as if the SEC is endorsing the fact that it's okay for investors to believe that relying on an opinion allows them to bring that to court or bring it somewhere and actually make a claim, as opposed to making their own judgments in their own self-interest.

My question is, are you at all concerned about that, because I am. I don't think the SEC should have reacted that way.

PANELIST: Yes, I am concerned. If you read my comment letter on Regulation FD, which is on the SEC website, I describe how the SEC had demonized analysts for a period of more than a year in an effort to sell the idea of FD.

In addition, the chairman of the SEC at one point said it is ridiculous to think investors need analysts; they can sit there on their computer and get the information right from Yahoo. That was, of course, in the days of more euphoric markets. Now everyone is blaming the analyst.

There are the cases and hearings that you mentioned, and I was asked by Representative Baker to write a comment letter, which one of these days will get published.

All of this appeared very important before September 11. I have not heard a word about it since, because I hope we are worried about more important things.

MR. GIUFFRA: I think your question raises a point that is important. Anyone who has ever read one of these prospectuses or any sort of public disclosure for a public company will see pages and pages and pages of warnings that are drafted about that company. In fact, if you read the warnings, you would never buy stock because you would think that the company is going to go bankrupt in a week.

But I think the First Amendment question is, to what extent can the government protect shareholders from what may be market risk. That is probably one of the reasons why the average person probably should buy S&P 500 index fund and not be in individual stocks.

JUDGE KOZINSKI: The gentleman in the back row.

MR. JAFFE: My name is Eric Jaffe. I'm an appellate attorney here in Washington, D.C.

Given the securities background, obviously everybody has spoken on the securities interest, but very little about the First Amendment interests. The only comments so far have been in reference to *Central Hudson*. But in much of the speech regulated by the SEC, *Central Hudson* would not apply because it is not commercial speech.

Even things that we like to think of as commercial in nature -- for example, my profits last quarter were X. Unless you're saying that on the brink of an IPO or on the brink of a reissue of some further stock, that is not commercial speech. It is a speech about economics, it is a speech about yourself, but you are not trying to induce people to buy. It's all information given to a secondary market, and the actual speaker is, in fact, not engaging in commercial speech at all. Other examples like G37 similarly are not commercial speech.

So I was wondering whether or not, while many of these regulations may be nice, may be helpful, may, in fact, be quite good, whether they are compelling, because there are a lot of things that are nice and helpful and good that can't quite overcome the strict scrutiny which presumably would be applied.

And then even as to things that the commercial speech doctrine would apply to, is protecting the securities markets in the abstract a substantial governmental interest? There is no question about that. But most of the regulations do not, in fact, protect the securities market starting from scratch; they protect only some marginal beneficial interest in it. For example, the no further written communications versus oral communications other than the prospectus rule. The marginal gain on protection of that particular regulation, (which says the SEC thinks you will be misled by this e-mail because you won't have read the prospectus, too, which is fully available to you, even if the e-mail asked you to, please read our prospectus), that is not substantial. To my mind, that is not substantial. aut I'm wondering how the panelists might think it would be.

JUDGE KOZINSKI: I want to focus on one aspect before you answer the question. How far is any of the stuff non-commercial speech? Presumably the commercial stuff is covered by *Central Hudson*, right? And so if you are buying, selling, offering, that test would apply. But is any of this pure speech, or is all of it at best the middling standard?

MR. JAFFE: The proxy stuff, the solicitation of votes back and forth, that's not commercial speech.

JUDGE KOZINSKI: Let's hear what the panelists say.

Mr. McLAUGHLIN: I think the only speech that we have been talking about that fits comfortably within the commercial speech definition is the ad in the Wall Street Journal looking for accredited investors to invest in a deal. The rest of what we've been talking about is probably outside the area of commercial speech.

PANELIST: I think that offers of securities are commercial.

JUDGE KOZINSKI: Buying and selling, but giving investment advice?

PANELIST: Investment advice --

JUDGE KOZINSKI: Pure speech. Compelling government interest.

PANELIST: Courts have given it intermediate scrutiny in the past.

JUDGE KOZINSKI: But that was the question, I thought, or at least my assumption of the question was that at least some of it is pure speech and you need to come up with a compelling governmental interest.

PANELIST: You are familiar with --

MR. JAFFE: It has been suggested it wasn't commercial speech in that case, and I am suggesting whether or not some lower court may have said it is commercial speech, they are wrong.

MR. GONSON: Mr. Jaffe, you are familiar -- I know you to be an expert in this area — with *Zauderer v. Office of the Disciplinary Council*, a 1988 case in the Supreme Court.

MR. JAFFE: Sure.

PANELIST: That's a case that I referred to obliquely when I said that apart from commercial speech, if the regulation is to require more speech than normally a person would voluntarily give, then the Court generally is hospitable to that.

MR. JAFFE: That is only in the scenario in *Zauderer*, for example, where you are, in fact, soliciting someone to hire your services, which I think becomes more like a speech act, which falls into the offer purchase and sale category, and is not pure speech, in fact. So yes in those circumstances. But when you are a company which has already sold its securities, and it doesn't have any more in the pipeline waiting to be sold, and it says we made 10 percent profit last quarter, that's not --

PANELIST: But you're a company and you're interested, as many companies are, in your stock price, because that has relationship to your business.

Let me just suggest that I think the SEC is fond of taking the position that everything we're talking about here is commercial speech, and I think that is an overstatement, that very little of what we're talking about here today is really commercial speech as such.

Mr. McLAUGHLIN: The bottom line is that a lot of this has never been tested, and it may well be something beyond commercial speech.

JUDGE KOZINSKI: Yes, sir.

THOMAS MORAN: I have a particular question in the context of the self-regulatory organizations and the way that the Commission exerts fairly extensive influence over those organizations to get those quasi-public or quasi-private organizations to enforce regulations and restrictions on speech on behalf of broker-dealers and the way they do advertising and such.

I'm curious of the panel's reaction as to what the exposure might be to an SRO. Does the fact that it's a private entity of voluntary membership, as some would argue, insulate it from a First Amendment challenge or does its derivative regulatory authority from the SEC potentially expose it to actions based upon the First Amendment?

MR. GONSON: There is a case now pending in the 9th Circuit called E-n-g, *Eng v. SEC*, which raises that very question.

I happen to have the SEC's brief.

As many of you know, the over the counter markets thought that Mr. Eng had made a false and misleading statement, exaggerated, unwarranted and misleading, in violation of the NASD advertising laws. The NASD brought a proceeding against Mr. Eng and found that he had violated the advertising rule that says you can't advertise falsely and in a misleading manner, and sanctioned him, and placed a bad letter in his file, gave him a reprimand.

He then appealed to the SEC, which acts as an appellate tribunal over the self-regulatory organizations. The NASD ruling was affirmed. Mr. Eng now goes to the 9th Circuit appealing the SEC's order affirming, and he makes two arguments. First, he says that the NASD is a state actor, as the phrase is sometimes used, subject to the First Amendment, which applies, of course, only to government people, and second, that his speech was protected by the First Amendment.

The SEC never reached the state actor issue or the First Amendment issue, but the SEC noted in not reaching the First Amendment issue that many courts have said that the NASD is a private organization not subject to the Fifth Amendment, not subject to the Fourth Amendment, in many, many cases, although there is no case of which I am aware that actually deals in the First Amendment area.

In the 9th Circuit, the SEC argues in its brief that the court need not decide whether the NASD is a state actor, but because the information was false and misleading, the First Amendment does not protect it because the First Amendment does not protect false and misleading information, and that's the issue there.

There is another case called *Blount v. SEC*, in the D.C. Circuit.

Mr. Blount challenged a ruling of the Municipal Securities Rulemaking Board, another self-regulatory organization, and the D.C. Circuit did hold that the MSRB was a state actor and then reached the merits of the First Amendment, finding no violation.

PANELIST: Anybody knows how Arthur Levitt, Jr. of the MSRB and the NESD would conclude they were state actors. Maybe that's more than you wanted to know, but I have this brief right in front of me.

JUDGE KOZINSKI: You know what I haven't heard yet, and we do have a question, but let me interject. Usually when you hear discussion of the First Amendment, you hear of the theoretical underpinning and so on, and people usually as part of the argument say: Here are the great benefits, for example, of commercial speech for people who are interested in advertising. I have heard a lot about how we have a really fabulous market that's envied all over the world and works terribly well. Maybe there's a problem that comes inherently with the provision of our Constitution, which, of course, is an important problem. We certainly do not want to be violating the Constitution. But I have not heard anything to tell me that -- maybe such an argument cannot be made -- "Gee, if only we follow the Constitution, the wisdom that comes from the great document will also give us benefits. Here is how we will be better off than we are now."

Is there a consensus here that the First Amendment is one of those things that we may have to deal with to make us worse off or at least no better off?

MR. GIUFFRA: Well, there are strong arguments that if the First Amendment is at least considered in the context of securities regulation, there are at least two benefits. One, complying with all these rules and restrictions is costly and slows the process down. It literally costs billions of dollars for public companies to comply with all these regulations. The second argument would be that the flow of information unimpeded by government intervention would presumably result in more efficient capital markets.

A good example would be Regulation FD, which says that if you are a public company and you're going to announce material information, you've got to do it in such a way that it's communicated to the marketplace as a whole.

Since Regulation FD has been put in place, and particularly immediately thereafter, there was a lot of volatility in the market as companies announced that they, for example, were not going to meet their earnings estimates, and all of a sudden at four o'clock one afternoon after the market closed, Cisco or Intel announced they weren't going to meet the earnings expectations, and then the stock dropped precipitously the next day.

Prior to the imposition of Regulation FD, companies would condition the market through their analysts and say, "Well, we have some problems. We're concerned about whether we're going to meet our earnings forecast", and the markets were less volatile. The bad information was probably communicated to the markets faster than under the present regime, although there were concerns about selective disclosure.

JUDGE KOZINSKI: Why is that good? Why doesn't that simply shift the loss? Rather than having the stock drop and everybody takes an equal loss, what happens is the people who get the information first get out early at the expense of everyone else.

MR. GONSON: Well, that's the argument in favor of regulation.

JUDGE KOZINSKI: Why is that a better result?

MR. GONSON: That's a good question. Regulation FD was premised on the notion that ordinary investors in the market did not like the situation where a corporation whispers in the ear of a favorite analyst and gives him material inside information. Then that analyst, either himself or in some cases the company tips the clients directly, and then, based on this inside information, the analyst or the clients buy or sell before the public is aware of the information.

There were 6,000 comments received on that proposal, and overwhelmingly, the average person very much wanted the equal playing field. That's really the basis for this rule.

The Securities Industry Association opposed it, the American Bar Association opposed it.

MR. McLAUGHLIN: I opposed it.

PANELIST: -- Joe McLaughlin sent in a letter saying he didn't like it either. There were a few people, but maybe, I would say a fraction of 1 percent opposed it. The big hitters opposed it; the little guys loved it.

Mr. McLAUGHLIN: I think the answer to the Judge's question is not really Regulation FD. The large savings are going to come from somewhere else. Certainly small businesses and other companies that do private placements will reap immediate benefits if they can do private placements without having to worry about crossing the line into general solicitation.

So a small company going into the *Wall Street Journal* with an ad to collect investors, accredited investors, will see an immediate savings.

Second, it is also the use of technology. I mentioned before the inhibitions on the use of e-mail, electronic roadshows, websites, Bloomberg. We have all these vehicles available. The SEC says we're in the age of information, but we can't use the vehicles best suited to disseminate information, and that's where the savings will come from.

JUDGE KOZINSKI: Is that a First Amendment problem or is that simply needing to kick the SEC in the behind to say "Come up to speed. We're now living in a different world."

MR. McLAUGHLIN: Well, the ABA letter does not mention the First Amendment. I think it makes a very good case based solely on economics and policy that the SEC ought to relax its restrictions in these various areas. But I think there is a First Amendment argument as well.

JUDGE KOZINSKI: Yes, sir. You waited patiently.

MR. GOLDSTEIN: Bill Goldstein. I am an investment advisor. I've run about twelve proxy contests.

I am going to address your question. While I think that there is way too much regulation in the area of the selling of securities, I can at least understand the rationale, when an investor is only given one side of the story. Perhaps there is an agency that should independently review these documents, but because of the potential danger from fraud, it's something that may be unworkable.

I do not understand, and I tried to get it through the SEC staff, why, in proxy contests, we need the SEC as a mediator. To me, it would be as crazy as having a political election where every time somebody criticized his opponent, you would have to run it by the FEC, who would say, what is the basis for that allegation?

The advantage of getting rid of the SEC, getting it out of the business of mediating proxy contests, is that I think there is a better way to get at the truth by letting the two sides make the charges, respond to the charges, then let the shareholder decide.

My question -- I will finish up with a question -- is, can anybody actually sitting on this panel or in this room say that a proxy contest is covered by commercial speech under the *Central Hudson* doctrine?

JUDGE KOZINSKI: Let's turn to the panel.

PANELIST: Well, the argument would be that in the heat of a proxy contest involving, for example, a closed-end fund and whether it should go open-end, and you can make some money that way, the proponent would make some arguments that would influence the shareholders. Before you could do anything about it in court, the proxy contest would be over and the vote would have been taken. I think that is the argument in favor of SEC review of those communications.

PANELIST: Well, that's what happens in political campaigns, too, though.

MR. GOLDSTEIN: Why can't the other side respond to that?

PANELIST: With e-mail.

MR. GOLDSTEIN: Point out the flaws in my arguments.

PANELIST: You would have to have a rule that keeps it open for a certain amount of time, like the tender offer rules?

MR. GOLDSTEIN: A proxy contest?

PANELIST: Yes.

PANELIST: In other words, unlike the election, which takes place on a date certain, the idea would be that if a particular inflammatory communication came out 24 hours before the vote, you would have to postpone the vote by 48 hours.

PANELIST: That's what happens in the tender offer areas; you have to postpone it.

JUDGE KOZINSKI: Robert.

MR. KRY: Robert Kry, Yale Law School.

One question that was asked before was the hypothetical about what the world would look like without pre-clearance, and another concerned SROs and state action. It seemed that, Mr. Gonson, you earlier presented the issue as a question between, on the one hand, do we want to sacrifice First Amendment values, or on the other hand, sacrifice a well-developed securities market with a lot of transparency?

But to me, it seems like even if we didn't have an SEC, there would still be many other private organizations, including stock exchanges, that could fill that role.

To what extent is the First Amendment a reason to have bona fide non-state actors like stock exchanges not acting under the pertinent Federal agencies set the rules and make appropriate determinations of the balances between transparency and more speech?

MR. GONSON: Well, that's a very complex question, really. I think many of you know that the securities laws work unlike most other government agencies that regulate business. The SEC regulates, except for initial offerings, trading through what is called self-regulatory agencies. These are the stock exchanges and the NASD for the most part, and these organizations are given quasi-governmental powers to regulate their members. They are exempt from the anti-trust laws.

Under the law, to be a stockbroker in the United States, you have to be a member of the NASD or a stock exchange. If you violate their rules, they can throw you out of the business, and then you are out of the business.

These self-regulatory agencies are run under the close oversight of the SEC, so there is a two-tiered regulatory system.

Now, let's say that you took the SEC out of that system and you still had these regulators. You need some government protection. If you're going to take the anti-trust laws away and allow these organizations to remove people from membership then they can't make a living, you need some governmental organization to oversee and make sure that's fair. I guess you could do that in a more limited way than now exists.

But then you would still have the question one step down. That is, you would still have regulatory agencies -- i.e., the stock exchange and the NASD -- doing to a great extent what the SEC is now doing. They have all their elaborate rules about advertising and sales practices and so on. You violate those and, boom, you can get sanctions, including getting tossed out of the securities business. So you are just displacing the First Amendment question one step down.

If you want to lessen regulation by these self-regulatory organizations, it becomes a problem and a question. I really do not know what the answer is.

I do know that when I read, to use your Food & Drug Administration question, these advertisements in magazines, the first page shows this middle-aged couple happy, smiling in the glow of health, and the ad for a pill on the bottom. Then when you turn the page, you get in four-point type -- you get elaborate disclosures of complications.

PANELIST: Has anyone in this room ever read a prospectus before you bought stock?

Prospectuses in recent years under the SEC's aegis have been made in so-called plain English, sort of like GEICO auto insurance policies. I try to read those, too. But for a long time, prospectuses were believed to be written for the professional, not for the average investor, and would be translated by these intermediaries to investors. That is why they

have long elaborate, information.

But I guess in answer to the Judge's original question, I suppose there could be a lessening of regulation, of the detail of SEC rules, to allow much greater latitude which would probably make it.

The SEC stabs at that. They have special regulations for small business designed to make it easier for small business to raise money at less cost and so on, and I suppose if you take all prohibitions out, you're out entirely.

JUDGE KOZINSKI: In the interest of having everybody ask one question before anybody asks a second question, we will go to this gentlemen.

AUDIENCE MEMBER: I am a corporate attorney in Chicago.

It seems at the very least, the securities laws brushed against the First Amendment by compelling and restricting various kinds of speech. What reason do we have to believe that when it comes to setting aside fraud that the market wouldn't bring about the efficient amount of information? Why shouldn't we just chuck all of these aside and not worry about it?

MR. McLAUGHLIN: Well, I think Jack Coffee at Columbia wrote the most compelling article on that subject a number of years ago in which he made the template argument that Bob referred to before.

MR. GIUFFRA: The weights-and-measures argument.

MR. McLAUGHLIN: The weights and measures argument. In the securities area at least, people don't buy securities because they read a 10-K or read a prospectus. They buy securities because they talk to a salesperson, who in turn talks to an analyst.

The only efficient way for an analyst to cover twelve companies in an industry is to look at documents that are roughly comparable in terms of their content.

So if we left it up to the marketplace to let companies decide for themselves what they want to disclose, it would be difficult for an analyst to cover the same number of companies. He might be able to cover only six instead of twelve. That's a decline in efficiency.

AUDIENCE MEMBER: But Joe, if the companies want to raise the capital, they are going to release the information in a format where analysts can cover them and they are going to do that voluntarily so that people will access them.

JUDGE KOZINSKI: Why isn't the information competition or the competition in the way of disseminating information as legitimate a way for people to compete for investment dollars as anything else?

MR. McLAUGHLIN: Well, we do that in the private market, of course. In the private market, people are not compelled to serve up a given template to the investors. The private investors are pretty much able to specify for themselves what they want in the way of information.

The intermediaries, on the other hand, have something else at stake. The worst that could happen to an issuer if there is false or misleading disclosure is that the issuer gives back the money. As far as the intermediary is concerned, the intermediary may be earning a couple of percentage points on the transaction, but if the intermediary is sued after the company has gone broke, the intermediary can be held liable for the full amount of the offering. So it may be that the intermediary is exerting pressure is to put the issuer's disclosure into some kind of standard format.

JUDGE KOZINSKI: Leslie.

MS. HAKALA: Leslie Hakala from Palo Alto. I understand that at least some members of the panel are unhappy with Reg FD because it has led to more volatility in the market.

PANELIST: That's an argument, anyway, against it.

PANELIST: Yes. I'm not sure that's established.

MS. HAKALA: Well, I am curious. If a company calls its favorite analyst and tells him it's going to miss the earnings this month or this quarter, and then the analyst turns around and trades based on that, why isn't that just insider trading?

MR. McLAUGHLIN: Well, the Supreme Court said it's not, in the *Dirks* case. It's not insider trading unless the analyst is

breaching a duty of trust and confidence.

PANELIST: Paying money to the company.

MS. HAKALA: But why isn't the company tipping?

MR. McLAUGHLIN: Well, tipping is like parking. There's legal parking and tipping and there's illegal parking and tipping. Tipping would be illegal if it were in exchange for some kind of consideration. So if an analyst pays the chief financial officer $1,000 for the tip, that's clearly a breach of the chief financial officer's duty to his corporation and the analyst is participating in that. But in *Dirks*, the Supreme Court, in a decision that I keep telling Paul has constitutional underpinnings, the --

MR. GONSON: I argued the case in the Supreme Court and I tell Joe that no lawyer and no justice and no judge ever even breathed the Constitution. No one ever mentioned the Constitution.

MR. McLAUGHLIN: But on the other hand, if you read Justice Powell's opinion, it is very eloquent in terms of the need to avoid labelling information. You can not paint information red or green and say that it can or cannot be used for a specific purpose. The only way you can really regulate conduct in this area is to focus on the relationship of trust and confidence, which is really at the bottom of all insider trading law.

MR. GIUFFRA: On the Reg FD point, two points. Reg FD is a rule that was just put in recently. We did not have Reg FD until this point, and the markets survived. There are many commercial transactions that occur in the world where there are informational inequalities.

The reason why Reg FD may be problematic is it does slow the flow of information to the market and puts corporations in a position where they must be extremely careful about everything they say, and one could argue that, as a result, stock prices are artificially inflated for some period of time when people are engaging in transactions without full information.

JUDGE KOZINSKI: I think that's all the time we have. This has been remarkably informative and a riveting panel this late in the day. We really are very grateful to the participants.

Criminal Law & Procedure

Litigating the High Profile Case

Mr. Robert Bennett, *Skadden, Arps, Slate, Meagher & Flom and Former Counsel to President Bill Clinton*
Mr. Plato Cacheris, *Law Offices of Plato Cacheris and Former Counsel to Monica Lewinsky*
Mr. Roger Cossack, *Burden of Proof, CNN*
Hon. James Robertson, *United States District Court Judge for the District of Columbia*
Mr. Michael Madigan, *Akin, Gump, Strauss, Hauer & Feld, LLP and Former Chief Counsel to Senator Thompson (moderator)*

MR. MADIGAN: I'm Mike Madigan and I am honored to moderate today's panel, which I am sure will be interesting and no doubt provocative. Let me introduce our panelists. First, on my immediate right is a man who really needs no introduction. Bob Bennett and I were federal prosecutors together in the 1970s. Over the years, he has been involved in too many important cases to even list. He was involved in the BCCI matter. He represented Secretary of Defense Clifford. He was involved in the Iran Contra matter. He represented Secretary Weinberger successfully. He served as Special Counsel in the Senate in the Charles Keating Hearings. He represented Congressman Rostenkowski; Senator Durenberger; Harold Ickes of the Clinton White House; and, of course, most recently he represented President Clinton.

On his right is Plato Cacheris. Plato is one of the Deans of the Bar here in Washington, D.C. — I think perhaps Co-Dean. Earlier, Plato, I saw your co-dean Mr. Jake Stein, passing through the hotel and he may be making an appearance here a little.

In any event, Plato started his career as a Department of Justice trial attorney. He was First Assistant United States Attorney over in the Eastern District of Virginia. He, too, has handled too many of these cases to even list. He was also involved in the BCCI matter. He was involved in the historic Watergate investigation; in the ABSCAM investigation; also, in Iran Contra; in the famous Ill-Wind investigation that was in the news a number of years ago. More recently, he has handled several of what we have called the "Spy cases". He represented Aldridge Ames and, more recently, Robert Hanson, in highly publicized, big-stakes representation. If I recall correctly, Mr. Hanson was threatened with the death penalty at one point. Also, during the Clinton Administration, Plato represented Monica Lewinsky.

On his right is Roger Cossack. Most of you know Roger from CNN. He is the Chief Legal Analyst at CNN. He hosts, and has for a number of years, the highly rated show called *Burden of Proof*. But, indeed, prior to becoming a television celebrity, he was a practicing lawyer. Roger, before he became a TV celebrity, argued a number of cases, including the *Leon* case, in the United States Supreme Court. And I think perhaps Roger's like my old mentor, Senator and now Ambassador Howard Baker, who said, when people asked him, was he a lawyer? He said, well, I was a lawyer, but I got over it. Roger went to the media world, and we are going to talk to him about the other side of the coin, so to speak — the effort of the members of the Fourth Estate to get information from your clients, from you and from others.

MR. COSSACK: I'm the man that ended the Fourth Amendment, as you may recall.

MR. MADIGAN: On Roger's right is Judge James Robertson. For the last seven years, he's been a member of the United States District Court here in Washington, D.C. In the surveys of the Bar, which occur every year, he has gotten rave reviews from the lawyers appearing before him for his fairness, thoroughness, and intellect. He, too, had an outstanding career before going to the bench. He practiced for, I think, over 25 years. I was telling him a little while ago, that in January I will have been with Akin Gump as a Partner for 25 years. He spent 25 years at the law firm, Wilmer, Cutler and Pickering here in town, one of the premier Washington law firms. He took time out in the early stages of his career at Wilmer, Cutler to go become Chief Counsel to the Lawyers Committee for Civil Rights Under the Law down in Jackson, Mississippi, during the historic time of 1965 to 1969. He was also very active in the Bar here. He was President of the Bar. I had the honor of serving on the Board of Governors when he was President. He was one of the best Bar Presidents we have had.

Since he has been on the Bench, he has had a number of significant cases, most recently the indictment of Webster Hubbell. The *Hubbell* case ultimately went on to the D.C. Circuit and on to the United States Supreme Court.

So, with that introduction, I am going to sit back down and see if we can talk through some of the issues. The cases that we're going to be talking about today are going to be hypothetical, so any resemblance of real cases is simply coincidental.

Let me start with my friend Bob Bennett, and I thought we'd go about it by, perhaps, examining some hypothetical situations that may occur, and how a lawyer and the members of the Fourth Estate and the court would react.

So, let's suppose, Bob, that you're sitting in that modest office of yours down at Skadden Arps overlooking the Washington Monument, and the phone rings.

MR. BENNETT: He's such a smarty, isn't he? He hasn't changed a bit. Been this way for 30 years.

MR. MADIGAN: ... and you get a call from a prominent elected public official who's under investigation by Congress. Perhaps there's a civil lawsuit filed. Considerable media attention has been drawn to it. There's talk of a criminal investigation, but at this time, there is no Grand Jury. And you are asked to take the representation.

Why don't we start by perhaps sharing with us, in that kind of a situation, where it is a public official, where it is very highly visible in the media, how you assess the situation and what do you try to accomplish right at the beginning.

MR. BENNETT: Well, first you say, how am I going to get paid?

Because a disturbing number of politicians feel that it's such an honor and a privilege to represent them that question is sometimes lost.

Obviously the first thing you do is you want to meet with the client. As is relevant here, you tell them, until we meet and talk, don't say anything; don't let your press agent say anything; don't let all your supporters say anything. That's obviously the first step. And then, you just start the normal lawyerly process of finding out what the problem is and setting out the terms of what they expect of you, et cetera.

MR. MADIGAN: Let me ask you about that piece, and ask for Plato's views as well. When you have a non-high profile client, it is sometimes easier to get the facts and to get the time and attention of the client. How do you go about it, when the person is very prominent, whether they're chairman of the board or an elected official or a celebrity on CNN — whoever they are — I should make that NBC, right, in the example? —

MR. COSSACK: Yeah, keep me out of this.

MR. BENNETT: Well, it has been my experience, we can only talk in general rules here, that very high-profile people, by the time they call you, are very worried and very concerned about their situation. They usually have found themselves in a situation where all of their skills and all of their instincts and talents have let them down up to this point. That is why they find it necessary to call you. So, it's not very difficult to convince them that there's a problem, and you have to really know the facts. So, that's generally been my experience.

Most of the time, political people who get into trouble, or very high-profile people, usually at the front end are much more concerned about their reputations. They sometimes seem less concerned about, whether they will be found liable or not? Whether they will be indicted or not? Most of the time, they are more concerned about their reputations.

Every now and then, they are absolutely shocked that they are in this position. That was particularly true (and I can say this because he has just written a book about it all) with Secretary Weinberger. For five years, thought he was a cooperating witness with the federal government, and one day he got a target letter and, at that point, I was called. He was literally dumbfounded.

I will tell you in all candor that, in 35 years of practice, I have never seen a more outrageous abuse of prosecutorial power than that exercised by Lawrence Walsh in that case. And you can quote me on that, if you want to.

MR. MADIGAN: Plato, let's follow along. Perhaps you are in your office. At the end of a long day, you've sent your tailor off to London as your last act of the afternoon.

MR. CACHERIS: And I owe him money.

MR. MADIGAN: And the phone rings, and this time, instead of a high public official, you are asked to represent a young woman who's in the middle of a media siege. You have actually been following the case; her lawyer set a record, perhaps, of going on nine talk shows in one morning and was then fired. But, this lady is under criminal investigation. She's already been subpoenaed to a Grand Jury, and as soon as the media finds out that you're going to be representing her, they're going to be staking out your office.

What do you do in the first strategic steps, when you step into a case that is literally swirling in a media hurricane, and you're client is right in the middle of it and would like to get out of it?

MR. CACHERIS: Well, with Monica Lewinsky, who you're alluding to, we certainly did not want her to talk to the media.

I don't have the luxuries that Bob Bennett has, of sitting in a spacious office overlooking the White House and some guy calls and says, Bob, would you come across the street and see me.

My calls might come from a jailer who says, there's a guy in here that needs to see you bad. So I have to leave the office, Mike, and go to jail and meet with the guy who has just been charged with espionage. Of course, the nice thing about that — if there is anything nice about it — is that he's inaccessible to the media and you don't have to tell him to keep his mouth shut because he can't talk to anybody. So, I have a little different perspective. My client's in jail before I've even had a chance to put him there.

MR. MADIGAN: Roger, why don't we stay with the hypothetical of the young lady and take it back, perhaps, when it first breaks into the news. There is a woman who is arrested for allegations of obstruction of justice and a high public official is allegedly involved. She has a lawyer. How do you approach it from the Fourth Estate, to try to get as much information as you can get?

MR. COSSACK: Well, let me just say this. In every example that we've talked about — we've talked about the young woman, we've talked about the elected public official and we've talked about a spy — all of those are newsworthy. All of those are news, and every one of those stories deserves to be talked about on television.

Why? We're talking about an elected public official. People vote for these people. We should know about what they do and don't do. That has to do with the Monica Lewinsky story. And certainly, espionage is news, and we should know about those things.

So, now having formed the argument that I am a hundred percent legitimate in going after this, let me tell you all the horrible things I will now try and do to undermine what my friends on the left are trying to do, and correctly trying to do, with their clients. They are trying to keep them away from people like me, because we are absolutely, at least in the particular hypothetical we're talking about now, at totally different ends of what we want. The lawyers absolutely correctly want their clients' mouths shut. The last thing they want is to see their client speaking to someone like me. I, of course, could care less about what they want. I want their clients speaking to me. So, what do I do?

In the situation of the espionage, Plato, and this is exactly what happened; obviously we couldn't get to your client. But, we got to your client's neighbors, who were on *Burden of Proof* telling us about the family and how they lived, what they didn't do, how they went to their schools, and all of those kinds of things.

Monica Lewinsky. Well, we could not get to Monica Lewinsky, either. But there were many people who knew Monica Lewinsky, and one of the wonderful things about the work that I do is a phrase we have in *Burden of Proof* called an "FFP". The FFP is a former federal prosecutor. And a former federal prosecutor will come in and talk to you about anything having to do with cases that they, most of the time, know nothing about.

But they will come in and you can say, joining us today is John Harris. John is a former federal prosecutor with the Central District in California, 3,000 miles away — besides the fact that he doesn't know anything about the case, he's 3,000 miles away from the case where it is going on. But John is a former federal prosecutor. What do you think is happening in this case? And, you know, John will tell you exactly what's going on.

So, there are many, many ways that we go about it. Obviously, we can't get to your client. Bob, you're smart enough not to let us get to your client. We know that. But we will go about trying to get as much as we possibly can. And people like to be on television.

MR. BENNETT: And if you can't get anybody else, there's always Alan Dershowitz.

MR. COSSACK: There's always Alan Dershowitz. What I was going to say was — I think I just said people like to be on television. That's not Alan Dershowitz. Alan loves to be on television.

Alan Dershowitz — you could call him at three o'clock in the morning for the opening of a CVS market and he'd be there before you. So, Alan's a given. Alan will come in and tell you about your case and your case and your case, whatever the case may be.

So, that's the way we go about doing it. Never let it be said, and you'll never hear me not say this: even though I am a legal analyst for CNN, I am also in show business and it is up to me to deliver a product on a daily basis that people want to see and people want to watch.

I try to do it in a responsible manner — as responsible as I possibly can. If you people would let me talk to your clients, it would be better. But you won't and I have to do the best I can.

But that's what we do. We will go about finding people. And as I was just saying, people like to be on television, and if you ask enough people, eventually someone will show up who knows somebody, who knew your client, who went to school with your client, or knows something. And they'll come out.

MR. CACHERIS: Mike, Roger reminds me of when Jake Stein and I went down to see Ken Starr, when we first got into the Monica Lewinsky case, to introduce ourselves and tell him that we were counsel in the case. Jake said, "Ken, there's one thing I'm deathly afraid of." And Starr said, "what's that?" He said, "Alan Dershowitz."

MR. MADIGAN: Let's bring Judge Robertson into this discussion.

Your Honor, you are actually coming back to your chambers from lunch and you see a bunch of TV trucks outside the federal courthouse — all kinds of microphones and satellite dishes set up. As you approach the steps, you see that the prosecutor is holding a press conference announcing the indictment of a high public official. And not too long after that, the defense lawyer is holding his own press conference on the steps of the courthouse denouncing the indictment. And you go inside and you learn that the case is assigned to you.

Do you have some initial thinking that you go through in terms of how to deal with the media? By this time, the media is calling your chambers, they want copies of whatever they can get. You are going to be handling this case from the beginning to the end. How do you approach it?

JUDGE ROBERTSON: Well, just like Bob's reaction is "how am I going to get paid?", my first reaction after the Court of Appeals' treatment of Tom Jackson is to put my hat over my face when I walk into the courthouse, turn off the phone and not talk to anybody. Period.

But, the situation you've given me so far doesn't cause me any particular alarm, frankly. We start thinking gag order, gag order. Well, there aren't too many cases in which gag orders are necessary or ever were necessary or ever will be necessary.

You hear judges and other lawyers cluck-clucking when somebody gives interviews outside the courthouse. But I think it is more out of some notion that this just isn't done than it is out of any notion that the community is going to be poisoned and prejudiced by what is going on.

Mike was good enough to send over to me before this program the kind of thing we know is there but we don't read very often, and that's the American Bar Association rules on trial publicity. They make it very clear that lawyers are not supposed to make public statements, if they know that it will have a substantial likelihood of materially prejudicing an adjudication — know that it will have a substantial likelihood. Well, how do we know *that*?

The trick part of this, though, is on the next page. It says, "Recognizing the public value of informed commentary is great, and the likelihood of prejudice by the commentary of a lawyer who is not involved in the proceeding is small." The rule only applies to lawyers who are in the case.

Well, we have Roger Cossack. We have Greta Van Susteren, we have Alan Dershowitz. We have all these people who get a lot more press time than any of the lawyers standing out in front. If anybody can influence the public's thinking about the case, it's lawyers who don't know anything about the case.

In this day of instant-messaging and Internet access and CNN — thank you — and all of the other ways that people get information, the old notion of the circus trial, the *Shepherd v. Maxwell* that everybody reads about in law school, is history.

Shepherd v. Maxwell was decided at a time when television was brand new, when there were two newspapers a day and when the public was a lot more naive about what they got from the press. Today, we are so inundated with public information that it is very hard for me to think about very many cases in which any kind of a gag order is appropriate.

We can jawbone; we can cluck-cluck. But gag orders — I am not even close to thinking about a gag order on the hypothetical you have given me.

MR. BENNETT: Let me make an observation about that. You know, as a general rule, — I can't think of a time when I would actually go out and publicly comment on a case that was actually at issue.

But even if Judge Robertson is not going to issue a gag order, I know he isn't going to like it. He doesn't like me — correct me, if I'm wrong — he doesn't like me being in his court from ten to four arguing a case, and then at five o'clock showing up on Roger's show. So, I have my own rule and that is I avoid commenting on a case once that case really is at issue. I guess there may have been rare exceptions to that.

Most judges will give you one bite at the apple. There is almost a rough sense of justice that when the prosecutor stands out on the courthouse steps, he or she does not really have to give a press conference; they just stand out there and read this awful, awful indictment. That is the most powerful press conference you can give. And my experience is, most judges aren't offended if the defense lawyer says, "Wait a minute, my client's presumed innocent. Let's wait."

But I think lawyers should not regularly comment at all about a case, when you are actually in litigation. I think it's wrong, and I think if the opposition does it, you have remedies, which, unfortunately, many judges will not enforce. You go to the court. I can tell you, when we were representing Clark Clifford and Bob Altman, the District Attorney of New York was making statements right before the jury went out and deliberated. And their statements appeared in the New York newspapers. It was a very troubling thing.

MR. COSSACK: I might add that, sometimes, television and the media does offer an avenue for defense lawyers or for opposition lawyers to come back and get something in front of the public, when they have been prejudiced by what the other side has done.

Let me give you two examples that will come right to your mind. One was — I'll never forget — Michael Tigar right after Terry Nichols had been arrested, standing up at a press conference at, it seems to me, an auditorium.

He was on a stage holding up a big sign that said, Terry Nichols wasn't there. And he kept holding up that sign and holding up that sign and repeating. And he'd answer questions and he'd answer questions, but it seemed like every minute or two, he'd hold up that sign again that said Terry Nichols wasn't there. And, of course, that became a keystone of his defense. But it came at a time when the prejudice against his client was incredible. And so, he used the media and he used the television to get across a position that he needed to get across to defend his client.

Second is Linda Tripp, when she was in the middle of that wire-tapping, case in Virginia, because of the conversations that she had with Monica Lewinsky. Her lawyers came on *Burden of Proof* often. And the point they kept trying to make was, you know, you may not like her, you may not think much of her or you may think she's wonderful. Who knows? But don't you think that basically this is a chicken prosecution, to bring this prosecution?

That was their point. What they were saying was, isn't this piling on? Isn't this a little getting even that she thought she was doing that was the right thing to do? And, isn't this a bad prosecution? And they were very effective with that.

So, sometimes the media can give the opportunity, when the deck is stacked, to come back and have a little opportunity to maybe make it a little more even.

MR. CACHERIS: Since, Roger, I have never had a client that wasn't there, I would find it very difficult to adopt the Tigar approach. But generally, I agree with what has been said here, that the less you say, the better. And certainly, the ethical constraints on a lawyer that is defending someone in a highly publicized case are still there. So, you're better off saying less, and just saying, the burden of proof is on the government and my client is pleading not guilty. That is as far as you can go.

MR. BENNETT: I totally —

AUDIENCE PARTICIPANT: Can you get closer to the microphone, we can't hear you.

MR. MADIGAN: This is the first time that someone's said they couldn't hear Bob Bennett, I think.

MR. BENNETT: I totally agree with Plato. You are much better off if you never have to deal with the press on these cases. But the fact of the matter is, if you represent the President in a sex case, there is no way you're going to avoid dealing with the press. It is just a question of how you deal with them. And that presents, obvious problems.

There is no way Plato could just ignore the press when he was representing Monica Lewinsky. Then it becomes a question of how you deal with them you and work through a whole bunch of conflicting pressures on you and apply the canons as best you can under the circumstances.

And that's particularly true with politicians. Politicians will say, "well, great, Bob. You're not going to say anything, I'm not going to say anything, and I'll have a trial two years from now but, by then, I'm dead and it's over for me." That is a very relevant concern.

There was a 6th Circuit case a number of years ago, which is very interesting, involving Congressman Ford, who was a sitting congressman. The district court put out a very broad gag order and it got reversed. The Circuit Court seemed to draw a distinction, interestingly, between the Defendant Ford and the lawyer.

MR. CACHERIS: Well, one case that comes to mind that none of us were in is the Condit matter, which got heavily publicized, Roger — right?

MR. COSSACK: Right.

MR. CACHERIS: All of a sudden, he decided to give an interview. His ratings went way down after the interview. So, I thought he came out worse just by talking than what he would have done — he was low already, don't misunderstand me. But no one believed that he was complicit in the disappearance of that young lady. And then, after you watched his press conference, you began to scratch your head and wonder whether he was complicit.

MR. COSSACK: That's probably a good example to talk about for a minute, particularly since Abbe's not here to defend himself.

MR. CACHERIS: It may not have been his fault.

MR. BENNETT: Well, I'll defend Abbe.

MR. COSSACK: Go ahead. You defend him.

MR. BENNETT: Look, I have yet to watch television and see a doctor from GW, who knew nothing about a case, get on TV and say," you know, that guy shouldn't have died; they shouldn't have used this procedure." But lawyers do it all the time. You do not know what advice was given or not given. I have had many clients that have not followed my advice on something. When you represent politicians, you are not only dealing with a client, you are often dealing with several other people, many of whom are lawyers, many of whom are not lawyers. You are dealing with press aides; you are dealing with public relations people. And advice is coming from all over the place.

I have been absolutely criticized on television by talking heads who do not know the facts. You are defenseless and you cannot go on T.V. and say, I advised this and the client rejected my advice. You can't do that.

So, yes — Condit looked awful. But my guess is it wasn't Abbe's fault. He is a very good lawyer.

MR. COSSACK: I would bet everything that Abbe Lowell told him not to. But let me just say one thing. When you're dealing with politicians in particular, we know the same thing that Bob just said. We know that there is a tension between the lawyer and the press people because there's two things going on. There's the lawyer who is saying, "for God's sake, keep your mouth shut, for the obvious legal reasons." There are the press people saying, "if you keep your mouth shut, you're going to look guilty, and when it comes time to get re-elected, you won't get re-elected, so we've got to get back there and say something." So we talk to the press people; we don't talk to the lawyers.

MR. COSSACK: The press people will come across for us. But we absolutely understand what you said. And as a lawyer, I absolutely understand that, too, that tension you face with these kinds of clients.

MR. BENNETT: And sometimes, it's easy, because on occasion when I get hired, I know exactly what the defense is because the client's been on television telling his story.

MR. MADIGAN: Let's follow up a bit more on the kind of case. Bob is absolutely right. You have no idea of the communications back and forth between the client and the lawyer. But what do you do? What do you do when you have a public official, as you pointed out earlier, who is getting hammered in the press and it is just going on day after day? What kinds of things can you do as a lawyer to try to stop it, or alleviate it in some fashion, other than having him talk, which is what you don't want to do?

MR. COSSACK: You have to remember that this summer, prior to the World Trade Center, was probably one of the lowest news time. And the Condit story is horrible because, as you know, we're talking about Chandra Levy. Is there anyone who doesn't believe that something bad has happened to her?

But during this summer, this was almost like beach reading and, you know, I work for a profit-making organization. At the end of the year when the shareholders come in, and they say, how'd we do this year, when my boss gets up and says, well, we didn't do quite as well as we could have, and the reason is because, when everybody else was hammering Chandra Levy and Gary Condit, we took the high road and talked about, intellectual things. But unfortunately, nobody watched us, so our ad revenue went down.

So, then the shareholders say, you know what? How about not taking the high road the next time? And, get as much Gary Condit as you possibly can because people watch that kind of thing.

That is another thing that happens, is, when does your case appear? This Rabbi just got a hung jury in Philadelphia. I would have been all over this guy; it's an incredible story. No one even knows about it. He's accused of killing his wife. It turns out he was having an affair with somebody else. Great dramatic testimony — he sinned against his religion. This was great stuff that, because of the horror that we are facing now, doesn't get on TV anymore. So, it depends on when it shows up.

MR. BENNETT: Well, I think you can overreact, too. And I think clients tend to overreact. With all due respect to you, I don't know how much impact that has at the end of the day. I think sometimes it might; sometimes it might not. But, I don't know if going on and giving your side repeatedly serves any purpose. You know, a scandal needs fresh oxygen everyday. It's like Count Dracula. If a scandal doesn't get a blood fix everyday, it can wither and die.

MR. COSSACK: Perhaps the other metaphor would be better.

MR. BENNETT: So sometimes, while you think you are out there mouthing all these great things, you're just providing that added oxygen to keep the story going.

One thing you can do, and I think very effectively, if the trial has begun, or you are in preliminary proceedings is to write your pleadings just a little bit differently, a little more expansively, dealing with some of the most troublesome things. And then you call Roger up and say, "Roger, you know, instead of listening to these Bozos who don't know anything, why don't you get somebody to read our pleading?" That has an added advantage. There is not much Judge Robertson will do when it is in a pleading, as long as you haven't written something scurrilous.

MR. COSSACK: Then I am not a count. I am that fine legal analyst from CNN, reading this stuff and pointing it out and saying, "Well, in this well-written brief by Mr. Bennett, he points out . . ."

MR. MADIGAN: But sometimes, the media hysteria is so great. I will use an example of a case that I had, the defense of the Chief Justice in New Hampshire who had been impeached by a vote of 290 to 90. We were retained the day of the impeachment. There was a lynch-mob mentality to get him to resign. The press was all over the case. We ultimately tried the case and he was overwhelmingly acquitted, 18 to 4 and 17 to 5. But there was a period of time in the beginning, while we were in the pre-trial, in the court analogy, there would be no judge yet. But there was certainly a court of public opinion. And we did, as lawyers, meet with the press, and provide information so that we would get his side of the story out.

What is your view about that, Plato? I know it depends on the case.

MR. CACHERIS: Well, it depends on the case. I will say that the most highly publicized was, I guess, Lewinsky. My office was across the street, and it was continually surrounded. I could not drive in or drive out without cameras in my face. But, to her credit, she did not speak. There was nothing for her to say. She did not speak, did not give interviews, until the case was essentially over, when she had her immunity and was free to speak.

So, there are occasions where I can see where I agree with what you have done, Mike. But, if the person can ride it out, as she did, I think that is the best solution for a party like that. She was concerned about an indictment, and she did nothing publicly to encourage an indictment. So, I think she came out all right.

JUDGE ROBERTSON: I think it is important to point out that what Plato and Mike are talking about is what works in the court of public opinion. But I don't really think it has any impact over an actual trial.

Now, Mike, your trial wasn't before a jury; it was politicians who had to vote. And politicians, of course, are tuned into the public airwaves like nobody else is. But I am convinced on the basis of my own experience that juries, for one thing, don't read the paper or listen to *Burden of Proof* very much. And, if they do, they are quite committed to doing what they say they are going to do and keep that stuff out of their mind.

Now, there are obvious exceptions to it, but not very many. O.J. Simpson, Timothy McVeigh, maybe the New York bombers — a very, very few extraordinarily high-profile cases like that. But otherwise, I think the notion of infecting juries and infecting the legal system with news is history.

Finally, regarding what Roger does. Don't let anybody think that the lawyers who come on that show are pushing the ethical boundaries, because there's an ethical loophole, if you will, in these canons that is big enough to drive a very large truck through. Notwithstanding any of this impropriety of speaking, a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer. So, there is the privilege of response written right into the canons, and it is there for Roger to explore.

MR. COSSACK: What if a lawyer would come on my show, Judge, and say the following: "We were severely disappointed at the verdict in this case. We couldn't believe the jury did what the jury did. We really believe that it's because the judge was prejudiced against us and didn't give us a fair trial.

JUDGE ROBERTSON: Well, actually, that strikes awfully close to home.

MR. COSSACK: I'm sorry I brought this up.

JUDGE ROBERTSON: What do I do about that? Nothing. There's nothing I can do about that. I have no response. I don't go on CNN. I have no response whatever. Period.

MR. BENNETT: You know, you have to remember, for a lot of the things we are not talking about of influencing the jury.

Here is an argument I have heard several times. "Bob, as a politician in order for us to run and win, we have to keep collecting money. There are staggering sums of money the politicians have to collect. And if the potential contributors don't see our candidate and your client denying the charges our funding is going to dry up.

I have been in other situations where political friends of the candidate will say, "Look, I know you are telling your client not to talk but unless he gets out there and talks and denies the allegations we are not going to support him." So you have to put all that in the equation.

Very often, lawyers tend to think in terms of the case, and sometimes you get overruled because the people who are closest to the politician are telling him, "Yeah, Bennett's strategy of no comment is best when you win the case two years from now, you'll be out of your seat." And usually, that argument is successful.

MR. CACHERIS: I think Judge Robertson has raised a good point on how much impact publicity has had on a trial. And I think, as Bob is suggesting, we overreact to that because most judges, in fact, all judges that I know, conduct a thorough and careful, and even lengthy, voir dire, when there is a high publicity case. This is designed to and does ferret out those persons who have made up their minds because they have been listening to Roger.

MR. BENNETT: Well, any lawyer that attacks Judge Robertson is a lunatic. Now, Judge Robertson happens to be a wonderful judge — and I mean this candidly — and all these wonderful judges, they are objective and impartial. But they all have lunch together.

So, if you're going to be practicing before lots of judges, you're a damn fool to go out on television, even if you really believe it, and say your client lost because some judge was biased and prejudiced. I mean, that is really stupid.

MR. MADIGAN: Part of the problem for the judges is when the criticism is anonymous, which obviously would not happen on your show, but in the print media it would. And, of course, we saw some of that with the *Microsoft* case. To what extent is the judge is ever allowed to defend himself or herself from the charges?

I think, Judge, we would be interested in your view as to whether there is any way you really can, other than to have, which happens frequently, lawyers come to the defense of the judge.

JUDGE ROBERTSON: Well, I wish they would come more frequently.

Not to get too personal about this, but a couple of years ago, I actually was the subject of a really sleazy op-ed piece in a major newspaper, written by a law professor who deliberately distorted the facts. The piece would have been libelous were I not a public figure. Indeed, it may even have been libelous, despite the fact that I was a public figure.

But, what can you do about it? The answer is absolutely nothing. And, if you do try to respond, you just make it worse. That's why they pay us the big bucks, I think, and give us the lifetime tenure, because there is no response you can make. You just literally shut up and take it.

MR. BENNETT: You know, one suggestion I would make. You may already have an organization like this. I am on the board of the American Judicature Society and one of the things that we're noticing is an increasing number of attacks on and criticism of judges, which is very bad for our system because when we lose respect for our judiciary, we are in real trouble.

Organizations such as yours and I know the American Judicature Society feels, that when judges are attacked in your jurisdiction, you should come out and say something, because the judge is helpless. If you do not have an organization or a committee or some sort of a structure to do it, it doesn't usually get done. Individual lawyers are afraid that, if they do it themselves, somebody will say, "you're brown-nosing or you're just trying to get in good with the court," or something like that.

But, organizations as large as this one should seriously (I don't mean to be presumptuous, telling you what to do) think about creating a committee to monitor this because judges are totally defenseless.

I remember the piece that Judge Robertson mentioned. It was a vicious, vicious, vicious piece. So, I think that is something your leadership should at least think about doing.

MR. COSSACK: And when they do, they can come right on our show and talk about it.

MR. MADIGAN: Let's move the topic slightly to a congressional hearing. It implicates the same sort of issues that we have been talking about. But, as all of us who have been involved in them know, it is a different breed of cat. And perhaps, if I can introduce that topic, as well as the Fifth Amendment into this discussion.

Let me start by saying that, normally, as a criminal defense lawyer, if there is any chance that the prosecutor or somebody is going after your client, you do not answer any questions. We have the Fifth Amendment in our Constitution to permit that. When you represent somebody who is a high-profile figure, the very last thing in the world that person is going to want to do, notwithstanding what you say, is to take the Fifth Amendment. The concern, of course, is

that it will end up in the media. So-and-so asserts the Fifth Amendment.

Maybe starting with you, Bob, what kinds of strategy considerations do you think about when, instead of a prosecutor, now you have a congressional committee that is interested in your client, who is well known, and they want to talk to him. 18 U.S.C. §1001 was amended specifically to provide perjury penalties for any kind of false statement to a congressional staff person. And, there are a lot of examples of congressional investigations leading to a subsequent criminal investigation. What's your thinking initially?

MR. BENNETT: One, I try to avoid them because, on both sides of the aisle, these committee hearings are, for the most part, witch hunts. I hate to sound like the cynic that I am. They are witch-hunts on both sides of the aisle, and it has more to do with face time for individual members of Congress than it does anything else. So, my strong preference is to avoid it, if at all possible.

But many times, it's just not possible. When I was representing Clark Clifford, we were subpoenaed, or asked, to testify before nine separate committees. Now, it wasn't that there were nine separate committees that really needed to investigate. They all wanted a piece of the action. If you could get Clark Clifford, an icon whose face should be up on Mt. Rushmore, walking into a committee room, that is good face time.

Now, if you think I could say to Mr. Clifford, "Mr. Clifford, I think you should take the Fifth," he would have fired me. You represent someone who is the chairman of the board of a major U.S. company, they are not going to take the Fifth. Remember that famous picture in the tobacco case? Seven went in. They all held up their hands. That was show time. That was show time. At least Roger's got a high-quality show. So, if you do go, you have got to thoroughly prepare your client from A to Z because it is going to be frozen in a record. There are some honest Congressional inquires conducted by responsible members.

There are some of Congress who do it straight, but an awful lot of them do not. And that is just the name of the game.

MR. COSSACK: I also think that this is the time when the media has to show some responsibility. It is a cheap trick to jump in on the "So-and-so grabs Fifth Amendment" kind of way, when in fact the implications of that are not correct and should not be used that way. In a place like *Burden of Proof*, where I have some time to talk about these things, or when I am given time during the news to talk about these things, I explain what the Fifth Amendment is and why it is there and why you can't say, "Just because somebody's taking the Fifth Amendment, oh, my gosh, they have to be guilty." Responsibility is necessary at times like that, and hopefully we act responsibly. There are times when we are not as responsible as we should be, but I think during those things that we are talking about, we are responsible.

MR. CACHERIS: Well, if you remember the old Teamster investigations when Jimmy Hoffa, Sr., was President of the Teamsters. Dave Beck was President of the Teamsters before he was, and he was called before congressional committees. I remember the old *Washington Star* had a headline that "Beck Pled the Fifth Amendment 56 Times" because for every question that was asked you have to plead the Fifth in order to preserve that privilege. That is a reason why many of the political types will not plead the Fifth Amendment before a congressional hearing.

Mike and I were both involved in Watergate, and every one of those persons summoned before the Watergate Committee, which was highly publicized, testified. Mitchell, Haldeman, Erlichman — they all testified. They all got indicted for lying before the Committee. They went down to the Grand Jury and testified; they all got indicted for lying to the Grand Jury. They were convicted for both of those crimes, in addition to the cover-up.

So, the advice you would like to give: "Do not open your mouth before a congressional committee," will not be followed. If it is a person of a high political stature, he is just not going to do it. He is going to testify.

MR. BENNETT: Now, I have brought people — and it's all very fact-specific. There are two people in this room that I've brought clients before, Dick Leon and Michael Madigan. I can tell you that a factor in making that judgment was I knew them both to be honest, straight shooters. And, yes, they were working for Republican committees and I was representing somebody on the other side. But I knew, and this is just the God's honest truth, that before Dick and before Mike, I would have a fair shake. They might not come out my way, but I was not going to get rabbit-punched. I was not going to have a report written, as has happened to me with Mr. Clifford, before they even heard his testimony. So, that makes a difference, too.

MR. MADIGAN: Roger, how about you?

MR. COSSACK: Well, you know, again I want to go back to what I said earlier. Remember — my goals are not the goals of the lawyers or even the judge at this table. My goals are to present as much information as I possibly can to the public about legitimate subjects. To get as many of these people — players, if you will — to come on the program or come on CNN

and talk about these things.

And sometimes, to be honest with you, as you and I have talked about, Mike, I'm shocked when they show up. I practiced law for a longer than I've been on television. I've practiced a lot of law. I'm shocked when some of the people show up willing to talk. There are times when you want to take them by the sleeve and say, "Are you sure you want to — of course I want you to do it — but are you sure you want to do this." So, my goals are just different than their goals. And sometimes we manipulate each other. Sometimes they need me; more times than not, I need them.

But I also think what you said about fairness and knowing someone who's a straight shooter — certainly, in my business, it works that way. I have only lived in Washington eight years. I come from Los Angeles, and living as a practicing lawyer in Los Angeles, we always hear about the word "leaks". Leaks, in Washington, D.C. It's not leaks. It's Niagara Falls in this town.

You can't go anywhere, particularly if you're a CNN person like I am, and maybe the other networks, too, where someone doesn't want to tell you something about what's going on that you're not supposed to know.

So, you learn — I learned to be responsible. That is the only word I can use. Sometimes I'm not as good as others, but I try and be as responsible as I can.

Bob Bennett has spoken to me deep, deep, deep off the record, and he also knows that anything he has ever said to me has never, ever, ever been reported. All I would have to do is do that one time. Not only would I lose his friendship.

MR. BENNETT: It was so deep, I don't remember.

MR. COSSACK: — But, obviously, my reputation would be shot in this town. So, it's like anything else. You build relationships and you try and do the right thing.

MR. BENNETT: What judgments do you exercise, Roger? I've already complimented you as being a straight, wonderful guy, but do you exercise judgment on who your guests are? I have seen some real bums on your show.

MR. COSSACK: Yeah.

MR. CACHERIS: I've never been on there, so I know you're not talking about me.

MR. BENNETT: No, I'm teasing a little bit, but —

MR. COSSACK: I understand your point. It's a legitimate question.

MR. BENNETT: It's a legitimate question. I think the audience would be interested in. And you could tell them without identifying people — unless you really wanted to the people who call you up and ask to be on your show to talk about cases they know nothing about.

MR. COSSACK: I won't do that. I won't give up names. But, as I told you earlier, I'm in show business, as well as doing what we would like to think is a serious, legitimate legal show. But at the end of the day, if nobody watches me, I'm back practicing law in Los Angeles.

You know, F. Scott Fitzgerald said, "There's no second acts in life." Well, I found one and I don't want to go back to that first act.

So, what are my tensions? My tensions are that I want to be on television people who are entertaining, who seem to know what they're talking about, who hopefully do know what they're talking about and will converse, and will not give me the deer in the headlight look, which every now and then you'll get. You'll say, "Former Federal Prosecutor Johnson, you've had cases like this, haven't you?"

MR. COSSACK: So, you don't want that.

Have we had Schlockmeisters on? You bet we've had Schlockmeisters on, and sometimes, you know, you just swallow it. And do we do subjects — did I do Gary Condit until was embarrassed to be seen in public? You bet we did Gary Condit until I was embarrassed to be seen in public. But sometimes, I'm afraid that's the nature of the game. You just try and trade off for every one of those ones that you know are people that make you uncomfortable, that you know down deep you would say to yourself, this person doesn't have a clue what they're talking about. They are making this up as they go along. And you are just as uncomfortable as you can be. You've got ten others. I'm looking over at a wonderful guest who doesn't call us to come on our show, who I have to beg to come on our show — you know, Sol Weisenberg, who does know what he's talking about.

And there are many of you in this room who have been on our show. Are there schlockmeisters? You bet. And do they beg? You bet. So, what can I tell you? I mean, as I told you, I wasn't kidding around when I said that Dershowitz would open up a CVS at 3:00 a.m., so —

MR. MADIGAN: We all know that the use of delay by responding to letters, even the situation of suggesting that you are not coming but you are not taking the Fifth Amendment either, requiring the congressional committee to try to get a vote to hold somebody in contempt is not exactly the easiest thing to do, and it's threatened a whole lot more than it's actually done.

So, Bob, if you get someone who's not wonderful like Dick Leon or myself, what kinds of things can you do to deal with it?

MR. BENNETT: Well, you just named some of the procedural things you do, because the one thing you don't want, you don't want your client to testify and you don't want your client asserting the Fifth. And so, you take advantage of the procedural steps you have.

Now, most of the time you have the ability — you have some built in advantages as a defense lawyer, namely that a good part of the time, the minority and the majority are not in agreement. A lot of the steps that take place require the votes of both sides or the agreement of both sides. So, I think a good defense lawyer, frankly, can take advantage those tensions and differences.

MR. MADIGAN: The people who don't do this kind of work do not focus on the fact that those of us who do always focus on, which is that each of these committees has rules. And believe it or not, the rules are highly beneficial. Many times there has to be a certain majority and sometimes supermajority to issue a subpoena.

So, you can deal with the minority staff, and you can essentially block the effort to get your client up there. Once you're up and the klieg lights are on, you're dead, in terms of what you want to try to accomplish. Before you ever get there, you want to be just as prepared as Bob's clients have been — one in particular that I remember.

With that, why don't we take some questions. If you'd go to the microphone, it probably would be easier.

AUDIENCE PARTICIPANT: Hi. My name is Elizabeth Brader. I'm a reporter for *National Journal*.

MR. MADIGAN: No reporter gets to ask, I'm sorry. Only kidding. Only kidding.

AUDIENCE PARTICIPANT: I'm not thin-skinned.
I think we all agree that Gary Condit botched his own chance at redemption. But I wonder whether or not Abbe Lowell erred by attacking the press. I was actually in the room when he screamed at us, and I can't help but wonder if there was an impact and that impact was that we reporters did a lot of the work for the prosecutors.

MR. MADIGAN: Why don't you take that hot potato?

JUDGE ROBERTSON: I don't think the press is immune from criticism. Whether he erred by attacking the press, I don't know. I don't know that that necessarily escalated the case to the position it got in because the matter of Chandra Levy was highly emotional, and Roger was correct in covering it. Whatever Abbe Lowell did, I don't think exacerbated the situation, in my opinion.

MR. BENNETT: I'm always amazed by how sensitive the press is. They write things about people, put shows on about people, and then Abbe Lowell says something like, you shouldn't be doing this, and raises his voice, and it's like these sensitive people are so fragile. It's incredible. I mean, incredible. Anyway, I don't mean that to you personally. I get press people sometimes who call me wanting to sue people about somebody who criticizes them: Steve Brill wrote this about them. Incredible — these are people who forget sometimes that they are destroying lives by sometimes writing things not as carefully as they should.

MR. COSSACK: I think what happened with Abbe Lowell, what you saw, was his incredible sense of frustration that he was feeling as a lawyer, dealing with a case that was spiraling out of control, almost like the little Dutch boy with his finger in the dyke. Every time he would get one, there'd be six other holes.

And I think what happened was, when that event occurred — and I've heard about that, too — I think it was just a sense of frustration.

AUDIENCE PARTICIPANT: My name is Scott Fry. I'm an Assistant U.S. Attorney in the Northern District of California. I

would be interested in the Panel's thoughts on when, if ever, it is appropriate for public pressure to influence a prosecutor, and whether any of the individuals on the panel have known someone who or, perhaps or themselves, attempted to use public pressure to influence that decision to indict or dismiss?

MR. MADIGAN: Do you want to start with that one, Bob?

MR. BENNETT: Could you — when you say "public pressure", you mean a congressman calling, or a senator? Is that what you're talking about?

AUDIENCE PARTICIPANT: I really mean the gamut, whether we are talking about a popular prosecution where, perhaps, the prosecutor may feel pushed to indict, or an unpopular prosecution where pressure might be exerted to decline and back off a prosecution.

MR. BENNETT: Well, let me divide it up because I think there are really two different — well, there are really 20 different calibrations to this.

One of the things, whenever I represent a high-profile client, I make absolutely clear to them that I don't want anybody — anybody — contacting somebody to call the U.S. Attorney to put the word in because I know when I was a federal prosecutor, that was the surest way to get indicted. It presented me the opportunity to show I was honest, I was not on the take and nobody could influence me. I really am afraid, in highly political cases, that some big-time fundraiser is going to call and say something. And I just really press people not to do anything like that. So, that's one category.

But the other is, you know, prosecutors read papers, too. And it is not that a prosecutor will say, "I'm going to drop this case because the public is sympathetic to the defendant." But sometimes, in high-profile cases, prosecutors in a close case like to have a security blanket. They like to know in a close case that, if they go this way, there isn't going to be this groundswell of people trying to run them out of town.

Now, it may come as a surprise to you, but some U.S. attorneys want to go on to a political life. So, I think that that is a factor which can be used delicately and appropriately, but it's got to be done with a surgeon's scalpel and not the butcher's meat ax.

MR. COSSACK: When Webster Hubbell was having his troubles, we said several times on *Burden of Proof*, and I said, "It seems to me there's a little piling on here. And it seems like the U.S. Attorneys Office is — enough is enough with this guy." Was that pressure? Sure it was. A lot of people heard me say that. Was I wrong in saying that? I don't think so. I don't think I was irresponsible in saying that.

But it is clearly something that the lawyer could have said and chose not to. But I had a soapbox to say it and said it. I think that if somebody would have called me on it, I could have at least articulated a reason why I said it. Maybe you wouldn't agree with me, but at least I was able to say it. I think that's pressure on a prosecutor, and I think they hear it.

AUDIENCE PARTICIPANT: Let's say you are representing a high-profile witness in an investigation. The witness is compelled to testify before the grand jury. After the witness comes out, you debrief the witness and find out exactly what was asked by the prosecutor.

You find out that night that person is going on Roger's show, and you ask the person, "What are you going to do on Roger's show? You can't help your friend who's the target of this investigation."

He answers, "Well, who says I am going to testify as to what I said before the grand jury? I'm going to tell them something totally different than from what I told the grand jury."

What do you tell the client? Roger, if you find out about it, what do you do? And Judge Robertson, if you find out this person has testified, and a transcript is laid on your desk the next morning from the prosecutor, saying, here's what the person testified to; this is what they said on TV last night; is this contempt? What do you do?

JUDGE ROBERTSON: Contempt is a perjury.

AUDIENCE PARTICIPANT: Well, let's say they told the truth before the grand jury. The truth is what they told before the grand jury.

MR. CACHERIS: You're saying a witness goes on Roger's show and says something contrary to what he or she testified to in the grand jury?

AUDIENCE PARTICIPANT: Purposely to obstruct the investigation because they know what they testified before the

grand jury's going to hurt their friend, and if their friend finds out that they testified truthfully, it's going to burn them. And they're going to say on Roger's show, "I would never say that. He didn't do anything wrong. He's perfectly innocent. What they're trying to allege about his conduct is not true because he was with me somewhere else. We didn't go to this party."

MR. CACHERIS: That's the "he never owned an ice pick" theory.

AUDIENCE PARTICIPANT: Right.

MR. CACHERIS: Ice pick? What ice pick?

I've never heard of that, to be honest with you. I guess if you could stretch it, and it is for the purpose of obstructing the investigation, then that person could be investigated for that reason. And I assume that the Assistant U.S. Attorney that had that witness before that grand jury that day watched the show. They might subpoena him or her to come back the next day and say, okay, what's the true version? But, aside from that, I see no other remedies.

MR. COSSACK: Well, talk about some great Jencks Act stuff; talk about getting some stuff turned over at time of trial that would be really interesting.

I suppose, from my point of view, gosh, wouldn't I love it to find out that somebody who testified before the grand jury came on my show and said something entirely different, putting us right in the middle of the mix, and getting a subpoena from about three different people that we could fight in the court and getting our name in the paper every day. It would be wonderful. So, you know, from my point of view, it would be exciting television. I suspect that there would be some discussion about perjury — which side does the truth start?

JUDGE ROBERTSON: There would be some discussion about perjury farther down the road if you're getting committed on both sides, but the contempt I don't see, at this point.

AUDIENCE PARTICIPANT: I'd like Bob and Plato to tell us whether you use public relations firms in these cases and, if so, at what point do you typically engage them, and do you have any war stories on that?

MR. CACHERIS: For me, no. I don't use public relations firms.

MR. BENNETT: Same here.

MR. MADIGAN: I don't believe in them. I think that the lawyer is better at it. The problem you have with public relations firms — and I've seen them used — is you get P.R. people talking to the media and they don't know the facts well enough and something bad happens.

MR. COSSACK: However, let me tell you that there are lawyers who do, in high-profile cases, use public relations firm. And they will, from time to time, call us and pitch a particular thing that they want to get on the air.

AUDIENCE PARTICIPANT: I didn't mean that they would be up front. I meant, in helping craft the message, when you feel that you need to respond publicly.

MR. MADIGAN: Oh, I see.

AUDIENCE PARTICIPANT: Just behind the scenes.

MR. BENNETT: Well, again, it depends on the kind of case. My strong preference is not to use them. I think that there are some lawyers who know how to do this. Now, it's better to have a public relations, if you're a lawyer who doesn't know how to do this. But I think the key is to keep control of these things.

But, in big, high profile civil cases, very often these companies have on retainer these big PR firms and tend to use them. And I, in those cases, try to force myself into the process so that I can at least be in the position to say "No." Let me give you a perfect example. I like to call it cross-town hypocrisy. I am aware of a case — I won't identify the players. The client had an SEC attorney who was submitting to the SEC all the reports that were required to be filed. The lawyer told the client they did not have to report something because it was not material.." At the same time, the criminal lawyers were saying something different to the Justice Department. That is the kind of problem that can develop when you have these P.R. firms and there is no control or coordination. .

Another instance I was involved in was a criminal case. There was a witness, this middle-management guy who the government really wanted to turn. And, without my knowledge the inside P.R. people sent out what would normally be a very good statement to our effort that the company was good and would not tolerate wrongdoing, and would fire those responsible.

And this middle-management guy read the release, and felt that it was pointed towards him, that his head was about to be severed, and he ran to the prosecutor and, as far as I'm concerned, made up a whole bunch of stuff. So, I don't like them and I agree with Plato.

MR. CACHERIS: Yeah, but every corporation has a publicity department. It is a little different than your question. If you are in a case involving a corporate defendant, one of your jobs is to make sure that you sit a little bit on the public relations guy in that corporation and have a say. Tell him what not to say.

MR. BENNETT: But if you are in a big, massive civil case like, say, the Ford Explorer case, you as a lawyer are not going to be running the public relations aspects of that. They are going to have a big P.R. firm. But you should at least fight to have a seat at the table, or an understanding that you will see statements before they go out.

MR. MADIGAN: Yes, sir.

AUDIENCE PARTICIPANT: I wanted to follow up on a point that was made at the outset. I think the suggestion was made that judges do not like lawyers going to trial all day, and then going out and speaking on the courthouse steps. I think this is directed more to Judge Robertson, perhaps, than anybody else. But, if it's not affecting a jury, okay — which is what you suggested, I think, generally — and so long as it's not slanderous or libelous, do you judges generally care, or does it affect you consciously or subconsciously?

JUDGE ROBERTSON: I think that is really a judge-specific question. It bothers some judges more than others. I have indicated how I feel about it. It does not particularly bother me.

There is a little bit of cluck-clucking — you know, "That's not professional; we didn't do it that way in my day." But it really is a case, as far as I am concerned, of no harm, no foul. I may think it's stupid to make a lot of statements and foul up the press coverage. I may have a view on whether or not it's productive or not productive for the lawyer to do that.

AUDIENCE PARTICIPANT: Right.

JUDGE ROBERTSON: And sometimes — this wasn't in my case at all — but during the trial we all watched, I think, the nightly back-and-forth every day during the trial of the *Microsoft* case, you sort of graded them on their performance. But it didn't really have any effect, I don't think.

MR. CACHERIS: There was a case, before Judge Robertson took the bench in District of Columbia, involving a high-profile defendant. And his lawyer was Edward Bennett Williams — the late Edward Bennett Williams, who was a fine trial lawyer.

He went in and pled very eloquently before the judge about how serious and how much effect this conviction would have on his client, and convinced the judge that he should be given probation — this was before the guidelines, of course, when judges could do things like that. He then came out on the steps of the courthouse and said his client will wear this conviction as a badge of honor.

Later, I'm told that one of Williams' partners was in front of that same judge, and the judge inquired whether or not this case was going to be a badge of honor for this client.

JUDGE ROBERTSON: Now, just the last part of your question was, would it affect me subconsciously. The answer is, I don't know.

MR. BENNETT: What would you do, Judge Robertson, though — to sharpen up the question, if you don't mind me doing that. I am before you, defending somebody. The prosecution puts on their key witness. You recess court at four o'clock, and at ten after four I am on the courthouse steps, (which I would never do — I really wouldn't) and I'm saying, "Twenty minutes ago, before Judge Robertson, the biggest liar I've ever heard testified in that courtroom." You don't think you'd drag me in, in front of you the next —

JUDGE ROBERTSON: I think you'd be in talking to me about it the next morning.

MR. BENNETT: All right. Okay. I figured that — you'd give me until the morning?

JUDGE ROBERTSON: Well.

MR. MADIGAN: He's a nice judge.

MR. BENNETT: Nice guy.

MR. MADIGAN: Yes, sir.

AUDIENCE PARTICIPANT: A slightly different question, but taking a little bit different turn. Mr. Bennett, when you advised President Clinton, I always wondered about the attorney-client privilege. I really do not know the rules about this. I would assume that the only person you can talk to about these things is the President himself, since he is your client. But, you have got all these advisors who want to know what's going on. How did you deal with that? If you can tell me.

MR. BENNETT: Well, I can tell you something. Most of the time, I met with the President by myself. And on those occasions when I met with him with other people, I saw to it that it was in a situation where the privilege would not be breached. If I had any doubt about it, I did not discuss things that I thought I could have problem with. That is how I dealt with it.

But also — maybe I should not say this, but quite apart from the privilege, if people did not have to hear something or know something, my attitude was, they had no business being in the room. And I didn't want them to be.

There were times when there were issues that came up and there would be other people in the room. It was a very awkward situation at certain points because when the impeachment process started, there were certain issues that White House Counsel had an interest in, and other issues that I had an interest in. So, there was a right, for both of us to be discussing an issue.

As you probably know, some of the decisions in the Court of Appeals came down and arguably undercut Executive privilege — I don't think it's even arguable. I think it clearly did cut back on some of the Executive privilege. But fortunately, I kept my counsel and was very cautious when I was discussing things. I certainly did not anticipate (I'm no prophet) that the decisions would come out the way they came out. But maybe it was just a natural caution of not talking about things when I should not be talking about them, or running any risks at all.

MR. CACHERIS: And it's a good thing Bob did not represent President Nixon because, if he had, everything that he talked about with the President would have been recorded and would now be in a book that you could all read.

MR. MADIGAN: Yes, sir.

AUDIENCE PARTICIPANT: I'm interested in the thoughts of the entire Panel, but particularly interested in Mr. Bennett's thoughts. I understood you to say that you thought it would be colossally dumb to say anything negative about a judge. But you also said it would be inappropriate, unseemly and fundamentally unfair.

I wonder what your thoughts are about criticizing a judicial appointee; namely, the independent counsel.

MR. BENNETT: Well, let me go back to your predicate. I don't have a problem criticizing a judge. But there is a way to criticize a judge. You do it in a pleading; you do it in a brief. I do not hesitate to take on judges, but there are ways to take them on.

My guess is, most judges would not be particularly troubled if you said they made the wrong decision and they were wrong. I have filed, only one or two motions to recuse. But that is a far cry from going on Roger's show and saying, "Judge So-and-So is this or that."

Now, the second part of your question is how I feel about criticizing an independent counsel. I draw a clear distinction between a member of the judiciary and a prosecutor, whether that prosecutor is an independent counsel or whether that prosecutor is a state D.A. or an Assistant U.S. Attorney. And I think there, too, it is always very, very fact-specific. It's what you say and it's how you say it.

MR. COSSACK: Was the implication that an independent counsel is in the same position as a judge, in that there is an inability to fight back?

JUDGE ROBERTSON: I think that is largely true. The independent counsel, unlike a career prosecutor, particularly given

that he is appointed by the judiciary, is constrained in what he can say and in his ability to defend himself.

MR. COSSACK: I'm not sure — and I agree with you, but I'm not sure, personally at least, whether or not that reason would rise to a rule that says you cannot criticize them. I agree with Bob. I think there is a clear distinction between a member of the judiciary and independent counsel. And, while it's true, I think, that independent counsel are in tough spots to fight back, I think that just goes with the territory.

MR. BENNETT: All these independent counsel, after they get all this office space, hire their own public relations person.

MR. MADIGAN: Well, on that note, we're going to wrap it up. Please join me in a round of applause.

Environmental Law & Property Rights

Judicial Activism or a Return to First Principles?

Professor Peter Byrne, *Georgetown University Law Center*
Professor James Ely, *Vanderbilt University Law School*
Mr. Douglas Kendall, *Founder and CEO, Community Rights Counsel*
Dean Doug Kmiec, *Columbus School of Law, Catholic University*
Dr. Roger Pilon, *Vice President for Legal Affairs, Cato Institute*
Hon. Roger Marzulla, *Marzulla & Marzulla, and former Assistant U.S. Attorney General (moderator)*

MR. MARZULLA: Welcome to the breakout session of the Property Rights and Environmental Law Practice Group. My name is Roger Marzulla. I am the chair of that practice group, and I will be moderating the panel this morning, which is titled unprovocatively "Property Rights: Judicial Activism or Return to First Principles?"

It seems to me that the title adequately states the key question here, which is whether the developing jurisprudence, most notably at the United States Supreme Court, since 1987 is a discovery or rediscovery of principles imbedded in the Constitution itself, or whether, as others will contend, it is a march down a road toward the creation of judicial doctrines which do not trace their legitimacy to the Founding Fathers.

We have a distinguished panel here this morning, and I am not going to take any of their time because I am as anxious as you are to hear from them.

We will speak in the order in which people are arrayed before you. Our first speaker will be Professor James Ely of Vanderbilt University, a noted authority not only on property rights but also on the legal history of the South. Maybe that will be next year's program.

Professor Peter Byrne of Georgetown University Law School. Peter has written and spoken extensively on property rights issues, and I have had the pleasure of seeing him in action explaining his writings to, I think, the Senate, at least, and maybe the House in connection with property rights legislation. He is a very articulate spokesman for the judicial activism side of this analysis.

Our third speaker will be Dr. Roger Pilon of the Cato Institute, a gentleman who is probably not unknown to most of you in this audience because if you are here, you probably know something about property rights or are interested in it, and if you are interested in it, then you have doubtless read Roger Pilon's writings over a very long period of time. He was involved in property rights long before it was cool.

Our fourth speaker will be Douglas Kendall with the Community Rights Counsel. Doug has been an ardent critic of the property rights movement for a number of years. He wrote a piece not too long ago , called something like The Takings Project with Charles Lord, in which he said some interesting things about property rights advocates and their cause.

Finally, to sum up today, I am especially pleased to welcome the new dean of the law school at Catholic University, the Columbus School of Law, Doug Kmiec. Welcome back to the East Coast after having been out West for a long time. Doug and I had the pleasure of working together at the Justice Department where I became completely committed to the recognition that Doug is a scholar on a number of levels. He has written extensively on property rights and is one of the leading authorities. He spoke last week at the Court of Federal Claims and did a heck of a job explaining *Palazzolo*, which may figure a little bit in his presentation today.

So without further ado, let's find out whether or not the property rights jurisprudence coming to us from the Supreme Court is, in fact, a return to first principles or, alternatively, judicial activism.

Jim.

PROFESSOR ELY: Thank you very much, Roger. It's a daunting prospect to be the lead-off speaker on this very distinguished panel. I would like to start by suggesting that we should explore both aspects of the question that Roger has posited: judicial activism as well as return to first principles.

First, I think we should ponder what we mean by activism. The word has taken on a kind of pejorative flavor in quite a few circles. It seems to constitute a kind of illegitimate use of judicial power by judges to impose their particular views or values rather than the norms expressed in the Constitution.

Unfortunately, if you take a historical view, activism so defined is very much in the eye of the beholder. Over the range of our judicial history, the Marshall court, the Fuller court, and certainly the Warren court have been accused of judicial activism. But whereas some have seen the activities of all of these prominent courts in very dark terms, others have contended that they were, in fact, robust defenders of constitutional rights.

At the end of the day, much of one's response to vigorous judicial decisionmaking seems to depend upon whose ox is being gored. There is, for example, a veritable cottage industry today of scholars trying to reconcile, it seems to

me, the activism of the Warren Court era, which was good, with the supposed activism of the Rehnquist era, which is bad. They are trying to work through whether we should once again be returning to the virtues of judicial restraint. One must take this with a grain of salt, since it seems to be advanced by people who were extremely enthusiastic when other sets of judges were doing the decisionmaking.

Now, our question posits that there is, in fact, some sort of judicial activism in a Fifth Amendment mask, to paraphrase the question put. I am prompted to ask, what activism? A handful of Supreme Court decisions putting some small degree of muscle into the Takings Clause is not much in the way of judicial activism, certainly when measured by historical standards. It strikes me that the takings decisions to which reference has been made since 1987 have been more hesitant, more piecemeal, more tentative, and certainly do not add up to any sweeping new direction in the law of takings jurisprudence. This may disappoint some, but it seems to me that is in the reality situation.

Moreover, the line of Supreme Court decisions endeavoring in a small way to reinvigorate the Takings Clause have hardly curtailed state regulatory authority in any meaningful way. In fact, a recent study by Professor David Callis suggests that state courts have in the main largely resisted this new takings jurisprudence and have tended, with some exceptions, to consistently put the narrowest possible reading on the decisions with respect to the Takings Clause. You might ponder whether the state courts simply are not listening, or whether they are listening and do not like the message. But the fact is that to this point, the takings decisions by the Supreme Court do not seem to have crimped state regulatory authority in any very significant way. I think it is simply fanciful to suggest that there has been some activist overhaul of all local land use regulations.

I am well aware that there are cries of alarm, and doubtless you are going to hear some shortly, from persons of the land use regulation community. But it seems to me that their alarm is exaggerated and their fears are overstated.

In truth, during the many years of judicial disinterest, officials became used to the idea that they could regulate any property to any extent and nobody would ask any questions at all. Now at least occasionally judges are reviewing decisions, and it appears, touse regulators, at least, that there is some kind of a judicial revolution afoot. I think that this notion is much overstated.

Now, let me turn to the other side of our question. Is this a return to first principles? As you can guess by now, I am going to argue yes.

It is hardly a news flash that the Framers of the Constitution and the Bill of Rights were deeply concerned about protecting the rights of private property owners and protecting commercial relationships. They frequently linked respect for property rights with individual liberty, a theme that comes up again and again at the Philadelphia Convention, is touched upon in the Federalist Papers, and is mentioned in numerous of their private writings and declarations.

Various clauses in both the Constitution and the Bill of Rights attest to this commitment to private property ownership. The Takings Clause, of course, is just one among others. Particularly important would be the Contract Clause, as well as the Due Process Clause.

Now, at the time the Constitution was framed, states had been the primary source of regulatory activity, and in this vein the Framers clearly saw that state authority was a source of concern and would have to be restrained. Security of property rights depended, at least to some extent, upon restraint of state autonomy. The Federal courts, as it is well known, early took the lead in protecting property and contractual rights through the enforcement both of the Constitutional provisions, to which I have made reference, as well, often in diversity cases regarding common law property rights. In fact, I would suggest that the protection of property rights and the protection of property rights of individual liberty were central themes in American jurisprudence down to the so-called Constitutional revolution of 1937.

The U.S. Supreme Court had very little occasion until after the Civil War to consider the scope of the Takings Clause. But thereafter, in a number of decisions, the Court began to develop the Takings Clause into a significant protective shield for property owners. I think perhaps particularly significant for this conference, in 1897, the just compensation principle was found to be an essential element of the due process requirements of the 14th Amendment and thus in effect became the first provision of the Bill of Rights to be incorporated and applied against the states.

The Takings Clause does not restrict state authority to any greater or lesser extent than other provisions of the Bill of Rights. Chief Justice Rehnquist pointed out a few years ago, "There is no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation."

There is a promise implicit in this statement that the Takings Clause will receive the same degree of judicial solicitude as other provisions of the Bill of Rights, but we all know that has yet to be realized. In point of fact, there is much less judicial attention paid to the Takings Clause than to other provisions of the Bill of Rights. But it no more restricts state authority on the face of it than the First Amendment or the Fourth Amendment or any of the other provisions of the Bill of Rights. We are not, and have not been since the Philadelphia Convention, operating under the Articles of Confederation.

The scope of the Takings Clause was little debated at the time of that ratification in the late 18th Century. This in some ways has been a boon to those of us who write in the field because you can pick over the very sparse evidence and argue a number of positions as to what was intended.

The Framers of the Bill of Rights lived an age with very little in the way of modern land use regulation. Property, even before the 18th Century, had been understood and defined in terms of value. The notion that the right of property encompassed the right to use and enjoy it had been recognized by scholars as far back as the 17th Century. It certainly was not understood as entirely limited to possession of physical things.

Given the high value that the Framers attached to the rights of property owners, it is inconceivable to me that they envisioned that the Constitutional protection to property could be satisfied by leaving the owner with mere legal possession or title, stripped of all economic value. Thus to the limited and belated extent that courts have begun to recognize this point, they are certainly engaged in the return to first principles that animated the Constitution and the Bill of Rights.

I think by way of conclusion, there might be some more profitable questions that we could ponder. Why has the Supreme Court under Chief Justice Rehnquist, which rhetorically exalts the importance of property rights, not done more to actually check encroachments on the rights of property owners? And why are some scholars so anxious to place a cramped interpretation on the Takings Clause when they seem so receptive to sweeping interpretations of other provisions in the Bill of Rights?

Well, I thank you. I look forward to hearing what the other panelists have to say.

MR. MARZULLA: Doug Kendall, did he get it right?

MR. KENDALL: Good morning, and thanks for coming to this panel so early on a weekend morning. The attendance today confirms my worst fears that conservative lawyers get up earlier in the day and work much harder than those of us on the progressive side. Maybe that is the real reason why our side has lost the last half dozen or so takings cases that have gone before the U.S. Supreme Court.

I also want to thank the Environment and Property Rights section and Roger for hosting this debate on the important topic of whether or not expansive regulatory takings doctrine under the Takings Clause constitutes judicial activism.

I note that other panels in this year's meeting addressed similar topics, and I applaud the Society for addressing this important critique of some of the emerging Rehnquist Court jurisprudence.

That said, it strikes me that the inclusion of me on this panel makes this debate considerably less interesting than it could be. You will not be surprised to find out that I think that the recent takings jurisprudence and regulatory takings developments constitute judicial activism. After all, I make my living defending state and local governments in regulatory takings challenges. I believe that the health, safety, and environmental protections that are the principle subject of takings challenges constitute perhaps the hallmark legislative achievement of the 20th Century.

I think a far more interesting debate would pit Professors Kmiec and Ely and Dr. Pilon against Judge Robert Bork, who openly supports Professor Richard Epstein's goal of repealing, "much of the 20th Century legislation", but nonetheless harshly criticizes Epstein's proposed regulatory takings revolution as, "not plausibly related to the original understanding of the Takings Clause". Or perhaps my esteemed co-panelists should be debating Justice Scalia, who admitted, perhaps too candidly, in his opinion in *Lucas* that before *Pennsylvania Coal v. Mahon*, "It was generally thought that the Takings Clause reached only direct appropriation of property or the practical ouster of the owner's possession." Later in his opinion, Justice Scalia states that "early Constitutional theorists did not believe that the Takings Clause embraced regulation of property at all."

Certainly if my co-panelists are serious in contending that expansive regulatory takings rulings do not constitute judicial activism, they should be talking to Clint Bolick and his colleagues at the Institute for Justice who are pursuing expansive regulatory takings jurisprudence and simultaneously viewing their mission as convincing conservatives that, "conservative judicial activism is neither an oxymoron nor a bad idea."

But alas, Peter Byrne and I were invited to take the position that takings rulings are judicial activism, and I accepted that task. Rather than bemoan my selection further, I will proceed to the task at hand.

The so-called property rights movement is advocating blatant, improper judicial activism that contravenes the text and plain intent of the Framers of the Constitution's just compensation clause.

Judges like Antonin Scalia on the Supreme Court and Jay Plager on the Court of Appeals for the Federal Circuit, who are advocating and adopting expansive readings of the Takings Clause, are doing the very things that the Federalist Society says it opposes. They are making up the law as they go along, they are trampling on notions of federalism, they are acting as judicial imperialists, using their power on the bench to make social policy.

These are strong claims. What is my proof? Well, let's start with the text of the Takings Clause. "...nor shall private property be taken for public use without just compensation." What does that mean? Well, I think "take private property" means expropriate, appropriate. I think it means when the government uses its power of eminent domain and takes private property for use in a military exercise or for use in building roads.

I think it is plausible to read the clause to include regulatory restrictions that are so severe that they are the functional equivalent of an expropriation.

I think Professor Epstein undermines his credibility considerably when he argues that the plain meaning of the text of the Constitution means compensation must be paid whenever the government, "diminishes the rights of the owner in any fashion no matter how small the alteration." Take does not mean diminish, and it never has. There is simply no way to justify from the text of the Constitution Professor Epstein's conclusion about the meaning of the Takings Clause.

Now, you may fairly be saying, who cares what Kendall thinks? What about the Framers? Well, that is a good question, and the answer is that the Framers, including James Madison, the author of the Takings Clause, also thought the clause was about expropriations, not regulatory impositions.

Historians have demonstrated this both through extensive analysis of Madison's papers and through analysis of regulatory impositions that were in place at the time of the drafting of the Constitution. No one, even Madison, thought that the Takings Clause would affect the scores of regulations in place at the time that regulated the use of, and in many case severely diminished the value of, private property.

This original understanding of the Takings Clause is embodied in the Supreme Court's jurisprudence for the first 150 years of interpreting the Takings Clause. For example, in 1870, in the legal tender cases, the Supreme Court stated plainly, "The Takings Clause has always been understood as referring to direct appropriation and not to consequential injuries resulting from the exercise of lawful power. Certainly, it would be an anomaly for us to hold an act of Congress invalid merely because we think its provision is harsh or unjust."

The evidence on this point is so clear that Justice Scalia was forced to acknowledge it in *Lucas,* and Professor Epstein was forced to recognize that his interpretation of the Takings Clause, "does not take into account the historical intentions of any of the parties who drafted or signed the Constitution."

Now, finally, I want to turn to the most commonly employed historical justification for an expansive regulatory takings doctrine. The argument goes something like this, and I think it's along the line of what Professor Ely has just said:

The Framers cared a lot about private property. An expansive regulatory takings jurisprudence protects private property; ergo, an expansive regulatory takings doctrine is consistent with original intent (even if the Framers understood the clause as limited to physical expropriations).

First, let's observe that this is not a textualist or originalist argument; it's an argument based on political philosophy. But even on its own terms, the argument is deeply flawed, and I will make three observations about it as a way of response.

First, as Professor Ely has written, for all their devotion to property rights, the Framers were intent to rely primarily on institutional and political arrangements to safeguard property owners. The Framers did care a lot about property, but, as explained in Federalist No. 10, they protected property primarily through the checks and balances that were set up in the political process. Correspondingly, there is no reason to think that the Framers would view expansive regulatory takings doctrine as either necessary or wise.

Second, while the Framers undoubtedly cared about protecting property and were influenced by philosophers like John Locke, it is not credible to call the Constitution a Lockean document. The nearly unanimous view of constitutional historians is that both Lockean liberalism and civic republicanism powerfully influenced the founding generation. The Framers, in other words, cared both about protecting property and ensuring that the government had the power to advance a common good.

As Benjamin Franklin put it in 1789, private property is a creature of society and is subject to the calls of that society whenever necessity shall require it, even to the last farthing.

Third, it is not clear that even John Locke or William Blackstone would support the extreme interpretation of the Takings Clause proposed by Epstein and others in the property rights movement. A portion of Blackstone's definition of property often edited out or ellipsed out by the property rights movement says that free use of property is subject to the "laws of the land."

Similarly, Professor Epstein was forced to "correct" the portion of John Locke's theory of property that opines that property rights can be exercised, "only where there is enough and as good left in common for others."

This correction led Charles Fried to quip that Locke was not sufficiently Lockean for Professor Epstein, and that Professor Epstein is, "moved to complete not only the text of the Constitution by reference to Lockean spirit, but Locke's text itself."

We should not forget the Lockean influence on our Founding Fathers. We should protect property rights. But we cannot so imbibe the Lockean spirit as to forget the limited text and original intent of the Takings Clause. Employing the clause to strike down health, safety, and environmental protections that present generations overwhelmingly support is judicial activism at its most dangerous and unprincipled.

I would like to finish by pointing you to Judge Jay Plager's 1994 opinion in *Florida Rock v. United States,* perhaps the most activist opinion to date in takings law, in which Judge Plager creates basically from whole cloth the notion of partial regulatory takings.

In an article in the Journal called Environmental Law written right after the *Florida Rock* opinion, Judge

Plager acknowledged that this partial takings issue had, "not been fully briefed and argued before his court." And he explains that "sometimes you have a problem of fitting the issue you want to write about into the case that is before you." Let me read that again. "Sometimes you have a problem of trying to fit the issue you want to write about into the case that is before you."

He then responded to the critics of his opinion with the retort: "One of the advantages of being an Article III judge with lifetime appointment is that you never have to say you're sorry."

This, in my mind, goes beyond activism and into the realm of lawlessness. This arrogance and lawlessness from the bench I thought was precisely what the Federalist Society was founded to combat.

I would hope that members of the Society will have the courage to combat judicial activism and judicial imperialism in all of its manifestations.

MR. MARZULLA: Forcefully stated case. Roger Pilon, let's talk about arrogance and lawlessness, shall we?

DR. PILON: I'd be glad to, Roger. I am well qualified to talk about arrogance.

You have just heard the attack on property rights from the left, claiming that the Supreme Court is engaged in judicial activism. You will not be surprised to learn that there is also an attack from the right, framed likewise in the language of "judicial activism." Both attacks show similarities with recent attacks on the Supreme Court's new federalism jurisprudence.

In fact, the attack from the right was brought home to me a decade ago when I published a piece in the *Wall Street Journal* under the title "Property Rights and Constitutional Principles." The article appeared just before oral argument in the *Lucas* case. A month later the *Journal* ran a letter from my erstwhile colleague in the Justice Department, Gary McDowell. The heading of the letter said it all: "Scratch a Libertarian – Voila, a Judicial Activist."

The letter began by claiming that "the libertarian molestation of the Constitution continues apace," and it went downhill from there. McDowell claimed, for example, that "political legitimacy is rooted in consent," which of course is wrong. Legitimacy is rooted in both consent and reason. If it were rooted in consent alone, none but new citizens would be bound by the law since most of us never gave our consent to be ruled as we are. In fact, it is reason, not consent, that will help us sort out the issues before us today.

But let me get to the heart of McDowell's machinations. "The federal structure," he said, "left some things to the states – the regulation of private property was one." And then he added, "Since *Barron"* – that's *Barron v. Baltimore* – "the Takings Clause has been applied to the states – but never legitimately. It has been as it only could have been short of an amendment – a matter of judicial musing and finagling. It has been an egregious example of judicial revision of the Constitution by a court bent on doing good."

There you have it from the right. And you will hear the same strains, of course, from Lino Gragia, Raoul Berger, Robert Bork, and even, to some extent, from Antonin Scalia – all pointing to the much mooted incorporation issue.

Before addressing that issue, let me speak directly to the question before us of whether the Court's recent protection of property is judicial activism or, instead, is a return to first principles. I will argue that it is a return to first principles. And I will do so by focusing precisely on that idea of first principles.

Let me divide my remarks into two main parts: first, concerning the jurisdiction or authority of the Court, which will involve the incorporation issue; and, second, concerning the substantive issue, the Takings Clause – or what the law requires on the merits. Both of those involve the question of judicial activism, but they are separate aspects of the question.

With respect to the jurisdiction or authority of the Court, here, too, we need to divide the issue into two parts: first, the federal side; then, with respect to the States. And on the federal side, here again there is a two-part division: first, prior to the ratification of the Bill of Rights; then, subsequent to that point in time.

Now, why would I start with the situation prior to the Bill of Rights? Well, let's remember, we lived for two years without a Bill of Rights. Does that mean that we had no rights vis-à-vis the Federal Government? Of course not. What was protecting us and our rights was the doctrine of enumerated powers – the idea that where there is no power, there is a right – and that takes us straight back to state-of-nature theory and to the whole justificatory apparatus that stands behind the Constitution, as first set forth in the Declaration of Independence: we start with our rights; we give up only certain of those in the form of powers; we retain the rest. That was the justificatory theory of this nation, even before the Ninth and Tenth Amendments made it explicit.

The fundamental idea behind the doctrine of enumerated powers, then, is simply this: the Federal Government has only those powers that have been delegated to it, by the people, as enumerated in the Constitution, plus those instrumental powers that are "necessary and proper" for pursuing any of its enumerated powers or ends. (And "necessary," by the way, does not mean "appropriate," as Marshall said in *McCullough v. Maryland*. After all, if the Framers had wanted to write "appropriate," they could have.) Thus, if we take the doctrine of enumerated powers seriously, it turns out that the eminent domain power itself, prior to the adoption of the Bill of Rights, is problematic – first, because it is nowhere enumerated in the Constitution; and, second, because none of us had such a power in the first place to yield up to any government

we might create. Not by accident was eminent domain known in the 17th and 18th centuries as "the despotic power." At best, it was an "incident of sovereignty," surrounded by an air of illegitimacy, and cabined by the sovereign's need to pay compensation when property was taken.

To be sure, once the Bill of Rights was ratified, the eminent domain power was brought to the surface – although it was still only implicit, framed in a clause that spoke directly and explicitly to the right of private property. Along with the rest of the Constitution, however, that was enough to allow courts to recognize the power, provided it was exercised consistent with the requirements of the Takings Clause – and even if the inherent illegitimacy of eminent domain remained unresolved. Still, as the Court would later say in *Barron*, the Bill of Rights was good only against the government created by the document it amended. Thus, state Takings Clauses aside, it remained to apply the federal Takings Clause against the states.

We turn, then, to the state side of the issue, to incorporation, and to the Civil War Amendments that brought it about. This is a complex and vexed issue, of course. Suffice it to say here that the long pre-Civil War battle between liberty and democracy led to the demise of the Missouri Compromise, to the Kansas-Nebraska Act of 1854, to the formation of the Republican Party, and to Lincoln's vision of a Constitution informed by the majestic principles of the Declaration of Independence. With the Civil War Amendments, that vision was finally realized. The Fourteenth Amendment in particular, written against the background of the "black codes" that emerged in the South after the war, was meant to constitutionalize the Civil Rights Act of 1866 and, for the first time, to give *federal* protection against *state* violations of individual rights. And the amendment's Privileges or Immunities Clause was meant to be the principal font of those rights, not the Due Process or Equal Protection Clauses.

The Framers of the amendment and those who ratified it understood what the Privileges or Immunities Clause meant, for they looked back over its long history. Blackstone had used it to refer to our "natural liberties." Colonial charters often spelled out its meaning. The Article IV version was said by Hamilton to be "fundamental" and "the basis of the Union." And the then-definitive interpretation of the clause had been given in 1823 in *Corfield v. Coryell* by Justice Bushrod Washington. In a word, the clause was meant to protect such basic rights as property, contract, personal safety, and the procedural rights necessary to enforce those substantive rights. Those were the rights that "no state shall abridge."

Unfortunately, as we all know, a bitterly divided Supreme Court effectively eviscerated the Privileges or Immunities Clause in 1873 in the notorious *Slaughterhouse Cases*. For a further analysis, let me simply refer you to the excellent essay on the subject in the 1989 *Harvard Journal of Law & Public Policy* by then-Judge Clarence Thomas, which traces the issues back through Thurgood Marshall's brief in *Brown v. Board of Education*, the elder Harlan's dissent in *Plessey*, and the dissents in the *Slaughterhouse Cases*. You will see there the logic of the matter and how it is that states, too, are restrained by the Bill of Rights. Thus, as a practical matter, incorporation may have come about piecemeal as cases have come before the courts. In principle, however, it was accomplished through the ratification process – just as the Constitution itself came into force through that process.

Let me turn now to the substantive issues and to the question of what the courts should be doing to protect property rights, whether threatened by federal or by state actions. The most basic thing courts should do, of course, is ask what rights there are to be protected. To do that however, they might begin by looking at the text of the Takings Clause, which means they will have to define such terms as "property," "take," "public use," and "just compensation."

I'm going to focus on the word "property" because that's what Doug Kendall focused on – and because that's where a good part of the current problem rests. What is striking to me is that in this area of the law alone, "property" seems to mean simply the underlying estate, whereas in every other area of the law the term is used to refer not only to that bundle of rights we call "property" but to each of the rights in the bundle. Thus, in everything from trusts and estates to tax law we divide property into as many "estates" as human imagination allows. Yet in the takings context, it's only the bundle that seems to count.

We saw that, in a way, in *Lucas* – a case that had Justice Scalia speaking of 70-odd years of ad hoc regulatory takings, even as he was adding yet another year to the string. In *Lucas* he gave us, in effect, the 100-percent rule. Absent a nuisance justification, about which more in a moment, if a regulation wipes out all value in the property, while leaving title with the owner, the government must pay just compensation because the effect of the regulation is tantamount to taking title. "What if the regulation takes 95 percent of the property's value?" Justice Stevens asks rhetorically. Tough, answers Scalia: "Takings law is full of these all-or-nothing situations." Thank you, Nino.

What Scalia has done here, of course, is start at the wrong end of the problem. He tries to determine if there is a taking by first determining what the loss is. If the loss is total, he believes, you have a taking (except, again, in the case of nuisance prevention). He's got it exactly backward. The first question is not whether there is a loss in value but whether there is a taking. Only then does the question of the amount lost arise, for purposes of just compensation. Indeed, one could have a taking, yet have no loss in value.

Thus, if we look at property not as a thing but as a bundle of rights, the question is whether any of those rights has been taken, not whether all have been taken. Scalia began with a 100-percent rule. He should have begun with a zero-percent rule. Take one of those rights in the bundle of rights and you've taken something that belongs to someone.

After all, if a mugger comes along and says, "Your money or your life," and you bargain him down to half your money, no one would say that he hadn't taken what belonged to you – half of your money. Yet if that mugger wears a badge that says U.S. Government, he gets away with it. We have an ordinary word in the English language for that: it's called theft.

In a takings analysis, then, you've got to begin by defining "property." Property is not simply the underlying estate but all the rights, or legitimate uses, that constitute that estate. Madison put it well in his justly famous essay on the subject in the *National Gazette* of 1792: "as a man is said to have a right to his property, he may be equally said to have a property in his rights." All of those uses or rights that legitimately go with the property are themselves property. Take one of those and you take property that belongs to the owner.

We come, then, to the question of what those uses are and, in particular, to the so-called nuisance exception to the compensation requirement. In truth, it's no exception at all, because when a regulation prohibits a use that is illegitimate to begin with, it takes no right. The difficulty, however, is in determining what are and are not legitimate uses. The theory of the matter is rather easy. The application, by contrast, is sometimes difficult and invariably is fact dependant.

Here, Scalia repairs rightly to the common law. But that gets you only so far, because the common law can handle only a certain range of cases before statutory regulation is necessary. This is not the place to go into this complex and difficult area. Suffice it to say that, as in every other area of the law, one needs a theory of the matter. And here, the basic theory, rooted in a concern for equal rights, says that there is a substantive presumption in favor of "quiet" uses – uses that all can enjoy at the same time and in the same respect – and against "active" uses – uses that crowd out neighboring uses. That principle has to be applied in a factual context, of course. And I say "substantive presumption" because there is – or should be – a procedural presumption in favor of nearly all uses, leaving the burden of objecting to a use on those who object.

Once those procedural and substantive details are worked out, however, the claim one hears so often from the other side – that a principled takings jurisprudence would require government to pay polluters not to pollute – is put to rest. Nothing could be further from the truth. Since there is no right to pollute in the first place, regulations that prohibit uses that pollute are perfectly legitimate under the police power, requiring no compensation under the eminent domain power. For no right – no property – has been taken, even if the owner is "wiped out" by the regulation. On the other hand, if a regulation takes an otherwise legitimate use, the owner is entitled to just compensation for his loss, even if it's small relative to the value that's left.

Thus, if a regulation takes legitimate uses, not to protect public or private rights but to provide the public with such goods as lovely views, wildlife habitat, or historic sites, the public has to pay for those goods, just like any private individual would have to pay for them. Government cannot simply take those uses, however valuable the goods that result may be. If they're that valuable, pay for them. Otherwise we're engaged here in theft, plain and simple. Indeed, the modern property rights movement can be reduced to a simple proposition: "Stop stealing our property; pay for it."

Now, what happens when the public doesn't have to pay, when the goods go "off-budget"? As any economist will tell you, when the price is zero the demand is infinite. It's no accident, therefore, that in recent years we've seen an explosion in the public's demand for environmental goods – they're free! What so many environmentalists fear, in fact, is that if those goods go on-budget, if the public is made to pay for them, the public will demand fewer of them. What a surprise! When you have to pay for something, you demand less of it. That's exactly what will happen, and that's why the other side is opposed to a principled takings law.

So I come back to the bottom line. This is not a matter of judicial activism. It's a matter of returning to first principles. Clarence Thomas put the deeper issue well when he talked about the Privileges or Immunities Clause. The clause was meant, he said, to protect us against the willfulness of both run-amok majorities and run-amok judges. The same can be said about the Takings Clause. It permits public projects to go forward, but not at private expense. Judges who understand and apply that principle are not imposing their own vision on the rest of us. They're applying the law, which is what they're bound by oath to do.

Thank you.

MR. MARZULLA: Professor Byrne, would you like to speak up for theft?

PROFESSOR BYRNE: Yes. Well, we may disagree about theft, but still it is comforting to be in a room of people who are hard-core enough to show up on a beautiful Saturday morning to hear about regulatory takings. That is a taste we certainly share.

Discussions of this sort are bedeviled by questions of definition. What is judicial activism, and how can we talk about judicial activism without having a sense of a baseline of appropriate judicial exercise of authority?

I want to suggest today that judicial activism can be best understood as enhancement of judicial power by expanding the scope of vague terms in the Constitution without serious engagement with the text, history, or some other limiting principle, joined with the disregard for the Constitutional primacy -- and I suppose this is a political philosophy judgment -- of democratic law-making by elected representatives, Federal and state.

In using this definition, I want to stand in a tradition that originated with Holmes' dissent in substantive due process cases, the essence of which is captured in the statement that the Constitution is made for people of fundamentally different views.

This tradition of arguing for judicial restraint found flower in liberals' critique of the Court's blocking of New Deal legislation articulated, for example, by Felix Frankfurter. It found fresh energy in criticisms of the Warren Court's pursuit of social egalitarianism through Constitutional rulemaking associated with justices such as John Harlan or William Rehnquist.

To analyze judicial regulatory takings developments from this perspective, I thought it would be helpful to concentrate on the jurisprudence of a single and central justice, and Justice Scalia is an attractive choice for several reasons.

First, he has been the most vehement critic on the current Court when it has engaged in what he believes to be unwarranted judicial displacement of the prerogatives of the legislative process. He gave passionate statement to this in his dissent in the *Casey* case, castigating an imperial judiciary for Constitutional decisions based on philosophic predilection and moral intuition.

Secondly, as Doug Kendall indicated and as everyone here agrees, he has eschewed any reliance in interpreting regulatory Takings Clause on the original meaning of the clause, frankly acknowledging that the consistent interpretation before 1922 was that it embraced only expropriations and physical invasions. And he offered as authority for what the Court is doing today only a vague salute to a mythical historical compact which he neither identified nor explicated.

Justice Scalia's frankness here allows me to put aside, at least for a moment, the question of the appropriate baseline of what the Framers intended. I hope in the question and answer session, we can talk about some of the theories advanced.

Third, Justice Scalia has eschewed result orientation as such, which I want to contrast with activism, orientation being maintaining a kind of judicial flexibility that allows the Court to resolve every case in a way that comports with its notions of justice. He rather has paid attention and has tried to articulate rules, and in the process of articulating rules, he has tried to ground them in principle. This allows us to discuss some principles that are actually extant in Constitutional law today, and he always writes with intelligence and flair, so it is fun to argue about him.

Rather than take you through all of Scalia's opinions in the brief time I have, I want to summarize what I believe are the three most salient themes in his regulatory takings jurisprudence and explain why I think they represent inappropriate judicial activism.

First, Scalia has revived the heightened means-ends analysis of regulations of property employed in economic substantive due process cases from before 1937 and eschewed by most judges of all persuasions in the period after 1937.

He has transferred this inquiry to the Takings Clause without real explanation of why heightened scrutiny is appropriate for regulations of property in any sort of principal way. This permits judicial supervision of the wisdom of legislative and administrative judgments. Following this lead, lower courts now frequently invalidate land use regulations because of an independent judgment that the legislative program will not, for example, substantially advance an articulated government interest.

I do not want to suggest that this is a return to 1936 or anything like that. The scrutiny is only intermediate, not strict. Moreover, to date, the opinions do not impose a strong substantive limitation on the legislative objectives that can be chosen, characteristic of the old substantive due process cases.

Justice Scalia himself, however, has urged in a concurring opinion in *Pennell v. City of San Jose* that a city has no business in principle reducing a rent increase that otherwise is economically reasonable in order to respond to the hardship of the tenant -- a hard substantive limitation on legislative goals.

It is fair to note that more recently in the *Del Monte Dunes* case, Justice Scalia pointedly expressed no opinion on the propriety of the substantially advanced test in takings cases. It is hard to know what he means by that, because in the same opinion he went on to indicate that whether any legislative purpose is legitimate is a question of law for a court to decide.

Second, Justice Scalia created the first per se test to condemn regulation on an owner's use -- that's the *Lucas* case -- and the point of the per se test is to find a taking without consideration or weighing of the public goals, and the character of the public goals involved.

He has expressed a willingness to consider abandonment of the parcel as a whole rule, a development that would greatly increase the number of regulations condemned without consideration of their social value, and we may see something of whether this thought will bear fruit in the pending *Lake Tahoe* case, which many of you are aware of which brings a blunt per se challenge to temporary development moratorium.

Third, Justice Scalia has indicated an assumption that "property" as used in the Takings Clause has a static Federal constitutional meaning -- dare I say it: a natural meaning -- apart from property law itself.

This would reverse many due process opinions by Justices Stewart and Rehnquist, decisions viewed at the time as conservative and restrained, indicating that property rights are created and their meanings determined not by the

Constitution as such, but by independent sources of law, primarily state law.

I would add my view that such a subsidiary in the development of property norms supports the continued vitality of private property law and the system of private property law by permitting the adjustment of these rules to changing economic and social conditions. That is what I view is at stake in these cases.

The signpost of Justice Scalia's view on the Constitutional content of property may be found in several opinions. First, he has indicated that he would subject state nuisance laws in *Lucas* category cases to Federal review. He has argued that regulatory takings are not about protecting reasonable expectations about the scope of permitted uses at some point in time, but about static or fixed substantive limits on what property rights must permit, and this is how I read his concurring opinion in *Palazzolo*. And he has suggested that a state court lacks authority to find public rights of access to state beaches in the interpretation of the state common law of property.

Besides greatly enhancing the reach of the Fifth Amendment and thereby judicial power, the move to constitutionalize the meaning of property greatly restricts states' law-making authority. States may not, without Federal judicial leave, amend property rules to enhance efficiency and fairness as they have done since Virginia abolished the fee tail estate soon after independence. Moreover, their administration of local land use regimes must be conducted with a firm view to the rear on the attitudes of Federal judges.

A great constitutional achievement of the 20th Century was to place questions of economic and social policy in the hands of elected representatives rather than Federal judges. But Justice Scalia's regulatory takings principles grow from a deep suspicion, particularly of modern environmental legislation. I think he sees these as complex restrictions in the service of obscure ecological values that threaten the legal order based on individual rights and market activity.

He fears the environmental law's concern about harms that traditional economic and personal behavior cause to natural systems potentially will empty the precious category of activities that we can pursue freely because they do not harm others.

Given that these environmental laws are firmly cemented in the people's regard, and attempts at repealing them by political means have been defeated again and again, Justice Scalia seems to have persuaded himself that they often exceed traditional constitutional values even if these values need to be newly articulated or rediscovered. His regulatory takings opinions reflect an attempt to erect new constitutional dikes against the flood waters of an environmentalism and the legal changes such concerns have prompted.

Now, it is fair to say that since 1992, Justice Scalia has not written a regulatory takings decision for the Court majority. The Chief Justice, who has always been in the majority, has assigned writing the Court's opinions to himself or to another justice whom he has viewed as less categorical or overtly ideological. I do think that many of these opinions are unduly opaque about the governing principles of regulatory takings while consistently finding for the property owner, but they have evinced an instinct to move slowly and not to sweep aside social consensus.

Advocates of judicial restraint should prefer even more that the salience of environmental restrictions to property use be debated and decided by the people at their most appropriate level of democratic decision making.

Thank you.

MR. MARZULLA: Well, when the professors disagree, it's time to bring in the law school dean.

So here's Doug Kmiec.

DEAN KMIEC: Thank you, Roger. I thought this was a panel on military tribunals, so I have to my modify remarks. But what the panelists do not realize is that there are several categories of people covered by the military tribunals: terrorists, those aiding and abetting terrorists, those harboring them, and those taking private property without the payment of just compensation.

It is my job as the dean to try and bring synthesis to the excellence of this presentation that we have heard this morning. Because my judgments to some degree have to be candid, and some might view them as harsh, I want to tell all the panelists now that there is going to be an award given at the end of this. I will go through the presentation of each person so that I can justify my rationale, and so the judges in the audience, can see that I worked my way backward to the result that I had in mind all along.

We were told at the beginning by Professor Ely that judicial activism and first principles were both in play, and we need to address both of them. He coined a phrase which I wrote down. He said a lot depends on "whose ox is being gored." I think that phrase is going to catch on. I think the way to work your way out of that phrase in terms of some meaning is, if you view property as a pre-societal natural right, then when a court intervenes to protect it, it is not judicial activism. If, however, you view property as merely a societal or positivist social construct, as Jeremy Bentham did, as to some degree Hobbes did, then when courts intervene to protect it, it is a form of judicial activism.

One of the reasons the area is so difficult to work our way through is because property is both of those things. It is a pre-societal natural right and it is one of the reasons we formed the Republic, but the particular specifications of property often depend upon positive law. This was something recognized by Blackstone in his commentaries when he told

us very helpfully that property was both an absolute and relative right.

One of the things that should be admitted right at the front is that to reach a definitive answer here in each and every case is going to be well nigh impossible unless one recognizes that property has both of these conceptions built within it.

Professor Ely, you more or less conceded that, but it wasn't clear to me, so I cannot give you the award, and I regret that.

PROFESSOR ELY: I'm heartbroken.

DEAN KMIEC: I know. And Doug Kendell you brought Professor Ely back by reminding us of the wonderful Lockean proviso that property is protected so long as there is enough and as good left for everyone else, and that is insofar as our Framers were shaped by Lockean ideas, that also was a reminder of the two sides of the property concept.

But Jim Ely, I do not want to leave you brokenhearted because I thought you asked one of the most trenchant questions here, and that was, "what activism?" We have got a handful of cases from the U.S. Supreme Court: Do they really amount to the protection of private property? I thought that was a particularly good question, because when you actually look at the litany of cases, you have one that says, if they pass a regulation that stations guards on your roof or in your living room, physically invades, physically occupies, that's a taking. If someone leverages regulations so that you have to give up part of your estate, that's a taking. If they totally wipe you out in an economic sense (and we really do mean totally wipe you out, because even Justice Blackman said to old Dave Lucas when he bought those million-dollar lots in South Carolina, well, you can still use them to picnic can't you?) that is a taking.

And then there is the relatively inscrutable *Penn Central* test where we have a set of factors. You know you are in trouble when the Supreme Court admits it's being ad hoc. The factors are not defined, and the definitions of these factors shift over time.

Back to that in a minute.

Now, Doug, I wanted to give you the award just because you called yourself a progressive and I never know what that is. But then you lost the prize because you said the Institute for Justice was a group of just dyed-in-the-wool judicial activists when they were litigating the issue of public use.

One of the things that I think constitutionalists ought to litigate are the words of the Constitution. I've never quite gotten over the fact that a unanimous Supreme Court just wrote the public use words out of the Constitution of the United States in *Hawaii Housing Authority v. Midkiff*. Or the fact that there is a merry band of litigators called the Institute for Justice that will say to the City of Pittsburgh, "Just because you don't think these little shops are pretty does not give you the right to use the power of eminent domain and transfer them to a private shopping mall developer that you think might make a prettier statement in the midst of your public square."

So, Doug Kendell, nice try, but I'm sorry.

Now, I am going to skip over Roger Pilon. But you may sense that he is already the leader. Roger made a concession here this morning that he has never made in any other public forum. Somebody was saying something about too much arrogance being involved here, and Roger said, well, I know something about arrogance. Now, that was the most self-deprecating thing I've ever heard Roger say, so we will come back to you, Roger.

Now, Peter, I must say, you know, I like Georgetown. It's almost a Catholic institution. And I have found your work enlightening. But I think it is not accurate to say that Justice Scalia has revived *Lochner*. I think the Rehniquist Court in its taking jurisprudence has, indeed, been very careful to distinguish itself from what *Lochner* was about.

Lochner was about the second-guessing of legislative prerogative. The Supreme Court in the takings cases is not that at all, or at least the Court has been very careful to say that they're not constraining -- and this goes to the issue of judicial restraint -- the legislature from doing things which it is authorized to do; namely, as Doug Kendall articulated, protect the health, safety, and welfare of the community. We expect local legislatures to do that.

So what Justice Scalia is actually measuring is whether or not regulation really does advance the end that it says it is advancing -- that's what *Nollan* was about -- and whether or not it is proportionate to place a particular burden on a given land owner to advance that end.

Peter made reference to the *Pennell* case, a rent control case, where it apparently got in the mind of the City of San Jose that individual land owners could be singled out to rectify the unfortunate poverty of their tenants.

Well, Justice Scalia rightly put up his hand and said, "I think there's an absence of causation here. This particular landlord did not cause the harm, did not cause the poverty of this particular tenant, and the Fifth Amendment to the extent we want to discover original meaning and original understanding is about the avoidance of the disproportionate burden of the public weal on a particular person." Scalia, I think quite rightly, pointed out that that would be a mistake.

So, I'm afraid, Peter, for that and so many other reasons, including the proposition that Justice Scalia adopts a static definition of property when it is he, the founder of *Lucas*, who told us that at least when all property value has been completley deprived, the state will have some burden to reference back to the dynamic background principles of

property, I can't give you the award. Can we just ask you what you're up to here, South Carolina? Can you justify your regulation in terms of the background principles of state property law, which are not static? Common law is hardly a static doctrine, and, in fact, is quite federalist and quite local and quite well suited to addressing the difficult questions of health, safety, and welfare.

And now I come back to Roger Pilon. He has done so well here today because he said we start with our rights, and he reminded us that in the original framing of the Constitution, there wasn't a list, but there were the rights, that flow from the fact that we are created human beings, and we have some unalienable things that cannot be deprived from us.

Our founders, with the great genius of the time, thought it was quite sufficient to enumerate power and to say nothing more about rights, and that if they did say something more, they would run the risk of leaving something out that would be important, and they were quite right in that supposition.

Well, things were made explicit for better or for worse in the Bill of Rights, and various things that Roger described brought tears to my eyes when he told us what happened to the Privilege or Immunities Clause. But he reminded us that we do need, among other things, definitions to make the Constitution work. We need definitions of taking, of public use, of property, and of just compensation.

Roger Marzulla mentioned when he introduced me at the beginning of this forum this morning that I had the pleasure of talking to the Federal Circuit recently about the *Palazzolo* case. This case put the most remarkable question to the Court: if the government passes a burdensome, oppressive regulation, can it avoid the argument that it amounts to a taking requiring the payment of just compensation merely because it gave notice of it in advance?

Well, had the Court agreed to that rather silly proposition, it would have left the Constitutional document entirely empty. It would have deprived the word property of any meaning or definition. It would have made it entirely circular, and it would have denied the natural rights and natural law foundation that Roger Pilon so eloquently spoke about. I think you see where I am going in tipping my hand in terms of the great award to be given.

But let me just end with a few comments about *Palazzolo*, which I think do have practical significance. Occasionally, deans do like to connect to what lawyers are actually doing.

There were basically three positions in *Palazzolo* that were notable to me. The opinion was written by Justice Kennedy, and he basically said, no, you can not simply take property upon giving notice. But the opinion was unclear because he was joined in a separate concurring opinion by Justice O'Connor of exactly what impact notice of the regulation has. Justice O'Connor in her separate concurring opinion said it's a factor, which is a little bit like saying a taking occurs when the regulation goes "too far". We are not sure where that's going to go, but I want to come back and say something about Justice O'Connor in a minute which I think practitioners will want to focus on.

Justice Scalia, being the principled person that he is, said factor, schmactor; advance notice doesn't have anything to do with the question. The question is whether or not an oppressive disproportionate regulation has been put in place on this land owner. It does not matter whether he has notice of it or not.

On the other end of the spectrum, Justice Stevens would have found no standing for somebody who had notice of the regulation. Anyone on notice, said Stevens, would know that he owned nothing and therefore he could not possibly have suffered a concrete injury in fact. We would really be down the rabbit hole with that one.

But Justice O'Connor said something very interesting about what she thought the word "factor" meant for her, and this is something worth paying attention to because land owners know generally they can't win those cases when they don't have *Lucas* on their side, when they don't have *Nollan* and *Dolan* on their side, when they don't have *Loretto* on their side. In other words, when they can't prove a permanent physical invasion, when they can't prove leveraging, when they can't prove a total wipeout, they are stuck in the residual category of *Penn Central* and its balancing factors, which usually means they are stuck saying goodbye to their life's investment.

But Justice O'Connor said it need not mean that, because when she wrote her concurring opinion in *Palazzolo*, she said the character of the government's activity is not just whether regulation involved a physical invasion. It involves the Court asking the question of whether or not the regulation has served the purposes for which it was intended.

That is an interesting point for Justice O'Connor, swing vote that she is, to make, because that suggests that she is saying that some of the concerns that were articulated in the *Dolan* case may count. In the *Dolan* case, old Florence Dolan out there in Oregon wanted to expand her hardware store, and the government said, oh, fine, you can expand your hardware store, but you've got to put a bike path in the town. She didn't get it — she didn't think that many people were going to buy bathtubs and then ride their bike home.

And Chief Justice Rehnquist didn't get it, either, and he said there didn't seem to be any proportionality or causality related to this, and therefore he didn't understand how the purposes of the regulation were being served by placing that burden on her.

Justice O'Connor suggests in her understanding of the character factor under *Penn Central* that this inquiry can be made. That's very helpful and that gets us closer to a natural rights formulation.

She also suggested that she is interested in knowing under the same factor whether the effects it produced -- *Penn Central* invites analysis of the effects produced by the governmental action -- actually accomplished its stated goal.

And again, that is not *Lochner*; that's the nexus between the regulatory means and whatever regulatory end the government has decided to pursue.

Well, that's my practice tip, and now to the award.

The award has troubled provenance. It is something that I have always thought probably was taken from somewhere – perhaps, the cloak room of a local federal building stolen. It was given to me by a colleague of mine and I have had it ever since, and I have worried about this. And so to expiate my sin, and to now move this artifact elsewhere, I present "the United States District Court Not Responsible for Private Property Award" to Roger Pilon.

DR. PILON: Thank you very much.

MR. MARZULLA: It seems to me that even with respect to that award and its inscription, that it perhaps is subject to debate. We might well be talking about the split of jurisdiction between the District Court and the Court of Federal Claims, and for those of you who, like me, spend a lot of time over at the Court of Federal Claims, you will know that such signs are generally not found over there. Perhaps next time we will invite some of the Claims Court judges over to make their own awards.

Doug is new as dean at Catholic, and so he thinks he gets the last word.

But as everybody who has engaged in the law school community knows, it's really the professors who get the last word. So I am going to invite each of the first four panelists to do a two-minute rebuttal, —three of them as to why they didn't get the award and the fourth to further expand why it has not contributed to his arrogance to get the award.

And then we will follow this up with questions, so be getting ready.

PROFESSOR ELY: I may not be entirely coherent because I am speaking to you through my tears.

But I will endeavor to respond to at least several of the interesting points that were raised.

It may be true that Justice Scalia has indicated that before *Pennsylvania Coal*, there was no recognized notion that a regulation could constitute a taking, but if so, neither he nor his clerks did a very thorough job of investigating the historical record. In point of fact, Justice Holmes, as far back as decisions written on the Supreme Judicial Court of Massachusetts in the 1890s, suggested that a regulation might under some circumstances constitute a taking. Leading treatises on eminent domain law had raised the possibility that a regulation could be so severe as to deprive the owner of all use and enjoyment, and that might amount to a taking, at least as far back as the 1880s.

Since by the 1880s we were moving into an era of modern and more comprehensive regulation, it is not surprising that this might be the first time scholars and jurists would have occasion to address that issue.

There were, of course, land use regulations in effect at the time of the drafting of the Constitution and Bill of Rights, and Doug Kendall is quite right to bring that up; however, I think it is also fair to say that these regulations fell far short of modern comprehensive environmental and zoning regulations. Indeed, many of the early regulations were designed to urge property owners to put their land to use, not to prevent them from putting it to use.

The *Legal Tender Cases* do indeed suggest that a taking must be confined to physical acquisition, but that, of course, was a case that involved regulation of the currency. This was simply a dictum, it was not a central point in the decision at all.

More interestingly would be the discussion about original intent. We are told that the original intent of the Takings Clause was confined to physical appropriation or acquisition of title. Now, as I mentioned before, that mystifies me because there was extremely little debate about the Takings Clause at the time it was added to the Bill of Rights, and so we all have to rest upon some degree of inference in deciding what the Framers in fact had in mind.

But why would we care about the original intent? In most other areas of law, near as I can observe, the law review literature is filled with articles that ridicule original intent. There is no point in looking for it, and it is undecipherable in any event, and besides, who cares? Why all of a sudden with the Takings Clause are we so preoccupied with trying to find the original intent? Do we have any movement to go back to the original intent of the right to counsel as it was understood in the 18th century, or free speech as it was understood in the 18th century, or the Equal Protection Clause as it was probably understood in the 1860s and '70s? I just don't see that.

The only time we suddenly are concerned about original intent is when it comes to the Takings Clause and then, based on what strikes me as unclear evidence, we seek to have the narrowest possible reading placed on that.

One other thought. There have been several potshots taken at the *Lochner* case in the course of the presentation. At the risk of opening yet another Pandora's Box, I want to suggest that; A) I think that the takings cases are quite different, in fact, as Doug has pointed out; but B) I think *Lochner* frankly has had an unfair rap over time. That would certainly be a topic for another conversation and I won't enlarge it here, but I think that much of the criticism of that decision has been rather dramatically overdone.

Lastly, responding to one of Peter Byrne's points about the level of scrutiny, whether it should be heightened scrutiny or intermediate scrutiny, I would like to suggest that all rights, property rights, non-property rights, should have the same level of scrutiny. In fact, we didn't have different levels of scrutiny until the *Carolene Products* case was

decided in the midst of the New Deal period when the New Deal Court was persuaded essentially that it wished no longer to be involved in review of economic legislation. So, amidst considerable controversy, the Court stepped back from that, but then proceeded to indicate that certain other claims of right, however, would continue to receive a high degree of judicial solicitude.

Not only did this coincidentally reflect the political priorities of the New Deal, but I would suggest to you it is the height of activism to be telling us which rights are more important than other rights and which ones are deserving of judicial scrutiny.

I could conceive of people who would be at least as interested in enjoying and using their property as whether they could engage in nude dancing. It's very hard to fully work out why certain rights, except for the subjective values of individuals, get more attention than others. That was not the view of the Framers, who saw all rights as interdependent.

MR. KENDALL: I want to make a couple points. One is that I agree with Professor Ely that the regulations at the time of the framing were different and less comprehensive than the environmental protections that we see now. But Professor John Hart's scholarship on this issue has appeared in some very prestigious law journals and pretty comprehensively documents that the regulations in place at the time of the framing were not of a different mold than the regulation we are seeing right now. They are less encompassing, but they are the same type of regulations that we are seeing now, and they equally diminished the value of private property and in some cases eliminated an aspect, a stick in the bundle, without providing any sort of compensation.

Second, I want to respond to Dr. Pilon and his assertion that private property does not have to mean an estate in land or a thing; it can mean any stick in a bundle. Of course, that's right. Of course there is a narrow and a broad definition of private property, and under the narrow version property is a thing, a piece of property, and, under the broader version, property can be defined as any stick in the bundle, any use, any aspect of property rights. But as Dr. Pilon has also indicated, Madison knew of that distinction. This distinction is not new in property law. There has been this distinction at least since Blackstone. . And if Justice Scalia and I are correct that the original understanding of property was the narrow version, then we have to view that as a choice. It is a choice that was made by Madison and by the framing generations that the narrow version of property was what the Takings Clause protected.

I do not think we are free at this point to say that we should now adopt a broader definition that was rejected, particularly where adopting that broad definition would entail a revolution.

If you say that the Takings Clause prevents any taking of any aspect of any stick in the bundle, there is not much regulation that would be left. I do not think that is an appropriate use of the judicial power. I do not think it's plausibly related to what the Framers and Madison were intending to do, and I think it would work a revolution that not many people in this room would really embrace.

MR BYRNE: Well, I understand we're saving Roger for last. I can't imagine why.

One of the things that I found clarifying about this discussion is that it seems pretty clear from several comments that it apparently does not really matter what the Framers intended or what they enacted. There were natural rights that existed before the Constitution was adopted, and the fact of the matter is that Federal judges are empowered to enforce those natural rights as they think fit based upon their reading of 17th Century philosophers.

That's an alarming prosect for me, and it's not just because of the results that would be reached. In his dissent in *Casey*, Justice Scalia said that questions of basic value in society should be decided through the legislative process because then the losers have at least the satisfaction of a fair hearing and an honest fight.

It may well be that we would live in a better world when you have to pay for any reduction in the value of property. I emphatically do not think so, but if such a world was to come into being, it should come into being through discussion among the people and choice by them of the kind of government that they want to live under.

DR. PILON: Before I launch into my rejoinder, I want to take a moment to thank Doug Kmiec for this wonderful honor he has bestowed on me this morning. I'm tempted to add that it has left me truly humbled, but if I did, he wouldn't believe me, and I couldn't pull it off!

So let me simply proceed to my rejoinder, and begin by repairing to the natural rights theory that is the foundation for this whole American experiment. Indeed, the Declaration makes that clear in its very first paragraph, and in the first line of its second paragraph, which says, "We hold these truths to be self-evident." Self-evident truths are truths of reason. And whether you take the natural rights tradition to be rooted ultimately in rational considerations, as I do, or theological considerations, they pretty much come to the same thing, as both Aquinas and Locke suggested in their different ways. Still, there are differences between the two strains that need to be worked out. This is not the place to do so. But it is the place to say just a bit more about the combination of natural and positive law that Doug Kmiec rightly noted as being central to a full understanding of property rights.

Without going into the fine points that range from the foundations of natural law, on one hand, to issues like the coming-to-the-case defense, on the other hand, we do need to notice that property rights have their origins in natural law notions like first possession, even if the contours of such rules require public consent and thus positive law before the rules can be fleshed out fully. Thus, in response to a point Peter just made, that the Founders did not want to incorporate natural rights theory, I think that he is just dead wrong. Nothing animated them more, even if they realized, at the same time, that positive law would eventually be needed to complete the picture.

Obviously, nuisance is a case in point, an area of property law that calls for line-drawing regarding quanta of particulate matter, decibels of noise, and the like. Natural rights theory tells us that one man cannot use his property in ways that will deprive another man of his property rights. But it cannot draw a precise line that separates one man's active rights from another's right to quiet enjoyment. We can draw such lines on a case-by-case basis. Or we can do so through public law. But in either case we should not delude ourselves into thinking that those are lines drawn in stone, discoverable by reason alone. In both cases we are simply refining the natural law through positive law methods.

There are many other examples I could raise that show how natural and positive law go together in a principled way, but I want to conclude this rejoinder by going back to the original intent issue. After listening to Doug Kendall, I'd like to believe that we're all originalists now, but I'm afraid that Jim Ely has it exactly right when he says that the striking thing about these recent converts to original intent is their selectivity: only in the regulatory takings area are they originalists. And that is so only because they ignore the larger historical picture. True, the Framers may not have talked much about compensating owners for regulatory takings. But they hardly had to. The modern regulatory state is largely a 20th century invention.

Two centuries ago we had nothing like the regulatory state we have today. It was only after *Euclid* sanctioned it in 1926 that massive land-use planning came on the scene, creating a legal regime that turned common-law presumptions on their heads. There was a time when owners could use their property pretty much as they wished, the burden resting with others or with the public to show why a use was wrongful. Today, the presumption is largely against use, with use permitted only "by permit." Not for a moment would we allow speech to be so treated. Yet nearly everywhere, property rights, and economic liberties generally, are subject to prior restraint. They've been reduced to second-class rights, which is hardly what the Framers intended. Indeed, they'd be appalled by the modern administrative state that bleeds the owner with endless procedures until he goes away or goes broke. They fought a war to end such abuse.

One final point: Are property rights opposed to environmental protection? Of course not. Unlike what Doug Kendall suggested, government is perfectly free to engage in all kinds of regulatory restraints on the use of property in the name of health and safety, and no compensation is required – provided the regulation serves that end. That's in part a factual question, of course. And you have to be on guard because there are countless bogus measures parading as health and safety regulations. But assuming the regulation genuinely secures private and public rights, nothing in the Takings Clause stands in its way.

If, however, we're talking not about securing health and safety rights but instead about providing the public with environmental goods of the kind I mentioned earlier – wildlife habitat, lovely views, and the like – then we're operating under the eminent domain power, not under the police power. The public has to purchase those goods. If a private person, to preserve the view that runs over his neighbor's property, would have to buy an easement to that effect, why should it be any different for the public? How can the state condemn those uses, without having to pay compensation, and get the view for nothing? That's just plain wrong, and that's a natural law principle.

MR. MARZULLA: We have about five minutes and we would invite questions to any member of the panel.

AUDIENCE PARTICIPANT: Thanks, Roger. I agree with James Ely that *Lochner* gets a bad rap, and in hindsight, if you look at *Carolene*, what real business would we say today that Congress had in what kind of oil they made margarine of? The substance of these cases indicates the necessity for substantive due process to address just the question of whether or not the regulations are proper.

Whether that's judicial activism really is not what we're talking about today, but I have to support that call to *Lochner*, indeed to cite *Buck v. Bell* where Carrie Buck was sterilized after wonderful procedural due process.

But I would like to address to the two folks who feel that the Fifth Amendment jurisprudence should actually be in the hands of community advisory groups. That's a little reference to the Soviet Union that used to exist across the way.

I would like to address the *Euclid* case cited by Roger. The case *Under* is far more interesting, where the District Judge said that no candid mind could not relate *Euclid* to the zoning cases that were ruled unconstitutional because they zoned by race.

I happen to see the Takings Clause and takings jurisprudence as the main cause of action for those seeking reparations for slavery at this time, and I actually feel that to an extent, they are in the same boat as all of us who are watching the so-called statute of limitations and changing understanding of property.

MR. MARZULLA: Professor Byrne, do you want to respond?

PROFESSOR BYRNE: On the question of block groups, I think it's fair to note that the private property system in the United States has been functioning pretty robustly through this entire period. It is really not a question of property or no property; it's a question of the relationship of property to health, safety, and environmental regulations. Nobody appears to be a Leninist.

As to reparations, I think reparations is classically a legislative question. I think it would be quite wrong for the Supreme Court to say that the descendants of former slaves as a matter of constitutional law are entitled to payment because it would deprive the rest of us of an opportunity to engage in what is a fundamental question of social justice.

MR. MARZULLA: Do we have another question? Jim.

MR. BURLING: Jim Burling from Pacific Legal Foundation.

The type of judicial activism that bothers me the most is the activism that I see at the lower state and Federal court levels when they seem to have an ability to completely ignore the language in the holdings of the U.S. Supreme Court on takings laws.

So my question is, if we are concerned about judicial activism, is there a way that you can see to it that the lower courts can be persuaded to follow more closely the dictates and the intent of the U.S. Supreme Court on takings jurisprudence?

PANELIST: That does I think raise an interesting question and one that was inherent in many of the remarks today. I think Doug Kendall especially criticized the Supreme Court jurisprudence, at least in part, on principles of federalism. Judicial activism obviously speaks to separation of powers. Both of those principles are included in the mission statement of the Federalist Society.

So I guess, Doug Kendall, given that the Supreme Court has handed down these decisions almost exclusively dealing with state court regulation, how do you respond to Mr. Burling's criticism that, in effect, if we are going to have a rule of law, don't state courts have to follow Supreme Court precedent?

MR. KENDALL: States courts or lower Federal courts?

PANELIST: I think he was addressing state regulation, I guess. And as you know, under *Williamson County*, you can never get into Federal court, anyway.

MR. KENDALL: Yes. Actually the ripeness and the procedural questions in takings law are incredibly complex and there is an entire question about whether you can bring a federal claim in federal court before you litigate your state claim under your state constitution.

What the Supreme Court's takings jurisprudence suggests is that you have to go to state court and see if your state is going to compensate under state law before you get to bring a Federal constitutional claim. That's a very complicated and complex Federal procedure and interpretation of the constitutional right question. I do not think that, as a general rule, the lower Federal courts and the state courts are getting it wrong; it's just that it's a complex area that they are figuring out.

I think the state courts and lower Federal courts certainly are struggling to interpret what the Supreme Court means in its opinions in cases like *Lucas*. I think that is a product of how divided the Supreme Court is on this issue. What exactly does *Lucas* mean and how should state courts interpret it? I think they are struggling with that for reasons other than judicial activism. I think there is some confusion in the current state of affairs.

PANELIST: Okay. So state courts are doing their darndest to keep up with Justice Scalia and they just can't do it.

MR. MARZULLA: Okay.

MR. KENDALL: I frankly think that and if you look at Georgia and a few others, some state courts are being quite aggressive in protecting property rights under their state constitution.

PANELIST: There is truth in that.

MR. MARZULLA: Another question.

MR. HOLLOMAN: Christopher Holloman, Small Business Administration, but here in a personal capacity.

My question is for Mr. Kendall and Mr. Byrne. What is their reaction to Professor Ely's comment that the actual decisions the Supreme Court has been rendering are a lot more limited than some of the advocacy groups and scholar say, and do they find these decisions as disturbing as some of the advocacy groups and scholars?

PROFESSOR BYRNE: No. Some of the decisions, in fact, I think are correct. I think, for example, that the per se rule saying that you could never challenge a regulation if you became the owner of the property after it went into effect, I think that's a correct decision.

I think that per se rule grew up out of an attempt by lower courts to try to make sense out of *Lucas* and to try to cabin within what they understood to be traditional boundaries. But I think it was a bad rule.

I think that the objections that I have to the holdings are really that they seem unconnected with a coherent principle, and that they therefore seem like kind of a rolling hairball where the one thing that seems consistent is that the property owner wins. One of the reasons I discussed Justice Scalia, I don't think that they have a big idea.

DEAN KMIEC: Let me suggest that I think the big idea is that property is not subject to redefinition by the legislature at will, that it does have a natural rights component to it.

Now, Peter, you asked in your rebuttal a minute ago does that mean that the courts are about to become philosopher kings that just enforce 17th Century philosophy? I would suggest it's not just 17th Century philosophy; it goes a lot earlier than that. But separate and apart from whatever ancient philosopher we want to rely upon, I think Justice Scalia's very federalist discovery of common law as the source of property definition in *Lucas* is indeed that which gives much resolution to the takings puzzle.

The reason that the takings jurisprudence has not advanced further to actually be fully protective of property rights as our founders envisioned is because *Lucas* has been cabined to that total depravation case, and I think the litigation as it moves forward ought to be incorporating that principle because that's what makes the taking clause more coherent than not.

MR. MARZULLA: Well, I guess Doug Kmiec is learning quickly on his job; the dean did actually manage to get the last word.

This has been an absolutely superb panel, and I think what it has underscored is the notion that many of the principles that are in play in other aspects of our constitutional system are found in sharp relief in the context of the debate over property rights. I don't think anyone here has the illusion that we have yet heard the last word, and we will look forward to doing another program for you next year.

Thanks for coming.

FINANCIAL SERVICES & E-COMMERCE

IS FEDERALISM CONSISTENT WITH NATIONWIDE MARKETS AND GLOBALIZATION? THE CASE OF THE INSURANCE INDUSTRY

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Mr. Robert Gordon, *Senior Insurance Counsel, House Financial Services Committee*
Dr. Michael Greve, *Director, American Enterprise Institute's Federalism Project; Author, Real Federalism*
Mr. Gary Hughes, *Senior Vice President and Chief Counsel, American Council of Life Insurers*
Hon. Peter Wallison, *American Enterprise Institute; former White House Counsel/Treasury Department General Counsel (moderator)*

MR. WALLISON: I'd like to welcome everybody to our program on "Is Federalism Consistent with Nationwide Markets and Globalization? The Case of the Insurance Industry".

I'm Peter Wallison. I'm the moderator of this panel, which will set before you today the very interesting federalism issues associated with regulating insurance, an industry that is engaged in competition with banks and securities firms. As you will see, our current state-based system of regulating insurance creates difficulties for the insurance industry.

As many of you probably know, insurance is regulated currently only at the state level. This has been the case since insurance companies were founded close to the time of the founding of our country itself. The federal government has largely stayed out of the regulation of insurance. Recently, representatives of the insurance industry — the associations here in Washington and others — have begun thinking seriously about whether it would be appropriate and sensible to have a federal chartering and regulation system for insurance. That may seem counter-intuitive to many, but people in the insurance industry have reasons for this.

We will first hear what the insurance industry's reasons are, and why it poses the question of which is more sensible — a national system that would permit competition among industries, or continuing the state system that we're using today. We thought that, inasmuch as the Federalist Society is interested in promoting federalism, this is an interesting question for all of you to contemplate.

We'll start today with Gary Hughes, who is the senior vice president and general counsel of the American Council of Life Insurers, one of the associations here that is most interested in considering optional federal chartering. Recently — in fact, this past weekend — the board of the ACLI endorsed a system of optional federal chartering. They're working on legislation for this purpose, and we'll hear the reasons for this.

After Gary talks, we will hear from Michael Greve. He's a resident Fellow at the American Enterprise Institute, and his specialty is federalism — what Michael calls competitive federalism. He'll suggest another way that federalism can be made consistent with a nationalized competitive system.

Then we'll go to Bert Ely, who talks about some very interesting questions that arise under the federal system of regulation.

Finally, we will go to Noel Francisco.

I will introduce Michael, Bert, and Noel just before their turns to speak.

First, we'll turn it over to Gary, who has been deeply involved in federal and financial services issues in Washington since 1977. He now is one of those who is spearheading the ACLI's consideration of optional federal chartering and drafting the legislation, I presume. Gary is a lawyer.

Thanks, very much.

MR. HUGHES: As Peter said, I represent an industry that, since time immemorial, has resolutely supported state regulation and opposed all efforts to broaden any federal role with respect to our business. That in and of itself should give you a sense of the gravity with which we've treated this whole issue, and the thought that's gone into this and ultimately prompted our board of directors to do the less-than-obvious for us and support the notion of an optional federal charter.

One footnote here that probably is worth mentioning. If there are those of you who are regulatory purists in the audience and think this is really a debate about pure state regulation versus something else, you're about 25 years late to the table.

Life insurance companies, and particularly those that are involved in growth areas — variable annuities, variable life, the pension area — have had a significant aspect of federal regulation for about 25 years.

Our variable products are regulated comprehensively by the SEC. In fact, I would say the SEC regulates those products more heavily than do the states, and certainly our pension activities are regulated by the Department of Labor. So, we stand as a business today that has some aspect of dual regulation. Again, I don't think about purity of regulation.

We took stock of this whole thing several years ago, and we found ourselves as the only significant segment of the financial services business that was predominantly regulated by the states. We're subject to a system of regulation that was devised when insurance, by definition, was not interstate commerce. Insurance companies did business almost exclusively within the borders of a single state. The vestiges of that intrastate nature of regulation unfortunately are still with us today. Yet, life insurers are global, if not certainly most of its national competitors, and it's been a very difficult situation.

We find that more and more of our important issues are being decided by Congress; certainly more now than even ten years ago. We've gone through Gramm-Leach-Bliley. We have tax legislation, whether it's part of the economic stimulus package or otherwise, which is always at the top of our agenda.

Certainly, September 11 and its aftermath have been an issue that is now being debated by the Congress. I think there's been frustration not only on our part but on the part of lawmakers that there isn't a federal regulatory presence in Washington that understands this, that's available, that can help them parse this out.

The most important thing is that the competitive paradigm for us has changed. Historically, life insurance companies competed against other life insurance companies. We knew the system of state regulation had a lot of baggage with it, but it was something that everyone was subject to uniformly.

If you were my competitor and you had the inefficiencies and I had them, it didn't really translate to the bottom line. We might both be frustrated by it, but it wasn't that much of a competitive economic issue. We griped about a number of things and the never did anything about it.

It's almost as though we woke up one morning and realized that we were now positioning our companies as providers of diverse retirement service products. We were using insurance products in the same market that mutual funds were using, securities products, and all in the same market that commercial banks were using, deposit products.

But here's where the math breaks down for us. National banks within about a matter of weeks can be in the market nationally with an innovative product. If a mutual fund comes up with something fairly similar, it gets through the SEC in three to four months. If an insurance company comes up with an innovative product, even if it's relatively simple, 12 months, 18 months, sometimes up to 2 years pass before it gets in the market.

The life cycle for a lot of our products some years ago was in the neighborhood of eight to ten years. Today, it's about two years. If the life cycle of your product is two years and it takes you two years to get it approved on a national basis, you do the math and you think this is not very good. As a result of that, we're seeing more and more evidence of adverse capital allocation within a single corporate enterprise.

If you have mutual funds and insurance under the same roof, and the mutual fund folks and the insurance folks make a pitch to management — we need internal capital to roll our product out — and again, the mutual fund people are saying we can hit the market window the first quarter of the year and the insurance people are saying we think we can be in 12 states by the end of the year; we can be in 30 states by the middle of next year; and maybe, if everything goes right, in 2 years we'll be in all jurisdictions, the money goes to the mutual funds side of the house. Post Gramm-Leach-Bliley, as diversification of financial services continues, we see that adverse capital allocation issue becoming more serious.

Given this situation, our board of directors made what for them was a difficult and certainly a momentous decision to tackle this whole issue of regulatory efficiency as a top-tier issue and to do it on two bases. One — we're very serious about this and we're committing enormous amounts of resources to it — is to redouble our efforts to work with the states to make a state-based system of regulation operate much more efficiently, and to see whether we can edge into the 20th and, if we're lucky, the 21st Century in terms of our system of regulation.

We suspect that there are a substantial number of companies — perhaps even a substantial majority of our member companies — that would wish to remain state regulated, albeit on a more efficient basis.

If you're thinking it's probably going to be like banks, where big insurers want federal regulation, and small insurers want state regulation, we have not found that it works out that way. Think of it this way. A big insurance company has an innovative product, has funds and internal resources to throw at the product approval process, and anticipates a volume of sales that would recoup whatever capital they expend pretty quickly.

A small company has the same innovative product. It has to go through the same groups in all 51 jurisdictions, it doesn't have the internal resources; they don't have the volume of sales that would recoup that money. For that company, something like an optional federal charter, where you have a single place to go to get a product approved, is much more significant an improvement than it is for the larger companies.

We did a study, before we really got into options, of what's working and what isn't with life insurance regulation at the state level. The conclusion was interesting. It showed, by and large, the laws on the books weren't bad. They're just different. You have 51 different ways of doing the same thing. No state is necessarily doing it wrong. You're doing it differently, and we have to do it multiple times, whatever it is. This mainly is in the area of the ability to get our products to market quickly.

If you do have an innovative product, you have to get it approved state by state by state. Each state has different requirements, and the net result at the end of the day is that you have to seek the highest common denominator. You

don't even worry about what liberal states will let you do because it's the states that want ten additional things that you have to comply with in order to have a product out on a national basis.

In any event, our board said that track one will be to work with the states. Track two will be to develop an optional federal charter. As Peter said, our board this weekend finally said go for it. Be mindful of the events of September 11 and Congress' agenda, but this is serious enough that we think we want you to move ahead on that second track.

Let me give a couple of notions of how we think this ought to be done, what would be optional. There are companies that wish to remain state-regulated. They ought to have that option. If a company, for whatever business reasons, thinks a federal charter makes sense, it should have that option.

Exclusivity — if you want to remain state-regulated, the new federal regulators shouldn't muck around in your business, and if you want a federal regulator, the states shouldn't have any role to play either.

A general notion of charter neutrality — and by that, we mean don't build so many advantages into the federal option that even those that want to remain state-regulated feel, for competitive reasons, they can't. For example, don't put federal tax benefits that attach only to the federal options because, if you do, it's not really regulatorily neutral.

DR. GREVE: Thank you, Peter. Since I do not actually know anything about financial markets and regulation, Peter and my distinguished fellow-panelists graciously acceded to my request for a conceptual assignment, rather than a policy-reform talk.

I will argue that there is no necessary conflict between federalism and efficient insurance regulation; it all depends on what kind of federalism. I will distinguish a bad, states' rights federalism, which does present such a conflict, from a good, competitive federalism, which does not. I have tried to develop that distinction and argument in other contexts. With my trusted federalism hammer in hand, the forebodingly complex and confusing subject-matter looks like just another nail. Having hit my nail one more time, I will make a concession to the topic at hand and argue that proposals for an optional federal insurance charter are in principle consistent with competitive federalism, though not a necessary part of it. Finally, I'll argue that Gramm-Leach-Bliley may represent a step towards, and an opening for, competitive federalism- or the opposite.

Federalism means that states will attempt to protect and favor their own citizens and companies vis-a-vis outsiders. Bad, states rights federalism lets them get away with it. First, bad federalism allows states enact statutes that discriminate against outsiders, openly or covertly. Second, bad federalism rests on a "destination" principle: in interstate transactions, it is the law of the customer's or buyer's state, not the law of the producer or seller, that governs the transaction. This means that companies - regardless of their domicile - must comply with the rules and regulations in each of the fifty states where they do business.

This, by large, is the "federalism" that we have in insurance, except that it's worse. Obviously, it is incompatible with a common market; in fact, it is a regulatory balkans. For the dangers and disadvantages of a regulatory balkans, see the actual Balkans.

States' rights federalism, however, is not the only possible federalism (and wholesale nationalization is not the only alternative to bad decentralized regulation). Also possible, and much closer to the Founders' vision, is a competitive federalism. Instead of facilitating parochial protectionism, competitive federalism integrates markets and compels states to compete for citizens' and companies' business.

Competitive federalism's structural principles must be supplied either by the federal Constitution or through federal law. Let me mention four principles and contrast them with current practice.

First, states must be barred from enacting laws that discriminate against outside parties. To the Founders' minds, this command constituted a principal protection against state protectionism and impositions on a common market. It is expressed in a half-dozen constitutional provisions, from the Privileges and Immunities Clause to the Export-Import Clause and the Full Faith and Credit Clause. The "dormant" Commerce Clause has also come to be understood as an injunction against (facially) discriminatory state statutes that are not specifically authorized by Congress.

The glitch with a constitutional anti-discrimination principle is that it captures only blatantly discriminatory state laws, not the states' countless "evasive maneuvers" (Madison) to disguise discrimination. That is why the Commerce Clause authorizes Congress to legislate against state discrimination and protectionism. In the insurance markets, however, Congress has failed to exercise this option and, in fact, done exactly the opposite: under the "reverse preemption" logic of the McCarran-Ferguson Act, blatantly discriminatory and protectionist state laws that would otherwise violate the dormant Commerce Clause are rendered lawful (subject only to very weak equal protection constraints).[1]

Second, competitive federalism requires free exit. Citizens and companies must be able to vote with their feet and their pocketbooks - companies, by choosing their domiciles and the places where they do business; citizens, by choosing products that, under competitive federalism, come along with the legal rules of the product's or service's origin state. The bedrock principle of American federalism is that citizens choose their state.

The bedrock principle of insurance regulation is the reverse: no exit. A California citizen is stuck with California's consumer protections, whether he wants them (on the books and in the product price) or not. Corporate changes of domicile are virtually unknown, both on account of regulatory obstacles and because threats of state retaliation appear to

be widespread or at least widely feared by insurance companies that have contemplated redomestication. Several states even administer exit restrictions that preclude states from discontinuing product lines that have been rendered unprofitable by state regulation. We might as well legalize confiscation.

Third, competitive federalism requires reciprocity, meaning that each state will respect and enforce the legal rights (charters, licenses and so forth) obtained in another state. Under this "origin principle" (or "principle of mutual recognition," as it is called in the European Union), each company need comply with only one set of legal rules - those of its domicile state. Insurance regulation operates on the opposite principle: the customer's law governs. That is an annoyance in personal lines, where agents sell policies in one or two states; it is a much, much bigger deal in commercial lines, where the producers' compliance obligations in multiple jurisdictions drive expense ratios (of cost to premiums) through the roof.

Fourth, competitive federalism requires that citizens and companies must be able to rely on the application of the law of the state that they have chosen, either by domiciling in that state or by contractual choice-of-law and choice-of-forum clauses.

But bluntly, market participants-customers and sellers alike-need protection from state attorneys general and trial lawyers who will attempt to home cook out-of-state insurers in front of a home state jury and a state judge of their own choosing. Realistically, this requires a federal choice-of-law default rule designating the domicile state's law as governing multi-state transactions; uncompromising enforcement of contractual choice-of-law and forum clauses; and access to federal courts in cases of minimal diversity. None of these conditions, of course, exist in the insurance markets.

So, insurance isn't an example of competitive federalism. It is the exact opposite.

Do we have an example of competitive federalism? Why, yes. Corporate chartering works on that principle. Companies freely choose their state charters, which will then govern their legal relations with shareholders everywhere. In principle, this Delaware model (as it's sometimes called) can be applied to insurance regulation. The difficulty, I think, lies in specifying the appropriate range of application.

Solvency requirements for insurance companies or financial institutions would appear to be an obvious candidate for competitive state arrangements. Much as big, well-informed institutional shareholders induce corporations to obtain charters in states that will maximize shareholder value (as opposed to entrenching the management), so profit-maximizing financial institutions would presumably choose states with optimal, rather than excessively lenient, solvency requirements and arrangements.

Licensing and registration requirements are likewise plausible candidates for reciprocity. Full reciprocity in that area would eliminate the compelling complaints over the existing protectionism of the system and its inordinate compliance costs. Full reciprocity for new products would solve the speed-to-market issues that Gary mentioned and facilitate more efficient competition across industries.

In these areas, admittedly, the competitive mutual recognition principle threatens to undermine state consumer protection statutes and the rationales on which they are based, such as consumers' difficulties in understanding very complicated financial instruments. But concerns over adhesion, asymmetric information, and unequal bargaining power do not apply to commercial lines, where bargaining parity prevails and marginal purchasers can be presumed to be reasonably informed. Thus, the case for full reciprocity and state competition seems most plausible precisely in the area where those principles would do most good.

A hypothetical federal insurance reform that would mandate non-discrimination, free exit, full reciprocity, and access to an impartial forum in multi-state conflicts would be fully federalist. States, not the federal government, would continue to regulate insurers. Arguably, such a reform might be more efficient than a uniform substantive federal reform. We're very unlikely to find efficient regulation by drawing it on a piece of paper, and any mistake we make at a national level will, by definition, be a very big mistake.

The political viability of the competitive solution, of course, is much in doubt. That is because competitive federalism substitutes private arbitrage for political harmonization and thus wrings the rents out of the system, which means that nobody who has anything to say about the matter wants any part of it.

But in the insurance context, I think the much discussed option of an optional federal charter may provide an opening. That is because it follows the logic of competitive federalism. It offers producers and their consumers a choice between competing legal regimes, except that the choice takes place along a vertical dimension, not a horizontal dimension, and there are only 2 choices, rather than 50 or 51. Thus, no serious federalist should reject that proposal as unduly nationalist. It is not, at least not in principle.

I would caution that the devil lies in the details. It is hard to mimic the principles of horizontal competition among equals – non-discrimination, exclusivity, free exit both ways, full reciprocity, and a reliable and partial forum – in competition between two inherently unequal partners. That's the neutrality difficulty that Gary mentioned.

On the one hand, the federal charter must not be allowed to disintegrate into a kind of federal floor of minimum standards over and above which the states still regulate. In other words, unimpeded choice requires robust federal preemption. Such unequivocal preemptions are very, very rare in federal law and may be especially hard to come by in the insurance context. On the other hand, effective vertical competition requires some credible assurance that the senior federal

partner will, over time, actually tolerate the competition that it has just established. These difficulties may prove considerable and even intractable, but they have nothing to do with federalism.

Since optional federal chartering follows federalism's competitive logic, it is fully consistent with that system. Under a fully competitive state regime, the additional option of a federal charter would simply turn the federal government into a 51st state. Obviously, that's not strictly necessary because state competition would do all the work that you want horizontal competition to do. There may be good reasons for providing a federal charter, even under a fully competitive state regime. There may be good arguments against it. But again, all these considerations have to do with policy and not with federalism.

Finally, a word about Gramm-Leach-Bliley. Title 3 of the Act prompts the states towards mutual recognition of insurance licenses. Should a sufficient number of states fail to achieve that objective by November 2002, Gramm-Leach-Bliley threatens the establishment of a suprastate agency under the supervision of the NAIC (and, failing that, directly under the federal government) to bring about the statutory objectives. That's a step towards a more competitive environment. But it's a small step, and unfortunately it's a step that may, in the end, make matters worse.

The problem isn't that the statute exempts the most odious protectionist restrictions, such as countersignatory requirements. The problem is that federal regulators and federal legislators, and certainly the NAIC itself, appear to view reciprocity as the first step toward harmonization. But I suggest that harmonization and reciprocity are mutually exclusive means of market integration. Reciprocity works through private arbitrage; harmonization, through political negotiation. Reciprocity means decentralization; harmonization means a single uniform regime. Reciprocity implies jurisdictional competition; harmonization, a policy cartel that suppresses that competition.

Gramm-Leach-Bliley entrusts the administration of its policy cartel to the NAIC, and perhaps a future NARAB, rather than an actual federal agency. But that concession to states' rights exacts a heavy price in terms of political accountability and transparency. In fact, Gramm-Leach-Bliley threatens to exemplify the depressing scenario that's being played out in a growing number of policy areas, from e-taxation to nuclear waste. Some states can move on their own towards reciprocity. But that doesn't help very much because California will insist on being California. In other words, the states cannot, on their own, overcome the free-rider and holdout problems, meaning that the balkanization persists. Congress recognizes that. But instead of trumping the states' rights regime with unequivocal federal rules, it pays ostensible deference to state autonomy and federalism. Then it nudges and bullies the states into "harmonizing" cartels under the authority of the suprastate authority that's off the constitutional charts, accountable to no one, and that no one outside the regulated industries has ever heard of.

The cleaner competitive solution would be to build on the reciprocity provisions of Gramm-Leach-Bliley, to make them mandatory rather than hortatory, to cover all states and all licensing requirements, to cover at least commercial product lines, to add federal prohibitions against discriminatory and no-exit provisions at the state level, to relieve the NAIC of its harmonizing obligations, and to put the envisioned NARAB out of its misery before a federal court strikes it down.

Against my better instincts and initial disclaimers, I seem to have actually ended up with an actual policy proposal. I'll do you the favor of not actually defending it. I'll instead end on a more modest and hopefully helpful note: There is a real competitive federalism that is fully consistent with the Founders' dual commitment to decentralization and to a common market. But the federalism we actually have in insurance isn't federalism; it is its parochial, evil states' rights' twin. There are lots of reasons to be cautious with federal interventions in financial markets. There are lots of ways to get confused about it. But the last thing that should deter or confuse reformers are false appeals to a false federalism.

MR. WALLISON: There's plenty to defend against, if you want to take it up.

Our next speaker is Bert Ely. He really needs no introduction to this audience. He is a very active member of the Federalist Society, as well as an active member of just about everything else that happens in Washington. It's hardly a conference at all if Bert is not there.

But I just want to say a few things about Bert. I've worked with Bert on a number of things. Together, we've prepared some papers and monographs, and he's an extraordinary colleague and enormously hard worker; very bright and innovative.

Bert was one of the first to predict the S&L crisis, and the fact that there was going to have to be a taxpayer bailout there.

He also doubted that there was going to be some sort of great commercial banking crisis. It's interesting to remember that this goes two ways. There are the pundits who predict crises and disasters that do happen, and those who predict that crises and disasters that won't happen. And it's important to have someone like Bert, who knows the difference. He said in 1991 that the commercial banking industry was healthy enough so that, no matter what people were saying about how it was going to collapse, it was not going to happen.

Finally, he predicted the eventual taxpayer bailout of the Japanese banking system well before most people here in the United States had focused on it.

Bert has developed a subspecialty. In addition to everything else he knows about in the financial area, he's

developed a subspecialty in various market mechanisms for addressing what you might call inefficiencies or market failures in the financial services industry. And one of those is a private deposit insurance system that he's talked about for years and years — a very clever and interesting proposal.

The insurance industry has a kind of private deposit insurance system, which is what Bert is going to be talking about today. It relies on guarantee funds. They are run on a state-by-state basis for the companies that are active in the specific states, and cover those insurance companies that actually fail, for insolvency reasons, to meet their obligations. How you would combine a state-by-state guarantee system with a national or federalized system of optional federal chartering is a real puzzle. And if there's anyone who can figure it out, it's my man Bert.

MR. ELY: Peter, thank you for that excessively generous introduction.

I'm going to talk about the guarantee fund aspects of the federal insurance charter, which may sound kind of technical, but actually it's far from that because, for anybody who's been involved with banking regulation over the years, you know that much of what drives banking regulation is ultimately intended to prevent the failure of individual banks and perhaps more importantly to protect at least some class of depositors and other creditors in those failures. That's what the guarantee fund issue addresses with regard to the insurance industry.

I'm going to touch on four things. First of all, a little bit more about the state guarantee funds, beyond what Peter discussed; second, the guarantee fund concept as it relates to the federal insurance charter; third, the experience that Congress will bring to this issue — a sad experience, I might add; and then, a few predictions on how Congress will address the guarantee fund issue.

First of all, the guarantee funds are the insurance industry equivalent of federal deposit insurance for banks and thrifts. That is, they are designed to protect insureds — at least those insureds as defined by law — against any loss if an insurance company becomes insolvent. And insurance companies do fail on both sides of the house — the life and health side, as well as the property and casualty side.

We have had situations where there have been losses to insureds, which is what led to the development of the guarantee fund system over the last 30 years. It's fully in place now, for the insurance industry. But again, just like federal deposit insurance and state deposit insurance schemes before that, it stemmed from the failure of institutions and people being left with a loss. The government's got to do something and so, in the case of the insurance industry, we have the state guarantee funds.

I wrote a chapter for a book that Peter edited a couple of years ago from an AEI conference, talking in probably more detail than most of you would ever want to get into about state guarantee funds. But it's an interesting history, particularly in structure, particularly for those of you who are familiar with banking regulations and federal deposit insurance, both in the similarities and also the many differences.

Again, I'm going to try and hit on some of the differences between guarantee funds and deposit insurance. First of all, there are actually two sets of guarantee funds. There's one set of guarantee funds for the life and health insurance companies and another for the property and casualty insureds, and they're totally separate systems because there are significant differences between the two types of products.

What happens is, if you are licensed to do business in a particular state, then you have to join the guarantee fund association in that state. So if you're a multi-state insurer, you're in lots of different state guarantee funds. You're in as many as there are states in which you are licensed to do business.

Another significant difference between the state guarantee funds, on the one hand, and the FDIC, on the other, is that the FDIC is a large government bureaucracy run by a five-person board of directors, all of whom are full-time employees of the federal government. The state guarantee funds are much less bureaucratic in that regard. There's much more of an *ad hoc* nature to it, built much more around the receivership process. What's important is that the directors of the state guarantee fund associations include not only insurance regulators but also representatives of the insurance companies. So you have much more of an industry management role in the guarantee fund process than you do in federal deposit insurance. In fact, you don't have any in federal deposit insurance, as a practical matter.

Another thing that's interesting about it has to do with the guarantee fund limits. First of all, each state determines the scope of and the limits on its guarantee fund provisions. So it's a state-by-state process. The other thing is that the limits are really quite complicated. The limits vary from state to state. They go as high as $500,000, to the best of my knowledge; I'm not aware of any above that. They vary by type of insurance product and type of liability, and again, it's actually quite complex.

When you think about federal deposit insurance, it's very simple. $100,000 per depositor per bank. That's it. You can take an additive approach, and people can combine coverages through different ways in which they title accounts, but you have essentially a single limit. There is not at the state level, and my sense is that there couldn't even be at the federal level, one nice single number to which that people could point and say that's how much protection there is if an insurance company fails.

Another interesting distinctive characteristic of the guarantee funds, and again a differentiation from

FDIC, is that except for the State of New York, the guarantee funds are funded totally on an ex post basis. That is, they don't have a fund balance. Assessments are levied on insurance companies as needed to cover insolvency losses that would otherwise be incurred by the insureds that are protected under the law.

To the best of my knowledge, there's no such thing as too big to fail with regard to the protection of the insureds under the guarantee fund system the way we have, as a practical matter, with deposit insurance.

One of the things that I find most ironic about the guarantee fund assessments is that they're not risk-sensitive. They're levied on all the insureds, usually based on the amount of net premium income they've written in that state over some period of time. What's ironic about it is that the insurance business is the business of pricing risk. And yet, in its own self-insurance system, there's no pricing for risk. Maybe Gary will want to talk to that later.

Another thing that's interesting about it is that in many states — more so on the life side than the property and casualty side — guaranteed fund assessments can be offset against the premium taxes that the insurance companies pay to their states. In most cases, premium taxes are paid in lieu of corporate income tax.

What's the effect of that offset? It passes insolvency losses back to the general taxpayer, and that is very much in opposition to what has been the case in this country, certainly post-FDICIA, where Congress said after the S&L crisis, never again are we going to have the taxpayers on the hook. It will be an industry self-insurance mechanism.

And as Peter and I and some others argue, it's the banking industry that is on the hook going forward for all future deposit insurance losses, no matter how big they might get, including any monies that have to be spent to save a too-big-to-fail bank or to protect its creditors.

One last point on state guarantee funds. That is, there have been a few cases — *Mutual Benefit* about 10 or 12 years ago was a good example — where a life insurance company actually had a liquidity problem because people were cashing out their policies, or taking out policy loans.

Theoretically, the Fed can lend to insurance companies — not from the discount window but by a vote of the board of governors. They never have, but I think that one of the issues that comes up with regard to the guarantee funds, particularly for a large company, is the whole issue of having a discount window available for emergency liquidity borrowing.

Now, let me talk about the guarantee fund concept as it would relate to the federal insurance charter. First of all, it's highly unlikely that Congress will enact a federal insurance charter without insolvency protection for insureds, up to some set limit. What those limits might be, I wouldn't want to hazard a guess.

But I find it hard to believe that the United States Congress is going to allow federally chartered insurance companies to operate, and then if they fail, that's tough luck for the insureds. The United States Congress doesn't work that way, and I wouldn't expect them to.

So, I think in any federal insurance chartering legislation, there will be some kind of protective mechanism for insureds. Of course, as Michael said, the devil's in the details.

There are two bills out there, and soon we'll see the ACLI bill, that have approached the chartering issue. The American Bankers Association has put one out through its insurance subsidiary; the ABA has a great deal of interest in this issue.

In that bill, at least as it was circulated and discussed in an AEI forum last December, they took the approach of trying to set up a guarantee fund that was modeled after the FDIC. In fact, they followed the FDIC model slavishly. I was one of those on the panel who was very critical of that approach, and I've been told by one of the authors of the legislation that they're a little more open-minded about how to deal with this issue.

The ACLI and the American Insurance Association, which represents the large P&C companies, are proposing, in slightly different ways, that the federally chartered insurers participate in the state guarantee fund system; in other words, that the federal government not set up a guarantee mechanism, but that the federally insured companies piggyback off the state system.

This poses an interesting federalism question, which as a non-lawyer, I cannot answer. That is, can Congress mandate the participation of federally chartered insurers in a state-run guarantee fund system? Maybe we can answer that in Q&A time.

Let me just touch on some experiences that Congress brings to this issue. First, Congress has a long, unhappy experience with federal deposit insurance, including the $153 billion S&L bailout, which cost general taxpayers $124 billion. Anybody who has ever sat in on a deposit hearing in recent years in the United States Congress will constantly hear senior members of the Banking and Financial Services Committees harking back to that. That was a once in a lifetime experience that they never want to go through again.

What was important about that, particularly with the FDICIA legislation in 1991, is that Congress intends that deposit insurance going forward is to be industry-financed with absolutely no cost to taxpayers. Keep in mind that, under the state guarantee system, much of the cost of insolvencies and protecting insureds goes back to the general taxpayer.

Second of all, Congress is getting a crash course on insurance in considering the terrorist reinsurance legislation that's now on the table. My belief is that this legislation, however it turns out, will significantly influence the

federal insurance chartering legislation. How specifically, I wouldn't want to speculate, but it's going to have an impact, because it's being handled by the two committees that are going to have a role in the federal chartering legislation.

Also, Congress has wrestled from time to time with insurance solvency issues, most recently in bills that Representative John Dingel introduced in 1992 and 1993. And as long as Mr. Dingel is around, even though the Commerce Committee on which he's the ranking Democrat no longer has jurisdiction over insurance, Mr. Dingel will undoubtedly have some influence on this issue.

Now, let me close by offering some predictions on how Congress will address the guarantee fund issue. First of all, Congress will reject complete reliance on the state guarantee fund system because if they authorize federal insurance charters, there's ultimately going to be some sense of federal political responsibility for the insureds of federally chartered companies.

I can see Congress going one of two ways. One is to create federal regulation of the state guaranty fund systems — something I think Michael alluded to — and the other is to create a federal guarantee system for federally chartered insurers. Both of these represent a harmonization that Michael referred to.

Second of all, Congress will be inclined or tilted toward a pre-funded system. That is, a fund balance is built up that presumably protects taxpayers. From it, you would pay losses. Anybody who's familiar with federal deposit insurance realizes that the insurance funds are no more real than the Social Security trust fund or Highway trust fund. But Congress buys into myths, and one is that there's this big fund out there that's going to protect the taxpayers. In fact, that is not the case.

But not only will they want a pre-funded system, they're going to want a system where all the cost of insolvencies is borne by the insurance industry, which again is another major departure from the present state system.

The other thing I think is that, even though you do have these two separate guarantee systems in the states for some very logical reasons, Congress may at least have a strong inclination towards having one guarantee fund system, in part because it will soon merge the separate bank and thrift insurance funds.

Finally, my last prediction is that Treasury will be the federal insurance regulator because it looks like Treasury is going to be the designated regulator under whatever federal terrorism reinsurance bill is enacted, possibly before the end of the year.

With that, I thank you, and I look forward to our discussion time.

MR. WALLISON: Our next speaker is Noel Francisco, who is in the Office of Counsel to the President. Noel prepared for this by serving as a law clerk for Justice Scalia, and prepared for that by serving as a law clerk to Michael Luttig.

He is also a graduate in economics from the University of Chicago and functioned as a financial analyst at Gleacher and Co. from 1992 to 1993. From 1991 to 1992, he was also a financial analyst in the Mergers and Acquisitions Transaction Development Group at Morgan Stanley.

So, Noel, we are delighted you are here. Actually, I should mention that there will be one person after Noel, and that is Bob Gordon. He's been working on some things on the Hill that are relevant to the discussion today. After Noel, we'll hear from Bob Gordon, and then we'll take questions.

MR. FRANCISCO: Good afternoon everybody. The question before the panel is, is federalism consistent with nationwide markets and globalization? The case of the insurance industry.

My remarks are going to focus on the first part of that question, which begin with the word "is" and end with the word "federalism". Notwithstanding my time in New York City working for an investment bank, I know virtually nothing about nationwide markets. I know very little about globalization. And aside from the car accident that my wife got into a couple of weeks ago, I don't know much about the insurance industry either.

But I do know a little bit about federalism. So, in my few minutes up here, I'd like to try to make the case for why federalism is, as a policy, as important today as it has ever been. I'll also briefly touch upon the overarching question before the panel, and that is whether federalism is consistent with the nationwide regulation of markets. In my view, it is.

Before I get into the substance, though, I just want to take a minute to explain what the Bush Administration is doing to promote federalism. In 1985, in a case called *Garcia v. San Antonio Metropolitan Transit Authority*, the Supreme Court suggested that the primary safeguard of federalism principles in our democracy isthe political process; that is, the process by which states petition the federal government to restrain itself from encroaching on traditional areas of state regulation.

This Administration takes the admonition of *Garcia* seriously. That's why on February 26, 2001, President Bush created what's called the Interagency Working Group on Federalism. This group consists of most of the executive branch agencies, as well as members of the White House staff. The President charged this group with consulting with a variety of state and local officials on issues pertaining to federalism. He also charged the group with drafting a new executive order on federalism.

These initiatives are designed to ensure that the voice of state and local governments are heard in the

political process and, accordingly, that the political process safeguard relied upon by the Supreme Court in the *Garcia* case works as effectively as possible.

[1] See Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985)(equal protection constraint).

Free Speech & Election Law

The *Bartnicki* Case and Privacy

Professor Eugene Volokh, *UCLA Law School*
Mr. Marc Rotenberg, *Executive Director, Electronic Privacy Information Center*
Mr. Stuart Taylor, *Editor, National Journal*
Professor Lillian BeVier, *University of Virginia Law School*
Mr. John Malcolm, *Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice*
Mr. Manuel Klausner, *Individual Rights Foundation and Reason Foundation*

MR. KLAUSNER: Gloria Bartnicki, a union negotiator, was driving in her car and she made a cell phone call to the president of the teachers union, one Anthony Kane. During the conversation, they were talking about how things were not looking so good at the moment for the negotiations because the school board was not caving in.

So, at one point during the conversation, President of the Union Kane said, "If they're not gonna move for three percent, we're gonna have to go to their homes, blow off their front porches and we'll have to do some work on some of those guys." Basically, he was saying to his negotiator that this is very bad news and we're going to have to do what we've got to do.

That cell phone call was, it turned out, intercepted. Nobody knows who intercepted the phone call. But after the negotiations were over and the Union signed its contract with the Board, the head of a local taxpayer's group found in his mailbox a tape of this conversation. It was not identified, but the taxpayer's group head recognized the two voices on the tape recording. First he played it before the School Board, and then he delivered the tape to a radio commentator who played it repeatedly on the air.

Bartnicki and Kane filed a lawsuit seeking statutory damages against a variety of players, including the radio commentator. Both the Pennsylvania Wiretap Act and the Federal Wiretap Act imposed civil sanctions on those who knowingly disclose – and illegally intercept – a private cell phone conversation or other conversation.

There was no complicity. The defendants did not play any role in participating in obtaining the intercepted conversation, but there was reason to know that the conversation had been recorded illegally, without the consent of the participants.

The case came down this year, on May 21, in a divided court. The majority opinion was delivered by Justice Stevens. He was joined by Justices O'Connor, Kennedy, Souter, Ginsberg and Breyer. There was a concurring opinion, which was filed by Justice Breyer, joined by Justice O'Connor. The Chief Justice filed a dissent, joined by Justices Scalia and Thomas.

In an interesting juxtaposition, in his opinion for the Court, Justice Stevens applied strict scrutiny and found that there was a First Amendment privilege to publish unlawfully intercepted conversations about a matter of public concern in order to avoid disproportionately harming media freedom.

Breyer's concurrence, joined by O'Connor, emphasized that the Court's narrow holding did not imply a broad constitutional immunity for the media.

The dissent basically said this is not a strict scrutiny case because you are not dealing with showing a need of the highest order. This is an intermediate scrutiny case. The statutory restrictions were content-neutral and, under these circumstances, the Court should not protect the involuntary disclosure of the personal conversations.

We have a very distinguished panel here to address this fascinating case, and we have a number of points of view. What we're going to do is have a ten-minute presentation by each of our speakers, and then we will have plenty of time for Q & A.

I will briefly introduce each of the speakers at the outset, and then I will call them in sequence to start. I will be introducing them in the order in which they'll be speaking.

Our first speaker is Professor Eugene Volokh,. Professor Volokh teaches free speech law, also copyright law, firearms regulation policy. He has been teaching at UCLA Law School and this year he is visiting at George Mason. Professor Volokh also has authored a First Amendment casebook, recently published by Foundation Press. He's written dozens of law review articles. One of his articles, from *Stanford Law Review*, is included in the Continuing Legal Education materials. It came out last year, and the title is "Freedom of Speech and Information Privacy — the Troubling Implications of a Right to Stop People from Speaking About You".

After Professor Volokh, we will be hearing from Marc Rotenberg. Marc is director of the Electronic Privacy Information Center in Washington, D.C. He teaches information privacy law at Georgetown University Law Center. He has testified on numerous issues before Congress. He has edited a volume called *The Privacy Law Sourcebook*, and he is co-editor of a volume called *Technology and Privacy — the New Landscape*, which was published three years ago by MIT

Press. Marc Rotenberg also, I should say, is the winner of the 2000 Norbert Weiner Award for Professional and Social Responsibility, and a variety of other distinctions, in his career.

Our third speaker, Stuart Taylor, is a widely read weekly opinion columnist for *National Journal*. He is a contributing editor for *Newsweek*. He focuses on legal, political and policy issues of national importance. He has had many of his articles reproduced and widely circulated. He appears regularly on many national television programs and news programs. Stuart was legal affairs reporter, from 1980 to 1985, for the *New York Times*, and he was their Supreme Court reporter in the Washington bureau for several years in the late '80s. That led to Stuart getting a nomination for Pulitzer Prize in 1988 for his Supreme Court coverage, among many other honors that he has received.

One of Stuart's most notable pieces was his incisive discussion of the Paula Jones sexual harassment lawsuit against President Clinton, a seminal piece in the *American Lawyer*, which helped reinvigorate interest into that litigation.

Our next speaker is going to be Lillian BeVier, who teaches at the University of Virginia Law School. Professor BeVier is presently the Henry L. and Grace Dougherty Charitable Foundation's Professor of Law and the Class of 1963 Research Professor at the University of Virginia Law School. She teaches property, constitutional law, including First Amendment, intellectual property, including copyright, and unfair competition. She is widely published on many issues and has had many, many honors over the years. Professor BeVier's most recent writings include the forthcoming "The Invisible Hand of the Marketplace of Ideas". That will be forthcoming in *Eternal Vigilence*. Lee Bollinger and Jeff Stoner are editors of that publication.

Earlier last year in *UCLA Law Review*, Professor BeVier published "Mandatory Disclosure — Sham Issue Advocacy" and "*Buckley v. Valeo* — a Response to Professor Hazen." And also last year in the *Journal of Supreme Court History*, Professor BeVier published "Free Expression in the Warren and Burger Courts." And also, in the wake of the change of Administrations last year, Professor BeVier was keynote speaker at the Cato Institute's very excellent program, since published, on the rule of law, in the wake of Clinton.

Our last speaker has is John Malcolm. John is one of us who has sort of become one of them. John Malcolm is currently Deputy Assistant Attorney General in the Criminal Division of the Department of Justice. John served as law clerk to judges both on the United States District Court for the Northern District of Georgia and the 11th Circuit Court of Appeals. He was an assistant U.S. attorney in Atlanta for some seven years. He is a frontline prosecutor, who is assigned to the Fraud and Public Corruption Section, and received numerous awards in his tenure in Atlanta, including the Director's Award for Superior Performance by an Assistant U.S. Attorney. John has taught. He is the former Chairman of the Criminal Law Practice Group of the Federalist Society, and he is going to be our last speaker today.

So, if we'd start with Professor Volokh. You'll have ten minutes. Thanks.

PROFESSOR VOLOKH: Thank you very much. I think *Bartnicki* is such a fascinating case because it isn't just about the rather boutique-y area of publication of intercepted cellular telephone conversations; rather, it touches on several other very important First Amendment questions that arise in a lot of different situations.

The majority opinion certainly has problems, but I think the outcome is correct. And had there been another outcome, then I think there'd be some pretty substantial problems for other cases down the line.

We're talking here about the problem of tainted information — information that, while true and while perhaps of considerable interest to listeners and speakers, is somehow tainted at the outset. One way it may be tainted is by having been gathered by someone in violation of eavesdropping laws. The question is, may the media be punished for publishing information that they knew was gathered by someone in violation of these laws?

I am not, by the way, challenging the knowledge point. In some cases, there may be some uncertainty about whether it was illegally gathered, but I am perfectly willing to stipulate that the media in this case knew the information had been gathered by someone in violation of the law.

What's the big deal about the media losing access to this very narrow range of information? Well, what about information that was illegally gathered by police? Some people actually draw an analogy, "Well, information gathered in violation of Fourth Amendment rights would be excluded in court. " But do we really think that if information is gathered illegally by police and the media hear about it, possibly at a suppression hearing, the media should be legally barred from publishing this information? And let's even say they are doing it after the trial, where there are no more fair trial concerns?

If you apply the logic of the statute in *Bartnicki*, you could make a very similar argument that information illegally gathered by police is also tainted at the outset and the newspapers can be punished for publishing it. If the Court had reached the opposite result in *Bartnciki*, lower courts might find it hard to resist this logic.

What about information leaked by corporate employees in violation of a non-disclosure agreement or a duty of loyalty? I have no support for the leakers themselves. We can imagine some whistle-blowing situations where the obligations of the confidentiality might be superseded by some higher obligation, but these are few and far between. If you make a deal to keep something quiet, you should keep that deal; if you do not keep that deal, you should be punished.

But can the newspaper or websites or radio stations also be punished for publishing the leaked material?

Now, this isn't just a little isolated circumstance. This is the bread and butter of a lot of investigative journalism, of many front pages breaking many important scandals.

I believe the answer is no, and I think most people would agree – the media must be free to publish the leaked material. But if *Bartnicki* had come out the other way, how could the leak scenario be distinguished?

The argument for punishing the media in *Bartnicki*, after all, was publishing intercepted communications was like knowingly receiving and using stolen property. Well, publishing leaks is then like knowingly receiving and using embezzled property — information that the leaker had a legal right to have but no legal right to pass on.

The law does not draw much of a distinction between theft and embezzlement. First Amendment law certainly couldn't do that. So if the Court had come out the opposite way in *Bartnicki*, all of this stuff would be subject both to civil lawsuits and criminal punishment.

Today, there's no statute punishing the publication of illegally leaked information; but if it seemed that such a statute would be upheld, it might well be enacted. And even without the statute, there might be liability under tort claims such as interference with business relations.

I think such claims should fail – but only because the First Amendment protects the media's right to publish information, even if it was illegally leaked or illegally intercepted by a third party.

The Bartnicki question also ties in to another important aspect of First Amendment law — the ample alternative channels inquiry. Content-neutral speech restriction must both pass intermediate scrutiny and leave ample alternative channels for the communication. (There is a question here as to whether this restriction is content-neutral; but I'm going to set that aside. Let's assume that it is indeed content-neutral.)

Consider a classic content-neutral restriction: you can't drive around a neighborhood in a sound truck blaring out your message. One of the reasons you can't do this is that you can still put up billboards, send out mailings, go door to door, buy television ads, and so on. These may not be perfect channels for you, but they are ample alternative channels.

A ban on publishing illegally gathered or leaked materials does not leave open other ample alternative channels for communicating the facts. After all, if a newspaper gets this information, they cannot publish it at all. In fact, according to the statute, they cannot even use the information, so they can't try to gather the information in other ways using what they have learned from the leak.

But even if they could use the information to try to regather the data legally, what can they really do? Say they call up the people and say, "Did you ever say X, Y, Z?" "We didn't," the people respond. They know the newspaper can't publish the original information, so they completely clam up. The law is a total ban on the communication of information; it doesn't leave ample alternative channels.

You could argue that there should be a new First Amendment exception that would justify bans on publishing tainted information, but I don't think that you can say, as the dissent did, that the law is okay under the existing traditional content-neutral scrutiny test. The dissent just didn't address this ample alternative channels issue, even though it's a critical prong of the content-neutral test.

Now, a third issue that comes up in *Bartnicki*, especially in Justice Breyer's opinion, is the constitutional tension argument: the argument that speech restriction may be justified as a means of protecting some kind of countervailing constitutional right. The argument is, "What do you mean we're suppressing free speech? We're not — we're fostering free speech. We're encouraging people to speak freely to one another without fear of being intercepted and taped."

It's a plausible argument; there's something appealing to this notion of balancing these constitutionally-inspired values. But exactly the same argument can be made and has been made to justify many other speech restrictions. One example is bans on racist speech. Repeatedly, these bans are defended on the theory that the ban is needed to protect the countervailing constitutional interest in equality.

What about barring speech that criticizes religion? Again, the constitutional tension argument was once made here, too: there's a tension between the values of free speech and freedom of religion, so it's ok to restrict speech that harshly attacks religion. Likewise, some have argued that *Buckley v. Valeo* was wrong and that even independent expenditures could be suppressed, because of the competing value of democracy and equality and free speech itself.

Interestingly, Breyer is the one who most focuses on this argument in *Bartnicki;* and in an earlier case, he made exactly the same argument in the context of advocating restrictions on independent campaign-related speech. So if you buy this constitutional tension argument, you might reach a result that you find appealing in this case. But you also risk reaching a result that is quite unappealing in other cases, and can lead to serious constraint on all sorts of speech.

What's more, if you really look at this argument, it talks about tension between rights; but there is no actual conflict between the rights. Publishing intercepted statements does not violate the freedom of speech, even if it might discourage other people from speaking on cellular phones. The tension is between a constitutional *right* to be free of government suppressing your speech and this supposed constitutional value of speaking without fear of having one's conversation be published. And of course there are lots of other constitutional values that could be similarly asserted in other cases.

I'm going to skip over another item which is pretty important and save it for Q and A.

Let me close with a brief discussion of free speech versus privacy, because this is yet another area in which this case bears on broader debates. There have been at least a half-dozen cases which have dealt with the tension between free speech and privacy. In many of these cases, the argument was that the newspaper was disclosing private facts. But of course, which facts are of private concern and which facts are of legitimate public concern is very much in the eye of the beholder.

For example, some lower court cases say that the media could be sued for publishing people's criminal histories. The theory is that it is not legitimate for the public to be concerned about the fact that this guy was an armed robber who engaged in a shoot-out with the police 11 years before (to take an example from one case). A magazine published it and the court said, "Well, there's no legitimate public concern here." But that's a value judgment, it seems to me, that should be left for readers and speakers to make for themselves. What is of legitimate public concern should not be for the government to determine.

Other situations, admittedly, are difficult. In one case, where a newspaper named a rape victim, the Court actually struck down the law barring publication of the names of rape victims; all of us surely must sympathize with the victim in a case like that. The trouble though, is that if the speech could be suppressed in that case, it would be hard for the Court to prevent much broader "privacy" –- justified speech restrictions in the future.

Finally, returning to situations like the one in *Bartnicki*, say that somebody leaks a confidential memo that includes the name of a government employee or corporate officer or union official. If you take seriously the notion that you can suppress constitutionally protected free speech to further privacy then publication of this leaked memo could be punished on privacy grounds just as surely as publication of the tape in *Bartniki* could be.

So, my take-home point from all of this: This is not a case where people instantly think, "Yes, the media has to have the right to publish." It might seem like such a picayune little issue. But it definitely implicates much broader concerns and had the case come out the other way, it could have lead to a great deal of interference with the right of the media to publish accurate factual information.

MR. KLAUSNER: Thanks, Eugene. The next speaker is Mr. Rotenberg.

MR. ROTENBERG: I am going to begin with two brief observations and then provide my rejoinder to Eugene's very good presentation.

The first is that when I teach privacy law, I always begin with the Brandeis-Warren article from 1980. I try to persuade my students that this article is of ongoing interest to the legal community, and sometimes even to the Court. So I was very pleased to see the Brandeis-Warren article cited in the majority opinion in *Bartnicki*.

I was interested, and perhaps somewhat amused, to see it cited in the concurrence. Then, lo and behold, it appears as well in the dissent. The article on the right to privacy in this case is cited in all three opinions, which I think is extraordinary and worth noting.

But things get even more bizarre. Here I am on a panel defending Justice Rehnquist, as Eugene is defending Justice Stevens, in a term where I found myself siding with Justice Scalia in *Kyllo*, which is a thermal imaging case. So we really have a lot of stuff tossed up in the air this afternoon. But I am just thrilled to be here.

Now, Eugene has a wonderful set of hypothetical claims, and with my free speech hat on, I could very well agree with him on any number of those fact patterns that he presented. Obviously, there are competing First Amendment interests, and those First Amendment interests will increase as we move toward broader statutes, as we move toward statutes that try to regulate conduct of government and so forth.

But none of those facts are truly at issue in this case because this was a case about a particular provision of the Federal Wiretap statute, which I was familiar with. I worked for the Judiciary Committee on some of the other amendments to Title 3. Section 2511(1)(c) basically said that if we are going to make real the privacy of electronic communications, then we have to discourage the subsequent publication illegally obtained by someone knowing that the interception was unlawful. That is the theory behind 2511(1)(c), the so-called dry-up-the-market approach.

Now, let's look at the statute. Is there prior restraint here? Is the government trying to prevent someone from publishing? No. It simply imposes a civil fine. Is the government exercising any type of censorious conduct? Is it saying that *your* communications can go forward, but *your* communications may not? No. This is content-neutral. It says that anybody who picks up the phone is entitled to a certain degree of privacy.

There is a notice requirement here. To be subject to this statutory provision, you have to know that it was unlawfully obtained. The statute protects the privacy of electronic communication. As Justice Rehnquist noted in dissent, citing, very interestingly I thought, *Times v. Sullivan* for people to engage in robust communication, they must have reason to believe in this electronic environment that their speech, that their private communication, will be protected. What is the alternative? To be guarded in your communication when you pick up the phone because you think it may be disclosed.

There is a line here in the concurrence, which I just find extraordinary. Justice Breyer, in trying to analyze

these competing interests, says here, "The speaker's legitimate privacy expectations are unusually low, and the public interest in defeating those expectations is unusually high." What does that mean, "their expectations are unusually low"? These are two people who are participating in a private communication. Would you, in the use of a telephone, have to make a determination at the outset that we are about to engage in a conversation involving matters of public interest; therefore, I have to take additional measures to safeguard the privacy of the communication. It almost doesn't make sense.

Before the panel, Eugene and I discussed what we make of Stevens' opinion. I think, for him, it doesn't quite work because, from his viewpoint, it doesn't go far enough. I think, of course, it goes too far. But I don't know what it tells Congress.

In other words, I don't know what you do at this point if the Court has said to Congress, "For certain types of communications that appear to be of public interest, although we do not want to call them a public interest exception, we will permit the publication by these third parties."

Is Congress now to say in effect, "We are going to make the content-based determination that certain types of communication are entitled to privacy protection, while others are not." It seems to be a paradoxical result.

So I side with the dissent here. I think this is one of the ways you protect privacy in an electronic communications environment. I do not think it requires that all forms of confidential communication, if they're obtained, cannot be subsequently published by the press. I do not think it has that type of chilling impact on press publication. But in this very narrow situation where Congress makes no attempt to distinguish among types of speech, where it imposes no prior restraint, where it gives notice to the party that the publication is not permitted, where the information, is not in the public domain because this is not information that would be available otherwise to the press but for the interception, I think the statute should have been upheld. That's my view.

MR. KLAUSNER: Thank you, Marc. Stuart Taylor is next.

MR. TAYLOR: Marc, that was much too fast. I'm the journalist on the panel and I am still reading the dissent.

I am not a very representative journalist, perhaps, so the rest of them should not be saddled with what I am going to say.

I am torn in this case. It may be the kind of constitutional tension that Eugene speaks of. I am as suspicious as he is of this constitutional tension idea. It is a good way to say that almost anything can be a constitutional value that would override a constitutional right. One could say that there is a constitutional tension between the Pentagon's desire not to be burglarized and my need to burglarize it for the purpose of facilitating my freedom of speech. I know journalists who have actually made the argument that there is a constitutional right to burglarize the Pentagon. I'm not sure whether they were serious or not.

But in approaching this, going from the general to the particular, there are cases in which there should be and clearly is, I think, a First Amendment right to publish some truthful information of public importance, even if it's a statutory crime.

The *Pentagon* case is a paradigm in a sense, although the issue there was prior restraint and, therefore, it doesn't stand for the proposition that you could not have had a criminal prosecution of the *New York Times* and the *Washington Post* for publishing the Pentagon papers. I think that if that issue were presented, the Court should hold and would hold that, in fact, you can't have a criminal conviction. There was nothing in the Pentagon papers that jeopardized national security, although they were of considerable value in terms of giving the public a basis for evaluating the war effort.

This case, *Bartnicki*, is not the *Pentagon* papers, but there is a little bit of a similarity. I think part of what was driving Justice Breyer, in particular, to reach the result he did was a feeling that the conduct of the people on the telephone here did not really deserve to be protected because they were engaging in reprehensible conduct — talking about bombing somebody's front porch. I don't know if they were joking or not, but for purposes of the decision, they don't seem to be assuming.

It is interesting to look at what Breyer said in the oral argument, in which one might have guessed that he was going to be on the other side of this decision. In the oral argument he asked the lawyer for the radio host whether a newspaper could constitutionally be sued for publishing information brought to it by an eavesdropping trespasser who broke into a home and listened at the bedroom door. I think your answer is straightforwardly "No." The newspaper could not be punished, Justice Breyer said. He got the answer he was looking for. And then he said, quite heatedly, "I don't see how you are going to have any privacy left. I mean, what kind of privacy," says Breyer, "if people can break into your house, steal all your information and it can be published in the newspaper, and you can't get any damages from that newspaper?"

Well, a few months later, up pops Breyer writing the controlling concurring opinion, saying that the newspaper in this case is protected. I don't think he underwent a conversion experience. Maybe he thought this is different because a bedroom is different than a telephone.

I think the essence of the difference, and he stressed it in his opinion, was that these people who were claiming that their privacy was invaded were privately talking about bombing somebody's front porch. He wrote his

concurring opinion, which I think is the controlling opinion because it's considerably narrower than Justice Stevens' is, and he and Justice O'Connor, who joined the Breyer opinion, were essential to the majority. His concurring opinion is very limited. He upheld the First Amendment claim on two conditions. One, the radio broadcasters acted lawfully in the sense that they were not complicit in the making of the improper tape. And two, the matter publicized involved a matter of unusual public concern — namely, a threat of potential physical harm to others.

That leaves you to wonder, "Well, suppose another case comes along just like this one but the conversation was, say, a congressional candidate and his or her campaign press secretary plotting strategy, something that they would want to be secret but that was in that sense reprehensible." I think Justice Breyer, and hence the majority, might very well come out the other way in a case like that, and I don't have a strong opinion about whether they should or not. I hadn't quite finished reading the dissent when Marc stopped.

But I want to close by anticipating a complaint that is sometimes made in cases like this, which is that the media are seeking for themselves and the Court here is giving them a special privilege that's available to nobody else: "Who do the media think they are?" I grant the general persuasiveness and attractiveness of that proposition, but I doubt its applicability to this particular case for a couple of reasons.

One, although the institutional media may be the main beneficiary of decisions like this, they are not the only beneficiary. The theory isn't that we are trying to help the institutional media. An individual who went out and did a newsletter or a flyer publicizing this conversation — let's say it was somebody opposed to these people — would presumably get the same protection.

Second, a couple of analogies. One could say that the constitutional protection of patent holders really only helps rich corporations because that is who gets the patents. Or one could assert that tax cuts like President Bush's really are only for rich people because they get most of them. Or that the takings clause is really only for rich people — or perhaps, most aptly, that the court's decision in *Buckley v. Valeo*, the aspect of it that created a constitutional right to self-finance campaigns — by Steve Forbes' millions and millions — clearly only benefits rich people directly. But in each of those cases, the defenders of those decisions would say that there is a larger societal benefit and the rich people who are the immediate beneficiaries are the proxies for that societal benefit.

Finally, there is a hypothetical question that I would like to float. Suppose that the person who made this illegal tape, instead of taking it to the newspaper or to somebody who took it to the newspaper, took it to the police. Suppose the D.A. decided to prosecute these people for plotting to blow up the porch. Would or should that evidence have been admissible? And by the way, what do you think Chief Justice Rehnquist and the two other dissenters in this case would have held, if those had been the facts?

There's a very strong argument that it should have been admissible because the police would have clean hands. It's not their fault that this was done illegally and it's a good thing that people be prosecuted for crimes. The purpose of the exclusionary rule, which is deterring the police misconduct, is not presented.

I called a friend of the Solicitor General's Office this afternoon to see what the case law is on this. He said there's a split on the circuits; our position is that the police ought to be able to introduce it. There's one circuit with us and there are three or four against it. I think the reason the circuits have gone against the government on that is that, under the literal terms of the statute, the police would be in the exact same position as the media are here, which is that it would clearly violate the statute, read in any ordinary way, for the police to use it. As the Court here held, it would violate the statute, but for the First Amendment, for the media to use it.

I think it is interesting to speculate on how each member of the Court would have voted, if those had been the facts.

MR. KLAUSNER: Thanks, Stuart. Lillian BeVier is next.

PROFESSOR BeVIER: I think there is lots to disagree with and contend with in what has been said so far. Let me first of all just suggest that this business about the constitutional tension that Eugene brought up — I think we always ought to view that with considerable care. But Eugene says you can't take a constitutional right and balance against it constitutional values. The difficulty with asserting that in the context of this case is that it's so incredibly question-begging.

The whole issue in *Bartnicki* is whether there is a constitutional right of the press to publish this information. That is what is at stake. The question of whether there should be or not is a question that, of course, you reason to your answer by whatever method of constitutional interpretation or First Amendment seems to you to be the most persuasive and lead generally to the best results.

Gene's assertion that there is a practically absolute right in the media to publish accurate factual information, I think, is not valid. But let me go to the beginning of the comments that I was planning to make.

From an instrumentalist point of view, when you think about the First Amendment as a set of rules by which the society attempts to accomplish certain social purposes that we deem important — among them, to be free from government control — it seems to me that *Bartnicki* is profoundly misguided, as a matter of First Amendment doctrine. The

Court seems to think that it is furthering a First Amendment interest in free dissemination of information about matters of public interest. I think that you can make an argument — I will try to make it — that precisely the contrary is true. The reason for that is something that has been alluded to previously. The reason for that really is that the ability to further the First Amendment interest in the free dissemination of information with respect to matters of public concern is wholly parasitic on information being produced in the first place. You can not freely disseminate information that is not available, and you can not eavesdrop on conversations that people do not hold or that they take effective precautions to keep secret. So the whole idea of trying to further dissemination in this particular case, by laying down a rule that in the future encourages people to take more precautions to keep their conversations private seems to me to be misguided from an instrumentalist point of view. The rule is one whose effect will be that we end up with less information in the future. We will end up with fewer conversations and less free discussion among the citizenry of both matters of public concern and of private interest to themselves.

The relationship between privacy and dissemination of information is not one so much of balance as it is a sort of synergy. The more privacy people have, the more freely they will communicate with one another. The more freely they communicate with one another, the more likely they are to share and ultimately produce information, and eventually to disseminate it or put it to socially useful purposes.

This seems to me to be a common-sensical insight, and it certainly is reflected in a myriad of ways in our law, ways that are not directly related to *Bartnicki* but that suggest that the law recognizes how important confidentiality is in furthering important communications. Just think, for example, where you would be without the lawyer-client privilege of confidentiality.

Now I'm going to take on Stuart's point. The notion that the media has a privilege that is not enjoyed by other citizens to publish truthful information that it knows was illegally gathered seems to me to be both perverse and quite wrong. I guess I am going to take on a couple of Eugene's hypotheticals, too. I do think the question Stuart asked about whether a prosecutor would be able to use the information to obtain a conviction is one of the more interesting questions that flows out of this.

Let's consider trade secret law. I don't know how many of you know anything about trade secret law. What I would really like to ask you is whether you think it's unconstitutional as a violation, generally, of the First Amendment? You do not have to answer and I will not call on you.

I will just give you a doctrinal assertion here, which happens to be true. If you obtain a trade secret through a wiretap or you knowingly accept a disclosure of information you know to be confidential, you will be liable as a trade secret violator to the holder of that secret. If you disclose that information, having received it knowing that the person who gave it to you is in violation of trade secret law, you will be liable as a trade secret violator. You may be enjoined, perhaps permanently from making any use of that information, and you may be subject to damages. That in a nutshell is trade secret law. It is generally thought to serve very benign social purposes, and it has not until very very recently been thought by anyone to contain an implicit exception for the press. Do you really think that that law violates the First Amendment rights of people who obtain information unlawfully? By the way, you will be liable as a trade secret violator not only if you disclose information in breach of a confidentiality agreement but also if you obtain the information by unlawful means, such as trespassing, for example, or illegally wiretapping someone's phone.

Business people across the country both are beneficiaries of trade secret law and susceptible to causes of action when they violate it by attempting in one fashion or another to get the trade secrets of their competitors. But does the generalization that the media has a privilege to publish truthful information — i.e., a trade secret — when it knows that the secret was unlawfully obtained mean that the media is not bound by trade secret law? Why? Why would this be so? What purpose would it serve? Would any genuine First Amendment interest be truly advanced by privileging the media in this way?

Of course, once the media publishes the trade secret, it's out of the bag, so you can imagine that this would be a great way for someone who wants to begin to use trade secret information simply to avoid liability himself or herself: just steal the information and then give it to the media, have the media publish it, and then go ahead and use the information themselves.

But either the media has a privilege that others do not to publish unlawfully obtained information or both the media and the general public have such a privilege for illegally obtained information in violation of trade secret law, or neither do. My view is, quite firmly, that neither do and neither ought to have.

MR. KLAUSNER: Thanks, Lillian. John Malcolm.

MR. MALCOLM: Thank you. I am really pleased to be here. I was saying to myself yesterday, I wonder what it feels like to be fifth on a panel of five late on a Friday afternoon, knowing that you are the only thing that stands between your audience and a cocktail party?

Now I know what that feels like, so I'm a better man for it.

I have a lot of sympathy for the majority in *Bartnicki* for many of the reasons that Stuart and Eugene

pointed out. Still, looking at it as a totality, I think the majority got it wrong. And the reason I think the majority got it wrong is that they gave very short shrift to two values which Congress clearly wanted to promote, and which I think Congress can promote.

The first is to create a disincentive to engage in illegal activity; in this case, unlawfully intercepting conversations. As Justice Stevens states in his majority opinion, "It would be quite remarkable to hold speech by a law-abiding possessor or information can be suppressed in order to deter conduct of a non-law abiding party."

I frankly don't see why that is such a remarkable proposition, given the ease with which perpetrators can now illegally intercept conversations, and given their incentives to disseminate this, either for strategic advantage or for notoriety, even if they are going to deliver it anonymously. I believe that a lot of times these tapes are left anonymously. They're there in order to gain something just from the dissemination.

Given these incentives, I don't see any reason why Congress can't employ, as Marc Rotenberg talked about, a dry-up-the-market theory. Now, a dry-up-the-market theory in essence says, we're going to remove incentives to engage in wrongful conduct by drying up the market for the downstream possession or use. As the dissent stated in *Bartnicki*, this is neither novel nor implausible.

Such an approach is considered legitimate in all manner of laws. It is considered legitimate with respect to illegal narcotics. It is considered legitimate with respect to child pornography. It is considered legitimate with respect to inside information. And I see no reason why it can not be considered legitimate with respect to illegally intercepted information.

In fact, in child pornography, you can argue that the greatest harm to the child, the victim, is in the production — the actual taking of the picture or the making of the movie — and that the downstream possession by the consumer of the child porn is not as bad as the original exploitation and taking of the picture. In the case of illegally-intercepted conversations, the downstream use is far more harmful than the original interception. The person who had the conversation is unaware that the original intercept took place. The harm occurs when it is spread to the world. So I don't see why Congress in this case couldn't try to go after creating a disincentive or destroying an incentive by going after the point where the real harm occurs.

Now, I think it is perfectly reasonable for Congress to have concluded that, given the strategic advantages to be gained by dissemination of unlawfully intercepted conversations and the unfortunate ease with which such conversations can be intercepted, there would be virtually no disincentive to stopping this, unless you employed a dry-up-the-market theory. Justice Stevens, in his majority opinion, treats this with the back of his hand. He dismisses this by saying, "There is no empirical evidence to support the assumption that the prohibition against disclosures reduces the number of illegal intercepts."

I have to say that I think it's very difficult to take him seriously when he says that because, as far as I know, there is no reporting mechanism for people to say, "I wasn't stopped by this law: I went ahead and illegally intercepted this conversation." Or, for people who say, "Gee, I would have illegally intercepted this conversation but for the fact that its downstream use was prohibited and therefore I was stopped." How do you get an empirical analysis of this? I just think he is wrong about it.

The second value that I think the majority gave short shrift to was Congress' desire to promote private communication. Really, an ability to limit — not necessarily stop — the dissemination of one's thoughts. Still another First Amendment value, which is the freedom of association, the ability to pick and choose with whom you deal in a private setting.

I don't really think that this case is about the First Amendment versus privacy. I really view this case as a congressional preference for private speech over public speech in instances in which the speaker means to keep his thoughts relatively private and non-public, when those thoughts have been disseminated because of an unlawful interception by an unwanted outsider. I think it's not about choosing between the First Amendment and something else. I really think it's making a rational choice among competing First Amendment values.

The majority states again, "In a democratic society, privacy of communication is essential, if citizens are to think and act creatively and constructively." But then the majority goes on to say, "In this case" — which I believe, by the way, is a very important qualifier for reasons I'll discuss in a minute — "privacy concerns give way when balanced against the interest in publishing matters of public importance." The majority never really says why that must give way, why that is so. And it also never says why the Court, rather than Congress, is the appropriate body in which to engage in that balancing test.

As a general proposition, I think the press is entitled to the same First Amendment rights as everybody else — no more, no less. The media does not have — and the majority recognizes this — an unfettered right to engage in any kind of illegal conduct. That would include the unlawful possession and use of illegally obtained material when it wants to produce a story.

As Eugene Volokh talked about, in terms of alternative adequate channels, there is nothing about this law that prevents the press from reporting on any topic whatsoever. They can ask the participants about those conversations. They can go talk to others who may have been involved in that conversation. In short, it involves the press having to do

what investigative agencies do all the time — gumshoe work.

All that is being said is that the press is prohibited from utilizing material that it should never have had in the first place. Nobody ever questions, for instance, the right of a legislature to punish a fence who receives ill-gotten gains from a thief and then uses it to some advantage. Nobody questions that right, even though it may well be the case that the fence had nothing to do with the theft of the underlying material. If Congress can punish the fence, I don't see why it can't punish the press for using the fruit of a poisonous tree in order to make its story.

Lest you think this is some kind of a new proposition, William Blackstone, as far back as 1769, in his Commentaries distinguished between prior restraint, which was not involved in this case, and punishing post-publication speech. He said, "The liberty of the press is indeed essential to the nature of a free state, but this consists in laying no previous restraints upon publication and not in freedom from censure for a criminal matter when published.

Every freeman has an undoubted right to lay what sentiments he pleases before the public. To forbid this is to destroy the freedom of the press. But if he publishes what is improper, he must take the consequences of his own temerity."

In my opinion, I think essentially that *Bartnicki* is a case of 'bad facts make bad law'. I think that the majority was concerned about the chilling effect if a state legislature criminalized the publication of unlawfully obtained information in a case of a whistleblower who wanted to disclose extreme misconduct, either by a private actor or a governmental actor. As I say, I have sympathy for this, and Eugene has cited this.

I question, however, in *Bartnicki*, whether the outcome would have been very different if, instead of talking about a loud-mouthed, hot-headed, tough union boss talking to his chief negotiator, the case involved a public official admitting to his psychiatrist or to his pastor in a confessional that he had taken a bribe. That is clearly a matter of public concern. Or, if it involved an illegally taped conversation of a criminal defendant who's discussing trial strategy with his attorney? Or, a board meeting in which trade secrets are discussed or a private meeting among governmental scientists in which they're discussing the potential vulnerabilities of nuclear power plants to terrorist attacks.

I believe, given the comments by the two concurring Justices, Justice Breyer and Justice O'Connor, that the outcome might very well have been different and in fact might well be different if the facts change ever so slightly in the next case.

I would also say that I think — and I think Eugene Volokh shared this by saying, "I don't wholly agree with Justice Stevens" — that the majority opinion is dissatisfying and, for that matter, the concurring opinions are dissatisfying from a number of perspectives. In the concurrence, for instance, Justice Breyer says, "Well, I don't believe that this matter is completely beyond the reach of legislatures in terms of their ability to write a law; they just didn't quite write a law in this case that was narrowly tailored enough." I actually find it very difficult to imagine how a legislature could have written a law any more narrowly tailored. Congress in essence said, there is no topic that is off limits. You can publish what you want. You just can't use unlawfully intercepted material in order to make that story.

The majority, for instance, tries to distinguish between matters of private concern and public concern. As Eugene also said, that makes no sense. They make no attempt to define that whatsoever. It seems to me that such a statement is entirely conclusory and entirely circular. Basically, if a media outlet gets something and it believes that its listener or its readership want to find out about stuff, it's going to be hard-pressed for me or anybody else, it seems, to say this really wasn't a matter of public concern. To me, saying that it's a matter of public concern means nothing.

Most importantly, the majority, and the concurrence make very clear that their opinion in this case is tied to the specific facts in this case. In fact, the concurring justices — remember, you had three dissenters; two concurring justices — stressed the fact that one of the things that they found important to their decision is that this was threatening speech — which, by the way, I think was a complete canard. But they said that this is threatening speech, and that as a result of being threatening speech, it's entitled to little or no First Amendment protection.

As Justice Stevens said in the majority, "The future may bring scenarios prudence counsels our not resolving anticipatorally." In light of this comment and the comments from the concurrence, the importance of *Bartnicki* really remains to be seen. Given the degree of hesitancy that was expressed both by the majority and the concurrence, I'm not sure, if I were a member of the media, that I would be taking that much solace in *Bartnicki* because they very well may end up finding themselves vulnerable, if the facts change ever so slightly.

Thank you.

MR. KLAUSNER: Thank you, John. So we have time for questions. We have at least 25 minutes before the conclusion of this session.

AUDIENCE PARTICIPANT: I would say the cell phone is a radio transmitter. If you speak on it with an expectation of privacy because Congress has passed a law that says you have privacy, I think you're being quite silly.

I'm an attorney, so I've got a few more hypotheticals for Professor Volokh, to add to numerous ones he offers. Suppose one of the participants in the cell phone conversation, hearing that the press has obtained an illicit copy of

the conversation, goes into court and files a copyright claim in which he says that that conversation was a copyrighted work. I'm entitled to an injunction to enjoin the press or broadcaster from reproducing this copyrighted work. That's my first question.

My second question would be, what happens when a radio broadcaster decides that as a matter of exercising their First Amendment freedoms they undertake to broadcast recordings on the air without the consent of the copyright holder?

PROFESSOR VOLOKH: I think it's an excellent question, and it's similar to what people ask in many other First Amendment states, whether about campaign-related advocacy, allegedly bigoted speech, allegedly pro-communist speech, or what have you. We already allow all these other exceptions, the argument goes; why not allow this one, too? So while these exceptions, such as the copyright exception, do exist, I'm worried about the creation of a new exception, precisely because I worry about what happens two years later when somebody says why don't we restrict this other speech by analogy to this new exception. This process of broadening by analogy the zone of unprotected speech needs to be checked.

Fortunately, it turns out that the very exception you mentioned illustrates the correctness of the result in *Bartnicki*. When the Supreme Court upheld copyright law in *Harper & Row*, it specifically stressed that copyright law barred only the copying of *expression*, and left people free to relate *facts*.

If there is a copyright claim based, for example, on a corporate document that's leaked to the newspaper, then, first, the newspaper can claim a fair use privilege, which the Court also said may have constitutional significance. And second, even if the newspaper may not quote the entire publication literally, it can include short literal excerpts and accurately paraphrase the rest. Copyright law leaves open ample alternative channels that allow speakers to convey the same facts, using other kinds of expression.

That is precisely what the law in *Bartnicki* does not allow you to do; not only can you not literally play the recording, but you can't even use any of the facts that you discovered. You cannot use them in your broadcast, and you can't even use them in further investigating the story. Any use of these facts is prohibited.

The copyright exception thus actually illustrates the importance of maintaining the distinction between allowing some constraint over the use of expression and allowing people to block the communication of facts. And the Supreme Court was quite right in saying that speakers should remain free to communicate facts.

PROFESSOR BeVIER: What about trade secret law?

PROFESSOR VOLOKH: Another excellent example of the importance of leaving people free to communicate facts. Let's say, for example, that a newspaper learns that a company is about to do something that some people — and I will almost certainly not be one of them, given my views on environmentalism — believe will be a great environmental risk. The plans of a company, as to introduction of new products or creation of new plants or whatever, are certainly trade secrets.

So, let's say that somebody sends to the newspaper a copy of a document that says the company is about to build this nuclear power plant, produce this new product or whatever else. Under trade secret law, the newspaper could not only be punished but could even be enjoined from reporting on the company's plans. But the First Amendment, I think, must override this aspect of trade secret law, and leave the newspaper free to publish the leaked plans.

Now, the person who leaked the document can quite properly be punished. I agree with trade secret law to that extent. And incidentally, while writing my Stanford article, I did a search for cases and there were virtually none where in fact there was an attempt to punish a downstream speaker, whether the media or a private person sending out a newsletter or whoever else.

But as to the hypothetical of the media publishing trade secret information, yes, I think the First Amendment, notwithstanding trade secret law, must allow the media to publish information in leaked documents.

MR. ROTENBERG: I'm sorry. If I may, you know, the media —

PROFESSOR VOLOKH: I'm sorry. The media and others. The media are just the ones who usually want to publish this stuff.

MR. ROTENBERG: The media doesn't have an unfettered right to get what it wants and publish what it wants. For instance, there's case law upholding — if a reporter were doing a story on illegal narcotics or a reporter were doing a story on child pornography — suppose there's a particular organization out there; NAMBLA, the National Association on Man-Boy Love — and they wanted to report on this stuff and talk about the pervasiveness and describe the content of this material, possession of this sort of material, obscenity or child pornography or whatever the case may be. And there's case law that clearly says that just because you're a reporter doing a story on child pornography doesn't mean you're allowed to possess this stuff. And I don't see why this is any different —

PROFESSOR VOLOKH: There is —

MR. ROTENBERG: — if I could just finish my thought. You have the same sorts of adequate alternative remedies, which is, you can go to talk to people about this subject; you can go and talk to people who are engaged in this sort of activity; you can have some conversations; you can do some digging that way. But you're not allowed to just say, "Hey, I'm doing a story; give it to me and I'll do what I want with it in order to make my story."

MR. TAYLOR: I'd like to hear more about that case law. I'd like to quote something first, from the Majority opinion — something I think they did say right as a general matter. And then they quote from *Smith v. Daily Mail Publishing Company* in 1979. "State action to punish the publication of truthful information seldom can satisfy constitutional standards." I don't think the court — you can cite many Supreme Court cases where the publication of truthful information, particularly on matters of public importance, has been published. I think, arguably, that's a line that we shouldn't cross too readily, although I can imagine the cases where it would have to be crossed.

While I'm at it, I'd like to address quickly the chilling effect argument — people won't talk on the telephone if they know that a newspaper might get a copy of something in which the justices anticipate that they're going to bomb somebody's porch, et cetera, et cetera. Well, as was pointed out earlier, everybody knows that if you're on a cell phone, somebody can be listening. So the incremental harm is that the media publishes.

Now, everybody who pays attention to this decision, if they pay enough attention to it, they will know that all the Supreme Court has cleared the way to publish without punishment is information that Justice Breyer thinks may lead to destruction of life or limb. That wouldn't chill my cell phone conversations incrementally one bit.

MR. MALCOLM: I just want to jump in on this point that because it's possible to intercept and publish someone else's cellular communication; therefore, there's no expectation of privacy. I think there's a bit of a problem there because virtually every privacy law relating to new technology is applied to a situation where the technology makes possible the capture of personal information that wouldn't otherwise arise.

This is basically the dilemma that was posed by Katz, in the reasonable expectation of privacy analysis. You know, Professor Amsterdam wrote after that case, the problem with the reasonable expectation of privacy analysis in a period of rapidly expanding technologies that enables surveillance, is the government simply says, "Hey, guess what, we've got the ability to conduct surveillance and you have no expectation of privacy."

So, when the Congress tries to legislate in this area and says in effect, "You know, yes, you are physically capable of doing these things, just as you are physically capable of trespassing onto someone's property and entering their home and stealing their possessions. Nonetheless, we will agree as a matter of law that we're not going to allow you to engage in that type of behavior."

So, I don't have a problem with the thought that Congress might choose to legislate, to create by statute, an expectation of privacy, which otherwise the technology would take away. That's the whole enterprise in this area.

I think the argument is the statute doesn't stop that, and everyone knows it.

MR. KLAUSNER: Yes.

AUDIENCE PARTICIPANT: There's an old Libertarian saw that says "Be wary of any law that the government does not apply to itself." Up the road in Ft. Meade, NSA intercepts tens of thousands of conversations everyday and uses those for intelligence purposes.

The question is why should private citizens be denied the right to do that which the government is doing —

SPEAKER: Yes, but if the NSA does that domestically, in violation of Title 3, they're breaking the law as well. I think that's another argument that just does not fly in this area.

We pass laws where technology evolves because we value privacy. And if you're really prepared to embrace the principle that laws play no role in this area, then I think you have to be prepared to give up your privacy.

SPEAKER: And I think the answer to that is that there are competing statutes, and there's a process involved by which the government goes and gets the ability to do this. You may like the process; you may not like the process constitutional or unconstitutional. But there is a process involved that the average citizen does not go through when they are intercepting a telephone conversation.

MR. KLAUSNER: Yes, sir.

AUDIENCE PARTICIPANT: This is for Professor BeVier. I believe you made reference to attorney-client privilege. And I don't really think that helps your argument because, if a client is telling a lawyer of an intention to do a future criminal act, the attorney-client privilege doesn't even apply. In fact, the attorney would have an obligation to try to dissuade the clients and, failing that, take other steps to prevent the crime.

PROFESSOR BeVIER: Right. I really didn't mean to say it was directly analogous. What I was really suggesting was simply the basic point that we have a number of privileges up for confidential communications that are designed precisely to achieve the goal of encouraging conversation for socially beneficial purposes.

MR. ROTENBERG: I actually do think it's a good analogy. And that's because you've picked one tiny subset of potential conversations between an attorney and client. In fact, the subset that you have picked is the commission of crime. The crime-fraud exception is a tiny subset of conversations that take place between criminal defendants, a lot of whom are guilty, and their attorneys who are trying to protect their due process rights in preparation for trial.

A conversation, say, between Johnny Cochran and O. J. Simpson sitting in the bowels of the detention center during the middle of a trial might be a matter of public concern; lots of people might want to hear about it. It's still a privileged conversation, and it is not a crime-fraud accepted conversation.

AUDIENCE PARTICIPANT: That relates to a crime already committed. I'm talking about future crimes — a cell phone conversations related to an intended future crime.

SPEAKER: Nobody was prosecuted.

PROFESSOR BeVIER: Right. I think one of the funny things about the case itself is, does anybody know how the negotiations turned out? And were these people — I mean, what happened to the union leaders and so forth? What was the deal that they finally signed to get to the teachers back to work?

MR. MALCOLM: I'm not sure, but I think the relevant point for purposes of analyzing what this decision does is that the controlling opinion by Breyer and O'Connor, which limits it, proceeded on the assumption that this was precisely a future crime-fraud exception type of a situation, that they were talking about bombing somebody's porch. Now that may have been a canard; it may have been silly; it may have been rhetoric. But that's the assumption on which they proceeded. And it limits their decision.

SPEAKER: I agree, and that's exactly why I think *Bartnicki* may be of very utility, because the concurrence latched on to this, and I think it's going to create a very, very narrow fact pattern. But the fact of the matter is, whether it was a legitimate threat at the time or not, time proved that it was purely hyperbolic speech.

The negotiations continued; the negotiations concluded. And this tape wasn't turned over to law enforcement. This tape was turned over to an taxpayers' advocate who just wanted to make the union look bad for future negotiations. And then it was played by a sympathetic radio host, Fred Bopper. So, if there was a real threat involved, it certainly didn't play out under the facts of this case. This was disseminated long after that "threat" had been made, and was quintessential hyperbolic speech.

PROFESSOR VOLOKH: But actually, let's pick up on this privilege point. Let's say that Bill Clinton went to his lawyer or to his minister or to his psychiatrist and said, you know, I did have sex with that woman; I did perjure myself. I knew it all along, and now I'm getting away with it.

MR. TAYLOR: Didn't he do that already?

PROFESSOR VOLOKH: Exactly. Let's say that he had said it early enough, before everybody already knew it.

Now, I fully agree that those people are under a legal duty not to reveal this, and I think if they do reveal it, they should be suitably punished.

But let's say that one of them tells Stuart this information. So, the claim as I understand it — Marc hasn't spoken up on this, but judging by his comments, I don't see how he could distinguish this — the claim is that Stuart could be legally prohibited from revealing this accurate information that we might have good reason to think is quite useful to public debate even though he himself was under no original duty of confidentiality.

MR. MALCOLM: But Eugene, we've got to sort of bring the facts a little bit more in line here. Let's say that that

conversation took place between Clinton and his attorney by means of cellular communication, and someone intercepts the communication and leaves the tape with Stuart. And now Stuart wants to write this story —

PROFESSOR VOLOKH: It's true; it's important; it's public debate. He has a right to write it.

MR. MALCOLM: But see, now we're in 2511(1)(c). We're not talking about some future act. I think we would argue — I mean, it's going to be very interesting to go back and look at this concurrence. Is that not of public interest? I mean, a phrase that Breyer's very much trying to avoid here — but those facts regarding the conduct of the President during that point in American history — I mean, I don't know where the First Amendment interest would be greater. Right?

Now, where do you come down on those facts?

PROFESSOR VOLOKH: To me, it's an easy question. I don't see how you could distinguish publishing information leaked by lawyer in violation of his duty of attorney-client confidentiality from publishing information leaked by a corporate employee in violation of his duty of confidentiality to his employer or of trade secret law.

I just don't see how you could limit your principles to the facts —

MR. MALCOLM: So, under those facts, same result?

PROFESSOR VOLOKH: Of course it has to be publishable. This is the bread and butter of the front pages of many newspapers.

PROFESSOR BeVIER: No. No, that is not true. Their bread and butter is not publishing trade secrets or overheard conversations. And the notion here that because the information is important and of public interest is the trump card that the media holds seems to me to be quite troublesome because, of course, the whole reason for privileges of confidentiality is that you are producing information; you are engaging in conversation that other people would really like to have.

SPEAKER: So it would be illegal for Stuart to publish that?

PROFESSOR BeVIER: Yes. Absolutely — poor Stuart, and he's going to jail, directly to jail; he will not pass Go.

MR. TAYLOR: Since I'm the one they want to send to jail, I will quickly address the point. First, I don't take all that much comfort from the *Bartnicki* decision, if I want to publish that, because the limitations in the Breyer opinion have been addressing. It has obviously been of huge public importance, but it's obviously of huge public importance, but it's not a contemplated future crime; it's not blowing up somebody's porch.

So, I'm sitting out there thinking, "Gee, what do I do here?" And then I go to my editor and he goes to his lawyer, and they tell him, "It's your problem." I think that I ought to be able to publish it and anybody else ought to be able to publish it who gets it under similar circumstances. Part of the reason is — another distant analogy of the Pentagon Papers — I think Justice Stuart in his concurrence in the Pentagon Papers made the point that the government has ways of protecting itself from these leaks short of prosecuting the people who publish them. And the analogy here would be the President and his lawyer are responsible for guarding their own secrets — wait a minute. That doesn't work; I take it back.

I was going on Eugene's hypothetical, not your modification. I withdraw the Pentagon Papers analogy. But I do think that the importance of the information probably justifies the publication thereof.

PROFESSOR BeVIER: It does in the eyes of the press. Isn't that interesting?

SPEAKER: I mean, there are certain types of confidential communications, including attorney-client communications, priest-penitent communications, and marital communications, that are good and that we need to foster so that someone can enjoy his due process rights or have a happy marriage or meet their maker with a clean soul. And these concerns have been considered to justify these core privileges.

If you're going to recognize this sort of "Well, we're interested in what they had to say," then, you know, bring the Secret Service back here and sweep the confessional before you walk in.

MR. KLAUSNER: Let me call on —

AUDIENCE PARTICIPANT: Yes. This is for Marc Rotenberg.

I agree, by the way, that the expectation of privacy is not one based on technology but on societal norms, perhaps tradition, perhaps some sort of moral values. What do people reasonably expect as opposed to what scientists can

do.

But I'm wondering if you would take that same expectation of privacy in the copyright arena, where there's an expectation that regardless of technological advances, people who have property rights secured by Congress have the right to expect that their DVD code won't be broken; that their music, which is encrypted, won't be cracked and transferred throughout the Internet; that, sure, some clever person out there might be able to, in the copyright arena, technologically overcome an expectation protected by law of privacy, but nevertheless we're not going to permit it. Do you see that the developments in the *Bartnicki* case might happen?

SPEAKER: So in other words, isn't it okay to enjoin the publication of the DCSS code and description, because that's necessary to foster —

SPEAKER: Well, I mean, it's a very interesting question. It's in different field, of course. I mean, I'm not arguing against intellectual property rights, and I think you can apply norms, as you say, to evolving technology. I have argued in the intellectual property realm that Congress has been overly enthusiastic about that enterprise. So, you have the anti-circumvention provisions in the DMCA, you have the new Electronic Theft Act, and another whole series of provisions that I would argue actually sweep too broadly and do implicate First Amendment interests.

But returning to the privacy realm, I mean, it is — as I said before, the entire enterprise is to, by statute, as you say, protect certain social values in this area. And I just don't see what the alternative is. I mean, what you're left with is this — and there's a hint of this, by the way, in Breyer's concurrence. He sort of drops in this line about encryption, which I thought was very interesting. We've done a lot of work over the years in opposition to government restrictions on the use of encryption, which is a sort of privacy self-help means, which arguably is where we head if we're not allowed to rely on statute.

But I think where we end up, if we go down that road, is essentially a form of privacy survivalism. In other words, we only get privacy in the communications environment, you know, if we're willing to swap private keys and we're sort of sitting in tempest-tested rooms. It's sort of like a Get Smart cone of silence world, because what else are we left with?

I mean, we're essentially saying we cannot use legislation in this fashion because there are all those publications out there, that Eugene wants to defend, which basically are, you know, privacy communications daily, where you get to read the transcript of what everybody's been saying that's been caught by a scanner.

PROFESSOR BeVIER: No, private communications of genuine public interest.

MR. TAYLOR: Well, let's test the limits of that. Suppose that Manny and I have a conversation that Eugene overhears, during which we are plotting to murder you — don't take it personally.

SPEAKER: I haven't in the past.

MR. TAYLOR: Lillian's listening in because it's a cell phone conversation, and now she knows that you're going to be murdered unless she does something about it. But I think your reading of the law precludes her from doing anything about it.

MR. ROTENBERG: Well, I think your hypo's interesting. If she goes to the police with this information, that's one thing. If she goes to the radio station with this information —

MR. TAYLOR: Does the statute let her go to the police.

PROFESSOR BeVIER: But maybe I would just go to you with it, Marc.

MR. TAYLOR: I don't think it lets — does it let you go to the police?

SPEAKER: That's true. But there is such a thing as prosecutorial discretion. And frankly, if there's a civil lawsuit left that Lillian can bring, she'd be stupid to bring it because no jury on the planet would award her any money and no lawyer worth his salt would take it on a contingency fee.

So, you can consider outrageous —

SPEAKER: What if the police don't much like Marc?

MR. ROTENBERG: Another not unfamiliar problem.

SPEAKER: And they say for whatever reason, you know, we don't think is serious. And Stuart —

MR. ROTENBERG: I don't have a porch, by the way, in case anyone's going there.

SPEAKER: I mean, the notion in which the only way you can blow the whistle on that conduct is by going to the police. And if the police say, "Sir, we're not interested," that's the end of the story. It is now a crime, and so to blow the whistle on bad conduct seems to be a pretty troublesome notion.

SPEAKER: But, if law enforcement was really at issue here, there are adequate alternative remedies. There are all sorts of other law enforcement agencies who can go and warn the person, and there is such a thing about whether or not any civil law suit would be laughed out of court, and whether any —

SPEAKER: Why can't you go and warn the person?

MR. KLAUSNER: We want to get two more quick rounds, so that nobody will be murdered here.
We'll take one from over there, then to the back room will be the last question.

AUDIENCE PARTICIPANT: You've been talking a lot about the narrower case, what happens in a narrower case. It turns out we have one, *Boehner v. McDermott*, the case of Congressman Bainer suing Congressman McDermott, who got a tape of Boehner, who was talking about how to deal with the ethics violation against Gingrich. He turns around and gives it to the *New York Times*. The *New York Times* isn't getting sued by Congressman Bainer, but Congressman McDermott is. The case is currently on remand before the D.C. Circuit.

I'm curious what the various panelists think is likely to happen in that case, given that it presents a marginally narrower set of facts, or at least no one's plotting to blow up the Supreme Court.

MR. ROTENBERG: That's true, by the way, in the third case, which is *Peavy* from Texas. In that case, the press did not have clean hands. They were, in effect, participating in the, you know, ongoing disclosure of the unlawful interception. So, your point is good.

My quick answer is that I think it's quite possible in both *McDermott* and *Peavy*, you do not get the benefit of *Bartnicki*. These are really somewhat extraordinary facts, and under the Breyer concurrence I think it's a narrow bit of protection here.

MR. TAYLOR: My answer is that you lose Breyer and O'Connor's up for grabs, as in every other field.

PROFESSOR VOLOKH: My answer is that this is a clear case where the First Amendment gives people the right to say, "This is what our elected officials are saying when they don't think we're listening."

What's more, I should stress that at least under Lillian and John's theory even if the speech wasn't overheard, but rather it was leaked by somebody who was in the room who was under a non-disclosure agreement, the press would still be barred from publishing it. That can't be right. This seems to me to be a classic example of constitutionally protected reporting of factual information.

MR. ROTENBERG: I don't think that's a good analogy because the person who breaks the NDA clearly violates a contract. If the person to whom he gives the information widely disseminates it is somehow complicit, pays him in some way —

AUDIENCE PARTICIPANT: No, no — there's no complicity.

MR. MALCOLM: Then fine, but then you don't have a statute that says that this is somehow wrongful.

PROFESSOR VOLOKH: Well, let's say a state legislature passes a statute protecting information covered by non-disclosure agreements just as much as the law protects personal —

MR. MALCOLM: And if the press realizes that the person has violated the NDA to get it? Remember, one thing that's important —

PROFESSOR VOLOKH: Exactly.

MR. MALCOLM: And if I was with the Electronic Privacy Information Center, I'd probably side with them.

MR. KLAUSNER: Okay. In back.

AUDIENCE PARTICIPANT: I'll ask all the questions at once.

I take it at the first level, you would not say the First Amendment prohibits someone from intercepting something. They're not —

SPEAKER: Communications and not interceptions.

AUDIENCE PARTICIPANT: Going a step further, I assume you would also agree — you said earlier something along this line — that there's not a person then that would punish the person who intercepted it for disclosing it.

PROFESSOR VOLOKH: Yeah, although I think it would probably be better to punish for the interception.

AUDIENCE PARTICIPANT: Once you go down that — go down one step more. The interceptor and his friends — I know the interceptor's going to go and steal it. The interceptor brings it back to me — this is our plan. I turn around and publish it.

PROFESSOR VOLOKH: So it's a conspiracy.

AUDIENCE PARTICIPANT: Conspiracy. You get a little bit further along that line. You may or may not go after the conspirator.

Then you take it one more step to, I wasn't involved in the end. But the interceptor comes to me and says, "Hi, I just stole the conversation." Now you publish.

PROFESSOR VOLOKH: I think there's a very basic distinction between punishing someone for disclosing something — which is, after all, speaking — and punishing someone for either intercepting something or being essentially involved in a conspiracy to intercept it. I think that's a pretty crisp line.

AUDIENCE PARTICIPANT: The disclosure's present in the second set, when the interceptor is being punished for his disclosure.

PROFESSOR VOLOKH: That's why I actually think it would be a lot cleaner to punish the interceptor and the interceptor's co-conspirators for the interception rather than for their own disclosure. So I would say don't punish for the speech; punish for the conduct.

But while your argument is intuitively powerful, exactly the same argument can be made as to the publication of information leaked in violation of a non-disclosure agreement. This is why I don't quite understand how Marc would purport to draw a distinction between the *Bartnicki* situation and the non-disclosure agreement case.

Clearly, we would all agree that if somebody has a non-disclosure agreement, they don't have a constitutional right to breach it. They don't have a constitutional right to get together with some other person and breach it. So therefore, according to this very logic you describe, then, if a newspaper gets information knowing it was leaked in violation of a non-disclosure agreement then it too could not publish the information.

So, I think your argument illustrates the slippery slope that I describe. Now Lillian and John may say that it is good for newspapers to be barred from publishing illegally leaked documents. But I think the right to publish them is a fundamental aspect of free speech.

MR. KLAUSNER: Any other comments?

Let me thank the panelists and the audience.

INTELLECTUAL PROPERTY

INTELLECTUAL PROPERTY RIGHTS: ADVANCING OR HINDERING MEDICAL BREAKTHROUGHS?

Professor F. Scott Kieff, *John M. Olin Senior Research Fellow in Law, Economics, and Business at Harvard Law School, and Associate Professor of Law at Washington University School of Law*
Professor Julia Mahoney, *University of Virginia School of Law*
Dr. Robert Oldham, *CEO, Cancer Therapeutics, Inc.*
Professor Arti Rai, *University of Pennsylvania Law School*
Mr. Michael Werner, *Director of Government Relations and Bioethics, Counsel, Biotechnology Industry Organization*
Mr. Daniel Troy, *Chief Counsel, Food and Drug Administration (moderator)*

MR. TROY: Good afternoon. I'm Dan Troy, Chief Counsel for the Food and Drug Administration.

The question today is whether intellectual property rights advance or hinder medical breakthroughs. The answer to this question is yes. The answer is also no. Of course, it depends.

Everyone can agree that if commercial entities, such as drug companies, lack the incentives that attend intellectual property rights to fund research, then medical breakthroughs will be hindered. At the other end of the spectrum, pretty much everyone can agree that intellectual property rights that are too expansive can prevent other entities from access to elements that they need to engender medical breakthroughs.

To be more concrete, if companies aren't given any incentives to isolate a particular gene and identify what it does, they are less likely to fund research, and then all such research would have to be funded by the government. Of course, much research is funded by the government, but the question is would anyone want a regime where basically all such research was funded by the government.

If, however, companies are able, as they are now in certain circumstances, to patent a particular gene or a stem cell line, then presumably the ability of others to develop therapies based on that gene or stem cell line becomes limited. Any therapy developed by the non-patent holder would then have to be licensed by the patent holder, and that, of course, is going to reduce the amount of research on that particular therapy. So, as is often though not always the case, the question is where to draw the line and why. A related question that I hope we'll be able to touch on is whether intellectual property rights advance or hinder the availability of medical breakthroughs. These are very closely related but slightly different questions. After all, the medical breakthrough serves a rather limited purpose if it's not widely and easily available to those who need it. This is an issue that my agency, the FDA, wrestles with everyday. We have a statute known as Hatch-Waxman, which allows generics to rely on the research of innovators to secure FDA approval. In exchange for surrendering the intellectual property rights to the data that the innovators, after all, developed, innovators were given additional periods of exclusivity. As long as they hold such exclusivity, they have an incentive to do additional research to find new uses for their drugs. Once the drug becomes generic, though, that incentive largely evaporates.

At the same time, the price drops markedly and this breakthrough becomes much more widely available. As you might expect, the political pressure to authorize generics is intense, but of course no one wants to cut off the research of the innovator companies to fund and find medical breakthroughs — hence, the dilemma.

Interestingly, as our panel reflects, these are issues that really cut across ideological and political lines. There are libertarians who believe in strong intellectual property protection and those who believe in extremely limited intellectual property protection, or not very much at all. The same is true of conservatives as well as liberals. Frankly, to me this area seems to be one in which utilitarian arguments may ultimately be the most persuasive.

Today, we have a panel the utility of which cannot be denied. One of the things that's really daunting and intimidating about getting into the food and drug and scientific world is we lawyers think we're reasonably well credentialed. Listen to the resumes of the people who are on this panel. Everybody's in the scientific community. They have gone to school much longer than we lawyers have and they're much, much better educated. And they remind me of that all the time.

I'm going to introduce them one at a time immediately before they speak so that they can be properly recognized, and we've asked everyone to limit their remarks to eight or ten minutes so we can have time for discussion and questions.

Our first speaker is going to be Professor Arti Rai, who is a professor at University of Pennsylvania Law School. She graduated Harvard; attended Harvard Medical School; and received her law degree from Harvard Law School. (See what I mean.)

After law school, she clerked for Judge Marilyn Patel of the Northern District of California and was a litigation associate at Jenner & Block and an attorney at Federal Programs Branch at the U.S. Department of Justice, which is not the part of Justice that represents FDA.

Immediately before entering law teaching, she was a faculty fellow at Harvard's Program on Ethics and the Professions. Her teaching and scholarly interests include law and biotechnology, patent law and healthcare regulation, so she's eminently qualified to address these issues today.

She's authored many articles in these areas and is a co-author of *Law and the Mental Health System — Civil and Criminal Aspects*. She's on the Board of Editors of the *American Journal of Law and Medicine* and has also taught at the University of San Diego and at the University of Chicago.

Please join me in welcoming Professor Rai.

PROFESSOR RAI: Well, my role as the first speaker on this panel was to provide some background on the issues and then weigh in with my own thoughts. Dan Troy has done such an excellent job of providing some of the background that fortunately, because I have way too much to say, I can perhaps abbreviate at least some of the background. In any event, as Dan has very acutely pointed out, there is no yes or no answer to whether IPRs advance or hinder medical breakthroughs. The question really is, when do we need them and where in the continuum between upstream and downstream research should they attach?

I think it's pretty clear, at least to me, that we need patents on end-product drugs. There is really no dispute about that. The question with respect to end-product drugs is how large the scope of IP rights should be. That is why, to some extent, we have this very complicated scheme, which Dan has already alluded to, known as Hatch-Waxman for end-product drugs. And then, of course, there are the very important access questions, which I think — unfortunately, we don't have as much time as we'd like to go into it today — but access questions get raised when you have monopoly rights on end-product drugs because of the supra-competitive pricing that necessarily is entailed. However, access questions can, of course, be dealt with on the insurance end of things. So, I'm not going to really focus on that issue today.

What I'm going to be talking about is rights on what might be characterized as upstream research — *i.e.*, more basic biological research — and how these rights affect the biomedical enterprise.

Once upon a time, this was not an issue because basic biological research was not the sort of thing that had much cash value. It was very much an ivory tower enterprise. So the idea of seeking patent rights or other IPRs in basic biological research would have been somewhat odd. Now, of course, everything has changed. Basic biological research is the foundation of the pharmaceutical industry, which, as we all know, is dominated by patents, and rightly so.

So some of the reasons why basic biological research has become the subject of this big debate are purely exogenous to the legal system. It's just a question of this research becoming much more important for commercial purposes. But there have also been some ways in which the legal system has done a great deal to encourage patenting of more upstream research.

The Federal Circuit, which, as many of you know, is the specialized appellate court that deals with patents, has lowered the so-called utility standard so that even inventions that are primarily useful, for further research only can be patentable. The court has also opened up the whole area of information technology to patents, and that could be the subject of a whole other panel, which unfortunately we do not have time to get into.

Basically, in this new world of patents, private firms have been seeking a lot of patents on upstream research. Over the course of the past decade, they've filed patent applications on everything from gene fragments of unknown function and sequences and proteins embodied not in their biological form but as data structures on a chip.

For reasons I'll talk about more in a minute, though, the legal change we should perhaps be most concerned about is the change that has influenced the behavior of institutions that receive public funding to do basic research. In this area, the most important influence has been two technology transfer laws known as the Bayh-Dole and Stevenson-Wydler Acts. These laws, which were passed in the early 1980s, explicitly encourage the patenting of research by publicly-funded entities, particularly universities and government agencies. Since these laws were passed, university patenting activity has increased precipitously. While universities secured only about 250 patents annually in 1979, immediately before the passage of Bayh-Dole, by 1997, that number had increased about ten-fold to about 2,500. This ten-fold to increase far outstrips the two-fold increase in overall patenting that we witness during this approximately 20-year period.

So, what sorts of patents are universities seeking? Well, they haven't gone quite as far as the private sector. They seem to have been constrained by academic norms, from going as far as the private sector. For example, they have not tried to patent gene sequences of unknown function, as has the private sector. But they have certainly patented some very fundamental research.

I want to cite in this regard one recent and prominent example of which many of you may be aware, which is the very broad patent that the Wisconsin Alumni Research Foundation, the technology transfer arm of the University of Wisconsin, has on what are known as primate embryonic stem cells. Because human beings are, of course, primates, this patent covers all human embryonic stem cells as well.

A little-known fact in the stem cell debate is that the research that was necessary to get this primate patent was, in fact, publicly funded. Nonetheless, WARF has not only patented stem cell lines but it has exclusively licensed most important therapeutic and diagnostic uses of these stem cell lines to a single company, a small biotech company known as

Geron, which is located in California.

Proprietary activity in academic biomedical science now extends not just to patented research but also unpatented research tools, such as databases, cell lines and the like. Private firms often impose not only access or subscription fees for the research tools they give to universities but also what are known as reach-through royalty rights, which essentially claim a percentage of any invention that might come out of work on the research tool.

Universities return the favor by imposing the same restrictions on private firms. It's a tit-for-tat sort of situation. And now this arms race to seek rights has even spilled over to transfers of tools between universities. Transfers of tools between universities can often contain some of these same restrictions.

So, why worry? Why worry about any of this? Perhaps there's no reason to be concerned. I would offer three reasons, though, why I think we should be concerned. The first is the problem of supracompetitive pricing that attends the creation of all monopoly rights, even when those rights are freely licensed to all comers. Concerns about supracompetitive pricing are particularly acute for publicly-funded research. In the case of such research, the conventional argument that one tolerates supracompetitive pricing in order to provide an incentive for invention simply does not apply.

In addition, the argument that motivated Bayh-Dole, which was basically that we need universities to patent inventions and then license those inventions, probably exclusively in order to attract risk capital for commercialization, doesn't really make sense for discoveries like stem cell lines that can be disseminated widely without patents. We see lots of people who are very eager to get their hands on stem cell lines. Stem cell lines can also serve as the basis for patents further downstream.

Second, there are reasons to be concerned about monopoly control of basic research platforms — again, like stem cell lines. A monopolist is unlikely to see the myriad applications of basic research platforms. The standard response to this argument is the monopolist will have an incentive to license widely to lots of different researchers who will see these different applications. Unfortunately, these types of licensing negotiations often break down due to either inadequate information on the part of the parties involved or, even more frequently, strategic behavior. Breakdowns in negotiations are particularly problematic in the biological area because it's difficult to "invent around" research platforms like cell lines or receptors that will be targets for a drug, for example. We have to take biology, more or less, for better or worse, as a given.

Now, these problems of inadequate information and strategic behavior only compound when the basic research platform is owned not by just one entity but by many different entities. The follow-on researcher who wants to work with the platform has to negotiate with all these different entities. In this situation, we get what my colleague Rebecca Eisenberg has called the anti-commons problem. A good recent example of the anti-commons problem is posed by single nucleotide polymorphisms, or SNPs. Now, that's quite a mouthful, but basically, a SNP is a single based locus at which the DNA sequence of individuals varies. SNPs — particularly SNPs found in coding regions of DNA — have promise as tools for tracking down disease genes, and also as tools for predicting individual patient responses to drug.

Not surprisingly, biotech companies have in recent years identified and sought patents on lots of these SNPs. This has prompted the concern that rights in this important research platform will be balkanized and difficult to aggregate usefully by follow-on researchers.

So, what should we do as a response to these concerns? The most obvious response would be some sort of change in the patent statute, or at least in its interpretation. In fact, some small changes have occurred and I would argue that, in large part, they have been quite salutary, particularly in addressing the potential for an anti-commons problem.

For example, in response to pressure from the National Institutes of Health and from the academic science community, the Patent and Trademark Office has issued some new utility guidelines that raise, to some extent, the bar with respect to patenting inventions that only have speculative research uses. The PTO has also issued related guidelines that indicate the scope of patents on gene sequences will be relatively narrow.

We should be concerned, however, about making large changes to the patent law. Patents clearly matter, as many of you probably know, to the biopharmaceutical industry. And if you talk to biotechnology entrepreneurs, they will insist that they need patents on their research platforms in order to develop those platforms in the first instance, and then also to attract risk capital for further development. And there are reasons not to dismiss these claims out of hand.

It is pretty clear that although biopharmacology is increasingly becoming an information industry that's based on data, it needs to have property rights claims, at least in downstream research, in order to get the research done. There's no reason to believe that biopharmacology will become like the software industry, for example, where we have seen so-call open source models of development, models of development that actually forbid property rights in any aspect of the software that is developed. It is unlikely that we are going to see that in the biopharmaceutical industry. So large changes in patent law are probably not a good idea.

Some might think that we could try to draw a line within the patent statute between what is upstream and downstream. Those who would think this might be encouraged by the fact that even pharmaceutical industry players have decided that, at least in certain circumstances, upstream research should not be patentable.

For example, pharmaceutical companies have spent their own money to put SNP research in the public

domain to basically preempt the possibility of patents in SNPs, and hence the possibility of an anti-commons problem. So, one could perhaps think that maybe there is a way we could cordon off certain types of research and say that it is not patentable because it is too upstream, and then what's downstream should be patentable. Unfortunately, what is downstream is very much in the eye of the beholder.

If Congress were to try to draw some sort of line that was more specific than the current, rather vague utility standard, every industry stakeholder around would be trying to convince Congress that their particular inventions would be or should be sufficiently downstream to be considered patentable. So we would have this massive rent-seeking going on, and the prospect of Congress trying to draw a line in that environment is not particularly attractive.

I would argue that when research is publicly funded, though, the situation is quite different. Obviously, no one can claim that the patents are necessary to develop the initial invention. The argument that motivated Bayh-Dole, which was basically that we need patents in order to commercialize invention, isn't always persuasive. For example, stem cell lines can be rapidly disseminated, and they will doubtless be developed because of the potential for downstream patents.

In fairness, though, even with publicly funded research tools, there might be circumstances in which patenting in exclusive licensing are useful. For example, patents were useful in developing machines for DNA sequencing into commercially reliable equipment. The policy challenge is to distinguish publicly funded invention that is best developed through patents or other proprietary claims from inventions best developed by being left in the public domain. Needless to say, in an area as complicated and rapidly evolving as biomedical research, this is a really formidable task.

Briefly, I would argue that the institution that should have authority to determine what lines should be drawn in terms of what publicly funded research is patentable and what is not is the National Institutes of Health. In the question and answer session, I would be happy to go into the reasons why. But the problem, as matters currently stand, is that under the Bayh-Dole, NIH has very limited discretion to issue a policy of no patenting or no proprietary rights with respect to publicly funded research. I would argue that NIH should be given more discretion in that regard.

I've clearly run out of time and I'm happy to take questions.

MR. TROY: There is this tendency to think, that if a drug has been publicly developed and so, therefore, it shouldn't be able to be patented. There is a drug called Taxol. Some of you know about it. It is the standard treatment for ovarian cancer. It comes from the bark of the yew tree. NIH developed it decades ago, but they need to aggressively find a partner to bring this drug to market.

It's one of those situations where the company can be characterized as seeming absurd because they are trying to patent this thing that comes from the bark of the yew tree and was developed decades and decades ago. But if they didn't have any patent rights, their incentives to develop it would be limited. Again, NIH really was looking for a partner because NIH can't bring the drug to market itself; they can't manufacture it; they can't produce it.

So again, the initial reaction of, "It's publicly funded, therefore nobody should be able to patent it," is probably too facile.

I am not suggesting that is what was said, but it's a reaction that I initially had, and the more I learned about it, I realized that was not the right approach.

Our next speaker is Dr. Oldham. He is an internationally recognized cancer specialist. He is regarded as a leading pioneer in the development and use of biotherapy, which it says here is the fourth modality in cancer treatment. I don't know what the other three are; I'd be interested in hearing.

He is the CEO of Cancer Therapeutics, Inc., so he is from the private sector. It would be interesting, Dr. Oldham, if you have any reaction to the sort of accusation of private companies patenting things like gene sequences of unknown purpose and the implicit suggestion that there is, on occasion, an abuse or overuse of the patent system by the private sector.

Dr. Oldham attended the University of Missouri at Columbia. He completed his M.D. in 1968. During his medical schooling, he was awarded a PHS Student Research Fellowship and two PHS Cancer Clinical Research Fellowships.

He did his residency in internal medicine at Vanderbilt, continued his education with Medical Oncology Fellowship and graduate studies in immunology at the National Cancer Institute.

From 1975 to 1980, he served as the Associate Professor of Medicine and Associate Director of the Vanderbilt Cancer Center. He was the founder and Director of the Division of Oncology. He went back to the National Cancer Institute from 1980 to 1984, and then in 1984 he established the Biological Therapy Institute and the Biological Research Center of the University of British Columbia and Biotherapeutics, Inc., which he took public in 1986.

In addition to his current role as CEO, he is the Associate Director of the Singletary Oncology Center in Georgia. He holds a Clinical Professorship of Medicine in Hematology Oncology at the University of Missouri at Columbia and a Clinical Assistant Professorship in Internal Medicine Oncology at the University of Kentucky.

He is also the Medical Director and Vice President for Business Development for CBA Research in Lexington, Kentucky, which I assume, among its other things, researches how one can do all these things without ever sleeping.

MR. TROY: He is the founder and has served as the editor-in-chief of three medical journals. He has contributed over 400 papers to the medical scientific literature and has presented thousands of abstracts, posters and lectures at various meetings on cancer research and treatments.

I hope you're suitably intimidated, because I certainly am. Dr. Oldham.

DR. OLDHAM: And as you know, my time is now up.

I'm going to take a completely different tack and try to be very brief about it.

In 1902, the Food, Drug and Insecticide Agency was created by legislation. In 1938, it was changed to the Food and Drug Administration and the charge was to make sure that drugs were safe. In 1962, the intent of Congress changed such that Act was altered to prove that drugs were not only safe but efficacious. As a result of these legislative changes, an agency has grown and expanded to regulate the drug development that we know today.

Most of the drugs and the intellectual property that were spoken of earlier had to do with drugs being applied to broad markets — hundreds of thousands of patients. The cost of those drugs run from $300- to $500 million each to develop, taking 15 to 18 years to get through the regulatory maze. That is the current situation.

The reason intellectual property and patent and proprietary rights are important is you have to somehow raise the money to create the hundreds of millions of dollars that you need to develop a new drug under current Food and Drug Administration regulations.

I want to suggest that our technology has bypassed this whole system in a dramatic way. We need to change the Food and Drug Administration or we need to develop a new track within it. Here is the reason. Today, my company, as with other companies, can take your white blood cells from your blood, your tumor, and we can grow them in the billions. We know that these T-lymphocytes can be curative in certain forms of cancer, when used with a drug called Interleukin 2.

Today, I can take a tumor, grow the white blood cells out, give them back to the patients as a form of therapy, and that treatment can only be used on that patient. Of course, the DNA, cells and tissues involved all came from that patient and are used in that patient. Therefore, all the ideas of managing risks for large populations don't apply to that circumstance. And indeed, I would suggest, when you talk about property rights, that those cells really belong to that individual.

The Food and Drug Administration and government has great limits on it, in terms of impinging on our property rights — something that this society spends a lot of time talking about. This morning's session was a good example of that. I wonder if we ought not to begin to think about our own DNA, our own cells, our own tissues, our own organs and our own bodies as the property of the individual to which those elements have been granted.

Maybe initially, it belonged to our parents, so some would say today the creation of the first cell in the embryo created a new individual, and that individual is imbued with all of the rights of ownership of the things that develop from that single strand of DNA. I would suggest that there is good reasoning behind that.

There has only been one case that has gotten any play in the courts that I know of, though I am not a lawyer. The John Moore case that went to the California Supreme Court was about that issue. Cells grown from Mr. Moore were used to develop drugs. Mr. Moore said, "Gee, you used my cells to develop drugs; maybe you should recognize my ownership of those cells." Indeed, there was recognition of that in the Supreme Court of California — not as complete as Mr. Moore's lawyers would have liked, but excellent recognition nonetheless.

So I would wonder today if it's not reasonable to test this issue, and I would ask all of you who are mostly lawyers whether or not this is something we should talk about and think through. Do you own your own cells? Is this my hand, or is the Food and Drug Administration's hand?

This is my arm, so I believe it belongs to me. I would like to ask whether, as you get ill, your parents get ill, your children get ill, if the elements of their bodies can be used to develop treatments that can be curative, should this be an area that the Food and Drug Administration regulates or not? I would suggest that they should not and we need to test this position in the federal courts.

Thank you.

MR. TROY: Well, the FDA would answer yes.

It is actually a really interesting thing called a transgenic fish, where you change the gene of the fish. To make the fish grow much faster, we have developed these transgenic salmon that grow twice as quickly, and grow to five, six, seven, eight times the size of a normal fish.

But it is not the fish whose gene you change but the children, the spawn, of that fish. So the question is, is the gene an article that is intended to affect the structure and function of the body of man or animal? And it is, clearly, when you put it into the first fish. But what about the fish's child?

That is a real issue we are wrestling with right now — does the FDA have jurisdiction over the transgenic fish.

MR. TROY: You think I'm making this up. But what it illustrates — I think this is Dr. Oldham's point — is that we're taking these very old tools from 1938 and trying to adapt them to technologies that nobody ever conceived of.

MR. WERNER: Thank you.

Yes, I did, and over several beers, I'd be happy to tell you my war stories. I will say, professionally, it was remarkable because there were really interesting issues and a lot of smart people, policy-wise. Obviously, there were some people who made some severe political miscalculations, but that's another story. But yes, I do admit that.

I tell you, there are some audiences that I speak in front of, where they say that they can't believe I admit that I work for the biotechnology industry. So, I get it coming and going.

I also will be brief, and I wanted to lay out some of the things that my members, who are biotechnology companies, think about. Dr. Oldham is somebody who is active in our organization, and I want to elaborate on some of the things he mentioned.

The important thing to remember, by way of background, is that the biotechnology industry is an industry comprised of small- to midsize companies. We have about a thousand members. We're a big trade association. We've got about a thousand members, over 90 percent of whom have no products on the market, and therefore no revenues from the products. About 40 percent of them have fewer than 50 employees. So the vast majority of them are small businesses. They are small companies.

As I said, they have no products; they have no revenues. You've heard that it takes how many years, how many hundreds of millions of dollars, to get through the FDA regulatory process? Of course, they all hope that they will have some product eventually, or some technology platform eventually.

So how are they going to get that $300 million and how are they going to fund all the research that they do, which ultimately will lead to the kind of medical breakthroughs that all of us as a society want? That's how we get all the drugs and all the biological products and all the vaccines and all the other things. The way they do that is by going to Wall Street and attracting investors. The primary asset that they have is their intellectual property because, as I said, they do not have a product. Sure, if you're Merck or your Pfizer, you might be able to fund your next research project with all of the money you made on Viagra. But if you're a biotech company, you can't do that. So what do you have? You have intellectual property. That's your asset. That is what is valuable. That's what keeps it going. That's what finances the research, and ultimately it's that research that gets turned into the product that we all use and we all want when we are sick.

Now, you also heard the relationship of the Bayh-Dole Act and some of the other federal statutes. It has been, I would argue, the explicit federal policy in this country for two decades that we create this relationship between the federal government through the National Institutes of Health, academic institutions and the biotechnology industry.

The rules are such, with technology transfer and the like, that public funding, which as we all know is a huge investment of public money in biomedical research in this country — the combination of all those things is why we have in this country a biomedical research enterprise and a biotechnology industry that is literally the envy of the world. It's why the best scientists in the world come here to work. It is why patients come here to get access to the kind of products we develop. It has been an enormously successful policy. It's something our government and our leaders should be proud of and we all should be proud of. And intellectual property is a fundamental foundation of all that.

Let me just talk about how these issues go from the macro level and get down into the micro. You've heard a little bit about this, but I was going to use stem cells as an example.

What is interesting is that there are numerous ethical issues that are implicated by this kind of research. What we have seen, though, after the President's announcement in August, is that Congress, in particular, but also, the advocates of the research, the scientific community or patient groups, have focused less on that. They have now started to focus on what they call the viability of the cell lines, which is to say, are these cell lines from which we can do more research? Are they scientifically viable? And related to that, is the availability of these cell lines. That's where intellectual property has suddenly come barging through the door, and why suddenly people who didn't think much about intellectual property issues, and they argue didn't know about them or didn't care about them, suddenly now care about them a great deal.

There has been at least one, if not more, congressional hearing since August, where the focus has been not on what is the scientific potential of stem cells and whether it's a good idea to use cells from embryos — that was the debate pre-August — but who is going to have access to these cell lines and commercialize all of this.

Who is going to do all this research? And are the intellectual property laws an impediment to that because, as was discussed, the University of Wisconsin has licensing arrangements with a particular biotech company? In NIH's recently published registry, there are a few biotech companies that say they've got any number of cell lines.

From our perspective, of course, this is the system that has worked very well in this country for many, many years, as I talked about. It has led to the availability of lots and lots of medical breakthroughs for all of us.

You know, a company like Geron or companies that develop stem cell lines didn't just get into it. They've been working on this stuff for a long time. They took business risks and they attracted investors because of it, and they've made a commitment to commercializing this research. They did that because they had intellectual property rights. It would

seem unfair, at best, now to suddenly say, "Well, we, Congress, can strip all that away. "

When we talk about solutions, it's an important discussion, and obviously one that is worth having. But it's going to be important to remember what kind of precedent you are setting. If you have a whole industry whose foundation is the intellectual property system, you have to be very careful about changing those rules. For what it's worth, the companies that are involved in the stem cell matter have said they will make the cells available for researchers, or at least Brezogen (phonetic) came out publicly and said, if academic researchers want this, we'll make it available. The University of Wisconsin said it will make these available.

When we get down to commercialization of that research, then that's a whole different question and obviously that is something that companies with the intellectual property rights now say, as you would expect them to, "Well, we'll talk and we'll see what kind of licensing arrangements can be reached." It remains to be seen whether anybody can work anything out.

What is interesting to me is that we have gone from this issue about stem cells, all the lightning-rod issues about embryos and when life begins and all of those really important issues. Now we are going to get into the nuts-and-bolts questions about things like intellectual property.

At a certain point, hopefully, we will start talking about other issues, and it will be intellectual property issues that dominate the stem cell matter. I expect lots of congressional activity next year. Whether or not there's legislation, who knows? But lots of pressure, I would expect my members to start getting a lot of pressure, maybe from the public or maybe Congress, to start relinquishing their intellectual property rights. It remains to be seen how we will proceed.

Thank you very much.

MR. TROY: Thank you. One of the things that is interesting about being at the FDA is that you see the intersection of bio-terrorism and national security and biomedical research. One of our most important responses in the national security context is going to be developing rapidly things like vaccines and treatments. I should hope we wouldn't need them, but you have to be prepared, unfortunately, in this day in age.

Stem cells are almost the easy case in intellectual property rights, but maybe Professor Mahoney, who is coming up next, can address it.

One of the hard questions is, what if you have a gene that you haven't discovered or developed but you were the one to discover its uses, you were the first one to map that out? Is that the kind of thing that intellectual property rights should address?

Our next speaker is Professor Julia Mahoney, an Associate Professor of Law at the University of Virginia. She also has taught with the University of Southern California and Chicago. Before law teaching, she was associated with Wachtell Lipton Rosen & Katz, where she worked in a corporate department on acquisitions, mergers, divestitures and restructuring.

She received her J.D. from Yale Law School in 1987 and her Bachelors from Columbia in 1984. She teaches the interesting mix of corporations, mergers and acquisitions, reproduction and the law, feminist jurisprudence and property.

PROFESSOR MAHONEY: Thank you. I'm here because of my interests in property, business organizations and the regulation of medical technologies.

As we have heard already, the problem is easy to state but difficult to solve. We want two things. We want to encourage innovation, but we also want to ensure that the innovations that we encourage are widely disseminated so that human suffering can be alleviated, and so that these initial innovations can form the foundation for later innovations.

The tension is obvious. Legal regimes that promote innovation at initial stages — what Professor Rai referred to as "upstream" innovations — will not necessarily promote wide dissemination. Of course, legal regimes that promote wide dissemination may frustrate initial innovation. Realistically, we ought to recognize that it is hard for law to get it exactly right all the time. We should expect to run into problems because what we are trying to do is difficult, and we will need to ask ourselves constantly on what side we are erring.

In short, the fact that things may be out of kilter – as evidenced by the strong criticisms triggered by some of the property rights accorded to biotechnology companies or the Wisconsin Alumni Research Foundation — ought not to cause us surprise. Moreover, we ought to expect to be constantly modifying the contours of property rights.

It is important to understand that the history of property law is replete with instances where existing property rights have been adjusted. This is not to say, however, that the history of property law is filled with major overhauls. Rather, changes in property rights tend to be incremental.

What matters in terms of designing property rights regimes to strike the appropriate balance between initial innovation and dissemination of knowledge is that we create effective institutions; that we have the sorts of societal organizations that we need in order to encourage the kind of behavior that we want. And this is the point where things can get tricky.

I want to talk about something that I think is terribly important to this debate but which has not, so far, been showcased in discussions, and that is the following. When we examine issues revolving around property rights in medical innovations, we note that three types of institutions interact. We have for-profit firms, we have non-profit firms and we have governments. So let me talk about each of these three institutions, and detail how thinking carefully about the social roles of these institutions are and how they interact with one another can illuminate our consideration of the problems that this panel addresses.

The first institutional category is that of profit-making firms. Or maybe, since a lot of biotechnology companies don't throw off a lot of profits yet, I should refer to them as profit-seeking firms. Profit-seeking institutions raise capital. And the reason that people give them capital is that they expect to get money back some day; ideally, a lot of money. These institutions are, in theory at least, operated to promote the financial interests of their shareholders. Do we think this is a bad thing? Of course not. If I asked you what institutions have fueled the explosive economic growth of the past 200 years, one of your first responses would be: "Corporations." Now, if I followed that with the question, do you think that corporations have no duty to the public whatsoever, you would probably say no. But there is widespread agreement that the principal goal of business firms is to enrich their owners.

Everyone understands that when corporations engage in charitable behavior, they do so with an eye toward benefiting their shareholders.

This is not wrong. We have set up legal regimes of corporate governance so that investors in profit seeking firms can realize returns on their capital. It should not offend us that managers of corporations are not, every hour of their waking days, seeking to further the public interest. The fact that they strive to maximize the returns of their shareholders does not make profit seeking firms evil, or even bad corporate citizens. But we ought to recognize what their incentives and objectives are because that helps us to understand how they will interact with my next category, which is the government.

The government has a crucial and important role to play, both directly in conducting research at NIH and other governmental entities, and also indirectly in funding research conducted by others. If I asked you what the government ought to be doing, you will all reply — this is the Federalist Society, after all — in one big voice, serving the public interest. No, I realize you probably won't reply that—I was only joking.

Nevertheless, if you went and asked a group out on the street what it is the government is supposed to be doing, one thing people would say is, "promote the public interest." They invent things that will cure sick people; they fund important research and make it available to everyone. That is what government should do.

Of course, we want the government to do that. But there is the problem of what happens when the government interacts with a profit-seeking firm. When governments interact with profit-seeking firms, the profit-seeking firms often attempt to get as much of the valuable government property as they possibly can and then exclude others from it. That is the nature of the profit-seeking firm. So we ought to be alert to the possibility that the government will, in effect, either give away valuable property, or transfer valuable property rights for less than their full financial worth.

There has been a great deal of upset about the fact that various stem cell patents have been gotten on various developments that were funded on public money. The solution to this problem is to understand that this is an endemic problem, this is going to occur all the time, and to figure out ways to avoid its happening.

The third category is non-profit institutions. Now, Professor Rai talked about the Wisconsin Alumni Research Foundation, which holds many valuable patents and which defends its property rights as vigorously, I think it is fair to say, as any profit-seeking firm in existence.

The University of California also holds a number of extremely valuable patents and, again, they don't seem eager to give them away and join hands and sing Kumbaya with the rest of the world. Not surprisingly, they would like to be compensated for these patents.

We have to ask ourselves the extent to which we are comfortable with non-profit institutions behaving so aggressively. I think that the specter of non-profit institutions developing valuable property, often with the use of government money, and then pursuing their financial self-interest as aggressively as profit-seeking firms gives a great number of people pause. In discussions I have had with non-lawyers about biomedical issues, concerns about "greedy" nonprofit firms have come up on many occasions.

When we look at non-profit institutions, we do not expect them to behave as profit-seeking firms do. We know that they don't have residual shareholders. We know that they do not, in theory at least, have owners. And so, the question arises about whose interest they are supposed to be promoting.

Now, I suppose in the case of WARF, the interest they're supposed to be promoting is the Wisconsin alumni. But at the same time, a lot of people believe that non-profit institutions do have some duties to the public. It is fair to say, however, that so far there has been little sustained discussion of the precise duties that non-profit organizations that hold these sorts of property rights have to the general public.

I don't think we've even begun to develop a theory about what kinds of behavior we expect from non-profit institutions. But I think that the enormous role that non-profit institutions play in this area means that we need to start

thinking much more carefully about what it is that we expect from non-profit institutions.

I want to emphasize how important non-profit institutions are in this area. Not only are there the universities, but there are a lot of non-profit organizations that are set up by people or families of people who suffer from terrible diseases. One question that constantly arises is, if they had gotten patent rights or if they had simply collected a database of the blood samples that would shed light on genetic predispositions to such diseases, then what obligation should they have to share with others?

For example, when families have donated blood samples to non-profit institutions, they often are surprised or horrified to learn that the non-profit institution is not sharing the blood samples with all interested researchers. This, again, is a glitch in our understanding of non-profits and betrays the fact that we have not yet thought a great deal about how the rights and responsibilities of non-profit institutions.

I think Mike Horner was correct when he said that we have a great deal to be proud of, in the institutions that we've developed in this country. But I think that there is always room for improvement, and that in shaping the society that we want in order to encourage both initial innovations and wide dissemination, we have to think carefully about what we expect from all three types of these institutions, and in particular, what we expect from the way these institutions should interact with one another to maximize social welfare.

MR. TROY: Our final speaker before our discussion is Professor Scott Kieff.

Remember how I talked about how absurdly well-credentialed people are in this area. Mr. Kieff is an Associate Professor of Technology, Law and Business at the Washington University School of Law and also a faculty fellow, The John M. Olin Senior Research Fellow in Business and Economics, at Harvard Law School.

He was a trial lawyer and intellectual property lawyer, and was visiting as an assistant professor at the University of Chicago Law School and Northwestern University School of Law. He graduated with a degree in — get this double focus — molecular biology and applied microeconomics — from MIT in 1991 and, as an undergraduate, was awarded a two-year fellowship sponsored by the National Science Foundation for research in molecular genetics. As an undergraduate. That makes me feel pretty inadequate.

He served as a law clerk to the Honorable Giles Rich at the United States Court of Appeals for the Federal Circuit. He's delivered many articles and speeches about obtaining and enforcing intellectual property rights. He's the co-author of the treatise and casebook, *Principles of Patent Law*, which is now in its second edition.

His research interests involve the interface among law, economics, ethics and creative endeavors such as science, engineering, medicine and art, with a focus on technology law and business, intellectual property, contracts, unfair competition, antitrust, complex litigation and the allocation of decision-making ability and authority in disputes involving technological facts.

He was an associate at the firm of Pennie & Edmonds in New York and an associate and counsel at the firm of Jenner & Block in Chicago.

In addition to teaching at the Washington University and Harvard Law, he maintains his connection to the law firm and business communities through an ongoing consulting practice. So he is at least another member of this panel who never sleeps. Thank you very much, Professor.

PROFESSOR KIEFF: Thank you very much. I really wish my folks were here because they would have liked that.

When we think about the role of government and we think about legal systems, we can imagine some having a difficult time. We can imagine having a difficult time, if the legal system is trying to decide what to do with stuff that we have at a certain time, but that changes. We might have to change that system. Or the stuff we had yesterday changes, and tomorrow we have different stuff. We might have to change that system.

But imagine a system designed to help us figure out what to do with all the stuff we might get. Then, as we get it and as it wants us to get more, why should we necessarily redesign the system? You see, patent law asks us to get new technology. I'm not sure that it makes sense to say that, therefore, patent law doesn't know what to do with new technology.

It seems to me that patent law was designed from the very beginning to get all the stuff that we couldn't conceive. In fact, if we really could conceive it, it wouldn't be patentable. It would be not new or it would be obvious. Patentability is all about the stuff that's not obvious. It's all about the stuff that's not foreseeable.

So, the notion that patent law is broken because new technology that we didn't expect has come to be — I don't know – but it does not make sense to me. I think we expected it because we didn't expect it. That's the stuff that patent law was supposed to get us, exactly that stuff we didn't expect.

Now, how could patent law be working out for us? Imagine the notion that patents on upstream stuff could frustrate the ability of us to make downstream stuff. That seems to be a big problem with patents on express sequence tags or SNPs or other basic biological research tools like stem cells. We also can imagine, in fact, entire industries breaking down because of patents on all the upstream stuff. That's why we don't drive cars — because patents on screws prevented us from getting cars.

PROFESSOR KIEFF: Oh, except I've got one. And most of us have them, too. We've seen patents on upstream stuff before. So the upstream nature of the problem can't necessarily be the problem.

I'll now make a little regression here to patent law. Imagine I have a patent on a composition. I think it is going to be great as axle grease, but it turns out that it really tastes great. It's great as a sweetener. Well, for those of you who know patent law, it turns out that intent is not part of the patent case. If I claim the product and you use the product, whether you use it to shine your shoes, or sweeten your tea, it does not matter. You still infringe.

We have never required a patentee to stake out the turf of all the possible uses for her invention. The fact that the patentee doesn't know all the uses is arguably nifty because then other folks can come along, figure out those uses and they can get some patents, too. That's not so bad, and we have seen that work in lots of industries, again, like automobiles, radios, TV, telephones.

What we've heard, in fact, is talk about the utility requirement. I've always thought it was kind of a funny problem because it seems to me, the argument goes, "Well, you've got a patent on this thing and I really want it, so it's not useful."

PROFESSOR KIEFF: Well, then you don't want it, right? If it's not useful, then what are you in court for, or why are you up on the Hill asking for that patent not to be issued? You're up there because you want it. And the fact that you want it means it's useful. It seems to me, you want it badly and that makes it very useful.

We've asked a lot of important questions up here, like, when is it best to have so-called strong property rights or weak ones? When is it best to have strong enforcement or weak enforcement? I don't know. But I do know someone who knows.

I wish Steve Forbes had been up here this afternoon to give his talk because I would have just inserted that right here. How does the story go? Well, if there are folks lining up to use the stuff and they really want it, we have a name for that. Those are called customers. And for those of us who like markets, we love customers. They're the best thing since sliced bread because we sell to them. So the notion that the patent is going to restrict output is a funny thing.

In fact, patentees want to push output. Why? Not because they care about the public in the "gee-I-really-care-about-everybody" kind of way. No. They care about it the way Steve Forbes told us; they care about it because they have to. That's what they're in the business of doing. That's how they make their money. That's how markets work.

I only make money if I have customers. That means I need to pay attention to my customers. I need to sell them what they want, and I need to do it at a price they'll pay because charging them a price they won't pay doesn't do me any good. It really hurts me.

So, why do drug dealers give away free cocaine? To get more customers, and to tell the other customers who will pay a lot of money, you see how well it works? These folks are lining up to do it.

If you're a drug company and you have a patent on a drug and want to charge a lot of money, might you choose to give it away for free to a lot of other people? Sure, so you can tell the FDA, look at how well it works. It works really well. Now give us approval so I can charge these other guys a lot of money.

You would rationally choose to engage in aggressive price discrimination. We know that even a dyed-in-the-wool ultra-aggressive, cold-hearted monopolist will push output to the full competitive levels, if she can price-discriminate. In fact, we see an immense number of mechanisms designed into the patent law, designed long ago, before we even thought about price discrimination theory using those words, but purposely designed into the system to allow patentees to elect to price discriminate. We did that, I think, because we wanted them to price discriminate. We wanted them to aggressively push output.

Remember, to the extent we don't like monopolies — that's an interesting question, especially for this audience, but let's assume for a second that we happen not to like them— the reason we wouldn't like them is because they restrict output, not because they raised price.

If they push output to the competitive level, all the rest of this becomes a distributional problem. We could have income taxes or we could do other things to re-distribute wealth, but it's a wealth problem. It's not a problem inherent with a market — at least, a market that has some wealth.

There are some other kinds of problems that we have explored, and I'll probably stop early because I want you to have lots of time to ask questions. But let's just think a little bit about one of them. How are we going to get the information about what patents should be gotten, what patents should be enforced? How are we going to get that information to the decision makers, and what decision making process will be the least expensive? It seems that if that information exists and is knowable by private parties, then wouldn't it be great if we could just get those private parties to come together and negotiate.

If that information is knowable by the government, then let's ask the government. But the interesting thing about each of the markets we have heard about is that most of the participants are pretty well expert. They know their stuff. They know what each other has. They can value what each one has. There will always be bargaining breakdowns, strategic behavior. There will be lots of problems. It will not be a perfect market because no market is perfect.

But all the standard tests we have learned in law school about when decision making is best left to private parties and when it's best left to government agencies tell us that when the information is in the hands of the individuals who would be talking to each other, if we force them to, then we ought to let them talk to each other and force them to. That's exactly what property rule treatment does for patents. It requires that the patentee talk to the licensee and vice versa. If the licensee doesn't need to talk to the patentee, then we have to make a decision about what value to put on that license.

Everybody's familiar with basic liability rules. You are allowed to infringe, and then you go to court and fight over the price. But the neat thing about property rules is that you don't just go to court to set the fee because the property holder has the right to enjoin you. And you enforce this property rule strictly with the injunction. That forces parties to bargain. So the nifty thing about patents is, people are forced to negotiate with each other.

Now, let's ask this question. Have they done that in the biotech industry with patents on basic research tools? For those of you who do biotechnology, you'll be familiar with just two quick examples — Restriction Enzymes and the Polymerase Chain Reaction. One is a product and one is a process. In both cases, we had patents, and in both cases, patentees aggressively went around to all the possible users in the world and said to them, would you please use — those six o'clock phone calls at dinner time.

That's what patentees do. They go to every lab and they say: "would you use my process; would you use my product?" "And by the way, how much money are you making because we'll adjust our price accordingly." We've seen that market work in the biotech area before with upstream technologies — technologies for which downstream applications were not known. And I'm not sure that it won't work again, time and time again.

Thank you.

MR. TROY: Thank you. Before we throw it open, I just want to ask whether any of the panelists have anything they want to say.

Arti, you were furiously writing. Do you have some responses?

PROFESSOR RAI: I'll just be very brief because I know that you guys have much more interesting things to say than we could ever say.

As with all questions, the question of whether markets work better or government works better, is an empirical question and I would basically disagree with Professor Kieff's characterization that markets have, empirically, necessarily always worked to disseminate broad-based patents widely.

Unfortunately, I think the auto industry and the aircraft industry are two prime examples of situations where broad-based patents early on actually delayed innovation. In the aircraft industry, for example, there was lots of litigation between the Wright Brothers and follow-on licensers, and they didn't manage to get to "yes," as it were.

I think these questions are really empirical ones, and that's why I would urge us to look at the history, for example, of the auto industry and the aircraft industry and determine whether in particular cases broad-based patents were really the way to go on upstream information are really the way to go.

MR. TROY: Questions.

AUDIENCE PARTICIPANT: The WTO meeting just finished, and there were some changes in TRIPs. Can I get some reaction, first of all, to the fusion of technology and also international property rights and the regimes to regulate them.

PROFESSOR KIEFF: Yes. It's funny. All the folks who happen to live on sand in Saudi Arabia have a lot of money, whereas all the folks who happen to live on sand in Central Africa have no money. It's because underneath the sand in Saudi Arabia, there's oil, whereas underneath the sand in Central Africa, there's no oil.

I think all the evidence shows that the one natural resource that seems to be located wherever humans are located is brainpower. Therefore, it seems to me that strong intellectual property protection is, if anything, the great equalizer for national economies.

In fact, if I were designing a national economy for a developing country, I would want a very strong IP system because I think it would develop a strong commercial center in my country. It would capitalize on a natural resource that I have. It would be a capital-intensive industry and would be an industry that is inherently one to engage in trade.

And you could do it all very inexpensively, by the way, by simply saying whatever the U.S. court or British court or the French court — you could pick a country — whatever that court decides, will just apply as precedent. You wouldn't even need your own courts. You'd just need your own police system.

I actually think that strong IP rights ought to be what every country should strive for, especially the poor developing countries. In the short term, there would be some wealth transfer away because while they have brain power they don't have education, and you need to get education to make the best use of brainpower. But that can be fixed in the medium term. In the long term, that's always going to be a winning strategy.

PROFESSOR RAI: I actually agree with Professor Kieff in one respect. This goes back to something he mentioned in his talk, that price discrimination, which is what has very much ended up happening in terms of the international patent regime for drugs, is the way to go. Basically, third-world countries that can not afford to pay for these drugs and would not be a market for these drugs anyway, should get them pretty cost-free, and the first world should essentially subsidize the third world in this respect. So, that is on the access side with respect to end product rights.

With respect to whether we should have an intellectual property rights system that's strong across the board, I think that a basic, minimal level of intellectual property rights is probably necessary for industrial development. But, because I am an empiricist at heart, I look at the empirical data that economists such as Josh Lerner at Harvard Business School have gathered about how patent systems have affected countries in different stages of development. The answer is, well, we don't really know and the empirical work really doesn't yield any definitive conclusions. So, I guess I'm not as sanguine that the strongest possible intellectual property rights system is great for all countries.

MR. TROY: Yes.

AUDIENCE PARTICIPANT: First of all, this is a wonderful panel. It's very interesting.

Why isn't contracting essentially establishing the right with respect to forcing the right, and then giving parties the right to contract and pursue whatever objectives they want to? Really, the answer to some of the questions that Professor Mahoney was proposing.

PROFESSOR MAHONEY: I think it is important to note that if investors fear that property rights will be compromised, there will be less investment. That is why I said that it is important to keep in mind that in the grand course of things, if you look at the history of property rights, it is unusual to have huge dislocations, to have huge changes in property rights.

I am not saying that we should never have huge changes in property rights. I am simply saying that when people think about doing something like saying to Bayer, oh, by the way, the deal's off, you ought to bear in mind that goes against the whole force of history, and there is a good reason why the history of property rights has emphasized minute incremental changes in property rights, and not big dislocations. So you and I are in solid agreement on that.

With the question of the non-profits, I think it gets quite hard because we in this country tend to worship non-profits — I guess probably not at the Federalist Society, but outside the Federalist Society. I think here in this room at this conference, there's probably a healthier skepticism about the claim that non-profit organization equals social good.

But out in the general world, people do equate non-profits with social welfare enhancing, and of course that's not the case at all. Of course, non-profits pursue their own agendas. But non-profit behavior can be more quirky because they do not have the disciplining effect of the residual shareholders. One thing that you can say about a profit-seeking corporation is that the shareholders by and large — not always perfectly — pay attention to what's going on and it's a little bit easier to predict their behavior, that they're going to be profit maximizing.

With non-profits, things can often break down. Many of you have probably been on non-profit boards of directors and you probably have your own tales of waste, indolence and so on that leads the non-profit organization not necessarily to behave in the way that a profit-seeking firm would. Think about what Professor Kieff raised: we expect that if a good deal could be struck, it will be struck unless there is a really good reason, like massive transaction costs or some kind of big information failure, or you just can't find the rights holder. We assume that deal will be struck. When we look at non-profit institutions, I think we have to not abandon, but relax that key assumption. So, my talk was meant to be a plea to everyone who knows something about this and is involved about this, to start thinking about how non-profit firms behave differently from profit-seeking firms and what that means for trying to solve this set of difficult problems.

MR. TROY: Professor Kieff.

PROFESSOR KIEFF: Just one minor comment to tie into what I think will be a difficult issue for all of us, especially in this group.

Your question in the federal context is, if the federal government wants to take, can it take? The answer is yes. But interestingly enough, the federal government — federal, keep that in mind because it'll change in a second — the federal government has actually given a limited waiver of sovereign immunity in 28 U.S.C. 1498 for patent and copyright cases. And you can sue them for royalty in the court of claims.

The real difficult problem for those of us who worry about states' rights is that the modern 11th Amendment jurisprudence means that any state today could start infringing, and they do not have to pay. That is actually a much more difficult issue, by the way, and it's not one that I've gotten my mind around but one that I think we all ought to think about, for those of us who think about states' rights.

The big picture here is that if a state wants to waive its own sovereign immunity, it can. So, if state X has

a statute or a constitutional provision that says, if we take, you can sue us in our own court, that's fine. But you can't sue a state for patent infringement anymore. That's the College Savings case in the U.S. Supreme Court.

For those of us who were interested in states' rights for a long time, and there are lots of good reasons to be, keep in mind that this presents a very difficult problem for intellectual property rights.

If I were the king of state X, I would make my automobiles myself because they would be non-infringing and I wouldn't have to pay any royalties. But I wouldn't ever open a factory; I'd just call Ford or Chrysler and say, you're now the state X automobile manufacturer. All my software, every copy of Windows that I have, would be non-infringing. Every patent, every copyright, would be non-infringed by any state.

Now, the Supreme Court decided that the Congressional Record wasn't good enough on that. That's why they struck down the waiver of immunity in the Patent Act. Keep that in the back of your minds for a different discussion on state's rights.

AUDIENCE PARTICIPANT: I agree with what I think everybody's been saying, that price discrimination in the pharmaceutical industry has worked out well and that we pay much higher prices here, and that's probably as it should be. However, that only seems to work because a lot of people don't seem to know that is going on. And as more and more states and more and more consumers groups know that it is going on, there have been a lot of laws trying to change this.

Do you think, politically, this kind of price discrimination can last? If not, what is the alternative?

PROFESSOR RAI: That's an excellent question, and that worries me. Believe me, I wake up at night thinking that this is a real problem because, unfortunately, there are, as you've suggested, populist pressures against this sort of price discrimination, economically rational as it is. I think, unfortunately, this is a problem we face with our healthcare system more generally, that people have this conflicted feeling about it.

On the one hand, they don't really want it to be something that the government takes care of for us. On the other hand, they don't really think they should have to pay a lot for it. Well, those two instincts are completely contradictory because healthcare is expensive. This is one reason I got out of doing healthcare regulation, because the political problems are just so extreme in this area. People have this sort of cognitive dissonance. They believe that they should have access to all the healthcare that they can possibly desire, yet not pay for it.

MR. TROY: Sir, go ahead.

PROFESSOR KIEFF: I agree with that. A political analysis would be that you won't see anything on the federal level. There might be some noise, but I don't think anything happens in terms of pricing at a fair level.

What you will see is that in, let's say, 20 states, you will see lots and lots of activity. Whether or not at the end of the day anything gets enacted is another question. If I understood you, you asked if it's sustainable. I don't know if you meant sustainable for the big picture that we're talking about. The political pressure will be sustained, I suspect. You will have, presumably, Democrats in an election year talking a lot about the price of pharmaceutical products. At the federal level, I don't think it would happen, but it will create this sort of climate that will spill into the states. So, I think you'll see a lot. And the reason is, as my colleague just said, first of all, Americans really do think they can have everything.

Second of all, in politics, which spills into life, there is also this feeling that in healthcare if my neighbor got it but somehow I didn't get it, and I don't know why that is, then I'm sort of upset.

We've seen the insurance industry be the fall person, if you will. And I think the pharmaceutical industry's next up.

PANELIST: In the Federalist Society, you can say "fall guy".

PROFESSOR KIEFF: And "the villain".

MR. TROY: Susan Braden.

AUDIENCE PARTICIPANT: Interestingly, as this one panel is going on this afternoon, across the street, down the hall, they are announcing that the Federal Trade Commission is going to begin a series of hearing in January throughout the spring, what they may do about problems with intellectual property.

PROFESSOR KIEFF: You know, patent breadth is something that people write about and talk about quite a bit. It's not something I really understand, in the following sense.

I worked for this guy, Giles Rich. Giles Rich was a patent lawyer for 28 years in New York, and then wrote what became Title 35, the Patent Act, then got appointed by Eisenhower to the federal appellate bench to interpret the statute

he wrote, which he did for another 43 years until he died. So, he knew a lot about patent law.

PROFESSOR KIEFF: I remember when I started clerking for him, I used to ask him these questions about patent breadth, and one day he sat me down and said, you know, Scott, you're really not thinking about this the right way because the stronger a patent is, the weaker it is; the weaker a patent is, the stronger is.

And I said, what the hell are you talking about?

PROFESSOR KIEFF: And he pointed out to me that this is a very ingenious device built in, in the patent system, which is that patents are self-limiting.

PROFESSOR KIEFF: Consider a patent that is strongest on offense because it is likely to cover all commercially significant stuff. It is also weakest on defense because it's also likely to cover something that existed in the world before. If so, that going to be found out as a fact. The prior art not going to be litigation-induced. That fact is just going to be out there. Or, the patent is too vague and the Federal Circuit, the court that deals a lot with these cases, has a lot of case law on vagueness or in the court's terms "the written description requirement."

But in fact, the flip side is also true. So a patent that is strong on defense because it's crystal clear, clear as a bell, and also very narrow and doesn't cover anything in the prior art, is also likely to be of no commercial significance.

Now, if that's true in the absolute sense about patent validity — strong on offense, weak on defense — then the question becomes, how do we decide validity? Interestingly enough, the people who have the information on validity, these are folks with facts. Those folks come to court in patent infringement suits.

Actually, a lot of people look at the Patent Office as falling down when it issues patents that are later adjudicated invalid. It issues a patent that's presumed valid but later found invalid; isn't that a bad thing? I think the answer is, normatively, actually no. To get that information to the decision maker requires the patent infringement suit because it's the defendant who has that information and that's the only way to get it to the attention of a decision maker.

AUDIENCE PARTICIPANT: It seems like the assumption here has been that this particular genetic material is property and the question whether it's even property. Certainly, property is not just a utilitarian kind of scheme. There's something deeper. I'm more philosophical about property

We all have the same genetic material. Is it really property? Can it really be fit under the same structure?

DR. OLDHAM: This is what troubles me about all of this. To me, intellectual property is when you use something called your brain to improve on something that you've recognized in the your work or studies. That's not what I was talking about today. I was talking about property rights that are inherent to ownership — your house, your car, your DNA, your cells.

I think those property rights have not been properly adjudicated in a court of law in terms of who owns them. I do not believe that a company can use DNA from an individual without a contractual relationship with that individual and have ownership of that property before they make a drug from it. Yet, none of the companies are requiring those kinds of ownership rights *a priori*. And informed consent does not convey those rights.

PANELIST: Let's take the issue that was in the *Wall Street Journal* article that you shared among us. That is, you have a gene that presumably is a gene that is not specific to an individual. Is that the kind of thing that can and should be able to be patented? It existed in the world before. It's not the kind of thing that someone has created. So, it's different than what we normally think of as covered by intellectual property rights.

And I think it's somewhat different than my own hand because my own hand is specific to me, at least until someone chops it off. So, what is your thought on the issue of the gene, the sort of ubiquitous gene?

DR. OLDHAM: Well, you have to come down in steps from the body to the organs to the tissue to the cells to the DNA. I think we'll all agree as you come down through there, at least at the cell level, you know, nobody else has those. Nobody has my cells or your cells. Not a single person in the world, unless you have twin.

Now, get down to the DNA level, and no one has that DNA either, precisely. If you take a particular gene sequence out of the DNA, is that shared? Sure. The gene pool's got lots of them. That's what the gene pool is. But, we each differ in specific sequences.

PANELIST: So, can somebody patent that?

DR. OLDHAM: — but at some point in time, there is ownership of property, just like at some point in time, there's a human being when you combine two DNAs. Yet, somebody's got to say when that is. I happen to believe that once the whole DNA is operative, that is a form of property as strong as your house. A gene from it, probably not.

SPEAKER: Yes, you can't get a patent on the letter in the alphabet. But obviously, when people string letters together and they form words or sentences, we create intellectual property rights, too. I think, to some extent, it's analogous with a single gene versus utility of what the gene does and the sequence of gene —

PANELIST: But isn't the difference — if I write a word, presumably I could copyright that word because I've created the word or a bunch of words together. But the genes is; it is there. Your company may be the first to discover what it's used for, how it works, etc., but it pre-existed nature.

PROFESSOR RAI: I think that part of the misunderstanding most people have — and I get this question all the time, of how can you patent a gene? — is one has to understand that within our patent system, we have allowed, historically now for years, the patenting of things that exist in nature in some impure form. And what the patent system allows you to do is claim rights to some "purified version" of something that existed in nature.

We have this famous case back in 1912, where somebody got a patent on a purified form of adrenaline. Well, adrenaline existed in nature, obviously, but once you purify it, the legal move that's made is that you've created something that has human input in it, and that's all you need to patent.

PROFESSOR KIEFF: Well, I might approach this slightly differently, I mean, just because a lot of people think of that as a so-called natural products exception it's important that it not be conceived of as anything other than the application of the ordinary rules, not some exception.

The rule is this — this is another cute little one from Judge Rich — the name of the game is the claim. The claim is everything in a patent. And the claim is never 'I claim adrenaline' or 'I claim interleukin'. Interleukin exists in nature. Adrenaline exists in nature. The gene for adrenaline exists in nature. The claim — that's the name of the game – is often directed to something like "a highly purified version."

I have to tell you exactly what I mean by "highly purified". I've got to have data. I've got to have details. I've got to have charts. And if I don't have them, my entire claim is invalid for the disclosure reasons discussed earlier. There has to be a clear test. You need to know, are you on my turf or not? And if you can't know that, then my entire claim is invalid. But the claim is never just "adrenaline."

We talk about a claim on a piece of DNA colloquially as a gene patent. That's not what it is. It's a patent on a bunch of other words and then a gene. And the really important thing is, always pay attention to all those other words because you've got to look at the claim in its entirety. That's true for a patent on something you've made up or a patent on something you found existed before and what you've made up is a pure version of it or a different version of it.

MR. TROY: Last question. Yes.

AUDIENCE PARTICIPANT: One of the kinds of property we didn't talk about that probably is not patented consists of scientific data. The FDA as well as Congress is looking at these issues and bio is looking at these issues. Does anybody see a different principle being applied to the government's use of data to bring more generic products to market?

PANELIST: Why don't you just write us a letter on that.

PANELIST: Well, it's an important question. You always have to remember that that other data's out there as this other form of IP, and it's typically associated with contract law and private ordering. One of the things you see is that when you don't go for patents in these areas, you end up seeing much more trade secrecy or lots more toll booths and people actually collecting at the toll booths. The neat thing about patents is because the right is absolute-enforced by the government, you can discriminate very aggressively in your licensing.

For example, if you walk down midtown Manhattan, a lot of times you're walking on private property. You don't know it; it feels like public property. But if you look down, there's a little anti-adverse possession plaque, a plaque that says you're welcomed to walk here but it's private and when we go to sell this property, this plaque will serve as the marker for our outer boundary being much larger.

The point here is that in a regime where you have a strong property right, the property owner can elect to let a lot of folks use for free because she'll be comfortable knowing that when she needs to enforce, she can enforce.

If you force her to go the contract alternative, she'll be very, very secretive. First of all, she won't let output go to any place where she can't be very careful, and second, she'll be extremely careful at work. So the life of the employee will be very different. There will be video cameras, there'll be pat-downs. If you think security's tough at the airport today, in a trade secret world, security's tough every time you leave work.

PANELIST: I really have to take issue with that. One of the background considerations in your question might be the pending database legislation in Congress. I think it's pretty clear that with privately created databases, we have, through the contract regime, very good price discrimination going on, and I don't think we really need an additional statutory layer of protection on top of the contractual regime, which allows a very useful system of price discrimination.

MR. TROY: Well, this has been a terrific panel, and thank you all for your participation.

INTERNATIONAL & NATIONAL SECURITY LAW

THE ALIEN TORT CLAIMS ACT: ARE AMERICA'S COURTS THE WORLD'S POLICEMEN?

Professor Curtis Bradley, *University of Virginia Law School*
Professor Beth Stephens, *Rutgers University Law School — Camden*
Mr. Hamish Hume, *Cooper & Kirk*
Mr. Andrew Vollmer, *Wilmer, Cutler & Pickering*
Mr. John Yoo, *Deputy Assistant Attorney General, U.S. Department of Justice, Office of Legal Counsel*
Ms. Margaret Wilson, *Deputy General Counsel, U.S. Department of Commerce (moderator)*

MS. WILSON: I am Margaret Wilson. I am happy to be here to moderate this panel on what may be the most obscure topic to be discussed at the Federalist Society convention this time, but maybe the most fun. We are here to discuss something so controversial that our panelists can't even agree on what it is called. Some of them call it the Alien Tort Claims Act. Others insist that it is the Alien Tort Statute.

I'll try to be moderate and not take a position, and call it the Act or the Statute. If I lapse into actually taking one side of the other, please forgive me. But I think it will be a lively, invigorating discussion and may border a little more on *Crossfire* than some of the other panels you have seen.

This is a topic gaining in popularity, importance and influence. It is a short little statute that was enacted in 1789 as part of the Judiciary Act but really didn't see the light of day until about 1980.

It is very short. Here's what it says. "The district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States." That's it.

We are very fortunate to have our highly qualified and passionate panel here today. We have with us Professor Curtis Bradley of the UVA Law School. He's written papers and has studied this topic extensively.

Beth Stephens, Associate Professor at Rutgers Law School is actually an author of a book on this subject that I helped cram to moderate this panel.

We have Hamish Hume, who is with Cooper & Kirk, and has actually litigated in this area.

Andy Vollmer with Wilmer Cutler, has also actually practiced in the area.

And finally, John Yoo, who is with the Justice Department ,Office of Legal Counsel. He is a Deputy Assistant Attorney General.

I think you will hear all points of view, I hope, on this undeveloped but exciting area of the law. I am going to give about eight to ten minutes to each panelist, to discuss what they want to discuss about the Act. Then we'll have a little bit of rebuttal, then questions.

Just as kind of a foreshadowing, I think that some of the issues that you'll hear them talk about are:

Whether a private right of action is granted by the Act; what is the law of nations; what are the benefits, cost and risks of implementing this Act; its relationship to Article 3 of the Constitution; some separation of powers issues and the impact of this Act on U.S. foreign policy; the justiciability of the Act and whether, really, it is in fact a political question; the appropriateness and effectiveness of civil damages in the context of this type of tort; the increasing use of the statute against multi-national corporations and the interplay with the Act's first cousin, I guess, enacted in 1992, which is the Torture Victims Protection Act; what this Act may mean in the current world climate and our war on terrorism — is it the same? Is it different? Will we see more of it? And finally, leading up to the $64,000 question on your brochure, should the U.S. courts be the world's policemen?

With that, I will turn it over to Beth Stephens, who can tell us about her perspective of the Act, the Statute, from, for lack of a better term plaintiff' 's perspective.

Thank you.

PROFESSOR STEPHENS: Thank you. That was rather a tall order for eight to ten minutes.

I'm not sure I can address any of those topics in eight to ten minutes, so I'll confine myself to more general policy issues — the good, as I see it, of the Alien Tort Claims Act and the general practice of permitting victims of human rights abuses to sue in U.S. courts for human rights abuses against a variety of defendants.

The statute has been used in this way for just over 20 years, since a Second Circuit decision in *Filartiga* interpreted the statute as permitting an alien plaintiff to sue for a violation of the law of nations, torture, against a defendant who, in that case, was a police officer personally responsible for and personally engaged in the torture. The events happened in Paraguay. One of the plaintiffs and the defendant were in the United States at the time the lawsuit was filed.

I should add the disclaimer that I have worked on many of the cases that I will talk about and that will be talked about today, in various forms — as a field investigator at one point, largely as counsel for plaintiff, occasionally as

amicus or consultant. And I'm always on the plaintiff's side.

My general approach is to argue that the line of cases that have developed since the *Filartiga* case under the statute, and a couple of more recent statutes enacted by Congress, are legally correct and, as a policy matter, positive developments both for U.S. domestic law and international law.

There are no untoward foreign policy implications from these cases. There may occasionally be rubs and frictions, but no more than we see in the general line of litigation and the general problems caused by U.S. citizens traveling around the world, sometimes making trouble and sometimes getting into trouble. The cases fall comfortably within the structure of our judicial system and of our federal government in terms of separation of powers.

None of these issues I'll be able to go into today, although I can answer questions about them if people are particularly interested.

Finally, as a policy matter, the cases do make a significant contribution to the international drive to hold accountable the various actors who commit human rights abuses. I don't claim that any one case individually necessarily is a breakthrough, or even that the sum total makes a major change in the international human rights situation. But they contribute to a movement that is underway around the world and have made a significant contribution to that movement.

I'll address some of the policy issues in more detail by distinguishing among the different kinds of cases based on different kinds of defendants. The earliest cases did involved individual plaintiffs suing individuals. Some, as in *Filartiga*, sued the actual torturer.

In one of my cases, I represented three Ethiopian women who had been tortured as part of the Red Terror, in the Marxist dictatorship in Ethiopia, when they were in their late teenage years. All three of them had made their way to the United States or Canada. One of them was working as a waitress in a hotel in Atlanta when she turned a corner and ran into the new bellboy in the hotel, who was the man who had tortured her in Ethiopia.

She called around to some people to see if there was anything she could do and was eventually referred to my office. We filed a lawsuit against him on behalf of these three women, who had all been personally tortured by him. He defended himself at trial. We got a judgment — an uncollectible judgment. He does not have the assets.

But the impact on these three women was striking, the effect of being able to face him in court in a position in which they were not powerless, to tell their stories and have their stories heard. And he was living in the United States. That case falls rather non-controversially within the structure of the kinds of things that our legal system is familiar with.

Later cases went against other categories of individuals — commanders being held responsible for actions committed by subordinates. And then in the last few years, there has been an increasing number of cases filed by individuals against U.S. corporations for actions taken abroad. Some of those involve allegations of torture', executions , even genocide in one of the cases, although that case was dismissed for failure to actually establish the claim of genocide. Others include environmental harm rising to the level of the destruction of the livability or sustainability of areas, in Ecuador, in particular, and Indonesia. One of the cases involves Burmese who are suing the California oil company, Unocal, for torture and other abuses committed by security forces working in tandem with Unocal and the Burmese military government.

These categories of cases could have been filed in state courts. For example, the Ethiopian women could have sued for the tort of assault and battery in state court. They're in federal court based on the jurisdiction granted by the Alien Tort Claims Act. Some of them might have been in federal court under diversity jurisdiction.

The Unocal case has now been dismissed by the federal court on a summary judgment motion. The motion is currently on appeal to the Ninth Circuit. But it has been refiled in state court, and a motion to remove and a motion to dismiss have been denied by the state court judge, so it's going into discovery in state court.

There also have been claims against foreign corporations based on their minimum contacts with the United States. One case in particular that went up through the second Circuit, where the Supreme Court denied *cert.*, was against the two parent Shell Oil companies, based in England and the Netherlands.

Both the trial court judge and the Second Circuit found personal jurisdiction over the company based on direct contacts with New York, discounting any responsibility for jurisdictional purposes, for the activities of Shell U.S.A.

The doing business standard applied by the court is a standard that is generally applied in federal court. To the extent that the federal courts look to relatively minor contacts as sufficient to constitute doing business in the United States, I'd say that's partly a reflection of the fact that internationally and nationally, our legal systems have yet to catch up with transnational corporations, although we've had 100 years to try to do so. We have international corporations and we have national systems of jurisdiction.

One of the Second Circuit judges asked at oral argument, "What do you mean Shell's not here? They are not doing business in the United States? They have a gas station on every corner."

The fact that Shell is able to structure its business so that Shell U.S.A. does not count as contacts of the parent corporation is a fact of life, a fact of law for our judicial system, but one to which our increasingly global economy will have to respond, if we are to have any control, not just in terms of human rights, but any control over corporate activity.

The final category of possible defendants in the human rights cases are governments, both the U.S. government and foreign governments. Suits against the U.S. government are governed by the Federal Tort Claims Act and

various governmental immunities, and generally face a pretty tough road, for the same reasons that other kinds of tort suits against the U.S. government, particularly for acts that take place abroad, face difficulties.

Suits against foreign governments originally were very difficult because the Supreme Court held that the Foreign Sovereign Immunities Act applied in its standard forms, even when the claims are based on human rights issues, human rights claims. But Congress passed a law a couple of years ago to permit claims for gross human rights abuses against foreign governments if those governments are on the U.S. State Department's list of terrorist states. There have been a series of judgments against Cuba, Libya and Iran, based on that exception.

That statute has raised a number of concerns about the possible foreign policy implications. I know, just from reading in the newspapers, that within a few days of September 11, the State or Justice Department entered a statement for the first time in one of the cases against Iran.

I can imagine some of the foreign policy implications there. Ironically, that is the statute that was enacted by a modern Congress. To the extent that it causes foreign policy concerns, my urge would be to broaden, rather than to narrow. My general interest in this area is to promote accountability, and to promote accountability by all of the actors that I have mentioned, by individuals corporations and governments, both the U.S. government and foreign governments.

My concern about this foreign state terrorist exception is mostly that it is not even-handed. It doesn't just look political but it is political, and I would favor pushing for accountability in ways that are both multilateral and even-handed, that recognize that human rights are different than other kinds of claims, that there is an international basis for international approaches to accountability and to jurisdiction, to permitting claims to go forward in foreign jurisdictions, when the cases involve egregious human rights abuses.

In many countries, universal jurisdiction is exercised through criminal claims rather than through civil claims. But some of those criminal claims actually have more in common with our civil litigation system than is sometimes realized. Some of them are initiated by private actors, a system that we do not have in the United States.

The goal, as I say, should be to promote accountability by all of these actors. Civil litigation in the United States is just one piece of a larger effort, but one that has had, as I started with, a significant impact internationally. It has fed the drive for accountability, nourished it, interacted with it, in other countries, and that I would hope would lead to a broader and regulated use of the approach, but one in which the United States in this situation is leading the way in a positive way.

One final point to answer the question, should the United States be the police officer for the world? I don't particularly think so. I am not sure of the analogy to the police rather than the judge. I think there's something a little bit off there. But the reality is that the United States often plays that role. The United States plays that role in many different forms in many different fora, and I think that there is a bit of a double standard in critiquing it in the area of justice for human rights victims rather than in some of the other areas. If anything, this is an area in which it is less troublesome internationally than in some of the areas in which we less controversially play that role.

MS. WILSON: Thank you.

MR. HUME: It's an honor to participate in today's panel, and I can assure you that I must be the least accomplished commentator on the Alien Tort Claims Act to appear here today. I have, however, been fortunate enough to work on two extremely interesting ATCA cases over the course of the past year, which may give me somewhat of an unusual perspective on this unique area of the law.

The first is a case in which we defended Jack Lawn, the former Director of the Drug Enforcement Agency, and three of his deputies in a lawsuit brought by an alleged Mexican drug criminal, Dr. Alvarez Machain, for his extraterritorial arrest in 1990. Dr. Machain was arrested for his alleged participation in the brutal torture and murder of DEA agent Enrique Camerana in 1985. After the U.S. Government was unsuccessful in extraditing Machain and other members of the Guadalajara drug cartel suspected of murdering Camerana, certain DEA agents are alleged to have helped arrange for his arrest in Mexico and transfer to United States custody in Texas. After a lengthy criminal prosecution in which he managed to escape ultimate conviction, Machain turned around and hired an ACLU lawyer and sued the U.S. Government, the DEA agents and deputies and his Mexican abductors under the theory that they had violated international law by arresting him outside of the Mexican/U.S. extradition treaty. In our representation of the DEA defendants, we argued that they are clearly immune from this lawsuit under the Federal Employee Liability Reform Act, and, in any event, would have had qualified immunity from any such case. We also argued that a claim of "false arrest," especially when made by someone for whom there was easily sufficient probable cause to arrest consistent with Constitutional safeguards, is simply *not* an actionable tort under the ATCA.

In the other case that I've been privileged to work on, we represent a group of individuals from the country of Zimbabwe who have been persecuted and had numerous human rights violations visited upon them by the ruling political party in that country— ZANU-PF. The atrocities set forth in our Complaint include claims made on behalf of three individuals who were assassinated by ZANU-PF operatives as a result of their having supported or campaigned for ZANU-PF's first real political opposition in two decades of power, the Movement for Democratic Change. Plaintiffs sought to sue not only ZANU-PF, but also the head of that political party, Robert Mugabe, who also happens to be the long-standing

President of Zimbabwe. The case therefore raised important issues of head-of-state immunity, sovereign immunity, and diplomatic immunity.

Thus, I have had the privilege in the last year of arguing on behalf of the immunity of U.S. Government officials who have been accused of violating international law by organizing the extraterritorial arrest of a suspected drug criminal, and of arguing that the immunity of a foreign president should be disregarded in a case brought on behalf of individual human rights victims who have been tortured and murdered by that president's political party.

If this experience gives me any insight into answering the question of whether U.S. courts should be the world's policemen through the vehicle of the ATCA, I would try to summarize those insights or opinions in three ways:

First, the jurisprudential controversy over whether the ATCA means what the Second Circuit said it means in the *Filartiga* case from 1980 is to a considerable degree now moot. I begin with this point because many of the panelists here have spoken or will speak about the controversial interpretation of the ATCA and of its mystical and unknown original meaning. But, whatever the First Congress meant in 1789 when they gave district courts "original jurisdiction over any claim brought by an alien for a tort only in violation of the law of nations," it is now clear and cannot be disputed by even the most rigorous originalists that in 1992 the 102nd Congress decided that foreign individual victims of extra judicial killing or torture have a right to sue their foreign government oppressors here in United States Federal Court, even if all of the conduct over which they are suing took place in a foreign country—so long as the court can exercise personal jurisdiction over those defendants.

In other words, foreign murderers and torturers—beware! If you come to the United States, you may be served with papers which will initiate a lawsuit that may finally vindicate the principles of justice against your acts of barbarism abroad.

Congress has unambiguously said that those lawsuits are a good thing and should be a part of our legal system. Specifically, in 1992 Congress enacted the Torture Victim Protection Act, which unambiguously says that ATCA actions may be brought against foreign defendants who are alleged to have committed acts of extra judicial murder or torture under color of law. Therefore, the kinds of debates that Federalist society lawyers like myself normally like to have—namely, whether our federal courts are overstepping the jurisdiction envisioned by Congress and the Constitution—really has no bearing on the mandate set forth in the TVPA. In other words, one way to think about what the TVPA does is to allow private individuals to come to U. S. courts through U.S. lawyers and get a *judicially imposed sanction* against specific defendants whom they can prove, subject to all the ordinary rules of the Federal Rules on Civil Procedures and the Federal Rules of Evidence, are culpable for committing acts of atrocities that are so grievous as to constitute extra judicial killing or torture under color of law and in violation of international law.

Of course, while it should always be remembered that the TVPA removed much of the jurisprudential controversy surrounding the ATCA, it should also be emphasized that Congress did not go beyond torture and killing. The legislative history behind the TVPA is ambiguous as to whether Congress believed that other causes of action brought under the ATCA are improper. The statute itself does no more than endorse the cause of action for torture and murder. More far-flung interpretations of the ATCA, such as bringing suit for environmental crimes committed by U.S. multinationals, seem to be less plausible interpretations of the original statute, and clearly are not endorsed by the TVPA.

In other words, the jurisprudential controversy is still alive and well, but it does not sweep through the entire gambit of ATCA cases, and, indeed, does not touch the core of what the ATCA is about. Instead, it says, as we argued in Alvarez Machain, that unless the cause of action is for something that violates a norm of international law that is *specific, universal, and obligatory,* there ought not be any grounds for bringing that cause of action in U.S. court.

Thus, while torture and murder are clearly actionable under the TVPA, it also widely accepted that causes of action based upon terrorism, rape, genocide, and politically motivated violence should also be actionable under a fair reading of the ATCA. However, an action that alleges that a country arrested a foreign national in a manner that is outside its statutory arrest power, even though it had arrest power within its own territory and even though it is conceded that there was ample probable cause for that arrest, does not constitute a violation of international law that could possibly be actionable under the ATCA. At most, that action represented a violation of Mexican sovereignty for which only the State of Mexico may seek recourse through its diplomatic relationship with the United States.

A second thought I have about this area of law is simply to try to respond to the reactions that many lawyers, particularly conservative lawyers, have to these kinds of cases by focusing on the important distinction between subject matter jurisdiction and personal jurisdiction. The ATCA and the TVPA do absolutely *nothing* to alter the normal rules of personal jurisdiction that apply under our Constitution and under the Federal Rules of Civil Procedure. Those two statutes do, of course, dramatically expand the subject matter jurisdiction of the federal courts for the most egregious kinds of international crimes that can occur, and provide that the perpetrators of those crimes can be sued for civil damages when they come into our country. But while this is a massive expansion of subject matter jurisdiction, it is at least arguably an expansion that is concomitant with the egregious nature of the conduct it seeks to deter and to sanction. On the other hand, by maintaining the ordinary rules of personal jurisdiction, including rules of immunity which I am going to speak about in a moment, this area of the law respects the limited power of federal courts, and if there is something untoward about the notion

that a foreign war criminal who pays a short visit to New York City can be tagged with service of process and sued for civil damages, it is something that runs to the heart of our system's endorsement of "tag jurisdiction," which was upheld by the Supreme Court in the *Burnham* case, and not something that has anything peculiar to do with the ATCA or the TVPA.

Following on that second point, the third and final point I would emphasize is that the issue of immunity seems to me to be a central one in this area of the law. The principle of immunity is that a defendant may be culpable under the law, but that culpability cannot be allowed to give rise to a legal cause of action because of the defendant's association with a sovereign government. If one believes in it at all, the principle of immunity must rest upon the proposition that for certain problems the only solution is to seek a recourse in the political realm, and not in the legal one. In many instances that may simply be a judgment based upon the fact that we don't think there's a problem to begin with. In other words, governments have to act, they have to enforce police laws and police powers, and the fulfillment of those functions is therefore normally protected by immunity, *unless* our Constitution or a federal statute is violated. It's on that basis that the Alvarez Machain defendants are, and should continue to be held to be, immune.

In other instances, it does seem—as the State Department argued in the *Mugabe* case—that our own domestic law may find a person to be culpable and yet wish to hold him immune merely in order to show some amount of comity or respect for another sovereign; those are certainly important, critical principles for us to uphold as we try to interact with governments around the world, and to balance all of the competing interests that play into our foreign policy, of which concern for human rights can only be one. We never took issue with that in the *Mugabe* case. All we said is that those principles have a *limit* and that limit must be defined by *law*. In other words, the question raised in the *Mugabe* case is what is the limit to the principle of immunity, and where does the rule of law take over from the world of international geopolitics? While the district court did not give us everything we wanted and did not accept all our recommendations for how they should draw that line, it did make a dramatic step forward in defining how that line should be drawn, and in holding for the proposition that a purely *private* entity that happens to be controlled by a government's elected president cannot use that president's immunity to be immune itself, and therefore, it is subject to the rule of law even though he, the president, is not.

Finally, in closing, I'd like to take a stab at rhetorically answering the rhetorical question that this panel is presented with—should the U.S. Courts be the world's policemen through the use of the Alien Tort Claims Act and the Torture Victim Protection Act? Well, one's answer to that question depends on what kind of policemen one envisions here. Are these statutes like the Keystone Cops—figures of fun who do more harm than good; or are they like Inspector Clouseau—also a figure of fun, but one who somehow manages to get the bad guy in the end, though perhaps at too great a price in the ridicule and contempt he brings upon himself. Or are they like the Lone Ranger— crusading idealistically, perhaps imperialistically, out along the frontier of international law. I don't particularly like any of those images, so I offer a fourth. I think that the Alien Tort Claims Act and the Torture Victim Protection Act offer a simple, firm, and unobjectionable proposition—the rule of law exists, and if you are a mass murdering war criminal whose conduct falls *outside* defined boundaries of "sovereign action" and you choose to visit the United States, then you will risk the consequences of that law. Thus, I choose as my model Sergeant Joe Friday from Dragnet. But I replace his familiar rejoinder "Just the facts, ma'am" with the more judicious "Just the law"—as in, "Just the law, Mr. Mugabe," or "Just the law, Mr. Karadzic," or "Just the law, Mr. Marcos." These statutes stand for the proposition that just because you are a tyrant does not necessarily mean that you *and* all of your henchmen are *always* above the law. There are certain norms that are so fundamental to our system that we as a sovereign country have enacted them into our domestic law and said that *anyone* who violates them, *anywhere* in the world, can be found liable for civil damages if they choose to visit this country. That seems to me not altogether such a bad thing.

PROFESSOR BRADLEY: Well, the time is short, so what I will do is briefly outline a few areas of my concern about the litigation. Everything I am about to say is going to be fairly truncated, so I encourage people in the question period to feel free to press me and ask me to flesh any of these things out.

This litigation that Beth and Margaret have described really got started in 1980, and I think has in recent years been expanding quite significantly. It does stem from this 1980 decision in *Filartiga*. In my mind, it raises three concerns that we at least ought to be considering in evaluating whether this is a good idea or not.

First, I don't think it is fair to argue, notwithstanding what Beth said, that Congress has really authorized this broad litigation in any meaningful sense. It is true that Congress enacted some statutes recently that relate to human rights, but it is a very different matter to say that they've authorized this broad set of open-ended *Filartiga* style litigation, which I will describe in a minute. I don't think they have.

Second, the nature of this litigation is such that it requires a heavy amount of policymaking by the courts — a role that I think it turns out they are not very well-equipped to engage in. One can therefore raise questions about whether it is legitimate for the courts to be engaged in as much policymaking and foreign relations policymaking as this litigation requires.

The final concern I will raise is more generally whether this is even a sensible way to conduct American foreign policy. There are a number of reasons to think it is not. First, with respect to Congress' role in this. The *Filartiga* case and the cases that follows it rely on this one-sentence statute that was passed more than 200 years ago. They do not

rely on these other statutes that Beth has referred to. When those statutes apply, everyone agrees that the cases can be heard.

But the key issue is, what happens when those congressional enactments do not apply? The answer has been, in the lower courts, that we rely on this old, newly discovered statute — the Alien Tort Statute.

There are many reasons to think that if we should apply the original intent of the statute — of course, people debate whether one should do that with law — but if one should, that Congress clearly didn't intend for the sort of litigation we are now seeing.

I won't go through all the historical points because one could say quite a bit about that. But among other things, the Congress that enacted this could not have imagined international law governing these sorts of issues, which involve the relationship between governments and their own citizens. They would not have had this extraterritorial idea as even being a proper exercise of American power; that is, trying to reach out and regulate what Nigeria or Paraguay does with respect to its citizens.

In addition — and I won't go into detail at all on this — it looks from historical evidence like the people who wrote this statute did not view the law of nations as being part of federal law in a constitutional sense. They thought it was important; they thought in some cases it would apply. But they did not think it gave the federal courts jurisdiction by and of itself. So, they wouldn't have thought in these modern terms that *Filartiga* has set forth.

I think more importantly that we can make some educated guesses about the policies behind the statute. When we do that, I think it's pretty clear that the modern litigation does not sit well with those policies. It looks like the people who wrote this statute had two things in mind. First, they wanted a federal court forum for situations in which the U.S. government might be either legally or politically accountable for certain kinds of torts in violation of international law. All the discussions that we can find relating to the statute are about that. All the historical episodes people cite behind the statute are about that U.S. responsibility.

The second general concern is to have a federal court forum that would reduce foreign relations controversies that would arise if we did not address certain kind of torts.

Neither of these concerns is served by *Filartiga*-type litigation. The U.S. is not responsible in the legal or, really, political fashion for various kinds of egregious conduct that may be occurring within the borders of other countries. There may be good moral reasons why we may be concerned about it, but we are not legally responsible in the way the founders and the writers of the statute were thinking.

Second, if anything, this litigation tends to raise foreign relations issues and difficulties — not in every case, to be sure, as Beth pointed out, but certainly in some cases. It is difficult to argue that it somehow, in net, improves our foreign relations. The State Department and other branches of the government have in some cases been quite concerned about the foreign relations impact of these cases. It is not a vehicle for reducing foreign relations controversies in the way that Congress wanted.

Even if one looks to the modern actions of the President and the Congress, one finds that, yes, they've enacted very discrete and limited sorts of legislation to allow particular causes of action. And when those requirements are met, everyone can agree that Congress has authorized a particular suit. Beth has mentioned a recent statute that allows suits against particular state sponsors of terrorism. But she didn't mention that it is limited to U.S. and it is not this alien versus alien tort suit with no connections to the United States.

Even the torture statute, which Congress enacted in the early 1990's is very circumscribed in terms of the kind of conduct covered — only two causes of action, torture and what they call in the statute extrajudicial killing. A number of procedural limitations were imposed by Congress; a statute of limitations, exhaustion requirements, definitional requirements that have to be met in the case, none of which apparently apply in these *Filartiga* cases.

So again, one cannot assume that just because Congress has addressed particular issues that it has focused on, that it has therefore more broadly approved of this open-ended litigation that we have had under the Alien Tort Statute. So don't think Congress has authorized this.

My second concern is about the role of the courts in these cases, particularly since they really are, in some sense, unconnected to any particular statutory directive.

One of the questions that Margaret pointed out that we could try to address, which I don't think any of us will, is what is the law of nations. The bottom line is, nobody knows. Maybe they didn't know perfectly well in 1789 either, but they probably had a much clearer answer than we do today. There is massive debate in the international community about even what it takes to form the law of nations — what evidence one would look to for the law of nations. There is even more debate about the content of the law of nations, and no statutory or political branch guidance on any of that.

The courts are entirely left to the arguments of the litigants and academic writers and trying to piece that together. Inevitably, it is a highly creative and politicized process involving lots of normative claims about what would be desirable for international law to regulate. But we have no treaty texts that are binding in these particular cases and nothing very concrete to look to.

In addition, one studies these cases, as all of us have, inevitably because we don't have much in the way

of statutory guidance. What one sees is that courts have to fashion on their own a multitude of procedural doctrines to try to facilitate this litigation to make it actually work, so they invent doctrines like various federal common-law principles to reconcile it with the requirements of jurisdiction. They imply causes of action out of a one-sentence jurisdictional statute written 210 years ago in order to actually give them a claim in these cases. And they do a lot of other things, too.

I just have a minute or two left. I want to point out, just to be even-handed about it, there are all sorts of ways in which these cases also require the courts to act in a much more conservative direction, sometimes in the same case. The judges find themselves fashioning all sorts of federal common-law doctrines to limit some of the excesses of the litigation, again without any particular guidance from Congress or the President

PANELIST: And yet, especially in the 19th century and obviously in the 18th century, and even to this day. But then, absolutely to violate the law of nations, you needed to be a government. It was literally the law of nations. And so — that's not true?

PROFESSOR BRADLEY: There are a few areas, which I think everybody basically agrees on, in which individuals could have violated the law of nations. Blackstone actually talked about it in his treatise on commentaries on the law of England. They are very narrow. I think piracy and breaches of neutrality. The situations I was just talking about might be another one. And an assault on ambassadors was another category.

Those were the kinds of cases they probably were thinking about in terms of the Alien Tort Statute. All of them in the context of U.S. responsibility for that sort of conduct.

MS. WILSON: Let me stop you right here. We can come back to questions at the end if we have any time. I still would like everybody here to walk away from this room having some clue about what the Alien Tort Statute is about. I'm not sure we're there yet. So, what I would like to do is call on Andy to give us a run-down of the *Filartiga* case and where we stand right now.

Looking at the original intent of Congress is a very interesting academic exercise, but the answer is that we don't know. So, that you can be conversant about the Alien Tort Statute today and how it's being used, I think it would be helpful to talk about *Filartiga* and talk about the cases that came after *Filartiga,* one in 1999, but currently no Supreme Court precedent, which is why it is such an open question.

And then we can get into some of the issues about the political questions involved, retaliation by other governments, whether torture victims have anywhere else to go and whether or not we have bitten off more than we can chew. But without a foundation, which I was hoping you were going to get, I don't know that those questions are going to mean a lot to you.

MR. VOLLMER: I'll try to give a very short overview of the modern development of the cases under the Alien Tort Statute, and I have lots of help up here to correct me when I get it wrong, since I'm up here being taken slightly by surprise. But let me try. My main effort here will be to try to identify some of the issues that are important today and are not entirely settled yet.

It is a very old statute. It was hardly used until 1980 — right before 1980 — in a very important Second Circuit decision in 1980 called *Filartiga*, which Professor Stephens talked about.

That was a case against a U.S. resident. A person in the United States discovered that a person who had tortured her, I think, in Paraguay was also living in the United States. So the case was brought by the victim against the torturer under the Alien Tort Statute for conduct occurring in Paraguay.

The Second Circuit decision had to resolve a lot of unusual questions that came up, such as, is there a claim authorized by the Alien Tort Statute, or is it just jurisdictional? And that is still today a very important question, settled in some circuits, particularly the Second because in *Filartiga*, the Second Circuit said, "yes, it does create a claim; yes, federal courts have jurisdiction; and the jurisdictional grant is constitutional."

That does not necessarily mean that everyone agrees with those outcomes today, but it was a very important start and it reinvigorated or actually commenced this use of the statute for international human rights abuses and allegations of human rights abuses. Of course, you need an alien as a plaintiff because the statute requires it. But if there is federal court jurisdiction and there are claims that arise under it, it could be used alien v. alien. That is another one of the issues that has become so important of the debate about the statute today.

The next key event is a D.C. Circuit case in 1984 called *Teloran.* A lot of the questions come up again about whether these cases — that is, foreign human rights issues — should be litigated in U.S. courts.

The D.C. Circuit three-judge panel had three separate opinions, reaching conclusions — ultimately reaching a judgment but with very different reasoning. And some of our panelists know the opinions better than I. The one I remember the best is Judge Bork's decision, saying that the statute does not create a claim; it's purely jurisdictional. So that issue is live in the D.C. Circuit and in other circuits.

The next key event, I think is a further development in the Second Circuit. That is the case against Koradjik from the Bosnian atrocity area. Avariety of additional issues were addressed in that case, particularly whether private parties can be liable for breaches of international law in certain circumstances and whether modern developments of international law ought to recognize the liability of private parties.

There was also an important service question because he, too, was served personally when he was visiting New York City, I believe for a United Nations event.

PANELIST: Well, I do think it's interesting to note that he was here at the invitation of the U.S. government, for the date in peace discussions and yet there was still adequate service.

MR. VOLLMER: I think the only other point, and then maybe we ought to get maybe a little bit of fill-in from other panelists, is that the other major development in this area that has begun to occur in the past five years or so is the use of the statute against corporations, who traditionally, under international law, except for some exceptions we've already talked about — along with private parties, are not subject to regulation by international law and, therefore, of course, could not violate it.

There were some exceptions, as we have already discussed. But what I was going to talk about — and whether I get to talk about it or not, I'm not sure — is a variety or set of questions that come up in the cases against corporations. I believe there are some quite serious issues; some at the high level we've already been discussing but some at a more detailed level that litigators care about, which I am happy to get back to.

The final point I want to stress for you is the use of the statute, first against corporations, and then second, for quite old wrongs. I'm sure you're all aware of the series of cases that have been filed, alleging breaches of international law for conduct during World War II. There were cases against the Swiss banks; there were cases against a lot of members of German industry; there was a case against Ford for the conduct of its German sub.

The current vogue is cases against Japan for a variety of atrocities that occurred, allegedly by Japan — almost certainly by Japan in view of historians — during World War II.

MS. WILSON: Well, I think we may know a little bit more about it than we did. Andy, I think I will allow you some rebuttal time in a little bit, but I would like John Yoo to finally get a chance to say something. He has requested to go last. He's not shy; I think he just wanted to make sure he got the last word.

MR. YOO: No, no.

MS. WILSON: We've all been waiting to hear from you, John.

MR. YOO: I definitely do not want the last word.

It is good to be here, and let me start with the usual disclaimer that my views do not represent those of the Justice Department. I recognize a lot of friendly faces. It's good to see you. You probably know that my views rarely, if ever, represent the views of the Justice Department.

In approaching this, I am probably not really going to talk much about the Alien Tort Statute as much as a species of legislation I think which is typical.

The criticisms I have of the Alien Tort Statute are non-partisan in the sense that they also apply to the Helms-Burton Act, another case where we are using causes of action to further foreign policy goals. There is a proposal on the Hill to create a cause of action to sue Osama bin Laden and the al Qaeda network for damages caused by the September 11 attacks.

Let me also say that, in doing this talk, I'm a little out of character. Usually, in my academic writing, which has mostly been in the war powers area, I've mostly been a formalist and I look to the original understanding. Everybody here has already talked about this. So I thought it would be fun to be a functionalist for once.

And so, you'll find that, like a functionalist, I am going to make overbroad generalizations about government and I am going to balance lots of things and then tell you that what I think is the right balance happens to be right because that's what I think. And so, I think it's going to be a lot of fun for me and for you, too.

As you can tell from the descriptions of the cases, a lot of the points of these cases, not just in the Alien Tort Statute context, but in places like Helms-Burton, are to not just recover damages, because oftentimes there's no expectation of recovering damages, but to make a political statement.

You don't sue Karadzic to get billions of dollars; you're suing him to make a statement about the type of activity he is engaged in. That creates a problem because the point of making that statement is to send a message in our foreign policy. I don't think people who support or oppose this type of litigation pretend it does otherwise. I think that creates some problems for the way we run our foreign policy, the way we set it and the way we implement it.

One way to understand that is to suppose you were going to create an ideal governmental structure for

developing foreign policy and for implementing it. What would it look like? A lot of political scientists have written about this question. No matter whether they think that power is the driving force in foreign affairs and international relations or economics or other things, almost all the theories in international relations are based on the idea that nation-states are rational actors, that they calculate the costs and benefits of their actions, that they have rational goals, that they translate those goals into policies and they try to implement those policies, and that they take feedback on the policies. And if they're succeeding or not, they change those policies and lead it to success.

For example, the first three weeks of our bombing campaign, we found that nothing was happening. Then we decided to bring in the B-52s and look what happened. That's an example of using feedback in order to change policies to achieve more effective goals.

This vision of how to run foreign policy is recognized by the Supreme Court and by different legal theories. You are probably all familiar with the language from Curtiss-Wright, about how it is a dangerous, scary world out there and how we need to have secrecy and dispatch of action by the President, who is the sole representative in our foreign affairs. I don't have to quote for this audience Federalist Number 70, where Alexander Hamilton went on one of his riffs about the virtues of the Presidency, a as unitary executive that could act secretly and swiftly to pursue the national interest.

Now, having described that sort of ideal system for conducting foreign policy — maybe this isn't the right audience to ask this question because you already knew the answer — do you think the judiciary displays any of the characteristics of a rational unitary actor that can easily take feedback and change its policies in accordance thereto, to reach its goals?

Let's take a look at the federal judiciary. First, the judiciary is slow. It takes years — sometimes 3 years, sometimes 12 years, sometimes 20 years for litigation to complete. It's decentralized. There are 94 district courts, with 647 district judges who can have different opinions about whether the Alien Tort Statute creates a cause of action. There is no unified position amongst the circuit courts as to whether the Alien Tort Statute permits the kind of litigation we are talking about here.

Furthermore, courts are not in the job — I'm not talking about the 9th Circuit, by the way — of measuring the costs and benefits of their actions and adjusting those policies that they think they are working or not. Courts are supposed to interpret the law, figure out the principle and apply it, regardless of what the social costs and benefits are. Balancing costs and benefits is a job for the legislature.

If a court, for example, believes an Alien Tort Statute violation has occurred, say in regard to Paraguay, which is the *Filartiga* case, it can not say, "well, I decide not to give damages to the defendant because it would be bad for our current policy towards Paraguay." Right? The court has to issue its judgment regardless of whether it interferes with our relations with Paraguay.

Further, and I don't mean to insult any federal judges in the audience, but the federal judiciary is rather error-prone. If it were not error-prone, you wouldn't need circuit courts. You wouldn't need a Supreme Court. Courts make mistakes all the time, and it takes years to correct them. And, it is a very cumbersome system to actually communicate upwards in the system that those errors have occurred and to have them changed.

In the military, if you bomb the wrong target, your commanding officer can immediately tell you bombed the wrong target; now go sit in the corner until your next flight takes off.

In the judiciary, you have to have oral arguments. You have to have an opinion written. It has to be sent back to the district court, which inevitably misinterprets it, I'm sure it comes back. This is one of the most inefficient systems for feedback and change of policy that you could come up with.

So, the question is, then, does it make sense as a matter of design of the federal government or national government in foreign policy to have things like the Alien Tort Statute, Helms-Burton, or some of the new ideas that we are floating today? I think my conclusion would be no. But I don't really have any sort of position as to the meaning or the textual meaning of the Alien Tort Statute itself.

So, I think I am actually the only one who made it within ten minutes, so I am going to keep going until I finish the time.

If this was a little discombobulated, it's because I've been working on military commissions for the last three, four, five weeks.

MS. WILSON: You're just trying to fit in with the rest of the group.

MR. YOO: Well, I'm trying to talk about stuff no one understands. I was just going to say, as regards the military commissions, if anybody has questions about those, I'd be happy to answer them, as well.

But just one story. I was telling one of my colleagues, with whom I've been working pretty closely, that I was going to the Federalist Society to do a panel on the Alien Tort Statute. He said, isn't that what we're doing in Afghanistan?

So, I will leave it at that, and I guess we will turn it over to you for questions.

MS. WILSON: Thank you very much. I'd like to turn it over to questions in just a moment, but first I want to see if Andy has a couple of minutes of any point that he was unable to make that he was itching to make before we get into questions from the group.

MR. VOLLMER: No.

MS. WILSON: All right. He's going to be a sport about it. So, questions.

MR. VOLLMER: I get the same fee.

MS. WILSON: All right. Yes, sir.

AUDIENCE PARTICIPANT: I have a jurisdictional question. I understand, if you've got him personally or for *in personam* jurisdiction. My question is, if you're going to tap into the asset, is that a quasi-*in personam* jurisdiction? Are you limited to whatever is in the country and what you can get to?

MR. YOO: I'm tempted to say no comment, if you're asking how we're going to enforce the judgment. But I'm not sure whether you're asking how we enforce the judgment or whether you're asking how we can get personal jurisdiction through another means. Is that what you're asking?

AUDIENCE PARTICIPANT: No, I'm asking, once you have —

MR. YOO: Once we have the judgment?

AUDIENCE PARTICIPANT: No. Once you get *in personam* jurisdiction to put the defendant in jeopardy, once you've tapped his asset, are you limited in your remedy to the asset that you have tapped?

MR. YOO: To be honest, I don't think I know the answer to that question.

PANELIST: This is all *Penoya v. Neff* (phonetic), right? You'll remember from first-year law school. There are different categories, and if you have *in personam* jurisdiction, you are not limited to the value of the property because you have not attached the property; you are attaching the person.

AUDIENCE PARTICIPANT: Well, do we now have a globalization of the long-arm statute?

PROFESSOR STEPHENS: If you have a judgment in this country and you find assets in another country, the question becomes whether that country will enforce the U.S. judgment.

The answer depends both on what kind of agreement we have in that country for enforcement and whether they will look behind the judgment at our basis for jurisdiction, which some countries will do, and find that either the *in personam* transient presence jurisdiction is insufficient or that the subject matter jurisdiction was improper, or that a default judgment is unenforceable. So there are many reasons why these judgments can be even harder to enforce than standard U.S. court judgments.

AUDIENCE PARTICIPANT: So if you've got a defendant that never comes into the U.S., you can actually get jurisdiction just by tapping his account, and once you've got that account you can also go to other nations and go after assets in other nations?

PANELIST: Well, I think — others are better situated. The major answer is that it's no different from where it is anywhere in the law. None of that is changed in any way by Alien Tort Claims Act jurisprudence or the Tortured Victim Protection Act. Personal jurisdiction rules are what they are, and their implications for attaching other assets are what they are.

MS. WILSON: All right. Go.

AUDIENCE PARTICIPANT: I have a question for Beth. From a claims perspective, are you worried that some of these new cases are taking the statute to the bar and are going to result in a ratcheting down of the jurisdiction? I'm going to give you an example.

In the preceding cases, now I guess you use the word transnational corporation, they were trying to get by the state acts requirement and essentially link U.S. corporations with foreign citizens who've committed clearly bad acts. But in some cases, for example, they are now saying that the corporations almost have a duty, as if it's a negligence action. It should be doing something in those countries, for example, to protect their workers.

Do you think that is a proper? Where the plaintiffs are saying in addition to being liable for a state action of murder or torture, these corporations are also liable to prevent acts against their workers and to improve labor standards in those countries?

PROFESSOR STEPHENS: When you started your question, I was going to say no comment. And I guess, in part, because one plaintiff's attorney's excessive application of the statute is another plaintiff's attorney's core, burning injustice, with plaintiffs who have a right to seek redress. If it fits within the permissible boundaries of our law and passes a Rule 11 standard, then it's a reasonable use of our legal system.

In terms of corporations, I am very supportive of the concept of enforcing human rights standards against corporations, and this gets into what Andy didn't get a chance to talk about from a different perspective. I think the question about how far it should go, how attenuated the connection is between the corporation and the human rights abuse, and the extent to which obligations are being imposed on corporations that go beyond just refraining from certain acts, I think the key there is to not step beyond the state of the law.

I certainly do not like to see negative decisions and negative precedents, although courts are quite capable of throwing us out when they think we've stepped beyond the state of the law, and it's happened in several of the corporate cases. And I think there is a growing international recognition of the application of international law to corporations, which I think is well established enough to justify litigation in U.S. courts.

MR. VOLLMER: Could I say a word on this?

MS. WILSON: Yes.

MR. VOLLMER: This is the subject I was going to address.

My concern — I have many concerns, which take far more than my almost allotted eight minutes. But the question here is about the theories of substantive liability that can be applied to corporations under the Alien Tort Statute. You need a breach of international law, and what you do not see is rigorous analysis of whether international law contains theories of secondary liability, which I think is precisely the concern your question identifies.

A lot — not every one, but many — of these cases against corporations concern misconduct by governmental actors, soldiers, police, government officials. And the effort in the suit against the corporation is to evaluate and impose secondary rather than primary liability against the corporation.

The question should be, does international law contain such a theory, and does it do it with sufficient clarity and precision for courts to have a rule of liability, a standard of liability to apply? What you see, happening instead, are plaintiffs alleging secondary theories of liability with no precision, and often based on secondary liability theories that we know as U.S. and common lawyers, rather than an analysis of what international law provided during World War II in the World War II cases.

It highlights two principle concerns I'll just try to cover quickly. It actually identifies lots of concerns. It identifies a concern about the amorphousness about international law. Does it really contain secondary theories of secondary liability that corporations can identify and conform their conduct to, or not?

Second, it raises, a lot of concern about the anti-democratic nature of the application of this statute. What you do not have is elected legislators in the United States making determinations of when corporations should be liable and when they should not be liable. You instead have these cases being brought by very sympathetic plaintiffs and decided by judges of good will, but who are prepared to look hard for a remedy because the plaintiffs are so sympathetic.

So, my concerns about this statute is that there has been no evaluation about the trade-offs and accommodations that we should be making to define a cause of action, as we did in the Torture Victim Protection Act, for example.

AUDIENCE PARTICIPANT: Two questions. One comment I would make is that I don't think the point came across as to how widespread these cases are and how assertively this tactic is being used. One of the private plaintiffs in the *Microsoft* case had a state law claim tossed out and brought it under the Alien Torts Claims Act.

But if the Administration felt that the the trend here were going too far, what tools does the Administration have in its toolbox, without relying either on the judiciary or on the legislative branches, to do something about what's happening?

Let me just quickly say, because I am not speaking out of any privileged information here, but it may well be that the *Mashein* decision from the Ninth Circuit will be petitioned to the Supreme Court. It would seem with the

government and the Solicitor General pressing, if they decided to do so, that it has a high likelihood of being granted, and it would be on the federal tort claims act issue, but could also piggyback in the Torture Victim Protection Act for the Supreme Court's review, which would give it a chance to curtail with appropriate legal analysis — and again, I stress law versus politics — curtail what's actually contained in this Alien Tort Claims Act broad language from 1789.

PANELIST: I'll address the first question about the tools, outside the legislation and the courts. But I want to say one very brief thing about the TVPA, which we haven't mentioned. One of its many requirements is that there's foreign state action. So this is not a *Mugabi* (phonetic) question, but it really doesn't apply in this new corporate wave of litigation. You have to go back to the Alien Tort Statute, if at all, or you'd have to prove under the statute that there was in fact state action because it clearly requires that as a matter of statutory law.

In terms of the tools, I think that does implicate *Mugabi*. The State Department and Executive Branch, I think, has a pretty large amount of authority on an ad hoc basis to try to suggest head-of-state immunity. And it does that in cases involving real heads of state. My sense is that courts will give close to absolute deference when they suggest that a sitting head of state, at least, is immune, which the State Department has done.

Outside of that, however — and most of the cases don't implicate head-of-state immunity — I think the State Department and the Executive Branch is left to its usual tools of filing briefs that suggest its views about the case, *amicus curiae* briefs and statements of interest. Sometimes courts seem to give those a fair amount of weight; sometimes they don't.

The Reagan Administration filed a brief in one of the more prominent Alien Tort Statute cases in the mid-1980s, arguing that it didn't think the statute should be used for all of its litigation, and the Ninth Circuit decided to disregard the Executive —

PANELIST: They're cases filed.

MS. WILSON: Good. All right. I appreciate your being here.

What I want to give you is citations to the two cases you heard bandied about up here — *Filartiga v. Pena*, 630 F.2d 876 (2d. Cir. 1980). The WEWA case that Andy mentioned was decided in the year 2000, 226 F.3d 88. It is against Royal Dutch Petroleum and gets into some of the issues regarding suing corporations.

So you can have somewhere to go if you really want to learn about this. I appreciate your being here.

LABOR AND EMPLOYMENT

LABOR LAW FOR THE 21ST CENTURY

Mr. Don Kaniewski, *Legislative and Political Director, Laborers' International Union of North America*
Hon. Ann Combs, *Assistant Secretary for Pension Welfare Benefits, U.S. Department of Labor*
Mr. Andrew Siff, *Counselor to the Secretary, U.S. Department of Labor (introduction)*
Hon. Cameron Findlay, *Deputy Secretary, U.S. Department of Labor (moderator)*

MR. SIFF: Thank you all for joining us here today for our panel, Labor Law for the 21st Century. As we stand here on the threshold of the 21st Century, we can look back and certainly say that the 20th Century was a wonderful success for our country, particularly its economy. And today, many countries shake and scratch their heads as we in America are gnashing our teeth over the fact that we have unemployment hovering at six percent, which in most countries is their greatest dream of full employment.

But, if we are going to continue the incredible economic growth and vitality that our country has had, certainly one aspect of that is going to be having American workers, employers and the American Government anticipate and figure out how to respond to some of the many changes that are taking place within the American workforce. That is what today's panel is all about.

Today's panel is a group of people who have some very well-informed views on what it will entail to anticipate and address many of the changes taking place in the American workplace and the extent to which the regulatory regime that governs the American workplace would either have to be amended, updated or radically overhauled.

We are fortunate to have with us today leading this discussion Deputy Secretary of Labor Cameron Findlay. I will refer to him more casually, since I work with Cam every day. In my day job, when I'm not at the Federalist Society, I serve as Counselor to Secretary of Labor Elaine Chao. For those of you who don't know me, I am Andrew Siff, a long-time member of the Federalist Society, and I have very much enjoyed working with Cam at the Department of Labor.

Cam has a distinguished history of government service that began when he clerked for Judge Steven Williams on the United States Circuit Court of Appeals for the District of Columbia. He then went on to clerk for Justice Antonin Scalia. Following his clerkship with Justice Scalia, in 1989, Cam went to work for the prior Bush Administration as a Special Assistant to the Secretary of Transportation. And he was so fantastic that they made him Counselor to the Secretary of Transportation. At some point, Cam was so fantastic that they decided to promote his boss to White House Chief of Staff, and so Cam went over to the White House and had an opportunity to serve as Deputy Assistant to the President and Counselor to the Chief of Staff. Following his stint at the White House, Cam was further sensitized to the plight of the regulated community while working at the Chicago office of Sidley and Austin, where he had an eclectic practice that ranged from complex commercial litigation, to antitrust, telecommunications and appellate litigation.

At the Department, Cam is not only our Chief Operating Officer, in essence, but he is also the Secretary's key advisor on a range of matters. He is the Chair of the Department's Policy and Planning Board, which oversees the planning and implementation of Agency regulations, and he is also responsible for the Department's budget process.

Cam's formidable intellect is matched only by his irrational enthusiasm for the Chicago Bears and the Northwestern Wildcats, so please join me in welcoming Deputy Secretary of Labor Cameron Findlay.

HON. FINDLAY: I apologize for my voice. I think I have been cheering too much for the Bears lately and bemoaning the Wildcats.

Before I introduce our panelists, I wanted to take a few minutes to set up the discussion and some of the provocative questions that I am going to pose to them. The premise that I would like our panelists to address is that the labor laws of the United States and the programs and policies of the U.S. Department of Labor need to be dramatically updated to address the challenges of the 21st Century workplace.

The Department of Labor, as some of you probably know, was established before World War I, and most of the laws that we enforce were enacted in the 1930s or through the 1970s. The Wagner Act was enacted in 1935; the Fair Labor Standards Act, in 1938; Davis Bacon passed in 1931. And even ERISA, which is one of our most up-to-date laws, was passed in 1974. This, of course, when polyester was considered high fashion.

Well, in the earlier half of the century, the workplace looked very different than it does today. Most Americans were working on farms at this time, and those who did not work on farms were working in factories. It was very easy to tell apart professionals who were exempt from wage and hour laws from the workers who were not exempt.

At that time, nearly all families had just one wage earner, and it was usually Dad, who went off to work for a nine-to-five week. And we didn't have the 24-7 orientation we do now, and there was no such thing as a service industry. So, really, the laws were enacted to address very different workplace problems than we have today. Let me give you just a

couple of examples, and maybe our panelists will address these.

Under the wage and hour laws, it's currently illegal for a worker and his or her employer to agree that the worker can take comp time instead of time and a half, if the worker works overtime. It's illegal, even though Federal workers have this option, and Federal workers love the option.

Another example: The Department of Labor's regulations that distinguish exempt professional employees from non-exempt blue-collar employees were written for a manufacturing economy, in which it was very easy to distinguish the two. In a manufacturing economy, the professional employees are the guys — and it was guys — behind those glass windows in the offices. And the blue-collar workers were the ones who wore blue collars and worked on the shop floor.

The workplace has changed, and these old distinctions do not seem quite relevant. How do you classify a Blockbuster assistant manager who runs the store when the manager isn't there, but also works the cash register or actually re-shelves videos? How do you classify a stock analyst at Merrill Lynch who makes $150,000 a year but doesn't have anybody working for him or her? How do you classify the guy at the Saturn plant who is a team leader, directs other employees' work, but also installs engines himself?

So, these are the questions that I want to pose to our panelists: Are the labor laws well adapted to our current workplace? Isn't it time to rethink everything we do to determine whether it's relevant anymore?

Let me introduce the panelists who will be addressing these questions.

Don Keniewski is the Legislative and Political Director of the Laborers' Union. Don has been roaming Capitol Hill for three decades.

From 1971 to '77, he worked on the House Education and Workforce Committee. In 1977, he began working for his current union, and has risen through several jobs to his current position. And during that time, he's been at the center of every major legislative battle on the Hill on labor issues, including debates on the Service Contract Act, the Davis-Bacon Act and the Fair Labor Standards Act. He also has been an architect of the coalition with some unions that have been come to be known as the Labor Republicans. So, he's well-known and well-liked on both sides of the aisle. Most recently, he's been working with the Bush Administration to pass the Energy Bill, which would allow drilling in Alaska, but would also provide a lot of jobs for union members.

And Ann Combs, who's to my immediate left, is the Assistant Secretary of the Pension and Welfare Benefits Administration. Ann has an agency which oversees approximately 700,000 pension plans, with nearly $5 trillion in assets. She also oversees over 6 million health and welfare benefits plans.

She is basically the ERISA maven of our department, which is one of our most important statutes. Because most people who encounter ERISA eventually commit suicide, she's probably the most knowledgeable person in America on ERISA. Before her appointment, Ann was the Vice President and Chief Counsel of the American Council of Life Insurers. And she also served as a principal of Mercer Consulting. During the Reagan and Bush 41 Administration, she spent six years as the Deputy Assistant Secretary at her current agency.

Ann is, I regret to say, a Domer — a graduate of the University of Notre Dame, and she got her J.D. from George Washington University Law School.

So I think what I'll do is ask Don to address the rather provocative questions I posed, and then I will ask Ann to talk, and then we'll take some questions.

MR. KANIEWSKI: Oh, good. I get to go first. Thank you very much, Cam. We will get to the questions you posed.

I do want to take a moment to do a couple of things. One of the pieces of paper I handed out that I think wound up in your packet — you may not have it with you — was a document that was produced about six months after our union was founded. Our union was founded April 13, 1903. This document was to be put in pamphlet form to promote the union and its aims and ends. It dealt with a number of issues that still are relevant to the work we do and how we conduct our business.

I included this for another reason. And that is because, with readily identifiable crafts, like the carpenters, the plumbers, sheet metal, iron — you can go down the list. Everyone knows, or thinks they know, or has some idea of who they are and what they do. When it comes to the "laborers", we seem to be such a generic-named union that the ability to identify our craft is somewhat lacking.

But I will tell you that we do a wide range of work, and have since our founding as the International Hod Carriers Union. No one carries a hod anymore, but we now do everything from ditch-digging to dynamiting. We are the people who do hazardous waste remediation on superfund sites, as well as asbestos abatement and elsewhere. We represent 60,000 postal workers through our mail handlers division. We have a large number of public employees in a variety of states and counties, and we are a diverse union representing a diverse membership.

I also want to refer briefly to this document, and just highlight a very few sentences. On page one, it talks about, "Since organizing, we have lessened the working hours of our members; increased their wages; and secured for them their just rights by the arbitration of disputes between employers and employees." It goes on to say, "Our first calling is to create general agitation for the purpose of making a universal eight-hour day, to increase the wages of the members of the

craft, to establish a system of arbitration and conciliation in the different sections of our land, to help the members of the craft in securing lawful and profitable employment."

And two other brief comments on this document. "As an international union, we propose to act along conservative lines" — I thought there would be applause at that moment —"having ever in mind the best interest of our members. We intend to ensure a uniform rate of hours, wages, throughout the country, wherever a local can be established."

And finally, "Without thorough organization of the members of our calling, wages would be forced down so low that our liberties and our rights as free Americans would be crushed, for none but an organized body of workmen of any craft or calling could hope to enter into agreements with their employers with any expectancy whatever of securing terms and maintaining a share of the fruits of their labors." I think that might answer all of the issues raised by Cam earlier.

I mainly work in the legislative and political area. I will tell you a quick story.

Two guys went hunting — Cam and Chris. I don't know where I got those names. And they were on this hunting trip in Upstate New York and a terrible snow storm develops. They saw a light in the field. They drove there and they found a farm house.

A woman answers the door, and she says, "I'm just a poor widow woman and I don't think it would be appropriate for me to have you in the house, but you're welcome to stay in the barn." So, they stay the night in the barn. The next day, the weather clears up, they bid their adieu and they are on their way.

Nine months later, they get together. Cam says to Chris, "Do you remember that hunting trip we took?"

He say, "Sure do."

He says, "Remember how it snowed real bad that one night?"

He said, "Oh, yeah. We took refuge in that widow woman's barn."

He says, "Yeah, I remember that."

He says, "Did you sneak out that night?"

"Well, yeah I did."

He says, "Did you visit with that widow woman?"

He says, "Yeah, I did."

He says, "Did you have sex with that widow woman?"

He says, "Yeah, I did that, too."

He says, "Did you tell her you were me?"

He says, "Yeah, but I can explain it."

He says, "No, no, no. No need to explain. She just died and left me all her money."

That sort of describes my life, in a way. We set goals. We think we know where we are going and what we are trying to do. Throughout the effort, we encounter a number of problems along the way, and often we meet with surprising results at the end of our efforts.

Our job is to put our members to work. Our job is to put them to work in a safe environment that protects their wages, hours, working conditions, and their health and safety. We also owe a duty to our contractors to make sure they are the best-trained workforce we can provide. So, our contractors are competitive and construction owners get value for their money.

In doing all of that, we engage a lot in work on some of the issues mentioned, like the Energy Bill. We were out there on T21 and Air 21, along with our partner contractors. And unlike that cult that masquerades as a trade association that did nothing on this legislation, our partner contractors, in fact, are there. And we are there, delivering product to market, whether it is clean water, infrastructure in T21 or Air 21. We are there to provide job opportunities for our members.

Along the way, we want to make sure the labor standards in 70-year old statutes like the Davis-Bacon Act are maintained because they assure our contractors a level playing field. So, we are not in this just for ourselves. Our contractors need a level playing field to enter into this debate. And when it comes to Davis-Bacon, that is what they get.

We need to deal both with the substantive and political arguments that attend to these issues, whether they are infrastructure issues or labor standards issues, or a wide range of things like Brownfields, where we think we have reached an interesting agreement with the Administration and some of the House Republicans.

Our union is diverse in its makeup, as well, with respect to who our people are. We are the largest minority union in the building trades, and the largest immigrant union in the building trades, in terms of the makeup of our membership. So we have a keen and deep abiding interest in that ever-changing workforce, and who is a part of it, and who is making that contribution to this economy. We have been very involved in the immigration debate.

I am not going to go on too much longer, but will end with one brief story. And I'll get back to a phrase Andrew used in describing the work some of you all do. When he referred to the so-called "plight of the regulated community"; oh, the poor, suffering regulated community.

I was on the Hill just a week or two ago to have a discussion with a staff member about an amendment to the Service Contract Act. Our union was instrumental in 1965 in seeing its enactment, and also with '72 amendments. And I had the privilege of writing the last amendment in 1976.

I had to remind the staff person — I said, why did you come up with this remedy for these problems? Well, the Agency said and the procurement people said and the DOD said. I wanted to remind her, and I'll remind all of you, these laws, whether they're 70 years old or 20 years old or 27 years old, were designed not to make the life of the bureaucrat easier, nor to solve the plight of the regulated community. They were designed to protect working men and women, and that is where my job comes in, in the work I do on Capitol Hill legislatively and politically. We are pleased, in doing that job, to have a good relationship with a good number of Republicans, as well as Democrats, to try and accomplish our ends on a bipartisan basis.

But, at heart, that's what we are about — advancing the economic cause of our members, to provide them opportunity, protecting them as they perform those jobs, training them in that process, and for making sure that, throughout, working men and women have a fair shot at doing a job, doing it well, and doing it safely. And to see to it that they're not subjected to the kind of competition that can destroy any advances they might have made.

So, with that, I want to thank you. I hope we'll have a lively question session, and I look forward to hearing from my colleagues on the panel. Thank you very much.

MR. SIFF: Thank you very much, Don. Now I'd like Ann to address several topics. And I'm also hoping that she can explain how that widow story plays in. I'm still waiting to hear that.

HON. COMBS: There's a connection — tenuous. Thank you. I was going to start out by explaining to the audience about PWBA because many of you in the employment labor law area don't necessarily practice in the ERISA field. So, we really are the agency that regulates or administers ERISA. Now, I've been dubbed the ERISA maven, which I hope does not stick among my DOL colleagues in the audience — you know who I am.

I wanted to talk for a few minutes about the 21st Century workforce and how it has changed, and how that has affected employee benefits, which is really what my agency is all about.

Undoubtedly, you are all familiar with some of the changes in the workforce. Cam laid them out. There are more job changers. People have less attachment to their employer than they used to. There are more part-time workers and independent contractors. There's a lower incidence of unionism. And more and more in compensation is being paid in the form of non-taxable benefits, and in recent years there has been a real attempt to link pay to performance, and that has led to the rise in stock options, which may be less popular in the coming years than they have been in the last five or six. But that is a whole new area in the employee benefits field, as well.

ERISA was passed in 1974. Despite being the new kid on the block, quite a bit has changed since its enactment. At the time, I think it really was a more paternalistic world. Defined benefit plans were the norm. Employer-provided health care was typically fee-for-service, with very limited cost sharing, if at all, among larger employers. It really was a situation where people went to work for an employer for a long career, and the employer assumed a lot of these responsibilities.

Since then, there's been a dramatic shift, and I think it really can be summed up as a shift of responsibility away from the employer and towards the individual. We have seen tremendous growth in defined contribution plans, for instance.

In the healthcare arena, we have seen the growth in managed care and in substantial cost-sharing among workers and the employers with the workers. There has been a growing interest in recent years in moving to a defined contribution model in healthcare. It started in the retiree health area, where people want to have a defined dollar that they are promised that they will have each year, as opposed to a defined benefit such as paying all your healthcare costs.

We are seeing an interest in medical savings accounts, and even in defined dollar arrangements for active employees. These are what's on the drawing board in the consulting firms and among the larger employers, and what benefits managers are talking about — how to limit their liability; how to put a cost limit around, a parameter around, their promises. And all of this is taking place in an environment in the financial services industry which provides a lot of these products, particularly in the retirement area, of massive consolidation, which creates problems with the way ERISA is structured.

So, I want to talk to you for just a few minutes about a couple of the items that are on our agenda, that I think reflect these trends. First, I will talk to you about some legislation that is actually pending on the House floor. They were voting as we arrived here today, dealing with investment advice in retirement plans.

I'll talk to you a few minutes about one of my priorities, which is looking at the whole exemption process in ERISA. And then, in the healthcare area, talking very briefly about the Patients' Bill of Rights legislation and association health plans, which are a new form of group purchasing arrangements for small businesses.

The investment advice debate is really extremely timely. This is a situation that really reflects the shift from defined benefits to defined contribution plans.

Recently — the last two quarters, really — workers for the first time since defined contribution plans really took off have seen their quarterly statements show negative returns. The growth of 401(k) plans really neatly coincided with the growth in the stock market, so people just thought these things went up, up and up. And in the last two quarters, they've

seen that the stock markets, in fact, do go down. And so, there is a lot of concern and interest in helping people make better decisions about how to invest their money.

Under ERISA, the Department has said is perfectly acceptable to offer investment education. That is, telling people about risk return characteristics; how to allocate and diversify their accounts. That is distinguished from investment advice, when someone says, "All that's well and good, but what should I do?" And Don says — this is my hook — "What should I do with all that money I inherited", somebody wants to sit down and tell him how to invest it. That was weak.

Currently, ERISA prohibits financial institutions that have an interest in any of the investment options that are being made available from giving investment advice for a fee. There's legislation on the Hill that was sponsored primarily by Mr. Boehner in the House that would create a statutory exemption from ERISA to allow those institutions to give advice to participants in 401(k)-type plans, as long as they assume fiduciary responsibility for that advice and there were significant disclosures accompanying that advice.

This Administration, in contrast to the previous administration, strongly supports this idea. We have endorsed the Boehner Bill, which has been passed by the Educational and Workforce Committee, the Ways and Means Committee and is on the House floor as we speak.

Today, with 80 percent of workers enrolled in defined contribution plans — we're told they've invested about $1.7 trillion — you really can't over-state the need for people to get advice as to how to manage this money. They have been given the responsibility; they really need the tools to assume that responsibility.

On the exemption process, generally, advice is one example of a transaction that is prohibited, but there are many. ERISA was set up as a prophylactic statute that basically says, "Thou shalt not deal with a party in interest, someone with whom you have a relationship, or deal in a manner which benefits you, unless you come to the Department of Labor and get permission to do so." It has created a tremendous bottle-neck for a lot of innovation in the marketplace. It results in fewer services and products being made available to participants in pension plans.

So, we are in the process of looking at that whole system and seeing what we can do to streamline it; to make it more flexible and responsive; to get the Department out of the business of designing products, which is what they have tended to do. They put so many constraints on how someone wants to structure a product or a service that they are actually helping to design it and eliminate the conflict.

What we are trying to see is if there are ways we can make sure we have protections in place so that the plan participants are protected, yet, at the same time, have enough flexibility that we can get products and services to market quickly. People will have more options available to them, and it will bring down costs. So, that's a major priority for PWBA at this time.

Switching, briefly, to the healthcare side, the Patients Bill of Rights is an interesting example of legislation that is addressing a problem that arose in the marketplace about five years ago — maybe a little longer — when managed care took hold in an attempt to control costs and to provide more consistent quality of care. As in many things, there was a perception that the insurance companies went too far and the pendulum swung too far toward restrictions on peoples' access to physicians, access to specialists, and other patient protections.

This bill, in various forms, has been considered in Congress for the last six years. A bill passed the House this year, which the President supports, that would include a lot of patient protections, but also establish a system of external review, so that claims would be heard by an independent third-party physician, and then, for the first time, establish extra-contractual remedies in ERISA for denied benefit claims.

Our goal is to make sure that people get fair determinations on their benefit claims quickly through this external review process, and to limit litigation. We need to hold down costs. Healthcare costs are going up 20 percent this year; small businesses are talking about 30 percent increases. So, we really have to fight against a bill that's going to turn loose the trial lawyers — with all due respect — on the healthcare system and on the managed care companies, at the expense of delivering care quickly. That is what people need; they need healthcare. They do not need more access to court. So, we are working on that bill. It is the end of the session, and we'll see what happens. More likely than not, we'll be back, still talking about it, next year.

Meanwhile, healthcare costs keep going up and access to healthcare is a real problem. So, in order to address that, the Republicans in the House have included in the Patient's Bill of Rights a proposal to allow small businesses to band together and use their clout as a larger group to purchase more affordable health insurance. These are called association health plans, and they would have two options. If they wanted to fully insure, they would be able to be exempt from state benefit mandates. Many different states have imposed individual benefit mandates, i.e., services that must be covered. Association health plans would be free from those mandates, but would buy an insured product that would keep costs down. That is the hope.

They would also have a self-insured option, where they would come to the Labor Department and be certified and have to meet certain solvency standards. It really would be a vast expansion of the Department's regulatory scope. We would be asked to, in effect, act as a state insurance commission for these self-insured association health plans.

So, while the goal is to expand access to and lower the cost of health insurance, it really does mean a growth in the regulatory reach of the Department of Labor, which is contrary to what Cam has posed as one of our questions.

I think, in sum that in the areas the PWBA is focusing on in the 21st Century, the mission has changed because, when ERISA was passed, its focus was retirement, defined benefit plans, and fiduciary oversight of the assets held in defined benefit plans.

Today, we're about 50 percent retirement, 50 percent health. More and more of the assets are held in defined contribution plans and, in fact, for the first time, the majority of the assets aren't even in 401(k) type plans. They're in IRAs. People are taking rollovers and moving them into IRAs, which is under yet another completely different regulatory structure.

So, there's a lot going on in the marketplace. We, as I think often happens with government, are playing catch-up, to some extent. But we're really trying to be more market-focused and make sure protections are in place, but also to make sure that people also have access to lower-cost services and products, and to help people manage a financially secure retirement and healthcare situation.

HON. FINDLAY: Thanks, Ann. Let me pose the first question, and I pose this one to Don. When you hear Republicans talk about compliance assistance, does it sound to you like Republicans are just trying to strip away protections for workers and let the big corporate fat cats do what they want? Is that what this is really about?

MR. KANIEWSKI: Yes. Thank you. Next question. I should elaborate. It sounds that way, but I understand what you are trying to do here because we have established in our union three funds. We have a traditional training fund that does training; a health and safety fund and a third, a labor management cooperation and education trust. These latter two funds are designed to do just that, to work with our employers, to help us meet their needs, and to help them meet the market's needs in making them competitive.

What I think scares people most about that in the context of the government doing it, in the context of Republicans doing it within the government, is, traditionally, it has not had a good — how quite to put this? It has not had a good reputation of just how far people are willing to go and, depending on which laws you are looking at, how much you will diminish actual enforcement over assisted compliance, if you will.

I think if everybody were complying with the law, we'd all be fine, and assisting employers to do so is a useful thing. But, dealing with the people I deal with on a daily basis on that side of the aisle, there is a tendency to let the market be a little freer and looser than it might to protect workers.

HON. FINDLAY: Ann, I wanted to ask you, when you talk about the move from defined benefit plans to defined contribution plans, it sounds like we are putting a lot more power and responsibility in the hands of individuals than has traditionally been the case. What do you say at PWBA to a person who foolishly fails to max out on their 401(k) or who invests all their 401(k) in a completely speculative and ridiculous stock, like, say, Hewlett-Packard or Cisco?

HON. COMBS: We spend quite a bit of time and effort in outreach activities to try to help spread the message about the need to take advantage of the opportunities to save for your retirement through a 401(k) plan. We do a lot of outreach with community groups, with employers, with service providers, with others.

We received over 170,000 phone calls last year, from people asking about their healthcare and their retirement benefits and what they should do. Actually, that is where we get a lot of our enforcement activity. "Money was withheld from my paycheck and it didn't show up in my 401(k) account". So, we support that effort.

We also support the efforts of employers. The way the law is structured, it is actually in an employer's interest to have more people covered under their pension plan because of the non-discrimination rules that are in the Tax Code. So, there is an incentive there for them to go out and encourage people to take advantage of these opportunities.

There are guidelines under ERISA. Employers have a fiduciary responsibility for selecting the investment options. Under one of the Department's regulations, they can escape liability for the actual investment decisions their employees make only if they offer them a broad range of investment options and have adequate disclosure, and there are some other safeguards in place.

So, we try to create a framework within which to provide people with reasonable choices, to help educate them and to encourage employers' efforts to educate them. And I think the House investment advice bill fits nicely with PWBA's ongoing effort to make sure people really can understand and maximize their retirement savings.

HON. COMBS: I can just say, as a line manager in the Department who went through the Policy Planning Board process, I found it very valuable and really welcomed the opportunity to put forward an agenda that I thought was realistic, and to have it vetted and have it stress-tested.

I mean, it's good to have people ask the obvious question, what the heck is that? Why are you doing it?

Is it necessary? Do you really, realistically, think those timeframes make sense? Can you get all that done this year? Those are really good push-backs to receive as a manager, to make you go back and rethink it and put forward a much more realistic picture to the world about what we're going to work on this year.

We took some items off the agenda, where we have a statutory mandate to do something within three or five years. We're not going to work on them this year; we'll work on them next year. They'll be on next year's agenda. This agenda reflects what our priorities are for the next 12 months, what we're going to be working on. I think that's very helpful out in the community.

HON. FINDLAY: Don, I wanted to ask you one more question, and then I think I'll throw it open to the audience.

You had said that your union's charters really protect the working men and women of the union. But I think it's not an exaggeration to say that those of us in the Department see that as our job as well. But we sometimes feel as if organized labor is unwilling to consider different means to that shared end. How open do you think labor unions are to considering alternative ways of get to the same goal of making sure that the workforce is protected and they have good jobs and good wages?

MR. KANIEWSKI: The charter spoke not only to the union's desire to protect its members, but also our desire to work with our employers. We are very proud of the work we do with our employers in making them competitive and providing them with a quality workforce that gets the job done on time under budget, and with highly skilled people.

Our willingness to be open to new ways of doing things falls in two categories. What does it do to the competitiveness of our signatory contractors? And, what will it do to our ability to represent our membership and maintain the level of standards and benefits which they have achieved.

No one would reject out of hand any approach from the Department or from Congress in looking at a different way to do something, to accomplish the same end. We would come to the table with a lot of questions, "Well, what about this and what about that?"

In reality, in terms of the industry or on the job, in terms of safety issues that arise on the job, in terms of issues that arise in the benefit world, and elsewhere — we're not closed to those things. But it has to be an open discussion. Some of these things are long-term. Ergonomics took 15 years to get into place, despite its fate.

But these things are long-term projects, and we're willing to enter those discussions and we're willing to look at things with people of good will. I think that's an easy one.

HON. FINDLAY: Can you see ways in which the Fair Labor Standards Act could be modernized to be more in line with the sorts of changes we've been talking about today, or is it really kind of like amending the Ten Commandments?

MR. KANIEWSKI: Well, I wouldn't be that extreme, that it's like amending the Ten Commandments. But it is crafted to protect workers. And your client is probably a good employer who's doing the right thing by their workers.

Yet, there exists out there a class of people who would take advantage of certain worker classification schemes to get out from under not only the FLSA but a number of other laws, and to create a series of independent contractors or other things that put workers at risk.

FLSA is a challenge. It's a heavy lift. I don't know how we attack that animal. But, again, people of good will wanted to sit down and talk to the AFL-CIO and hear about the kinds of things they're concerned about and what can be scrapped — I think everybody, if they thought they could limit the damage, would find something to agree with, but I don't think everybody trusts each other. And trust is the foundation of any changes you're going to make in FLSA. Right now, that trust isn't there.

AUDIENCE PARTICIPANT: I'm Bill Adamson from Philadelphia. I'm a registered Libertarian who was attracted to the Federalist Society by the Society's claim to be a Conservative/Libertarian organization.

I am not a labor lawyer, but I have heard nothing from this Panel that questions the underlying validity of having such things as Fair Labor Standards Acts and other labor laws that you all assume should remain in effect and simply be tweaked.

This is my first convention, so I'm kind of feeling my way here. I'm wondering why the Federalist Society doesn't have anybody on the Panel who actually takes a Libertarian position with respect to the Department of Labor or ERISA or OSHA or the Fair Labor Standards Act.

MR. KANIEWSKI: Well, I am not a member of the Federalist Society, but I'm honored to be their guest here today.

Libertarian principles are something I have done some reading about and understand a little bit. I hope people aren't sitting here saying, get rid of OSHA, get rid of FLSA, we don't need this kind of stuff. The real-world experience tells us that people will abuse people in this employee-employer relationship, and there is a role for the federal government

to afford protections there.

Whether we have a greater or lesser degree of regulation in that process is a healthy debate we engage in as a civil society. But, I would just say to you that I am glad that we are not diminishing the role of the Department and its agencies and the very real, hard work they have to do to deal with the history that we know.

HON. FINDLAY: Something I'd say is that I've worked in different departments. There was economic regulation in the last department where I worked, which was DOT. They had finally achieved a consensus as to the right answer, which was that economic regulation is a terrible idea. Deciding what airplanes fly what routes, what their service levels ought to be — that sort of thing decreases economic welfare.

Some of the regulatory responsibilities in our place are different. OSHA, for example, is intended to address a market failure. If one company provides a safe workplace at some expense to itself and another one doesn't, the one that will win in the marketplace is the one that doesn't. There are some market protections built in. I think workers do not want to go to work in an unsafe workplace.

But I think that there is regulation, and then there is regulation. And it's impossible to make a sweeping statement that all regulations are exactly the same, and equally good or bad.

AUDIENCE PARTICIPANT: Hi. Theresa Parante from the Department of Justice. And, perhaps going to the other end of the spectrum, you mentioned that there is no choice right now for private employers for comp time and overtime. I know in my department the only people who have a choice of comp time and overtime are represented employees. And since most employers do not have unions, are private employers, what protection, if any, are you proposing to give employees this choice?

MR. KANIEWSKI: I'm glad you raised that because I thought all the comp time stuff in the federal government took place in the context of collective bargaining and the represented employees.

What we worry about in the outside world — the legislation that's been proposed so far does not distinguish between and among industries. How are you going to enforce a comp time law, in terms of the abuses that may occur? You have good faith and good intentions but they'll be *de minimis* in this context.

But there are bad employers out there. And in our industry — in the construction industry, in particular — we would think this would be prime for abuse in this area. But we can have a debate about that.

HON. COMBS: It is interesting for me because I come from a slightly different field. The history of ERISA is one that is largely bipartisan. There are differences of opinion, certainly, and there are flare-ups. But generally, the two sides of labor and management have worked relatively well together and have come up with solutions that are acceptable.

What do you need, Don, to build the trust that you say we need to deal with these very real issues? I think there is a trust. You and I were talking about your counterpart in collective bargaining. We work together; we have for years. How are you guys going to build up the trust that you need?

MR. KANIEWSKI: I don't know. As a student of the Congress, I think we're the victims of the terrible historical wrong that came about in the 1980s with the shrill political atmosphere that was created on the Hill, that degenerated into abuses in the political process on both sides; a name-calling vengeful spirit that has to be quelled in some fashion. I don't see that it has, yet, and I don't know how to quell it.

But I was around in 1974 when ERISA was enacted. I knew Vance Anderson and a whole host of people that worked on the legislation. I knew about how it worked across the aisle. When I did the last service contract amendment, I worked with John Ashbrook — my candidate for President, and you could work in trust across the aisle. That seems to have been destroyed since the 1980s, and I don't know how we restore it not only to the body politick, where I think it's epidemic, but the campaign industry and this viciousness industry that exists on both sides of the aisle. It's tit-for-tat and it's a war all the time. I don't know how we get back to a reasonable dialog. I hope we could.

AUDIENCE PARTICIPANT: I'm Mark Levine. What are you doing at the Labor Department to protect union employees from their unions? What are you doing to investigate corruption and send cases over to the Justice Department for prosecution? And as for the poor labor movement that's put upon, what are you guys doing with your 990s, where you put zero on line 81 for political activities? The AFL-CIO has put it on there since 1994; the NEA's put it on there since 1994. Do you spend not one penny of general revenues on political activities? Or, does it all go through your PACs?

HON. FINDLAY: Who wants to start? We're going to have give Don a chance.

MR. KANIEWSKI: I have a little bit of experience with a union and corruption. My union, quite frankly, has had problems.

We have addressed those problems aggressively.

When the Justice Department came knocking on our door in 1994 and threatened us with a RICO suit, we went back to them with a proposal to allow us to remedy this problem, under their supervision. We are proud of the results we have achieved in ridding ourselves of corruption and in introducing a mechanism to protect our members and to protect the people we represent from any abuse by anyone in the union.

We have independent hearing officers — effectively we have a prosecution team. We have cops, prosecutors and judges. And this has worked well for us. But let me point something else out to you.

Just in today's paper, McDonnell-Douglas was alleged to have enriched themselves to the tune of $21 million . I go to this wonder website. I'm sure you've all seen it — the National Legal and Policy Center. They have this wonderful little thing they update biweekly, called the Union Corruption Update. I commend it to you; I want you to go look at it.

I want you to look at and add up all the money these thieving union bosses allegedly stole, some of whom were no longer employed by the unions, but they wind up there anyway. Some of them were removed by their unions, but they wind up there anyway. Add up all the money, and I'll bet you money today, it doesn't equal what Archer-Daniels-Midland stole from the American consumer and the companies they dealt with.

Who's policing the crime in the suites? Unions get blamed for the abuses of their members. We have a mechanism to deal with it. We put that mechanism out there in public, and we'll defend it and we'll take on anyone who wants to attack it.

Our members, if they're not getting good representation, they have a mechanism to deal with it. They have a democratic election process to remove people who are not doing their jobs. And they have an internal process to do the same thing, if someone is abusing or not doing their job. But this is not just a one-sided union boss thing.

I tell all the Republicans on the Hill, there's going to come a day when you're going to be dealing with me and you're going to wish I was a union boss. You are going to wish I didn't have to go back to my members in your district and tell them you're a good guy. You're going to wish I could do that for you.

I can't do that for them. Our political program is membership-driven. Who we endorse, who we support, doesn't come from somebody sitting in Washington. It comes from people sitting back in Illinois, in Missouri and elsewhere. You know, if we were the union bosses we are painted to be, I think the Republicans would be a much happier group of people in the House and Senate, but we are simply not that way.

HON. FINDLAY: Don, what about the question about disclosing political activity? That's something one reads about in the paper all the time. Why does it say zero on the form?

MR. KANIEWSKI: I don't know what it says on my form. I don't quite look at it; that's done by others. And I can't answer for other unions. But the activity we do is lawful. We comply with all the laws that we're asked to. I don't know what's on our 990. That's not in my department.

HON. FINDLAY: Ann, do you want to talk a little bit about what the Department is doing in terms of Union democracy?

HON. COMBS: Well, there are multi-employer plans, which are jointly trusteed union/management plans. We do police those and we have a very active enforcement program, as well as a compliance assistance program, in terms of training trustees about their responsibilities. We are working with some partners to do that. OLMS is really the overseer of the union activity, and that's not in my purview.

MR. KANIEWSKI: We are pro-disclosure. We completely comply with the law, as does the AFL-CIO with respect to informing our members of their *Beck* rights. I can't tell you that I am aware of five people — and that is probably high — ever running to the union to seek reimbursement.

The principle here is balance. Sure, *Beck* is out there and it prevails as a Supreme Court decision. Workers are informed of their rights by their unions. The President is taking that a step further and requiring the posting, under the Executive Order, of broader notice.

All we are saying is, give us some balance. Let's give workers in non-union workplaces their rights to join and form unions. Let's tell them what they're able to do under the law. Let us tell them it's illegal if they are fired for joining or forming a union. Let's tell them they have the right to get together with their coworkers to form a union, to engage in an election and collective bargaining.

The beginning of the National Labor Relations Act says it is the policy of the United States to promote the practice and procedures of collective bargaining. That ought to be foundation enough to post a notice. It is about balance, and I think that is part of the reason why the AFL is in court on the *Beck* notice. Because it is unbalanced.

But there was also another Executive Order issued, I believe, on the same day, that was illegal. And we're

quite pleased that the court saw to overturn the PLA Executive Order.

HON. FINDLAY: Well, it hasn't made it to the court of appeals yet.

MR. KANIEWSKI: We'll see if it goes there.

HON. FINDLAY: Wait and see — exactly. I think this will probably have to be our last question.

AUDIENCE PARTICIPANT: Yes. I'll try to be brief. I'm Joel McCune with Reed Smith in Pittsburgh.

Why do unions view favorably so many of these federal regulations and statutes, which have to a large extent reduced the relevance of unions? Why aren't unions capable of privately negotiating with employers in getting types of benefits? Why aren't unions capable of using money from their general funds to run commercials at eight o'clock at night, where they tell folks about their rights to form a union? Why do unions feel a need to have the federal government so involved and so supportive of all of these things that they should be able to do on their own?

A hundred years ago is a different story. Unions were just getting started. They had a lot of issues, a lot of problems. But since the topic of today is the 21st Century, and there have been a lot of changes, and most folks know that they can join unions, why is there still such a need for a federal rule?

HON. FINDLAY: Put another way, Don, haven't unions put themselves out of existence or nearly out of existence by achieving many of the same protections through federal law that should be the subject of collective bargaining?

MR. KANIEWSKI: There's a great debate about that in the labor movement, whether we sought and gained protections under law that should have been rightly at the collective bargaining table, that would have enabled us to be the more attractive alternative to workers in a variety of workplaces. That debate goes on, but let me address a couple of things you have mentioned.

We have sought these things because we are not just a labor movement solely concerned with the welfare and benefit of our members. We are a social movement that fought for civil rights, that fought to better the lot of all workers in this society. We have taken that mission of social justice into the arena of broader workplace protections, and I think that is what got us to endorsing a number and different kinds of regulation and legislation that regulate our industries.

As much as we would like to be more visible in the public media marketplace, we are not for-profit organizations and do not have that kind of income. We can not generate the kind of income that it would take to run the kind of media campaigns you have to run.

As we have proved, though, in our political programs, we're best when we're talking member to member. When our members are talking to each other about candidates and issues, that is our most effective communication. And when there is an organizing campaign going on, I think there's a belief that we're better off not with some air attack but rather looking at the workforce we are trying to organize and trying to go member to member. There have been a number of attempts to try and explore other ways to get at some of these issues, and I think that exploration continues to find an effective way to do it.

HON. FINDLAY: I want to thank everybody. I wanted to particularly thank Don for coming into this room. I was once a student at Harvard Law School, so I know what it's like to have one opinion in the room when everyone's against me. So, thank you very much.

PROFESSIONAL RESPONSIBILITY

WHEN FREE SPEECH AND ETHICAL STANDARDS COLLIDE

Professor Steve Lubet, *Northwestern University Law School*
Professor David McGowan, *University of Minnesota Law School*
Hon. A. Raymond Randolph, *U.S. Court of Appeals, D.C. Circuit*
Hon. Harold See, *Supreme Court of Alabama*
Professor Richard Painter, *University of Illinois Law School (moderator)*

PROFESSOR PAINTER: This is the Professional Responsibility Practice Group panel. My name is Richard Painter. I am a professor at the University of Illinois College of Law.

We are going to be talking today about, when free speech and ethical standards collide, with a focus on the judiciary. A great part, although not all, of our discussion today is going to focus on elections of state judges. But we will also have some discussion of the confirmation procedures for federal nominees and other issues relevant to the judiciary.

One of the areas I teach besides legal ethics is securities regulation. One of the topics I discuss with my securities class is the sharp difference between the standards that apply in the election of a board of directors of a corporation, which is an election with proxy solicitations and so forth, and, a political election. The election of a board of directors of a corporation is very strictly regulated with respect to what you can say and what you cannot say, and a federal agency, the Securities Exchange Commission, is looking over your shoulder. If you say something about the opposing candidate who is running for the board of directors of a corporation and it turns out not to be true, you can be liable under Section 14(a) of the 1934 Act.

Compare this with the free rein that is given to participants in the electoral process when candidates are running for office. Occasionally there are cases like the *Long Island Lighting* case, where constitutional issues arise out of a political election going on side by side with a proxy fight — in that case over the Long Island Lighting Company's involvement in nuclear power – but this does not happen very often.

Which rules should govern the restrictions on free speech in the corporate proxy context, or the primacy of First Amendment free speech rights that we see in the political arena? The election of judges at the state court level is in some ways in a position between the election of political officials and these other elections, where we see some restrictions on the First Amendment. Another such area is labor union elections.

One of the issues we are going to be exploring here, particularly in Justice See's discussion, is whether the election of judges should be bound by the same First
Amendment free speech rights that we see in the political arena. Or are judges like corporate directors or labor union officials, somehow special, such that maybe we should rein in the First Amendment rights that people are normally entitled to in a political election.

We will explore that topic and several others. I want to allow plenty of time for audience discussion after our discussion, so we are going to limit each speaker to, approximately ten minutes, maybe a little more — 12.

We are going to lead off with Judge Raymond Randolph of the United States Court of Appeals, District of Columbia Circuit, and then jump to Justice Harold See from the Alabama Supreme Court, and then move in with our two law professors, Professor David McGowan from the University of Minnesota and Professor Steven Lubet from Northwestern.

And so, with that, I will begin with Judge Randolph.

JUDGE RANDOLPH: I will not talk about elections of judges; I am not familiar with that. But I will talk about federal judges.

I have always been a great believer in robust, uninhibited, unfettered freedom of speech for most everyone except judges. I think it would be a disaster — in fact, I'll go further; I think it would be the end of the republic as we know it if federal judges had the same freedom of speech that all of you do.

Consider what things would be like if judges regularly gave public addresses on any matters that might suit their fancy at the particular moment, or appeared frequently as critics or guests on radio and television programs, or contributed regular op-ed pieces or wrote in magazines. Now, I'm aware of at least one federal judge, a judge on the Ninth Circuit, (where else?) who thinks that that would be just dandy.

He believes — let me quote so I don't get it out of context — "Judges should engage in vigorous and unfettered judicial speech because judicial silence denies the public an opportunity to hear from an entire branch of government." Ignore the hubris, if you can.

The remark is altogether silly anyway. Federal judges are not silent; far from it. Each day, the federal judiciary pours out an avalanche of judicial opinions and orders and memoranda and so on and so forth. It took 70 years for

Fed 2.d to reach a thousand volumes. In Fed 3.d we are going to break that milestone in record time.

Of course, the public, the great mass of people, doesn't bother to read very much of the judiciary's product. To paraphrase Winston Churchill, never in history have so many judges been saying so much to so few.

If federal judges, at least, were free to write or speak on anything that sparked their interest, if we're suddenly permitted to express our views anywhere, any time on any subject, I have no doubt that some judges would grab their robes and run to the broadcast studios.

So, try to imagine, if you can, a weekly television show, or even a weekly radio show, with a lot of federal judges sitting around talking about the controversies of the day, from a judicial perspective, of course. Do you have trouble imagining that? I do. And the reason I have trouble is because that is totally out of the tradition of the judiciary, at least in this country. And there's a good reason for that.

A visibly impartial and independent judiciary is essential to a free society. Yet such a judiciary requires an element of remoteness in the judges and in their work. If judges were free to chatter publicly about any subject that struck their fancy, and to reveal that we, in fact, have views, then I think respect for the law would collapse.

These reasons and others are why the federal judiciary has rules against judges speaking at certain times, in certain settings and about certain subjects, with the notable exception of the honorarium ban, which I'll get to in a moment.

These are really not rules at all, by the way. They're ethical prescriptions. And ethics has to do with what you should do and what you should not do. The model rules on professional responsibility that all practicing lawyers are subject to are not ethical rules at all. They are now framed as what you must do and what you must not do.

An ethical rule is one that talks in terms of "oughts" and "ought nots. " I had no idea before I was appointed how many "ought nots" there are in the code of conduct for federal judges. Federal judges should not make speeches for political candidates or support publicly or oppose candidates. No bumper stickers on your car; no posters in your front yard. We shouldn't contribute to political campaigns, although that's a form of speech under *Buckley v. Valeo*.

We should not speak about the merits of pending or impending cases. An impending case is one that we're fairly certain is going to arise, so I won't talk about the constitutionality of the military tribunals that try the terrorists because we are pretty sure that is going to happen; at least, we hope so.

And there are other things. I won't go into all the details, but there are other things that we can and cannot do. Now, I do not begrudge these ethical restrictions on my speaking. It's the price that judges pay for the privilege of wearing a black gown with floppy sleeves, and I pay it gladly. I am happy about these restrictions because I think they keep the federal judiciary where it should be.

But there's one particular restriction that I do resent. And it's a restriction placed on us by Congress — not an ethical rule about what you should or should not do, but an absolute flat prohibition enforced by the Attorney General of the United States. I refer to the Honorarium Ban enacted in 1989 as part of the Ethics in Government Act. Let me give you some background.

1989 just happened to be the year that Jim Wright, the Speaker of the House, resigned. Speaker Wright and other congressmen were very creative in inventing ways to get money from lobbyists. So creative, in fact, that the body over which Speaker Wright presided became known as the "house that honoraria built. "

When this was exposed, Congress knew it had to something. But Congress didn't want to pass a rule barring only its members from accepting honoraria — heaven forbid. So they swept in the executive branch and the judicial branch.

The 1989 law prohibited anyone in the three branches from receiving payment for any speech or any article or any appearance. Book royalties, by the way, were excluded in deference to Judge Posner.

And you could get paid for teaching. I can give a speech at a law school and I can get paid. The ban on honoraria for other payments for speaking and writing amounted to a ban on speech itself. Why, you may ask.

Well, Dr. Samuel Johnson famously said, "No man but a blockhead ever wrote, except for money."

And a former President of ours has amended that to say, "No man but a blockhead gave a public speech, except for money."

I won't go so far because — and I'd better not because I'm not getting paid for this address.

Anyway, a year ago the Senate voted to repeal the honorarium ban for federal judges. Rumor had it that the Chief Justice of the United States had engineered the repeal as a way to get some more money for us poor federal judges. He's a good man, the Chief.

But then somebody tipped the press, and the hue and cry went out. The nightly talk shows or, as my wife likes to call them, the shouting shows, had a field day. Geraldo was firmly against repealing the ban. So was Alan Dershowitz and most everybody else who appeared. Editorials in the *Washington Post* and the *New York Times* huffed and puffed. This was "a scheme to weaken judicial ethics radically," according to the *Times*.

"The provision, if enacted, could only erode public confidence in the integrity of the courts," said the *Post*. In the end, the House refused to follow the Senate's lead, and repeal of the ban died in conference. The Republic was saved.

Well, I watched all this with some amusement. I found it an amazing controversy but I judiciously kept

quiet, until now. I think the time has come to let you all in on a little secret. I found the controversy amazing because, in fact, there is no statutory ban on honoraria for federal judges, and there hasn't been one for five years. Let me explain.

In 1995, the Supreme Court struck down the ban as applied to all executive branch employees under the grade of GS-16. The Justice Department, which enforces the law, wondered whether it should enforce the ban with respect to everybody above GS-15. What about judges? What about the legislative branch?

A 1996 opinion of the Office of Legal Counsel, the OLC, binding in the Justice Department, determined that the law was not severable. And so, according to the Office of Legal Counsel and hence the Justice Department , the honorarium ban was kaput. It fell entirely with the Supreme Court's NTEU[1] opinion. This development in 1996 escaped the attention of nearly everyone, including the press. But it did not escape the attention of the Clinton Administration.

Two days after the OLC opinion issued, the Administration, through the Office of Government Ethics, advised members of the executive branch that they could now accept honoraria. This was in 1996. Hooray for the First Amendment. Later in 1996, the Administration completely eliminated from its government ethics regulations any reference to honoraria.

Given the OLC opinion, there will never be a case pending or impending about the legality of the honorarium ban. And in my remaining few minutes, I am, therefore, free to give you my opinion about it without violating ethics. And here it is.

As applied to federal judges, the honorarium ban was flat-out unconstitutional.

In the NTEU case, the Supreme Court struck the ban down because Congress had no evidence of misconduct relating to honoraria by any of the vast number of federal employees below the grade of GS-16. Congress had no such evidence with respect to federal judges either, and for good reason. Congressmen accepted honoraria from lobbyists or from foundations or from corporations, and then went back to the Hill and voted for legislation that affected them. A federal judge couldn't do that. We have rules against that, and we have a law against it.

If I gave a speech to the Ford Foundation and accepted $1,000 for it, I couldn't turn around and sit on a case involving the Ford Foundation, according to our rules. Federal judges are honest, and very few of us are stupid. Compliance with the ethical rules is taken very, very seriously.

The way the ban worked was ridiculous anyway. If I were giving this talk at a law school, I could get paid for it. But if I give the same talk before a group of lawyers, I can't get paid for it. The ban contained an exception. If I gave a series of lectures, I could get paid; if I wrote a series of articles, I could get paid. But if I write one article, no pay. This seems to me totally counterproductive because the ban encouraged moonlighting, which is what it was supposed to prevent.

Please understand, it's not that I want to line my pocket with speaking fees or that I even could. But writing an article takes time. And so does preparing a speech. I am fond of Mark Twain statement that "an impromptu speech is not worth the paper it's written on."

This is extra work, above and beyond my judicial duties. For two centuries, we had no ban on judges accepting honoraria. There was absolutely no evidence of abuse whatsoever.

I will end on this note. With respect to the federal judiciary, the story of the honorarium ban, from its enactment to its very quiet demise, shows the wisdom, I think, of Eric Sevareid's insight. "In government," he said, "the main cause of problems is solutions."

PROFESSOR PAINTER: Thank you very much, Judge. And now we will turn to Justice See.

JUSTICE SEE: Thank you. It is good to be here with you again. I love to come to these Federalist Society meetings. I enjoy the open and vigorous debate that we have, and the insights.

I thought for a minute that I was going to get out of this bind I always find myself in when I speak about judicial speech. I find it peculiar that the burden seems to fall on one who defends the First Amendment, freedom of speech, when it seems to me that the burden ought to be the other way.

I thought for a moment that Judge Randolph was going to put me in a position where I could, in fact, respond. But I think, bottom line, he and I are pretty much in agreement. We believe in ethical standards. We believe judges ought to follow those ethical standards. But the question is, should there be some regulatory body that tells Judge Randolph or any other judge what part of his speech is permissible and what part is not; what he may speak about and what me may not?

How do we address these questions of application of the First Amendment in a judicial context? I am going to speak about it in the context of the election of judges, although it seems to me that, with a little adjustment, the same principles apply when we are talking about an appointed judiciary where judges are asked questions and they respond or do not respond to those questions.

Can a rational public choose to elect its judges? I think a rational public can choose to elect its judges, that is, if the public is capable of selecting people who are qualified to be judges. Are citizens capable of making a decision that one person or another is better able to serve as a judge? If citizens are not capable of making such a decision, then I do not

know how a democratic republic is going to select its judges; if citizens are not capable of evaluating the judicial choices made by others on their behalf, then there is no representative means by which a judicial selection can be made.

I believe citizens are capable of determining who is not performing the judicial function in the way they believe the judicial function should be performed. And, in fact, I think we frequently see that. Judges are usually simply re-elected, but, if there is a problem, then the public has the power, through either contested election or retention election, to say, "No, we don't think you're doing the job right, and so we're going to remove you." If we believe that a rational public could believe that it is capable of making such an evaluation, then it seems to me we have to concede that a rational public could choose to have an elective system. And, if there is such an elective system, we then must address how the First Amendment ought to apply to that method of selection.

Now, let me make another quick point. There are three branches of government, and one of those three is the judicial branch. Since the judicial branch is a branch of the government, speech about the selection of someone in the judicial branch or the retention of someone in the judicial branch is core political speech.

I don't know how we can say that the legislature is political because it's part of the government and the executive is political because it's part of the government, but the judiciary is not political. No, it is part of our constitutional system of government, and speech about the selection of the members of that branch of our government, it seems to me, is core political speech. If that is the case, then there must be some compelling state interest to restrict the campaign speech of judges.

At this point in my presentation, I ought to be able to sit down and wait for someone to show me the compelling state interest that justifies restrictions on judges' campaign speech. What we are really talking about here is a regulatory agency, some sort of state or federal agency, some regulatory body that will say this speech is permissible or this speech is not permissible.

The argument I hear — generally, it's no more than this — is, well, judges are different. Yes, judges are different from public service commissioners. And public service commissioners are different from state legislators. State legislators in their turn are different from governors, and governors from Presidents. Yes, judges are different, but, in what way are judges different that justify regulating their political speech?

Here are the three arguments I hear most frequently. The first argument is that we need public confidence in the judiciary, because without it the system will fail. I think that is true, but I think it is also true of the executive branch and the legislative branch. It is true of democratic governments. It is probably true of all governments, but it is particularly true of democratic governments that if we do not have faith — public confidence — in the executive branch, the system is going to fail. If we do not have public confidence in the legislative branch, the system is going to fail. But, I don't hear a lot of arguments that we, therefore, ought to regulate the campaign speech of legislators or of governors or of Presidents. We may not like some of the speech, but we say that it is core political speech and that the answer to the speech we do not like is more speech, not less speech. So, simply to say that we need public confidence in the judiciary does not justify the restriction of campaign speech.

I have two other observations about the argument that political speech destroys necessary public confidence in the judiciary. My first observation is that the argument, once you cut away its fancy garb, is that we can have public confidence in our judiciary only if people don't know what judges are doing. That is, we cannot have the public informed; we cannot have vigorous debate. We cannot have someone pointing out problems, because people will lose confidence in our judiciary.

I have a problem with the idea that public ignorance is the foundation upon which the strength of our government rests. It seems to me that it is better to solve the problems, to address the accusations, and to base public confidence on what is really there. The argument that the public must not be exposed to political speech is a Whited Sepulcher argument, that with a coat of whitewash on the sepulcher no one will see the bones. But, the bones are there, either way.

My second observation on the public-confidence argument is that, if we are to improve the system, we must be able to talk about it. The people who can talk about it are the people who are involved in it. If we restrict speech so that no one can say anything that might cause someone to question whether the judicial branch is perfect, then we will not make it better. In fact, we will be giving it the opportunity to become worse.

That is the first argument, that to preserve public confidence in the judiciary we can't have people talking in their campaigns about such things as the courts and the law, or their records or those of their opponents. It is the argument against political speech.

The second argument is that the public does not know enough about the candidates. We must restrict campaign speech because, in the presence of public ignorance about the candidates, one candidate could say something that would be misleading. Candidates must not be allowed to say those things.

As with the first argument, I have a little trouble seeing the difference between judicial races and those for legislative or executive offices. Tell me who your state treasurer is. Name your public service commissioners. Do you know who is on your school board? Few citizens know these officials, yet for some reason we think it is acceptable to elect them.

Why is it, then, that because we aren't intimately familiar with all of the candidates in a judicial election, we should prohibit those candidates from talking about themselves or talking about their opponents? Isn't the answer to this absence of information, more speech, not less? And, certainly, the answer is not to have some government entity, however selected, determine which speech the public should hear and which speech it should not.

The final argument is that the public doesn't understand the judicial function. Citizens know enough about what legislators do to make intelligent decisions about who should be a legislator. They know enough about what governors do to make decisions about that, or attorney general, or public service commissioner, but citizens don't understand what judges do. Therefore, we cannot let candidates say things that might be misleading to the public, that might sound good but don't really have to do with the judicial office.

First, speaking as someone who's run for office three times, I don't think the argument is true. Maybe Alabamians are smarter than folks around the rest of the country, but I find that voters understand the judicial function better than they understand the legislative function or the executive function. So, I reject the argument. But even if it is true that voters don't understand what judges are supposed to do, what is the answer? Cut off speech? Not let a candidate talk about what judges are supposed to do and what they aren't supposed to do, what judges are doing and aren't doing? Isn't the argument, instead, for more speech? Shouldn't there be more speech in order to counter that ignorance? These are the arguments I hear. They do not make a lot of sense to me. It seems to me that we are talking about core political speech, and that more information is preferable to less.

In my opinion, there are some things that judges should or should not do in order to do their jobs right. There are a lot of ethical restrictions that we ought to abide by. I don't believe judges should announce in advance positions on cases that are pending before them.

But, the question is what to do if a judge does speak on some topic, like Judge Randolph's topic of whether a ban on honoraria for judges is appropriate? Should there be a governmental body that will decide whether the judge's speech undermines public confidence in the judiciary and, therefore, should be punished? Or, should the answer depend on the problem that has been created and the solution to that problem? If a judge comments on a case in a way that indicates bias, then shouldn't that judge be precluded from ruling on that case? Well, that is the law on recusal. Doesn't that solve that problem?

It is true that a judge could comment on everything and not have to do any work, but if a judge is not doing his job, in an elected judiciary the people can get rid of him.

The question, it seems to me, ought to be approached by asking, what is the problem we are trying to solve? And, is there a way to solve that problem without having some regulatory body determine which speech is appropriate and which speech is not?

PROFESSOR PAINTER: Thank you, Justice See. We will now turn it over to Professor David McGowan.

PROFESSOR McGOWAN: Thank you, Richard.

I think the problem that we are addressing is fundamentally a problem of reconciling two values that, in the context of selecting judges, come in conflict with each other. Those values are accountability, on the one hand, and independence, on the other. Those two do conflict. You are independent from things; you are accountable to things. And what we are thinking about is the manner of choosing the best way of navigating and negotiating that tension.

I think I come down closer to Judge Randolph's view of the republic falling than perhaps Justice See's. But let me pose, initially, the criteria that have to govern the choices that are made and why I think this an ethical issue at all, which is somewhat against the current stream. I am going to talk, by the way, about federal nominations rather than state elections.

Justice See was asking, if the courts are a political branch, how is it that they are different from other political branches? That calls to my mind an article by Professor Lon Fuller of the Harvard Law School — the late Professor Fuller — who asked, how is it that adjudication is different from other forms of social ordering? How is it different from elections? How is it different from negotiation? What is it that makes litigation unique? Why don't we just have elections over guilt?

The answer Professor Fuller suggested was that in adjudication the parties have a unique interest. They participate directly in the process through the presentation of evidence and reasoned elaboration of evidence to an argument in their favor. We do not do that in the executive branch; we do not do that in the legislative branch.

It follows that, as Professor Fuller stated, the criterion for evaluating any rule, not just rules pertaining to nominations, whatever heightens the significance of this participation lifts adjudication towards its optimum expression. Whatever destroys the meaning of that participation, the participation of the parties, destroys the integrity of adjudication itself.

The difference between courts, on the one hand, and the executive and legislative branches, on the other, is the same reason we worry about this issue when we do not worry about senatorial confirmation of executive branch nominees in the same way, even though General Hamilton — as I like to remind people that he is — wrote in Federalist 78 that

he didn't need to worry about the appointment process when writing about judges because that was the same as for all other officers, and he'd already talked about that in 76 and 77. That's not right.

The President has people working for the President, responsible to the President, and for whose conduct the President will be held accountable to the electorate. We do not want any of that for judges. And even though the process is the same, the values are very different. Independence is a value and it needs to be attended to. So, what I want to talk about are the ethical considerations facing nominees to the federal bench in what has become a very contentious process, and there is no reason to think it's going to get any less contentious.

My favorite method, by the way, just to let you know where I would come out, was suggested by Dr. Franklin at the Constitutional Convention. There were various proposals, and he forwarded what he called the Scottish method, which makes me like it right off the bat, in which, as he put it, "The nomination proceeded from the lawyers who always selected the ablest of the profession, in order to get rid of him and share his practice among themselves."

Now, this solves the information problem.

Competitors know better than anyone else who really does a good job. It aligns self-interest and selection of the most stable. It is actually the perfect example. Alas, we can not do that.

Of late, many people have come, to think of federal nomination processes as sort of extra-legal. This is largely a legacy, at least in my generation, perhaps to the Carswell nomination, but most specifically, to Judge Bork's experience. Professor Monihan, shortly after that experience, wrote that the entire appointments process is best understood as largely beyond the operation of norms of legal right and wrong. It instead involves mainly questions of prudence, judgment and politics.

And I commend to the attention of anyone who is seriously interested in ethics and the pre-commitment problem the Souter Confirmation Hearings because it was mooted there. Senator Simpson raised in the testimony of Kate Michaelman and Fay Waddleton the ABA Canon of Judicial Ethics. I don't know why he didn't go for Conduct for United States Judges. He went for the ABA. The witnesses were saying they wanted an absolute commitment on abortion rights, and Senator Simpson raised the Canon near the end of the testimony.

There was an exchange where Senator Biden asked Ms. Waddleton, "Do you want a specific answer on *Roe*? Are you demanding that we reject unless we get pre-commitment on *Roe*?"

And she alluded to the Canons.

Senator Biden said, excuse me; let me interrupt you there.

Senator Simpson, God bless him, notwithstanding reading the Canons of Ethics. If he applied the Canons of Ethics to what was said here, clearly Judge Souter has breached them.

Brown v. Board? Oh, yes, non-controversial. Commerce clause? Oh, yes, non-controversial. That was 1990. *McCollough*? Oh yes, non-controversial. *Roe*? It might come before the court.

The interesting thing to me is not the substance of any of these issues. Opinions vary on that and I have no interest in getting into that. What interests me is the relative scorn the Canons received in the Hearing. They were treated as a rhetorical device. It was consistent with Professor Monihan's view that this was an extra-legal world.

Senator Biden said, "Please try not to be a lawyer's lawyer with me," which is exactly what I would like to see a little bit more of, is the lawyer's lawyer approach. Let me talk to you for just a brief period about how that would work. The first point is that there are both accountability considerations and independence considerations. The choice to place the nomination power in the President is an accountability choice. For most of the Constitutional Convention, the appointment power resided in the Senate. Late in the Convention, the Senate had come to be equalized. It, therefore, in Madison's view, represented states, not the people. And he argued for a shift of the appointment of a national officer to a national official. And that's consistent, but is an accountability function.

The Federalist 78, which the Federalist Society has as its motto, has the words of Alexander Hamilton beneath the portrait of James Madison. Sometimes I wonder.

It's all about the complete independence of the judiciary being necessary as a safeguard to liberty. Federalists 76 and 77 are about, in part at least, accountability, in which Hamilton says, "The possibility of rejection would be a strong motive of care in proposing. . . " Those two tensions are built into the structure.

So how do you navigate them? We value both; we have both. It is not irrational, as Justice See said, to expect accountability. In my state of Minnesota, formed shortly after, or at least in the strong presence of mind of the *Dred Scott* decision, accountability was a very meaningful concept to a large number of people.

I think that the way to navigate the tension is to return, first, to principles, to basics. What is it about courts that is unique? What is it about the judicial office that is unique? And, what is unique — I think that Professor Fuller is right — is the interest of litigants; not the interest of the public in general; not the interest of the National Abortion Rights Action League; not the interest of Operation Rescue — except insofar as they are litigants because that is what is distinctive about the mode.

So, what does that mean in practical nuts-and-bolts terms? I want to address specifically the pre-commitment problem. What if a nominee is actually asked to promise not to overrule a specific precedent and they should actually

make such a promise and say, I will be bound, I will never vote to overrule case N. Probably, you would consider that an ethical violation. Probably, you would reject them. First, you should just check them for a pulse. It's just unrealistic in our current world.

What we really have are three choices. We have a choice, if asked about one's views on a case, to say nothing; to discuss fully, completely and honestly what one's views are; or to do that on some issues but not others. What I want to suggest that either the first or the second option falls within the reasonable range of ethical behavior — and this is the "ought" sense Judge Randolph discussed —, in that it is consistent with Canon 2 of the Code of Conduct for U.S. Judges, taking that as a normative statement, rather than arguing with whether this is going to be the basis of discipline, which instructs judges to avoid impropriety and its appearance, and states that a judge should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

The first and the second do that, in my view, because they correspond to the values that are conflicting. Full discussion corresponds to accountability. A refusal to enter into discussion corresponds with independence. The third option is the one that bothers me. It bothers me because a willingness to state a position on uncontroversial issues, a willingness to pledge fealty to decisions that everybody supports, is a deviation from the principle of independence, from the value of independence. It is a deviation precisely because it is in the direction of the majority view. It is a deviation that is costless to a nominee in the sense that, I know no one will get mad at this; that is why it is safe for me to do it. That seems to me not to be what we are trying to foster, with Canons that say things like judges should be apart from and resistant to public clamor and pressure. Judges should comport themselves in a way that enhances the meaningfulness of the parties' participation.

Picking and choosing in that respect seems to me to send the worst possible signal, which is, if I am a party looking at this person, I will deviate from the norm of independence when it is in my self-interest, when it is costless to me. When there is controversy, when there are people clamoring for me to be rejected based on what I might say, I will refuse to speak because that is also in my self-interest.

That is perhaps the most unsettling message that one can derive. It is also probably the most practical approach. I will show that I am in touch with popular sentiment and, therefore, not a dangerous person by deviating in favor of the majority, and then I will show that I am a careful and prudent person by not committing myself.

I do not contend that the mix-and-match is unethical in any strict enforceability sense. I do content that of the three available options, it is the one least to be preferred and the one that does the least to advance either of the goals, either of the values at stake in the nomination process. But rules of ethics are rules of reason, and they need to be applied in context, with an eye toward some practicality. So, let me talk about the other two.

When would you choose silence, which might call to mind, for example, Justice Scalia's Confirmation Hearings, as opposed to a full discussion? The criteria, I think, are the same. In the context of a nomination, which would include things like promises during a Presidential campaign, which would include things like the qualifications of the nominee, are they such that there is every reason to believe that this person was chosen because they were supremely qualified as opposed to political agreement? To the degree that the context and facts of a nomination suggest that litigants have cause to worry, then probably accountability is a more important consideration and full discussion is preferable.

I do not mean to imply that Judge Bork, by being the only person in recent memory courageous enough to enter onto a full and complete discussion, did anything wrong. His publication record warranted that in the sense that he wanted to explain himself, and he did.

I remember distinctly; it was my first year in law school. I was at Berkley. We went to our Con Law class, and we all asked our professor, as first-years do, "professor, can you tell us what's going on in the hearings?" And my professor, being a good Berkley professor, said, "yes, it's a great instructive constitutional debate and Judge Bork is getting vastly the better of it." That was Willie Fletcher.

That context is relevant. However, if there are not facts, if there are not things that suggest to a prospective litigant, using sort of a hypothetical projection approach, that explanation and accountability deserves primary consideration, then it doesn't.

Judge Randolph mentioned Mark Twain. I'll choose another Mark Twain. "It's easier to stay out than to get out." If you enter in and start answering on some things but not others, you will end up with the kind of dialogue we had before with Judge Souter. If you don't, you can at least consistently, with the value of independence, say, I have acted ethically in the sense that my conduct in the hearing is upholding the value of supreme importance to the very essence of the judicial function, which is the evaluation of the proof and reasoned argument that the litigants present.

It is at least, I hope, something that you would consider. Thanks.

PROFESSOR PAINTER: Thank you very much, David. And now for Professor Steven Lubet of Northwestern.

PROFESSOR LUBET: It is a tremendous privilege for me to speak with you this afternoon — a very great privilege to share the dais with Judge Randolph and Justice See. It is an extraordinary coincidence that there would be two people on

this panel — although one, quite silent — from Illinois speaking on the subject of judicial ethics, a subject on which I have some insight. About 14 years ago, my coauthors and I published the first edition of our treatise on judicial ethics. And ever since then, about once a week, I get a telephone call from a judge, always wanting advice; never willing to pay.

The most interesting calls, the ones that really stay with me, are from the judges in Chicago. One of the very first calls came just about four weeks after the book came out. The phone rang and I picked it up and the voice at the other end said, "Professor, I got an ethical problem." I don't know how many of you are from Chicago, and I'm probably not getting the accent quite right, but this guy was, beyond question, from the 11th Ward.

If you closed your eyes, you could see the iridescent suit, the diamond pinky ring, the cigar. "Professor" — and nobody can say the word "Professor" with as much derision, scorn as a Chicago precinct captain. He says, "Professor, I got an ethical problem. What I want to know is, is it ethical to duke your rabbi?"

Well, it was immediately obvious to me that he did not want to show a John Wayne movie to a Hebrew clergyman.

But I'm from Chicago, so I knew what he was talking about. In Chicago political parlance, your rabbi is your political sponsor. There are actually other ethnic terms for the same phenomenon — but even here, I can't repeat them.

But your rabbi is your political sponsor, and duking your rabbi is giving him an unsolicited gift. It is like an homage or a St. Patrick's Day tribute. And there is no *quid pro quo*. It is not a bribe. It is going in the other direction. It is just kind of what you do if you are part of the machine. So, he said, is it ethical to duke your rabbi? And I didn't really have an answer.

I thought to myself, well, you obviously could not take the money, but can you give the money? Why would that be wrong? How does that deal with the deeper issues of moral philosophy — and then I thought, this guy doesn't want metaphysics. He's not interested in deontology. He just wanted an answer.

So, I said: "you're a judge; forget about it. You can't do it."

And he said, "Gee, thanks a lot, professor. I always figured ethics would come in handy for something someday."

I think that really is the watchword. Ethics really does come in handy. Ethics really does perform an instrumental role. It has an instrumental value in ordering the relationship between judges and the citizenry, even when it comes to judicial elections. Therefore, I'm going to take issue with my good friend, Harold See.

I do agree with Harold completely that the burden falls upon people who would impose restrictions on the speech. People who are in favor of wide open speech don't have the burden to meet, particularly when it comes to core political speech. And the burden, of course, is to demonstrate — in sort of hackneyed terms – a compelling state interest in any restriction. The people who would restrict speech must show that it is really absolutely necessary for a valid public purpose.

And I equally agree that the values that Justice See mentioned as justifications don't do the job. That's which is why he chose them, of course, advocate that he is.

JUSTICE SEE: Give me another one.

PROFESSOR LUBET: And there are a couple other values that also don't do the job. The need for civility and decorum in judicial elections — that's not adequate. The sort of generalized notion of the integrity of the judiciary — I'll concede that's not adequate. Certainly public confidence, as Justice See suggested, isn't adequate either. But there are yet other values that remain to be discussed.

So, when the statement is made, "well, I didn't give up my First Amendment rights when I decided to run for Judge," I would agree with Judge Randolph basically — and say, "oh, yes, you did." You did. We can surely agree on all sorts of First Amendment rights that are necessarily given up by judges, either in the context of judicial elections or otherwise. Some of those — for example, the endorsement of other candidates — are also core political rights.

I think we can be absolutely certain that if we had judges endorsing senatorial, gubernatorial, or Presidential candidates, that the legitimacy of the judiciary as a depoliticized branch of government would crumble. So, the fact that it is core speech does not get us everywhere that Justice See and others would want us to go.

And to make the case that judges are different, let me point out that, even when elected, judges are not "representative." That is, the job of the judge, once elected, is not to fulfill the will of the majority — not to keep promises; not to engage in constituent service; not to meet with constituents in town hall meetings or behind closed doors, or to listen to lobbyists, or to reward friends and punish enemies, or to change policy because there has been a change in Administration, or to distribute patronage to allies as an aspect of coalition building. All these aspects of political office are antithetical — indeed, I'd say subversive — of the idea of an independent judiciary.

And as to whether judges, because they are elected, are political, I am almost certain that if we read through the Federalist Papers, we would find a reference to the political departments of government by which the framers meant Congress and the Presidency, excluding the judiciary from the definition of the political departments.

Once on the bench, the duty of the judge, as Professor McGowan ably pointed out, is to do justice between the litigants. And that justice can't be subjected to a vote. We do not have elections about case outcomes. Now, does that justify all of the restrictions sometimes placed on judicial campaigns? It does not, and again, I would agree with Justice See.

There are really three types of restrictions that we have seen on judicial campaign speech. One is the so-called "false statements or misrepresentations" restriction. And I agree, that one has no standing at all. That problem can be remedied within the campaign. And the idea of disciplining candidates, as has been tried in Alabama and Georgia and Ohio, because they said things that weren't true, well, that's nonsense..

The second restriction is somewhat more viable, the so-called "statements on disputed legal issues," or the announce clause, as it's sometimes called in the literature. This one is tougher, of course, because you have judges signaling how they might rule and giving a general outline of their positions. Professor McGowan thinks that is all right, if you do it consistently. And I pretty much agree with that — so long as the statement is confined to what Professor Gillers calls the "major premise;" that is, the broader issue of the law.

The reason for this is that no matter what you think about the general outline of the law, every case comes forward on its own facts. One can even see someone as committed to a major premise, as Justice Scalia on abortion questions, voting for the pro-choice litigant on an issue such as standing or ripeness or jurisdiction or justiciability. In fact, I am certain that, somewhere along the line, Justice Scalia has voted to deny certiorari in abortion cases because he did not feel they were cert-worthy. So, there, you see, even a solid commitment to the general framework of law does not pre-judge, necessarily, the individual case.

But the third category, the "pledge or promise of conduct in office" is absolutely subversive of due process and judging because it commits the candidate to an outcome before hearing a case. And that is pernicious not only because it damages confidence in the judiciary, it's pernicious because it causes the denial of due process to the litigants. And it is pernicious for another reason as well — because these promises multiply each other. That is, if someone tells a lie about you, I can react by telling the truth, and they cancel each other out. But, if someone makes a promise — I'll cut your taxes; no, no, I'll cut your taxes even more — if someone makes a promise, the response is to make it worse, not to make it better.

So, my brief, then, is to argue in favor of this narrow restriction on speech in the course of judicial campaigns. I'm probably close to out of time, but I have a clever thing to say, so I'm going to finish with it. One of the objections often made to my position is that justices have views, judges have views, anyhow. So why not express them? We are better off knowing what the judge is thinking, than we are causing the judge to remain silent.

To this, I say, there are views, and there are views. And they don't spring fully formed from the forehead of Zeus. The problem with making promises in judicial campaigns is not the long-standing, firmly held, well-developed legal ideas that the candidate holds. Rather, the problems is created by questionnaires from interest groups that demand promises on a wide range of issues where there aren't pre-existing views.

You know, judges have views; why not say what they are? Well, judges have genitals, but we make them wear robes.

And there are just things better left unsaid. Maybe that was one of them.

PROFESSOR PAINTER: Thank you very much, Professor Lubet.

I guess I will break my silence first. A question, perhaps. Assuming, Steven, your premise here that there ought to be some narrow restrictions upon judicial speech, let me inquire of you and others in the room who might advocate such restrictions, at least in some context, one, who should be the decisionmaking body which sits in judgment on the judges? Should it be an official disciplinary commission of other judges, or simply the court of public opinion? And secondly, is it so easy to define the boundaries of this narrow restriction on free speech? Is there really a difference between the judicial equivalent, we might say, of a promise, "I will lower your taxes" and the statement "I absolutely am convinced your taxes are too high"?

PROFESSOR LUBET: I'm willing to defer to others, if they want to answer it. I've had my chance to speak. No? Okay.

As to who decides, every state, I think, by constitution now, has a constitutional body that is given authority to decide these issues. And Federalism is a perfect opportunity. A lot of people in the state can decide whether they want to have the issues addresses, and if it doesn't work, they can change it. So, I don't have a fixed opinion about that.

And of course, it's hard to decide what constitutes signaling and what constitutes promise, and there's a continuum. But this is what judges do all the time. And there are people in jail today who thought they were on the right side of the continuum and it turns out they were on the wrong side. And you know who put them there? Judges.

So, I'm not too sympathetic to the idea that judges will not be able to figure out what constitutes a promise and what does not. I mean, there are examples in the literature. You know, the person's running for county court judge and says no bail in drunk driving cases. I promise I will not grant bail in drunk driving cases. Well, that is a promise.

The judge who says, bail should not be easy to get in drunk driving cases, might be signaling an intention, might be going after the same voters. But I think it is a statement of a very different quality, and people charged with making that decision will have to make the decision.

PANELIST: How about the statement, I believe that it would be professionally irresponsible for a judge to grant bail in drunk driving cases?

PROFESSOR LUBET: You and I will be on the body. We'll hear the evidence. We'll consider the context. We'll listen to the arguments and we'll make a decision.

PANELIST: In the context of the federal judiciary, it is not very well known. There's a committee of the Judicial Conference called the Codes of Conduct Committee, which I sat on and was chairman of for a number of years. It is difficult to decide these issues.

There was one judge from every circuit in the United States on the committee. And we sit *en banc* and issue private rulings; somewhere in the neighborhood of 150 a year, very carefully-researched opinions using the professor's book. But it is just advice, and it is before the event; it is not adjudicating whether a speech was or was not permissible, or whether an article was or was not permissible.

Believe it or not, the federal judiciary is so conscious of the ethical restrictions that we would get hundreds of letters a year and hundreds of phone calls "Can I do this? Should I do that? Am I allowed to do this? Is this permissible?" And the idea behind it was that it was our own self-policing mechanism. Once again, it was not any separate independent body deciding whether judges were complying with the rules or not complying with them. Self-policing; I think it has worked very, very well. It has been in effect for about 30 years now.

PROFESSOR PAINTER: We will take questions from the floor, if there are any questions for the panel. Sir.

AUDIENCE PARTICIPANT: Clark Nealy from the Institute for Justice. A question for Judge Randolph. I am fascinated by your discussion of Congress's attempt to outlaw judicial honoraria, and I had a question that flows from that.

It seems to me that the real right that is at stake in that situation is not really so much a First Amendment right because Congress is not saying you are forbidden from going out and speaking, although there may be ethical canons about what you can speak about. It is just saying you cannot get paid for that activity.

And at the Institute for Justice, one of the areas that we litigate is economic liberty. I'll give you a comparison. We work in the transportation industry, or we represent clients in the transportation industry, and so they might be engaging in the constitutionally protected, the First Amendment associational activity of picking people up and riding around. As soon as they try to get paid for that, the state says, you can't do that without complying with all these regulations.

You mentioned earlier, that the fact that Congress had not a shred of evidence that there was any problem that needed solving made that law an outrage. Yet there isn't a shred of evidence that there are people, for instance, driving others around and getting paid for it creates any kind of problem. Congress doesn't have to have, or state legislature doesn't have to have a shred of evidence that there's any problem. Yet, they can interfere with the economic liberty of these people to do what they want to do.

Is there a distinction in your mind between forbidding judges from getting paid to speak without a shred of evidence before the legislative body on the one hand, and forbidding people, for example, from getting paid to drive other people around without a shred of legislative evidence on the other?

JUDGE RANDOLPH: Well, whether there's a distinction in my mind or not is really quite irrelevant. It's the Supreme Court's mind that matters. The Supreme Court has required, in *Edenfeld v. Fain* and the City of Cincinnati in *Bartnicki*, which came down last term, in the *NTEU* case that I mentioned, that before Congress passes a law that touches on First Amendment rights, it's got to have evidence that there's a problem existing.

A lot of this in the area you're talking about is what the court refers to as predictive judgments. And in that area, they've been much looser in terms of economic regulation and have been since, I guess, *Lochner* was overturned. So, the Supreme Court has drawn the distinction. I'm just following it.

PROFESSOR PAINTER: I believe that may go back to what I led into this with a discussion of proxy regulations. I think I have a panel coming up on this, the SEC infringing free speech. But regulation of commercial speech has been treated with a lot more deference than regulation of political speech and whether or not the distinction that we ought to have in the law is indeed one we have.

PROFESSOR LUBET: Can I comment just briefly on that? In one sense, what we're trying to do when we talk about the free speech aspect of this is isolate what, in a philosophy of language, you would call a performative utterance, a verbal act; words that we read as conduct. "I offer", "I accept", "Will you marry me?", "Yes". "Is this a real gold watch?" "Oh, sure." The fact that you're lying to somebody and committing fraud to 10,000 people does not make it different in its performative aspect than if you're doing it to one.

The problem is, exactly because there is this tension in the selection process between the judicial function which we ideally would like to be independent and various methods of accountability, what you're actually coming out with is this sort of hybrid instinct. What is performative? A promise to judge a certain way. The national commitment is a no-brainer violation for the reasons that we've talked about, but backing away from that point between comment and action, that is never going to be clear. It's just not. And it is in large part a social context question.

Am I kidding? If two people are standing together in front of a third person, one of them says, "Will you marry me?" The other says, "Yes." Are they married if they're on stage? You say no. If they're in a church, you probably say yes. If they're two men in a church, you probably say no. But then you think it might be a political protest. Thirty years ago, you wouldn't have thought that.

The context affects the way that you view these questions, and that's one of the reasons you're getting this feel-your-way-along impulse. It's not going to be easy.

JUSTICE SEE: Could I just follow up. It's related. Somehow, Steve and I arrive at very nearly the same position, having started at very different places. My argument is that we must specifically demonstrate what the problem is and why regulation of that speech is the answer to that problem. Steve mentioned those three types of restrictions on judicial speech, and I would agree with him on the three categories. I share the concern about what we mean when we talk about signaling, but I would note that what we mean by signaling really does matter when there is a governmental agency regulating political speech. And, it seems to me that there is a difference between that and making decisions about who goes to jail for fraud.

With respect to pledges or promises, remember, there's another possible answer, and this goes to the question of speech and conduct. The argument is, we should regulate the speech because the judge has made a promise, and heaven forbid that a judge do that. We could, instead, regulate the conduct. That is, the judge has made a promise; therefore, the judge may not sit in judgment on that case.

PROFESSOR PAINTER: Next question.

AUDIENCE PARTICIPANT: My name is Jim Bopp. I'm general counsel for the James Madison Center for Free Speech, and I've handled a few of these judicial canon cases.

I have a question for Professor McGowan. I wonder if what you're talking about when you talk about accountability, is part of it this concept, that judges in their role as judges have, I think, two roles. One is to be impartial with respect to the two litigants. But the other role is making policy. And that can be either done legitimately, where state courts, have constitutionally conferred power to develop the common-law and, in fact, then do regulate much of our conduct through the development and creation and change in law through the common-law.

And the other part, of course, I would consider illegitimate, which is the seizure of power, which, any number of federal and state courts have done over the years. But if we are going to have an election where the people have decided that they are entitled to select the policymakers that are going to occupy the judiciary, that they have both a prospective right to know the views generally of the candidates and retrospectively when they stand for reelection, that it's fair to discuss their record while in office.

PROFESSOR McGOWAN: Yeah, my comments were directed toward the federal side, which is in some sense easier for me because the mix of accountability and independence is very different in the federal context than it is in the state election context. State courts are courts of general jurisdiction. Your advisory opinions are all over the map. You've got a lot of different considerations going in there.

My sense is that it is proper to put the parties and prospective parties first in any list of audiences because when you talk about the judicial power, those are the people who feel it. There are ripples, obviously. And there are ripples affecting everybody else. There are external effects, if you want to put it that way, to every decision.

If you do not put parties first, I am not entirely sure what you do. You talk about common-law adjudication and I agree with you. It's almost said that Congress makes law wholesale; judges, retail. You are going to get some sort of policymaking.

My view is that is inevitable but we should try, to the extent possible, to make it bottom-up, not top-down, meaning necessary to decide the case and, as a consequence of the decision between the parties before you, a by-product of the necessity of resolving an actual dispute, rather than the judges' exercise of will, as Hamilton would say. And to the

extent possible, we need to preserve that model in order to preserve the distinctive function of the judiciary. If you don't value, to the extent that you value the distinctiveness, the consideration of proof and argument, relatively less than accountability to the public at large on the theory that press then affects everyone, you are going to get a much more lenient set of restrictions; a much more speech-friendly, if you will, set of restrictions.

There's nothing as good as a promise that could be enforced by a private attorney general claim for damages. You want accountability? There you go.

California Business Professions Code Section 17.800 makes it an unfair business practice to do anything that's unfair.

PROFESSOR McGOWAN: That's literally true. You promised — we'll say this business and I can pass a law that gets this far. We'll say it's a business. You made a promise. You haven't kept it. I should be able to get damages from you. I relied on your promise. That is accountability.

If we're squeamish about that — and I hope we are — then you're still back to striking this balance. And I think the only way to do that is rank-order your audiences.

AUDIENCE PARTICIPANT: Hi. My name is Nathan Sales. My question is for the whole panel. Judge Randolph proposed that it's acceptable to restrict the speech-related activities of federal judges because you voluntarily accept those restrictions as a condition of joining the federal judiciary.

My question has to do with the applicability of the Unconstitutional Conditions doctrine, which of course holds that the government cannot condition the receipt of a benefit on the recipient's agreement to forego the exercise of a constitutional right. Does that principle have any applicability here?

JUDGE RANDOLPH: I don't think there is any such principle. For example, it's clear that the government could not pass a law, Congress could not pass a law, saying that women should have two children. Everybody knows that, right? But can Congress pass a law that says we're only going to give welfare benefits for up to two children? The answer is yes.

So the whole area of constitutional conditions is a muddle, as far as I'm concerned. If you found a principle, I'd like to talk to you afterwards because we get these cases.

I have no problem whatsoever with the conditions that are put on federal judges. We wouldn't have a judiciary that functions as well as it does not if it were not for these conditions. But remember they are largely self-imposed. It is not Congress passing laws requiring us to do things. The Code of Conduct has never been enacted into law. It is something that the judiciary imposes and can change at any minute. I think that's the best system of all.

And as I said before, I'm not bound to follow it. I could say, oh, to heck with it. I'm going to write an editorial in the *New York Times* criticizing the Supreme Court. Some Ninth Circuit judges have done just that.

JUSTICE SEE: I find myself with Judge Randolph and Professor Lubet. I have only a couple of minor disagreements with Professor McGowan. I think it is an excellent system that they have in the federal courts. What frightens me is, and you might contemplate it — imagine Congress setting up a body that would determine whether federal judges abided by their ethical standards, and would determine what those ethical standards mean. Imagine further that this regulatory body were empowered to remove a judge if it determined that the judge had not abided by those ethical standards as construed by the regulatory body. Would you then not have a body with enormous power over how federal judges decide their cases?

JUDGE RANDOLPH: It's clearly unconstitutional.

JUSTICE SEE: Oh, yes.

JUDGE RANDOLPH: I'm not supposed to say that.

JUSTICE SEE: But someone else might say it. But, what would that system be like? Is that a system that we would like to have, or do we prefer a system that assures First Amendment rights but encourages judges to act in a particular way, and, then, presumably, the President and the Senate look for candidates who will behave in that way.

The question is, can voters do the same thing? Can they look for judges who meet those requirements?

I guess that would be my disagreement with Professor McGowan. He seems to think — and it may be a wrong characterization, but I understand him to say **B** that voters really can't do that; they vote for the people who are representing them, who are giving them "patronage."

No, I think voters are going to vote for candidates for judicial office that they believe are going to behave like judges.

AUDIENCE PARTICIPANT: My name is Eric Jaffe. I'm an attorney here in Washington, D.C.

Talking primarily of the state court system, I agree with Professor McGowan that it depends upon how high you elevate the public function of judging over the litigant function of judging. And I think in the state court system, the elections do precisely that. It elevates the public component of the act of judging.

So limiting to that, I was curious about the distinction between signaling and promising. It seems to me that there is not much of a distinction, but in the example, the actual distinction boiled down to promising to do that which you cannot or should not do, or promising to do that which would be illegal if you did do it. And if that's the true distinction, then signaling it or promising it would be improper and should have some remedy — perhaps the recusal remedy, as Justice See suggested.

But it's not really a function of the strength of your signal that creates the problem. It's a function of what you are signaling.

So in the bail instance, if you say, "I promise to deny bail." What you are effectively saying is, "I refuse to consider the multiple factors that the law requires me to consider and I guarantee an answer regardless of what those factors say."

Whereas, if you say, "I think it's very important to keep criminals off the streets and so I will keep that in mind in bail considerations," you're not promising to ignore all other factors. You're just signaling your weighting of certain factors and the importance you place on one. And so I think that's true, perhaps, in any legal example.

"I promise to overrule *Roe v. Wade"* — well, *Roe* is a better example. "I promise to overrule the state analog of *Roe*, if and when that case properly comes before me." So long as the promise is that, which is not "I'm going to ignore all other legal restrictions upon me in order to get to that result," it seems to me that that's a perfectly legitimate promise, as much as saying, "I think our state analog of *Roe* was wrongly decided and should be overruled," whether you say that in a campaign speech or whether you say that in a dissent or whether you say that *in dicta*.

I don't see any significant distinctions, so I was wondering whether it's the strength of the signal versus the substance of the signal that is really the problem.

PANELIST: Well, the promises — all promises, I suppose, to decide cases in a specific way have that aspect of derogation of duty or illegality to them. That is, you do not have to be promising to do something illegal. It is the act of promising that makes it unjudicial. And when signaling morphs into promising is a question of fact that would be decided by whoever decides these things, if you ever get to the point of deciding them.

Your last point, Eric, though — what was it?

AUDIENCE PARTICIPANT: Oh, I'm sorry. The question was whether it matters whether the signal or the promise, however strong it may be, shows up in a campaign speech or —

PANELIST: Oh, yeah. A campaign speech with judicial opinion.

AUDIENCE PARTICIPANT: — *in dicta* or in a defense.

PANELIST: Yes. This is a very common argument, which is that people running for judge have frequently expressed their views previously. If they are judges, they have written opinions. And if they're not judges, maybe they've written op-eds or they've been in the legislature or, you know, they've written law review articles. There are huge numbers of law professors becoming state court judges all over the country.

It's almost a coup, I think, actually.

PANELIST: I'm not running.

PANELIST: Only the good ones. But I think it's really a false argument. It's, "we can't eliminate the problem entirely, so let's not eliminate it all." Of course, people running for judge have a background of expressed opinions, and voters will consider those things. None of those are in the nature of promises, and they are unavoidable.

But the campaign promise, is of a different nature and consequently falls under a different rule.

JUSTICE SEE: Could I just touch on that a little bit and ask you to answer this. Suppose I'm up for reelection and I know the state analog of *Roe v. Wade* is a big issue. And so, I drop a footnote in an opinion, in a dissent, unrelated to the text, saying I believe our analog of *Roe v. Wade* ought to be overruled. Now I've been able to publish that, but my opponent can't say anything about it?

PANELIST: That's right. Aren't you happy?

PANELIST: Like I was saying, there's a French proverb, which I would mangle in French, but the rough English translation is "perfect is the enemy of good." I agree. There's no perfect system that captures all the problems and there are means of evasion, always, in campaigns.

But perfect is the enemy of good. And I think a rule against promises of decisions is good.

PANELIST: Can I say one quick thing. Just, apropos. I would add opinions into this, and I have in mind I am 84 years old, lobbed into the middle of the 1992 Presidential election. I cannot stay here forever. The next President will pick my successor. Ring any bells?

You can use an opinion to politick. In my view, first and foremost, it's inconsistent with the values of the judicial office because it derogates from the litigants' interests. I'm talking about Justice Blackman's concurrence, obviously.

But the point is that this is not mathematics. I think the rules are derived from the values the institution has to advance their purposes. If you change the purposes of the institution, you are going to change the rule structure. That works both ways.

So, in part, when you decide these questions, you are deciding what kind of court you want to have. And in particular, I think with the use of opinions, using the parties as a soapbox is actually even worse than the other forms that people worry about.

PROFESSOR PAINTER: We have about three more minutes. The Secret Service is keeping everything on a very tight schedule because we're going to get things done in time for this evening's dinner.

The question here?

AUDIENCE PARTICIPANT: Actually, this may be a better topic for another day. You may need a whole new session.

Judge Randolph referred to Judge Posner's books, which are on quasi-legal subjects, things which may not come in front of him, but might. President Clinton's sex life or the sex life of people in general have been some of his subjects, just as the Chief Justice has written about historical controversies before the Supreme Court. On the other hand, Justice Douglas wrote books on his mountain climbing expeditions, which would not seem to have any effect on the court.

Does anyone see any difficulty raised by judges attempting to write on ostensibly unrelated subjects that aren't immediately connected to their work but might publicize themselves or might someday come back in the form of an issue that they will face?

JUDGE RANDOLPH: Well, they are beautiful examples you give because one of them, and I won't say which one, seems to me to be close to the line in violating the rule about speaking about the merits of a pending or impending case.

Justice Douglas' book was *Go East, Young Man*. I argued cases before Justice Douglas and I was hoping the title would be *Go West, Old Man*.

Justice Douglas's book was just historical. It has nothing to do with much of anything except his biography. And the Chief Justice's book is very general. And it's in a historical context.

There's a Canon that encourages us to write, speak and teach about the law, so I think most of those books were consistent with that. But there may have been a pending case involved in one if them and I wondered about how close to the line that was.

PANELIST: There was definitely an impending case involved in one of those books. I've written an article about that. You can find it on Lexis.

PROFESSOR PAINTER: With that, I am going to have to bring this to a close. So I thank our participants.

[1] *UNITED STATES V NATIONAL TREASURY EMPLOYEES UNION*, 513 US454(1995)

TELECOMMUNICATIONS & ELECTRONIC MEDIA

THE FCC VERSUS THE CONSTITUTION

Hon. Jane Mago, *General Counsel, Federal Communications Commission*
Mr. Randolph May, *Senior Fellow, Progress & Freedom Foundation*
Mr. Andrew Schwartzman, *Media Access Project*
Mr. Gregory Sidak, *American Enterprise Institute*
Hon. Stephen Williams, *U.S. Court of Appeals, D.C. Circuit (moderator)*

JUDGE WILLIAMS: The structure of today's panel is that first two challengers will present a set of attacks -- those are Randy May and Greg Sidak -- and then there will be a defense roughly of the status quo from Jane Mago and Andy Schwartzman.

Greg, you are closest.

MR. SIDAK: Thank you.

Usually when I'm on a panel like this, I joke that I'm there to make the other people sound reasonable, but this is a Federalist Society event, so I am among friends.

As I was thinking about what I might say this morning, a song kept popping into my head. About 30 years ago, Graham Nash of Crosby, Stills & Nash put out a solo album. There was a song on there that you might remember that was about the scope of Congress' commerce power, and you will recognize the chorus: "We can change the world, rearrange the world. It's starting to get better."

I think that tells us a lot about how we approach telecommunications policy because the Telecom Act of '96 had this very ambitious goal of rearranging and changing the market, and the assumption certainly was that it was going to get better.

That, in turn, leads to all kinds of interesting questions of statutory interpretation and constitutional law, and the theme that I've been particularly interested in over the last several years is the Takings Clause and how attempts at regulatory change (I hesitate to use the word deregulation because it's not always clear that we end up with less regulation) may affect the taking of property.

Implicit in the idea that things are getting better is the idea that we are increasing welfare in some way. Presumably we are not passing legislation just to shift rents back an forth from one entity to another, but we are increasing the size of the pie. So if the size of the pie is going up, the means exist to compensate losers from the gains that winners get, in theory. So the potential exists to award compensation if there is a taking of property as a result of the regulatory change.

There are a couple of cases in the Supreme Court this term that raise these issues. The one that is most on point is the one that was argued last month involving the pricing of unbundled access to the telecom network. I am sure that we will get into a lot of the fine points of that later on in the panel, so I don't want to talk about cost models right now. But let me make just a couple of general observations.

I think that the Supreme Court approaches a case like this with a view that is not very 21st Century; it's more the 19th Century view of property, thinking of property more as, in the words of William Fischell a clot of earth. So the Court may have difficulty with the idea that use of a network, the movement of bits through a network, is somehow infringing on someone else's property, and could that be a taking of property. And the same kind of argument has come up in electricity deregulation where there is wheeling of power by competitive generators over some incumbent's transmission and distribution network; how could that be a taking of property?

Now, of course, there is a strand of cases involving physical invasion of property. These cases have, and that has the advantage for the property owner of entitling him to a finding of a per se taking, and thus permitting him to move directly on to the question of calculation of just compensation. The courts and certainly the regulatory bodies, (which, of course, are adverse parties in these proceedings) typically, have been resistance to look at something like view the movement of bits or electrons as something that is physically intruding on another party's private property such that it could possibly give rise to just compensation.

So with the physical invasion strand of cases, and (the keynote case there is *Loretto v. Teleprompter)*, with that getting a cold shoulder, we fall back on more traditional doctrinal categories of regulatory takings involving in the public utilities. That line of cases, which seems to be the way the Supreme Court, at least judging from the kinds of questions last month, is looking at this issue of unbundling in pricing. There the major case is, from the '40s, *Hope Natural Gas,* and a follow-up case from, I think in 1989, called *Dusquense*. These cases involved the question of whether some regulatory action denies the utility a fair rate of return to such a degree that it constitutes a taking of the property of the shareholders of the utility, and that is a pretty tough standard for a utility to prevail on.

There is some interesting language in the *Dusquesne* case that says, if the regulator was whipsawing back and forth between two contradictory regulatory models just to achieve some opportunistic outcome, we might be more concerned. I think that's actually is an interesting hook for these contemporary network unbundling cases to focus on. I would urge judges to consider that when there is a fundamental change, when there is this Graham Nash rearranging of the world and we say, "Okay, we're going to trash the old rate of return monopoly franchise kind of regulation, we're going to go to open access, open competition,"— we're really changing the nature of the market. We're changing the expectations that the parties who made the investments have to recover the costs of those investments over time.

So I think that something that is not currently well defined in takings jurisprudence is the idea of compensation for transactions, for regulatory transactions.

Let me just conclude, then, by making one other point. The Supreme Court and the lower Federal courts (with the exception, of course, of the D.C. Circuit) and the state supreme courts are not cracking their Econ 1 textbooks as much as they could in some of these takings cases, particularly those involving the deregulation of network industries or the regulatory restructuring of network industries. There seems to be resistance to the idea that there are any immutable economic truths, such as demand curves slope downward or that risk is an inherent feature of investment. The push back that I detect is the line of questioning that I think the Chief Justice had in the case last month—that the *Hope Natural Gas* test says it's the end result that determines whether a regulatory action is confiscatory or not, not the methodology that the regulators use. There is almost the whiff of *Lochner* in the air. To say that a certain costing or pricing methodology is constitutionally required would be to enact Mr. Herbert Spencer's social statics. I don't think that's right. There may be for some an even more ominous brooding omnipresence of natural law—that, if economic principles are given constitutional dignity, this is natural law. I don't buy any of that. I think that judges have to be expected to be economically literate. That is just part of having a view of constitutional and statutory interpretation that keeps up with the times.

HON. WILLIAMS: Okay. Thank you.

Randy.

MR. MAY: Thank you, Judge.

I don't want to use my time this morning at the outset to argue with any degree of certitude that a particular FCC order or policy is or is not constitutional if the issue were litigated all the way up to the Supreme Court.

Rather, I want to suggest that, having in mind certain constitutional principles or constitutional norms, the FCC on its own accord ought to move in certain policy directions which I would maintain are consistent with those norms, policy directions decidedly different than those of the past including even those of the recent past, the post-1996 Telecom Act era.

Recall at the outset that in passing the 1996 Act, Congress proclaimed that it had established a, quote, "pro-competitive deregulatory national policy framework," close quote.

The first point I want to note, because this is a panel on the "FCC versus the Constitution," is that the FCC, of course, is one of those so-called independent regulatory agencies supposedly free from Executive Branch control and supervision. But a wise man once said, back on April 27th, 1998, referring to the FCC, that: "There are only three branches of government set out in the Constitution, and we are not one of them." That wise man was Michael Powell, then a mere commissioner, but now the chairman of the FCC.

Despite separation of powers concerns, the constitutional status of the agencies of this, quote, "headless fourth branch," close quote, is argued by many commentators to have been sanctioned in *Humphrey's Executor* case, with which I think most of you are familiar. The Supreme Court held that President Roosevelt, as the FTC Act specified, could not remove an FTC commissioner "without cause."

The Court has never specifically decided the issue of whether the existence of these independent regulatory agencies is, in fact, consistent with our constitutional structure of three separate branches. But putting that issue aside, it seems to me the mere existence of that question suggests that the FCC, in exercising its authority under the Communications Act, should adopt a posture of heightened sensitivity regarding constitutional norms that, absent explicit statutory commands to the contrary, at least guide its decisions in the direction of the values that animate those particular constitutional norms.

Already having invoked the FCC chairman's words, in a moment I want to do so again to illustrate two areas in which I think new direction should be taken at the Commission, having in mind these constitutional values. I do so knowing that perhaps my good friend Jane here, in her previous incarnation as a senior advisor to then-Chairman Powell, may have penned some of these words, or at least certainly collaborated in inspiring them.

Now, as you know, a significant chunk of the FCC's activity takes place under "public interest doctrine". In fact, in the Communications Act, there are approximately 100 separate public interest delegations. Some of them are obviously used more than others as justification for chunks of the FCC's activity, such as in the provisions that mandate that the FCC grant licenses to use the spectrum in the public interest.

I have argued that the public interest doctrine is so standardless as to be unconstitutional as a violation of the non-delegation doctrine, which requires that Congress at least provide an intelligible principle when it delegates law-making authority to another entity. You can actually find that argument in this book that the Freedom Foundation put out, "Communications Deregulation and FCC Reform," and in one of the recent FCBA law reviews.

But after last term's *American Trucking Association* decision, it is clear that the Supreme Court does not agree. In sustaining the Clean Air Act against a non-delegation challenge, Justice Scalia made his point by stating in so many words that we have even found an intelligible principle in the public interest standard, citing the venerable NBC case.

By the way, I was at the Commission for three years in the General Counsel's Office. There is a special key on the computer terminals that they use in the General Counsel's Office. The FCC lawyers can just punch Control-N, and it inserts that NBC case citation where Justice Frankfurter said that the public interest standard is, quote, "As concrete as the complicated factors for judgment in such a field of delegated authority permit." Think about that statement. Anyway, that key still there, I'm sure.

Okay. So now I must go back to my wise man for support for the direction in which I would like to see the FCC move. I want to share why I'm quoting these. It's because of my fondness for these quotes and out of respect and just to recall them to mind for anyone who may have forgotten about what I thought were really terrific speeches.

On October 28th, 1998, then-Commissioner Powell said, "I believe we need to reassess the Commission's application of the public interest standard. Specifically, I believe it is imperative that we try to enunciate principles that will discipline the broad discretion we have held historically. Only by looking to such principles can the Commission, in my view, reach conclusions that are relatively predictable, reasoned applications of the public interest standard, and not just the result of the most effective lobbying or political pressure or our unguided subjective judgment. More importantly, by adopting such principles, we may release from the `black box' the regulatory fears of private actors in the market who understandably assume that what they don't know about the regulator's future decisions may harm them."

So even though the public interest standard may not be unconstitutional, and I am accepting that for now, as a matter of prudence the Commission should develop a policy statement which sets forth its understanding of some limiting principles which will guide its decisionmaking. To take one example, and we could talk about some more later possibly, that is ripe for this type of prudential discipline that Chairman Powell has called for: the handling of license transfer applications in the context of mergers. As many of you know, the existence of this standardless public interest authority in the context in which parties come before the Commission obviously anxious, within some reasonable time frame, to complete a merger transaction, has led at least to the appearance that the Commission seems to negotiate so-called "voluntary" conditions in order for the parties to get the merger application approved by the Commission. Very often, these voluntary conditions seem more appropriately the types of requirements that would be adopted, if at all, in generic rulemaking proceedings.

So I would say that the Commission, in order to discipline itself, could announce in a policy statement that, number one, it will not generally duplicate the competitive analysis undertaken by the antitrust authorities that are looking at the same merger transaction, at least without articulating special concerns that it has; and number 2, that absent extraordinary circumstances, it will not impose conditions uniquely on the merging applicants that more appropriately should be considered in generic rulemaking proceedings because the requirements should apply to all similarly situated applicants.

Another area where the Commission could also discipline itself as well with regard to the public interest standard is content regulation. This is an area obviously where the public interest standard shakes hands, so to speak, with the First Amendment, so that cautionary restraint in the exercise of the agency's authority should be particularly valued.

The FCC's regulation of program content of broadcasters is distinct from the hands-off First Amendment model applicable to print and other media, in which content regulation is forbidden. Broadcast content regulation was sanctioned in the 1969 *Red Lion* case, principally on the basis of a scarcity rationale. Because of the physical limitations of the spectrum, the Supreme Court said, quote, "There are substantially more individuals who want to broadcast than there are frequencies to allocate."

I think Judge Bork put it nicely in the *TRAC* decision in a D.C. Circuit opinion. He said the attempt to use a universal fact -- physical scarcity -- as a distinguishing principle necessarily leads to analytical confusion. And that's the argument that newsprint is scarce, of course, and other resources are scarce in the same sense that broadcast spectrum is scarce. We can talk more about that later.

I think Judge Bork is a pretty wise man. But for this morning's purposes, I want to go back to that other really wise man of the day, then-Commissioner Powell.

This is from a speech before the Media Institute in April of 1998. 1998 seems to have been a particularly great year for Powell speeches. Commissioner Powell was accepting an award for his strong First Amendment principles, and in a speech entitled "Willful Denial and First Amendment Jurisprudence," Powell declared: "I submit the time has come to reexamine First Amendment jurisprudence as it has been applied to broadcast media and bring it into line with the realities of today's communications marketplace. As far back as 1984, the Supreme Court indicated in the League of Women Voters case that it would await some signal from Congress or the FCC that technological developments have advanced so far that

some revision of the system of broadcast regulation may be required. I believe we should be getting those signal fires ready."

Powell went on to debunk the scarcity rationale. He listed all the changes from 1969 to now in terms of the number of media outlets, cable homes, cable outlets, all of those things which I won't go into today and, of course, have changed even since 1998 in the direction of more outlets for expression.

But then he went on to say, "The fact is that spectrum is not really scarce." And he said, "More importantly, the advances in technology have been astonishing since the time of *Red Loin*. Digital convergence, rather than reinforcing the unique nature of broadcasting, has blurred the lines between all communications medium. The TV will be a computer, the computer will be a TV, cable companies will offer phone service, phone companies will offer video service. Digital convergence means sameness of distribution."

Then Powell concluded, "Should we continue to apply the reasoning of *Red Lion* to determine the First Amendment rights of broadcasters in today's communications environment? At the very least, any responsible government official who has taken an oath to support and defend the Constitution must squarely address this important question."

So what to do? Well, in December 1999, the Commission issued a notice of inquiry in a proceeding it called the Digital Television Proceeding to examine what the public interest obligations of broadcasters should be in the digital age, the broadcasters who were receiving the new digital licenses. But when you look at the notice, it seems to refer to all broadcasters, at this point, both analog and digital broadcasters.

In that Notice, the Commission, in asking about the public interest obligations, suggests that content obligations on broadcasters under the public interest doctrine might include everything from being required to provide targeted weather forecasts, which is easier to do in a digital world, to mandatory free airtime for political candidates. In the fashion of notices of inquiry at the Commission, the Notice does not telegraph the answers, but it does ask wide-ranging questions.

What was so striking to me about the Notice is what it does not ask or even mention. There is no discussion in that notice of the current marketplace environment for the mass media industry and what this environment, with its multiplicity and diversity of sources of information means for the continuing application of the public interest obligations.

There is no discussion of this digital convergence to which Chairman Powell had earlier referred. The Commission's Notice focuses only on broadcasters as if there are not digital cable-casters, digital direct satellite broadcasters, digital web casters. Indeed, the Internet is not even mentioned in this Notice to which I am referring. Most striking, there is not a word in the Notice about the relevance of the First Amendment to the Commission's inquiry.

So what I would say, to offer another specific suggestion for consideration, is that the Commission ought to use this outstanding notice on which comments have been filed, approximately a year and a half ago, to make a powerful statement about free speech in the digital era along the lines that Chairman Powell has spoken so eloquently about in those earlier speeches.

It should proclaim that, consistent with its understanding of the First Amendment and the present realities of the marketplace brought about by the digital revolution, the FCC will abandon all mandated content regulation that is not expressly required by statute. So I am focusing on what the Commission can do itself under its own regulations and not focusing on what Congress has mandated.

To wind up, some other areas that come to mind in which, if the FCC were to have a somewhat heightened sensitivity to the First Amendment where the decisionmaking process could benefit, those areas would be, for example, the cable ownership rules where there are obvious First Amendment considerations that at least lurk in all of these media ownership rules.

There is another one that I was just looking at a couple days ago. The Commission has on remand the rules relating to the disclosure of customer proprietary network information that telephone companies have and the extent to which that information should be able to be disclosed. This is on remand from the Tenth Circuit decision where the Tenth Circuit said you have to balance the privacy interest in nondisclosure of this type of information with the First Amendment.

So that is an example where, even if the First Amendment does not absolutely dictate the result, an appreciation of those free speech values might tilt in the direction of a result that would allow more disclosure.

I will wind up now. Thank you, Judge.

HON. WILLIAMS: Andy, I will have you speak now so that Jane can be in the position of defending all FCC positions that she wants to.

MR. SCHWARTZMAN: Well, I am torn between making some broad generic observations that may be important and timely and apply to some things said and engaging in a house-by-house line-by-line defense of Randy's thoughtful work.

I feel that Randy and I have spent a lot of years, we share an institutional habit of swimming upstream. Somehow, though, we're swimming in opposite directions. I've never understood that.

MR. MAY: Let me say one thing. When I started, we were swimming more in the same direction, but over the years, the world

has changed. But that's why we will engage in the discussion. But I was swimming with you for a while.

MR. SCHWARTZMAN: I will limit my generic observations to the thought that recent events perhaps have heightened the importance of seizing too quickly on constitutional principles as useful litigation tactics as a substitute for getting legislative relief and using the democratic process to attain one's objectives.

Perhaps the Commerce Clause takes on new meaning when we are dealing with anthrax and airline security questions and perhaps the Fourth Amendment takes on different meanings when we are talking about redefining national security. I know there are divisions within this organization on some of these things, the libertarian streak that runs through many people associated with the Federalist Society has been sparked by some recent events, and I know the Vice President has been addressing this as well. I am concerned at the notion that we're going to decide that people are not entitled to basic rights of counsel and public trial and due process and evidence and Federal sentencing guidelines even based on an unreviewable predetermination that they are not citizens anyway, and so they're not entitled to the same rights, which is a paraphrase, but pretty close to what the Vice President said the other day. If you do not have counsel to have that initial determination, maybe a citizen is going to get lost in the shuffle. There were several people who had the misfortune of having the wrong name who wound up being imprisoned as material witnesses for days on end recently.

I think the same thing is true with respect to the delegation clause in Randy's persevering in the face of the *American Trucking Association* case when even Judge Williams, who wrote the best case you are ever going to have to support invalidation of a statute, didn't get anywhere. I think Judge Williams exceeded the authority of the Supreme Court on this, for the time being.

Anyway, I think that there are some dangers here, and I would make that generic observation about property. It is not a litigation tactic. How did the property get acquired? How did all of these rates of return regulation systems get developed? What municipal, state, Federal rights-of-way, what special rights of access, what special poll attachment rights, contributed to the creation of this property in the first place, and how did that happen?

There is a case in the Fourth Circuit involving a challenge, including a takings challenge, to the so-called Chavia Act. It relates to broadcasting and retransmission of local television systems on direct broadcast satellites, and the satellite broadcasters are challenging the statute as a taking. One of the problems I have with this exercise is that these same companies helped write the statute and lobbied aggressively for it and forcefully fought for its enactment. Now they are turning around and challenging it, which was a tactically valuable thing for them to have done. Now they are turning around and, having won certain rights, they are trying to get certain of the other rights in the statute thrown out as unconstitutional. I think that that cheapens the Constitution. I think it cheapens the rights that we ought to care about.

I am somewhat heartened that the National Association of Broadcasters has just filed in the Supreme Court, supporting us, I might add, to make it even seem odder, expressing concern about using constitutional rights as a tactic to attack economic regulation. I think it's very dangerous. We ought to limit the invocation of constitutional rights to living, breathing citizens who have living, breathing concerns, and living, breathing persons, I suppose, in some cases.

That is a broad, generic set of observations, and it is not directly applicable to any particular point that Greg has made about TelReg where I think much of the criticism has a lot of validity. But I do create that generic set of observations.

With respect to Randy's discussion of the public interest standard, it does work pretty well. We have a system of checks and balances. The courts have had a pretty good understanding of what this can mean. Familiar language does not necessarily mean that it is imprecise or wrong, and we all use word processors. To repeat things doesn't mean that they are wrong; it may just mean that they are right.

I do think that delegating authority to agencies, giving them a lot of discretion in how to decide difficult questions that the legislative process in a complex society can't possibly deal with, is not only important and necessary; I do think that there is a difference between judicial review for excesses and a blunderbuss of saying, well, this is something that we don't like and we haven't been able to get Congress to fix it, so we are just going to attack it.

With respect to the stretching of the public interest standard conditions in negotiations, I don't see anything inherently wrong in a settlement discussion where there is a perceived problem for a package of remediation to be developed which may include some things that are not literally within the four squares of what the particular cause of action is about, but nonetheless has effect of changing the balance and positively affecting the outcome in private litigation or in litigation with the government. I do not think that there is anything wrong with that.

My problem, for which I would hope there would be more support from the people from the right side of the political spectrum on, is the way in which this is often done in secret. I think transparency is a very important aspect. I have been highly critical with only limited success in trying to open up the FCC's secret processes, abuse of their *ex parte* rules.

Indeed, the problem with the kinds of settlements and negotiations that Randy is talking about is that they have been conducted behind closed doors in secret, despite rules that supposedly preclude that from happening, rules which are now routinely waived as part of the checklist of what the FCC staff does when a merger comes in. It's one of the first things they do on their little checklist; they publish a public notice saying that the Commission's *ex parte* rules don't

apply.

I think openness would help a great deal and would facilitate action in the public interest and facilitate some understanding of what the public interest is rather than just saying the public interest doesn't mean anything.

Finally, without launching into a full-bore defense on the *Redline* spectrum area, I think a few comments may be worthwhile.

First of all, yes, there are more outlets out there. Yes, the digital technology uses the spectrum much more effectively. Yes, the demand for spectrum far exceeds the supply as the auction process for licenses undoubtedly demonstrates. It is not irrelevant that on September 11th, 20 percent of the cellular telephone calls in Manhattan were effectively completed and about 40 percent in Washington, D.C. Without taking sides and without agreeing that they are right, the cellular industry says that that's because they don't have enough spectrum, and they want more and they have been complaining about caps, which the FCC has now addressed. That does not strike me as abundance.

As far as signals are concerned, in 1983, in the Leland voters case, in a footnote, an opinion that was joined by six Justices, the Court said, we await a signal from the Congress or from the Commission. That is 18 years ago.

What has happened since then? A lot of things. First of all, the dependence on over-the-air television for news and information is greater than ever. The Internet doesn't do anything about local news and information to speak of other than repeat stuff that comes from the same newspapers and television stations, if that.

Congress passed the children's television law in 1991, finding that there was a lack of programming for children and a marketplace failure. In 1992, it passed a statute because of the concern about the dependence of a large portion of Americans on free over-the-air television. It imposed public interest programming requirements, including equal time and a set-aside of capacity for non-commercial use on direct broadcast satellites.

In 1996, Congress not only reenacted the public interest standard as the basis on which license renewals would be awarded, but it gave a large chunk of spectrum to incumbent broadcasters without challenge, simply because they were incumbent broadcasters, free of charge, and then loaned them their current spectrum indefinitely, free of charge, in the interim. Now the FCC is trying to push them off, bribing them in the case of Channel 69, by allowing them to sell something they got for nothing for billions of dollars because other people want it and it's scarce.

I don't see any signals from Congress or the FCC that it's time to revisit the scarcity principle at all, and I don't see the stock market evidencing any particular concern that the people who occupy spectrum are having a particularly difficult time because of the diminishing value of the spectrum that they are utilizing.

I could go on, but I won't.

HON. WILLIAMS: Thank you.

Jane. Wind up.

HON. MAGO: All right.

My goal today is to say as little as possible because I think I can only get myself into a lot of trouble, but let me start off by saying to you that I object to the name of this panel. It is not the FCC versus the Constitution. The FCC is simply a poor little administrative agency, we're a creature of Congress, as Randy pointed out, and we were created to implement the law.

We are not a court and we're not a legislature. We have no power to declare acts of Congress unconstitutional as Judge Williams told us in the *Syracuse Peace Council* case, I believe.

We also said in *Syracuse Peace* that you did have an obligation not to concoct your own innovative violations of the Constitution. I've now said enough. I said I was only going to get myself in trouble.

But, it's true, the FCC does have a duty to implement the laws that Congress tells us, and we have a duty also to defend those laws.

In the course of my 23 years at the agency, I have personally been involved in the defense of the broadcast indecency laws. We have a statute that tells us that we must, in fact, defend that. I've also been involved in litigation to defend restrictions that Congress put on dial-a-porn, the availability of dial-a-porn over the telephone network. I have also been involved in defending Congress's directions to us to place restrictions on unsolicited telephone calls going into your home through the Telephone Consumer Protection Act, and in defending some of the restrictions that Andy referred to a minute ago with regard to the direct broadcast satellite, the four to seven percent set-aside with regard to educational services, some of the political requirements. Currently, I am dealing with the defense of the statute that also Andy mentioned in the Fourth Circuit of the Satellite Home Viewer Information Act, Andy?

MR. SCHWARTZMAN: Something like that.

HON. MAGO: Yes. Where the satellite industry said that they should have a right to take the local signals of broadcast television and put them over the satellite in order to be able to grow the service, but now are saying that having had that right

to take the local signals, they shouldn't have an obligation at the same time to take all of the signals, all of the local signals. They want to be able to pick and choose.

We also at the Commission have been involved in any number of other constitutional issues over time that deal with equal protection. We have equal protection rules that have gone before the courts and we have defended those.

We have had to deal with the takings issues. As Greg mentioned earlier, those take on very many forms, from the physical co-location requirements for the telephone network that went down under the *Loretto* theory to some of the types of things that Greg was talking about, some of the takings with regard to the recovery for the telephone companies. Those are the issues, the TelReg principles that are before the Supreme Court right now.

The government's position, that we have to be able to defend is not that the companies are entitled to recover everything that they have ever put into their network, but rather that they are entitled to a reasonable regulation that does not impinge on their financial integrity, and that is something that is very different. I think we will probably get into this a little bit more as we go along.

Before I go on there, I need to give you a quick disclaimer on this, which is that I personally do not get involved in defending the telephone cases because my husband works for one of the telephone companies and it leads to bad harmony at home.

We also have due process issues that are raised constantly.

The key message that I really have is that the FCC is an implementer. We do not have the authority to overrule Congress. We do have a duty where we have policy choices, as Judge Williams said a few moments ago, to look at those issues and to make sure that the policy choices that we are making are consistent with constitutional principles, and that is something that we do in every single proceeding that comes before us.

We are looking at precisely those principles right now in any number of contexts, including how we are dealing with the owners of multiple-dwelling units and the rights that carriers have to have access to those structures. How we set up rules and regulations consistent with the Constitution that will ensure that the competitive spirit that's embodied in the 1996 Act goes on?

We are looking at the various issues. We have just initiated a proceeding in the radio ownership context to take a comprehensive look at where we are right now in the broadcast industry. Where do we stand? What should we be thinking about in terms of implementing our policies and taking the kind of look that Randy was talking about just a minute ago at where the industry stands and where should policy be going? In the course of that, we will be taking a look at how it fits with constitutional principles and the current realities of the marketplace. We are doing similar actions with regard to the cable industry.

I think that it is not true that we never think about constitutional principles as we go through all of this. We constantly look at those principles. We make judgments. Certainly reasonable minds can disagree as to some of the judgments that we make, and frequently they do, but that is part of our obligation, to take that into account, and we are going to be doing more of that.

Let me address a couple of the things that came up in the course of some of my fellow panelists' discussions. One, I have to point out that Randy lied to you about the computer key on the Commission because he said that it was there when he was at the Commission. Now, having been there when Randy was there, and writing briefs at that time, we not only didn't have computers, we didn't have push-button telephones. We only got push-button telephones at the FCC about five years ago.

MR. MAY: That is all true, and I was afraid that the NBC case had not been decided by then.

HON. MAGO: At this point, I am starting to feel a little bit wary about trying to throw age jokes. They come back at me.

But with regard to mergers, I wanted to make a couple of observations there. The Commission is, in fact, trying to take a very comprehensive look at our merger policies to ensure that we do have the kind of transparency in our dealings that Andy was talking about, and that we provide the fairness to the parties that is essential.

Michael Powell does very much believe that the agency should be in a position of looking at any particular merger that is in front of us. If there are conditions that are necessary to put on that merger to ensure the public interest, he has no qualms about putting those conditions on. But if there are conditions that are more appropriately set for a wider range that do not fit as something that goes to an individual party rather than something that should be an industry-wide condition, the chairman's position is that the agency should not be imposing those in the individual context of a merger just because it may be that the parties would want to try to negotiate that to get a better leverage, but rather that the agency should be initiating a rulemaking proceeding to say, should we be addressing this across the board?

It causes distortions in the marketplace if we have conditions that apply to one particular entity but not to others. That's not say there is no condition that should not be applied in a merger context. There may well be something that is specific to the parties that should be applied. Those are the kinds of things that we have to look at.

Addressing for just a second the *ex parte* issue on this, I wasn't quite sure what you were referring to,

Andy, when you said that we say we don't apply the *ex parte* rules.

As far as I know, what the Commission says is that we frequently make a particular merger proceeding permit but disclose, which means that the *ex parte* rules apply. But that means that the parties can come in, they have to tell us what it is that they've said in their pleadings.

You and I have talked about this on other occasions where those reviews or those summaries of what is being said at the Commission can sometimes be a little bit too terse. I think that they should be more comprehensive and agree with you on that, but I think that is a different thing than saying that the *ex parte* rules get thrown out the window.

What else did I write here in my many, many notes that I was throwing around?

Content regulation. Hit that one for just a second. As I noted when I first started here, the content regulation that we do is by and large in response to specific statutory requirements. We are required by statute to deal with broadcast indecency. We are required by statute to look at the unsolicited telephone calls, we are required by statute to look at political broadcasting issues. Those are all things that Congress has directed us to address, and as an agency we have an obligation to do so until the courts or Congress tells us differently, and I think that we have to continue in that regard.

I think I have probably said enough to get myself in trouble, right? That's probably it. I will stop there before I say something really bad.

HON. WILLIAMS: Okay. I thought I would open it up for questions in a minute, but I would indulge my privilege as chair to pose a hypothetical question.

Suppose that right after the ratification of the First Amendment, the first Congress had looked out on the scene before it and was concerned about the high price of paper and the way in which the high price of paper made it hard for many would-be newspaper operators or pamphleteers to get their views across.

So as a solution, it adopted a statute whereby an agency would be established which would buy up all paper suitable for printing purposes. One can theorize about the way in which the price would be worked out, but anyway, let's assume roughly approximate to what would have been the market price absent this. They buy it up and then they would provide it free to those who wish to operate newspapers, publish pamphlets, books and so forth.

Now, then, they weren't fools in the first Congress, so they recognized that if they offered the paper free, the demand would be virtually infinite, which would be much in excess of the supply, and there would be tremendous scarcity. So they said, well, we have to have some way of allocating this paper. Well, I think the agency that buys it up should also be in charge of allocating it on the basis of applications. But it is awfully hard to say exactly which newspaper publisher is more worthy. Who is going to more usefully inform people than another. We cannot foresee in advance, we cannot set up general rules. So this agency should allocate the paper for these purposes in accordance with the public interest. Then the system started flowing merrily along. Then, of course, you get to how they would exercise it and so forth and you could have a lot of sub-hypos which I won't give you and I won't even ask you give answers to it, but I will now invite questions by the panelists.

The panelists, of course, those who have had people speaking after them, may want to get their licks in and they can exploit a question to achieve that if they like. Only if you've got a question, Randy, only when you've got a question.

MR. MAY: Can I ask just one clarifying question about your hypo.

HON. WILLIAMS: Clarifying question.

MR. MAY: If the first Congress also passed a law saying that no newspaper publisher named Rupert could be licensed.

PANELIST: I might note that we really haven't been told we have to answer this question, but you asked me essentially the same question once in oral argument and used up about a good ten minutes of my time.

HON. WILLIAMS: It's a useful device, obviously.

PANELIST: And I prefer the option of not having to answer it.

HON. WILLIAMS: All right. Questions. Yes?

AUDIENCE PARTICIPANT: This is for Mr. Schwartzman. It's more of a comment than a question. You said something here today that Congressman Markey essentially said, too. I think it is the most dangerous thing I've ever heard said at a Federalist Society conference. You said that if someone is at the table negotiating a bill and a member of Congress really wants to pass it badly, that person has to come back to the table again and deal with that member of Congress, and under that

pressure, they cut a deal. They should not then go to the courts to avail themselves of any constitutional flaws that are in that bill to protect their rights unless they are living and breathing people.

The Media Access Project is not a living and breathing person, either, and I hope that you will think about that, whether you really believe that in the event that you are involved in negotiations on an important bill and you might have to deal with a member of Congress and you don't want to tick him off, and you are forced to go along with a bill that violates your rights, and in return for that, you give up your right to challenge that in court. I found that to be a very dangerous doctrine.

MR. SCHWARTZMAN: Well, let me address it. The instance that I just described was not a coercive situation. As I indicated, this was a statutory provision that the groups in question affirmatively supported and sought enacted. This was not a compromise that was worked out where I would have no problem accepting a compromise and reserving a right to litigate. That is not the situation I just described.

Media Access Project is not a living, breathing citizen. We do not assert standing on our own behalf; we function as a law firm. We represent organizations, each of which have living, breathing members on whose behalf we act, and we have been highly critical of organizations from the right and left that have attempted to obtain standing, Article III standing, for an entity that does not track itself to some sort of membership function, and that is a matter of great concern for us.

Sure, we have individual opinions and we are often asked what we think about this and that, and there is an implicit kind of representation in those things. But when we go to court, we do it on behalf of citizens because I think that that is a very important part of the role. I hope that's responsive.

MR. SIDAK: Can I add something to that?

HON. WILLIAMS: Sure.

MR. SIDAK: Corporations have shareholders and they are people. They have employees and they are people. So I don't see where that's a very helpful basis for distinguishing between whether you should or should not be forced to waive your right to challenge a statute in court on constitutional grounds.

AUDIENCE PARTICIPANT: Good morning. I'm Scott Delacourt. In a panel on FCC and the Constitution, I have to ask about the *Next Wave* case.

This morning's Post reports that the government and the parties are near settlement: but who knows? I wanted to get the views of the panelists on a question lurking in that case, which concerns FCC spectrum licenses and property interests therein.

HON. WILLIAMS: A call for volunteers.

PANELIST: It is often too easy to pass off distinctions in saying this case is *sui generis* or however you choose to pronounce the Latin. But this one certainly has certain attributes that are unlikely to come up again.

HON. MAGO: One can only hope.

PANELIST: That aside, and one of the special aspects of this is that I think, as many people in the communications bar have learned, definitions of what constitutes property and what constitutes rights for purposes of bankruptcy are not the same as definitions that apply in other areas of jurisprudence, and that is okay, too. But I think it has proven difficult to generalize some of those concepts over into other concepts.

That said, what we are talking about here is a lease, a leasehold, but a leasehold terminal under conditions, breach of duty and subject to certain kinds of unusual conditions.

Deciding whether a lease for a term certain subject to certain conditions confers some degree of property rights, whether you answer it yes or whether you answer it no doesn't really answer the larger question that you asked, and I think that the litigation suggests that it may be true and it may not be true and there is not even a lot of agreement about whether the Second Circuit and the D.C. Circuit are in conflict with each other.

We may not get the answer to this at this time or ever, but what we are talking about when the question is answered is not going to be this broad sweeping question that you asked. I don't think it's going to have a lot of bearing on that broad sweeping question about whether there is a property right in a spectrum license in other situations.

MR. MAY: Could I respond to Scott's question this way? I agree with a lot of the way you actually put that. I don't want to

spend all morning quoting other people, but I want to read to you from a court decision, from an opinion, not even a majority opinion, which I think is very useful for all of us to have in mind when we think about this very question.

I think *Redline*, the broadcaster, could only have claimed its speech rights in a sense if the government, had allocated, property rights, I would say.

Let me just read you this. There is perhaps good reason for the Court to have hesitated. This is in a discussion about that same issue of whether, the license is property. It is a good reason for the Court to have hesitated to give great weight to the government's property interest in the spectrum.

"First, unallocated spectrum is government property only in the special sense that it simply has not been allocated to any real owner in any way. Thus, it is more like unappropriated water in the Western states that belongs effectively to no one. Indeed, the common law courts have treated spectrum in this manner before the advent of full Federal regulations," citing that *Chicago Tribune* case which you have seen cited.

"Further, the way in which the government came to assert a property interest in spectrum has obscured the problems raised by government monopoly ownership of an entire medium of communication."

SPEAKER: Even reading these wonderful quotes?

MR. MAY: Wait a minute. Let me answer Judge Williams' hypothetical this way.

"We would see rather serious First Amendment problems if the government used its power of eminent domain to become the only lawful supplier of newsprint and then sold the newsprint only to licensed persons, issuing the licenses only to persons that promised to use the newsprint for papers satisfying government-defined rules of content."

Okay. I commend that decision. This is an opinion by Judge Williams --

HON. WILLIAMS: It's regrettably not a decision; it's merely dissenting from a denial of --

MR. MAY: Dissenting from a denial of -- I was going to say that, to make it clear -- dissenting from a denial of petition of rehearing. But to me, it's an excellent discussion that frames this issue of property rights, and I agree with his answer to the hypothetical that he posed.

HON. WILLIAMS: I didn't quite answer it. I just said there are First Amendment problems.

PANELIST: I don't suppose we should get off of the spectrum issue without inviting Greg or Randy to make some unpatriotic remarks about the role of the Department of Defense in spectrum management.

PANELIST: Well, let's don't waste a lot of time on that.

MR. SIDAK: The big problem there is that DOD and other government agencies that have spectrum cannot directly benefit from selling to somebody else.; tThe money has to go back into the Treasury for reasons that were made well known during the Iran Contra Affair. All money goes into the Treasury, and it has to be appropriated out.

HON. WILLIAMS: Yes.

AUDIENCE PARTICIPANT: Art Aldenaff. I also work for an agency authorized under Article 1.5 of the Constitution.

Recently, the FTC's general counsel -- Phil Kavosich's recent talk at the ABA and several conferences suggested that the development of a so-called domestic competition network might be useful. One thinks of AOL-Time Warner. And the notion is that currently, mergers undergo review from a variety of different regulatory bodies. Sometimes quote/unquote "antitrust" principles informing the review are applied by different bodies, and I think his notion was that in going overseas and talking to foreign competition bodies about the optimal system, they asked why state, local utility commissions, several Federal agencies are all playing with the same merger transactions, and then he explains that's the beauty of our system.

I guess the broad question is, do you think, speaking personally and not for the Commission, that there might be some interest in having some kind of coordinating group for dialogue among the Federal antitrust enforcers and those independent agencies that also examine mergers.

HON. MAGO: In fact, there already is a certain amount of dialogue that goes on. This is a common concern. Are we duplicating the efforts? In fact, Randy could probably find six more quotes from Michael Powell for raising that very concern, that we not be duplicating the efforts of other agencies.

When we at the FCC try to look at them, we in fact take into account that our mission is somewhat different.

We have a responsibility to look at the public interest from the point of view of diversity and economic competition, and that is something that we, bring into our review of it, and we attempt not to simply duplicate the efforts of other agencies, but we do defer to their judgments. We have announced that in a variety of decisions where we have deferred to the Justice Department or to the Federal Trade Commission.

I think you are proposing a somewhat more formal body to oversee that, and I guess my reaction to that, and this is a purely personal reaction, is I don't think we need any more regulation on top of the regulation we have. What we need to do is to be able to have effective coordination among the groups that do have responsibilities under the statutes now.

AUDIENCE PARTICIPANT: Actually, I am not proposing something formal. I mean, I think the notion was here to have a forum, perhaps a regular forum where say public utility -- let's take public utility officials, perhaps people from FERC, FCC, you know, sit down, people from the Antitrust Division of the FCC, and get some current thinking. For example, how do we analyze effects on particular markets of these mergers, what are you hearing?

The notion again is not at all something formal, but something not requiring statutory or regulatory action. Perhaps a forum, outside the context of any particular transaction, to help shape the debate.

HON. MAGO: Again, I think we're looking at that in the broad context of all of our merger regulation, and that is a very important point.

HON. WILLIAMS: I might just say that Judge Posner, in a talk on antitrust in the new economy, was very hesitant about a lot of issues, but one firm proposal he made was that, certainly for the new economy, the power to enforce antitrust laws be vested nationwide, that is to say governing the states as well, in a single body, substituting one veto power for 52.

AUDIENCE PARTICIPANT: My name is Tom Fisher. I do some telecom cases.

I was thinking about the problem, going back to the newsprint and the scarcity issue, and I always come back to the notion that, like newsprint, it seems like the spectrum could just be, left to the market and let that take care of it.

But the problem I have a hard time getting my arms around is the idea of policing who is actually using spectrum, whether they are trespasses or whether the notion of typical laws of trespass could be used in the same way as with newspapers and could be criminally prosecuted as trespassers would be.

Would those kind of laws be effective in the area of spectrum or does the FCC's role in allocating that also have to do with the ability to police all of that?

MR. SIDAK: No.

PANELIST: Will you elaborate?

MR. SIDAK: The Federal Radio Act of 1927 was enacted when Congress realized that they were going to lose control if they did not pass a statute to regulate radio, because at common law in Illinois, in the *Oak Leaves* case, a trial judge laid out the law of radio trespass. The best place to look for this is Tom Hazlett's writings. He analyzes the early political economy of radio broadcasting.

But what is really interesting, too, about what the judge came up with was that it was identical to the rules that the Federal Radio Commission came up with once Federal law preempted all the state common law decisions.

PANELIST: This is on the interference issue.

MR. SIDAK: On the interference issues, yes.

HON. MAGO: I can take a slightly different view on that. From the agency perspective, one of the jobs that I have had over the course of time was as the deputy chief of the Enforcement Bureau, and in that context, we have some responsibility for dealing with all the different interference issues.

Frequently I was dealing with local jurisdictions who wanted to get into interference protection. Talking about the different definitions of what we were, what was interference, and what really was a problem, it became clear to me in that context that having that be something that could vary on a state-by-state or even locality-by-locality basis would be something that could cause mass confusion.

PANELIST: Yes. I don't think any of the radicals in this area object to the concept of Federal rules of the road with respect to broadcasting.

PANELIST: Let me make one observation about the delegation part here and the need to afford an agency with enough latitude to deal with the kinds of questions you raise in a changing technological environment.

Something that I think everyone on all sides of the political spectrum, at least on the extremes of the political spectrum, happy about is technology that affords much greater opportunity to use spectrum in new and wonderful ways.

Spread spectrum technologies and so-called ultra-wideband technologies that are coming into play that use the spectrum differently or defy the principles of allocation that have been employed over the years offer some tremendous opportunities, opportunities for innovation, opportunities to do new and different things.

I have been pushing very hard for development of low-powered radio, which is a somewhat analogous situation where technology now permits the insertion of large numbers of small low-power radio stations without causing interference or, depending on who you talk to, too much interference. And this is not something that a legislature can effectively deal with on a year-to-year basis and it's not something that can be dealt with very well without having a generic set of principles like a public interest standard within which to evaluate and balance these considerations.

It is a testament to the kind of innovation that can be possible, that the FCC is trying to develop these technologies, and if it did not have something as supple, one of my favorite words in the precedent NBC, the FCC would not be able to do that.

HON. WILLIAMS: Yes.

SPEAKER: Mr. Schwartzman, what case law might stand for the proposition that a party which was involved in lobbying a particular provision into a law is somehow estopped or has waived the right to challenge that in court or what ethics opinion binding on counsel might establish such a policy?

AUDIENCE PARTICIPANT: I don't think there is any. I was making a policy point. I don't challenge the right to do it, but it does raise questions, in my mind, about the dangers of using constitutional principles as litigation tools. I think it demeans the democratic value in a generic way, and that is the concern that I was trying to express.

SPEAKER: You argue that it might be unethical for counsel to make such arguments?

AUDIENCE PARTICIPANT: I think so. It would raise concerns on my part. It makes me question the motives.

SPEAKER: Because I know of no ethics opinion that says anything even close to that.

AUDIENCE PARTICIPANT: I am not suggesting that they are barred from doing it; I am suggesting that it ought to raise some questions about how we approach the intersection between the branches of government.

SPEAKER: My concern is that ethical issues are now being brought in to limit the right to petition the courts on the part of private parties, and that counsel, in effect, are implying it's unethical for counsel to make an argument against a statute in which negotiated a provision, and I see no authority for that and I see very serious implications for the parties and their constitutional rights to take it in front of the court.

AUDIENCE PARTICIPANT: The point is not unimportant; it's well taken.

SPEAKER: Are the people who were actually broadcasting before 1927 and staked out of their own piece of the spectra, exempt from all this re-licensing?

MR. SIDAK: No. In fact, there were some early spectrum takings cases litigated around 1929, 1930, and they were all shot down by the courts.

HON. MAGO: We have dealt with this in the pirate radio context where there have been a number of challenges over the last several years of various entities contending that they have a right to use the spectrum without having an FCC license and they have been consistently put down by the courts.

PANELIST: Tom Hausis, as I recall, has a wonderful fantasy. Suppose the United States, on acquiring the unoccupied western lands, had set up a Western Lands Allocation Commission, and it would mark out, say, everything south of one line for cattle and everything west of some line for sheep and so forth, of course, subject to modification in later rulemakings.

PANELIST: In the public interest.

PANELIST: Well, I would note that the Land Grant College Act and the set-aside of property for land grant colleges proved to be pretty effective public policy.

PANELIST: I think I can see subtle distinctions, yes.

SPEAKER: Before September 11th, the stock market had its own September 11th, and it was all in telecom, just oceans and oceans of capital lost, $210 billion at last count, much bigger than the S&L bailout. I know some of the companies that have gone under pointed the finger at the FCC for failure to really police the opening of competition that came out in 1996.

As I sit hear listening about the FCC, all I'm thinking about is all the stocks I own.

Would any of your proposals or positions that you are taking, help with this in the future?

HON. MAGO: Well, let me jump in first and say I don't take that rap.

The 1996 Act opened up competition, and I think it has been described several times as attempting to drink from a fire hose to see if we could figure out how to implement this Act in a reasonable way. Some of the choices of the Commission helped to shape where the market went, but I think that the market itself took off and various parties developed their business plans. Investors in fact invested in those companies, and there was a real sense that some of the plans were not well founded. When that was realized, that helped lead to that sell-off, and it was not simply FCC regulation or government regulation as a general principle.

PANELIST: Could I just add? I agree with Jane generally and I would not want to tie particular stock market prices to the FCC's policy very closely. But I want to use your question as an opportunity to say that in my view, what the FCC's policies have done in implementing the Act really are tilt. It is a matter of balance and judgment.

The Communications Act itself was not really explicit in so many ways, including the ways that I am going to talk about. But I think the FCC has tilted its interconnection and network unbundling rules -- this is what the Supreme Court case is about that Greg talked about -- too much towards promoting resale of services versus facilities-based competition. And in the sense that the FCC has required an excessive amount of sharing at these TelReg prices, which I think are too low (it would take more time than we have to explain why that's so), what happens is that it disincents the new entrants that you want to come into the market to provide facilities-based competition. That is ultimately the only type of real competition, when people own their own facilities and control them. It disincents new entrants from constructing their facilities if they can share the incumbent's facilities at prices that are arguably too low, but it also disincents, and this is important, the incumbent from investing in new facilities if it has to share away the profits.

Reid Hunt basically said in his book that because the Communications Act was not explicit that we were able to give the new entrants a fairer chance to compete. That was the way he put it: a fairer chance to compete. Relating this back to the Constitution and the subject of our discussion, that when you give someone a fairer chance to compete as opposed to a fair chance, that it actually it implicates the type of discussion in those cases that Greg was talking about in terms of the rate-making balance and the takings argument, that we talked about.

So when you set out to do that, you are implicating, constitutional principles and values in the way that I talked about before. If a provision is ambiguous enough to give the FCC the authority to tilt one way, then it is also ambiguous enough now, if it explains why it is changing its policies, to go back, I think, and tilt in another direction that would incent more facilities-based competition rather than just this resale. Ultimately, if that happens, you will see the stock market zoom way up. That's my prediction.

PANELIST: Did you learn whether to buy, sell or hold?

SPEAKER: You didn't say when.

PANELIST: Watch these guys at the FCC, and don't watch what they do, and there is a lot of talk about new reorganizations and they are going to move the boxes around and create new bureaus. You know, that all might be very nice, but watch actually what they do substantively in terms of the policies.

MR. SIDAK: May I add a word to that? I think that it is also important not to view regulatory agencies as angels, to invoke Madison. And it is the Federalist Society event here, so somebody can tell me which Federalist number that is; I've forgotten.

PANELIST: Fifty-one, I think.

MR. SIDAK: Fifty-one? Okay.

But regulatory agencies are subject to all kinds of pressure, not only from interest groupsAgencies have their own agendasIf the public interest standard is, in fact, as supple as Justice Frankfurter thought, it's supple in ways that may not be good., and tThat can translate into what might be called regulatory opportunism.An argument can be made that some of the big decline in the value of telecom companies was because it became more apparent that there was a kind of regulatory risk out there in the way the '96 act was being implemented.

HON. WILLIAMS: It looks as if we're out of questions, so will the audience give a hand to the panelists. Thank you very much for coming.

RELIGIOUS LIBERTIES

MOMENT OF SILENCE DEBATE

Honorable Walter Dellinger, *O'Melveny & Myers and former Solicitor General of the United States*
Honorable William Pryor, *Alabama Attorney General*
Ms. Margot Adler*(moderator)*

Transcript of broadcast on National Public Radio's "Justice Talking" program.

MARGOT ADLER: Is a moment of silence school prayer in disguise or simply an opportunity for quiet reflection? I'm Margot Adler and we'll debate this issue in this edition of NPR's Justice Talking. I'm joined by Walter Dellinger, former Solicitor General in the Clinton Administration and Bill Pryor, Attorney General of Alabama.

Walter Dellinger is a partner at the Washington, D.C. law firm of O'Mel-veny & Myers. A professor of law at Duke University. Mr. Dellinger was head of the Office of Legal Counsel in the Clinton Justice Department. As Solicitor General, he argued a record 9 cases before the Supreme Court, including several dealing with the religion clauses of the First Amendment.

Alabama Attorney General Bill Pryor is a national leader in litigation involving federalism. He recently won several major Supreme Court cases, including University of Alabama vs. Garrett and Alexander vs. Sandoval which limited the reach of federal civil rights statutes. The Wall Street Journal has called Bill Pryor the intellectual leader of the Alabama Republicans.

Thank you both for joining us here at Justice Talking. Our debate begins with opening statements, first we'll hear from Attorney General Pryor.

BILL PRYOR: The First Amendment provides Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. We have strayed far, too far, from the original understanding of the First Amendment when we would debate whether a mere moment of silence, with an expressed allowance of prayer at the beginning of each day in public schools somehow violates the First Amendment. Indeed, a moment of silence is a neutral accommodation of religion that violates neither the First Amendment nor the decisions of the Supreme Court interpreting that amendment. The framers of the First Amendment did not harbor any hostility toward prayer, even public or government sponsored prayer. The First Congress, promptly after its ratification of the First Amendment, called upon President George Washington to proclaim a national day of public thanksgiving and prayer to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God. Both Houses of Congress also instituted the practice of opening each day's legislative session with a prayer delivered by a chaplain who was employed and paid by the government. The Supreme Court itself begins its sessions, each day, with the prayer God Save the United States and This Honorable Court. The Court, however, has laid down more stringent rules for religious expression in public schools. The Court, understandably, frowns upon any attempts by the government to coerce a child, who is required by law to attend school, to observe a particular prayer or religious exercise that may violate the freedom of conscience or contradicts the beliefs of that student. But, a moment of silence is not coercive. It does not create peer pressure. It neither encourages nor discourages religion. It is neutral. This is not a hard question. There is nothing dangerous about a classroom of silent children.

MARGOT ADLER: That was Bill Pryor. Now an opening statement from Professor Dellinger.

WALTER DELLINGER: I need to first express the view of those who are not represented on this panel because I fully agree with Attorney General Pryor that moments of silence are not unconstitutional. I think the particular Virginia law, which mentions prayer is, for reasons I will tell you. But, not only do I believe that moments of silence that are neutral and undesignated are constitutional. I believe that very fervently and have expressed that view since the 1970's. I also believe that student religious groups have an equal right to use of the school facilities with all other student clubs and that religious speech is fully entitled to be protected. There are many who disagree with that and they are well-meaning but I believe in all of those views. I also believe that the mere fact that legislators enact a moment of silence in the hope that children will use it to pray does not come close to invalidating. There's nothing constitutionally offensive about the mere existence of prayer in the public schools or anywhere else. The constitutional evil to be avoided is government encouragement or inducement to pray or not to pray. As long as a prayer results from the private choice of individual citizens, the Constitution is not violated. This statute, and one where a legislature passes a moment of silence for meditation or prayer or any other silent activity, rather than simply a moment of silence for any activity of the students choosing. It crosses a line that seems trivial but is not and it ought to be at the heart of where people, who believe in the principles of the Federalist Society, belong and that is it crosses this very simple line. I try to explain it to my students in the simplest possible fashion. This is not rocket science. Private prayer, good. Government prayer, bad. The hard cases are always deciding whether it is the government or the individual that is deciding about prayer. Here, the seemingly trivial fact, and I understand that it seems to be trivial, of the addition of the word prayer in the statute that crosses the line of constitutionality precisely because it is unnecessary to the goal of creating a formal opportunity for reflection which students who choose to do so can choose to pray. That purpose is wholly accomplished by a statute or policy that simply provides that a moment of silence be set aside. If a simple moment of silence is created, parents, priests, rabbis and ministers can, if they wish, suggest to their children or parishioners that they use the moment of silence for prayer. But, providing in the state's code of laws that prayer is a designated activity, takes the state itself across a thin line and into the improper business of the official endorsement of religious exercise. There is no good role

for government in organizing, promoting, encouraging or discouraging any groups of Americans to pray or not to pray.

MARGOT ADLER: That was Walter Dellinger. Bill Pryor, students have the freedom to pray on the school bus. They have the freedom to pray around the flag, around the flagpole at school, they can say grace before lunch, they can meet with their Bible Club after school at the end of the day, why do they need a state sanctioned minute in the classroom?

BILL PRYOR: Well, the Virginia legislature found that there was more than a reason to accommodate religious belief and religious exercise at work here. In response to the Columbine incident of school violence with which we're all familiar, the Virginia legislature felt and the sponsors of the moment of silence bill in Virginia felt that each student could use a moment of quiet reflection as a management tool for the school to prepare the children of that school to collect their thoughts and realize the seriousness of the work and the day ahead, that's a valid secular purpose but also the Virginia legislature also wanted to make sure though that it, in no way, suggested that there was going to be discrimination against believers and, for those children who chose to exercise their right to pray during that moment of silence, they could certainly do so.

MARGOT ADLER: Professor Dellinger, it's only 60 seconds, aren't you making a mountain out of a molehill?

WALTER DELLINGER: I'm not concerned about what goes on in the 60 seconds. I think if students choose to use 60 seconds to pray, they're fully within their constitutional rights and I would zealously defend that. I think the constitutional problem occurs way far away from that school classroom. It occurs in the halls of government where government officials choose to pass a law that tells people that the government officially sanctioned view is that prayer is the preferred activity, singled out just prayer and meditation or any other activity. I think what that is and I know that, you know, some laws are truly terrible and yet not unconstitutional. This may be reverse. A law that's not bad at all but is constitutional because it crosses a narrow line. In a country in which religion has been a matter of individual conscience and private citizens acting as individuals and in groups, any step that takes you across the line into the collectivization of religion, even if it's a trivial collectivization, by having the government formally put in its code of laws that this is what you're supposed to do at that time, to me crosses a narrow line and that's where I, if you'll pardon the expression, get off the school bus.

MARGOT ADLER: Attorney General Pryor, would you be concerned if the moment that we're talking about was 5 minutes. If it was 5 separate moments throughout the day, if you can argue for 60 seconds, what about 60 minutes?

BILL PRYOR: Well, as Walter said a moment ago, just because a law is constitutional doesn't mean that it's wise. I would say that it might be unwise to have a 60 minutes of moment of silence law but it would be constitutional. I don't think the principle would be any different.

WALTER DELLINGER: And, Margot, let me add on that very point, though, again, there are those who would disagree from the left, I'm not troubled by an hour. If there's a wide range of activities permitted, that is to say, talk about the hour is to talk about a school setting aside an hour for student initiated clubs or organizations and if there are a group of students who wish to spend the entire hour on school premises engaging in a hour long not simply silent prayer but vocal, spoken group prayer, as long as it is truly a product of individual private choice, I would defend that. Now, I know, for the purposes of your debate, it would be good to have another view out there and just let me say that there are 4 justices on the Supreme Court who, I believe, would disagree with General Pryor and myself, Justice Stevens, Justice Souter, Justice Ginsburg and, in most but not instances, Justice Breyer believe that, when prayer occurs on public property, even if it's a product of private choice, where if religious activity occurs, it is constitutionally suspect. I don't agree with that as long as their is private choice. On the other hand, I mean, if I may digress for just a moment, I think this is an area in which there's a miracle of collective decision making. The court has gotten every religion case in the last decade right even though 7 out of the 9 justices are wrong, and I think very fundamentally wrong, about one half of the equation so that the, you know, the government prayer bad, private prayer good dichotomy is one in which I celebrate the wonderful opinion of Justice Thomas, joined by Justice Scalia and Justice Rehnquist last term, upholding the right of student religious groups to meet on even elementary school campuses. It's a wonderful vindication of that right. Where they get it wrong, however, and I think that the dissenters...I don't understand why the dissenters don't agree that allowing an equal voice for religion is just fine in a world in which there are government subsidies out there, you should not discriminate against those who would use those subsidies for religious purpose. Where they get it wrong, to just (indistinguishable), it seems to me is when they allow the government itself to say, where there's a football game, we're going to have a minute, it's going to be for prayer or one other thing, then the government itself intrudes in that process and I think there, we're missing the critical distinction between government prayer and private prayer.

MARGOT ADLER: Bill Pryor, what are schools or legislators trying to accomplish in that one minute? If a student dozes off, if they do a crossword puzzle, their homework, if they doodle, if a girl puts on makeup, would that defeat the state's purpose?

BILL PRYOR: No, not necessarily, you know, we had study hall when I was in school, I guess that was our hour moment of silence and we didn't always study and it...but it, nevertheless, served my purpose most of the time to study and it did not necessarily defeat the school's purpose that one member of the class might put on some makeup. Just because students don't take advantage of that moment to the state's end does not mean that the state's end still has not been served when most do.

MARGOT ADLER: Mr. Dellinger, what happens if, during this moment of silence, a student prays out loud? You can think of many different religions where, in fact, praying out loud is appropriate and considered part of their religious practice. Would it violate the Free Exercise Claus to punish him for praying?

WALTER DELLINGER: Well, I think it is...you've identified one of the policy issues about a moment of silence. I don't think...I think it is perfectly fine for the school to enforce a neutral rule if the moment has not been designated by the government as being either for or against prayer. I'd firmly find for the government to enforce a moment of silence, you may not speak out against the war in Kosovo and you may not speak out about religion or math or football or anything else during that moment of silence. Each person can use it as he or she sees fit. It is the case and those who oppose, unlike me, that give them a voice who would oppose a moment of silence believe that it is not even neutral among religions for precisely that reason that it favors those for whom prayer is a private and quiet activity and disfavors those for whom it is important to have it be a group and collegial activity involving spoken prayers.

BILL PRYOR: But the government here did not say that it favored prayer, it only said that this law would not disfavor prayer. The statute itself said, each people may, in the exercise of his or her individual choice meditate, pray or engage in any other silent activity and that's why it was upheld by the Federal Court of Appeals.

MARGOT ADLER: So you don't think, for example, that the Virginia statute favors one form of prayer over another because, for example, Orthodox Jews might want to dauvin and Muslims might want to kneel and face Mecca and do stuff that might not be considered...might be considered disruptive in some schools in fact.

BILL PRYOR: Well, as we both agree, this is a neutral rule. All it requires of students is silence. It's an accommodation of religion to say the government does not disfavor prayer in the exercise of that individual choice to remain silent. The government...the Supreme Court has upheld accommodations of religion in a variety of circumstances. The military draft law which exempts members of the clergy is constitutional. The court has upheld a public school program that allows release time for students to attend religious classes off school premises. There are a variety of those kinds of accommodations and that's all this is.

MARGOT ADLER: Do you think school districts have the right to fire teachers who refuse to comply with a silent moment in a classroom? How about you, Walter, you can start.

WALTER DELLINGER: Gee, that's a tough one. I think the school certainly can...if the policy, unlike the Virginia policy is truly a neutral moment of silence, certainly the school and not the teacher gets to make those kinds of decisions. Attorney General Pryor is the Attorney General, whether one would have a...who had a religious conscientious objection to participating in a moment of silence would have a free exercise right not to be punished because of that, it's...I think a difficult question. I can't give an answer. Actually I would...want...the Attorney General is the chief law enforcement officer of his state, what would you advise if asked by a teacher...a school whether they could discharge a teacher that refused to provide for the moment of silence, if his or her reason was one of conscience.

BILL PRYOR: Well, I certainly would not advocate that a teacher has a right to disobey a law passed by the legislature and I would, generally, take the view that if a teacher refuses to comply with a state law, that is, refuses to allow the students to have their moment of silence, that that would be grounds for firing.

MARGOT ADLER: Since September 11th, more and more schools are requiring that students recite the Pledge of Allegiance which ends with the phrase, one nation under God, indivisible with liberty and justice for all. Isn't the Pledge a form of prayer? It doesn't end with amen but it's a kind of prayer, it mentions God, Mr. Dellinger, what do you think?

WALTER DELLINGER: You know, I think, Margot, that all principles have their point of diminishing returns and the principle about the government nonendorsement of prayer runs out for me before you get to In God We Trust on the coins or the mention in the Pledge of Allegiance, that's not a prayer.

To say that we are one nation under God is an acknowledgment of a supreme being and the Supreme Court itself has said, with Justice Douglas of all writing that our nation's institutions presuppose the existence of a supreme being but it's not a prayer. It's not like God save the United States and this honorable court, a request for God to save the court. That is a prayer. And it needs...and the court needs it.

MARGOT ADLER: Attorney General Pryor, if teacher-led prayer in public schools were legal, would you want it?

BILL PRYOR: That is a tough question. I'm a Roman Catholic, I was raised on the Gulf Coast of Alabama, I attended Catholic schools, my parents were Catholic school teachers and I can imagine that if I were a teacher in North Alabama and I tried to lead the Hail Mary, that there may be some Southern Baptists who would object.

And, for that reason, I'm not upset by the balance that has been struck and that balance is that the government doesn't sponsor prayer but it does fully protect, under the First Amendment, the rights of students totally on their own initiative to express their religious beliefs and pray.

WALTER DELLINGER: May I address that?

MARGOT ADLER: Oh, absolutely.

WALTER DELLINGER: Because I don't find that a difficult question at all. Hugo Black, that great Baptist from the State of Alabama,

wrote in the school prayer case which involved, remember a group of government bureaucrats called the Board of Regents, sitting in a room and composing the prayer, the exact words of a prayer to be recited in unison by groups of school children throughout New York at the beginning of every school day, Hugo Black said it is no business of the government to compose prayers to be recited by any group of citizens as part of a religious program carried out by governmental officials. And we have to remember that schools are governmental officials. I, too, grew up in the Catholic Church and every Thursday, for many, many years I had an ache in the pit of my stomach, still remembering how painful Thursday's were because on Thursday's the Protestant Bible came to my public school and when she came, I would dread her arrival because the teacher would say, when she swept in laden with Kool Aid and cookies and coloring...Bible coloring books, my parish priest would advise my mother, it would be an occasion of sin for me to learn the doctrines of the Protestant faith and so, the teacher would...and my mother, therefore, refused to consent to my remaining, a good Irish Catholic that she was and the teacher would say, Victor and Walter will now leave the room and I envied Victor K. Berg, the only Jew in the class for his seat next to the door because he got to sneak out quickly, I had to walk the gauntlet, wondering what was wrong with a kid who couldn't stay in the room to color pictures of Jesus and have cookies. And, it was an extraordinarily painful experience. We had to go shelf books for an hour and maybe that's why I've been unusually sensitive to these issues. Now, I realize years later, it gave me a sense of what it's like to be an outsider to the dominant culture which you don't usually get growing up southern, white and male but every Thursday for an hour I had a glimpse of that and I think the person who really stood...helped stand...stem the tide for a constitutional amendment to put organized government prayer back in the school was Senator Hatch. And I think he understood the plight of (indistinguishable) who had adherence to the Church of Jesus Christ of the Latter Day Saints who are in public schools outside of Utah throughout the country. What it's like to be made to be a religious stranger in your own public school. Again, I think there's no good role for government as long as speech and prayer is private, it's fine but not where government itself makes the decision and the...you know, the strong case where government officials compose the prayer but it also is the last unconstitutional step when the government says this moment is designated as being for prayer.

BILL PRYOR: The reason that it is a more difficult question is because the First Amendment is not the discomfort amendment. Part of the price of our liberty, the ACLU and others have taught us is that we sometimes might hear something that offends us and that's why the question is more difficult. I, again, don't have a problem where the court has struck the balance and that is that the government should not be in the business of sponsoring the prayer and...but, the students' right to pray on their own initiative should be fully protected.

WALTER DELLINGER: I'd (indistinguishable) that there's not a discomfort amendment and, therefore, if the valedictorian chosen on neutral grounds, is the person with the highest academic average, if you're in a school where the valedictorian really gets to express his or her views and the previous valedictorian condemned the war in Viet Nam, then that gives valedictorian, I think, to speak about how the role of God or a particular religious doctrine meant her life or even offer a prayer because it's an individual who has not be chosen by the government for religious purposes who is doing this. Across the narrow line is another person who is offering a prayer who's been asked to give a benediction but their government officials have decided that this is going to be prayer and the person is invited to speak, conditioned upon the government's requirement, that what they do is pray. They may cause the same degree of discomfort or, on the positive side, the same degree of religion but one is governmental and one is not and that's why I think we have to keep our eye on that very, very fine line.

MARGOT ADLER: You're listening to Justice Talking. Our debate on a moment of silence continues in just a moment.

MARGOT ADLER: Welcome back to NPR's Justice Talking, I'm Margot Adler. We're joined by two people who have different views about whether Virginia's moment of silence law promotes prayer or just promotes peace in the classroom. My guests are former US Solicitor General Walter Dellinger and Bill Pryor the Attorney General of Alabama. Now, I've had a lot of chance to ask questions, I'm wondering if any of you have questions for each other.

WALTER DELLINGER: I had one for General Pryor. Since we're in so much agreement, I want to focus on, and this is supposed to be a debating series, one area where we disagree and that is whether the addition of the word prayer to what we otherwise would agree is a constitutional moment of silence, invalidates it. I think General Pryor's argument, and the best argument I've heard for the notion that having the legislature itself designate prayer is not itself an invalidation, is this and that is that it doesn't actually constitute a state official imprimatur or endorsement of prayer, it's just stating a fact. It's just stating that one of the things you can do with the moment is pray, which is obviously true. Any student can and some no doubt will pray no matter what the statute says so, what is the harm of adding the word prayer if it's merely informational. Here's my question. Suppose a state legislature, I presume it wouldn't be Alabama, set aside a moment at the beginning of each school day for meditation or erotic fantasy.

Now, I think some citizens would be upset and it would seem to me that the response would sound disingenuous to say, oh, the government is not endorsing erotic fantasy, we put it in the statute just to acknowledge the fact that students can and no doubt, some young ones no doubt will do exactly that with their time. How persuasive would it be to people who would be concerned, as I think you and I would about the adoption of such a statute, how persuaded would we be by the argument that the state's being completely neutral. It just happens to mention erotic fantasy and provides information. That is my question.

BILL PRYOR: I'm confident I would have a much better chance of having the ACLU on my side if the statute provided a moment of silence for erotic fantasy.

WALTER DELLINGER: I think you're exactly right about that.

MARGOT ADLER: Is that the end of your answer.

BILL PRYOR: Yes it is.

WALTER DELLINGER: And an excellent answer it is.

MARGOT ADLER: You didn't really answer his question.

BILL PRYOR: Well, in fact, if the statute so provided and included the language in the Virginia statute, the catchall, what I would call the catchall language or any other silent activity of the student's choice, then I would think yes, again, to make your point, Walter, that bad laws are not always unconstitutional laws and I would think that would be a constitutional law.

WALTER DELLINGER: Well, I think the difference is, the only point I want to make is it does strike me as an official encouragement and that while it's not unconstitutional for the state to either encourage or discourage erotic fantasy, they may do either one, I think that religion is an area where we think it's no business of government to get into either encouragement or discouragement. My point is that when the legislature singles one of these out, it's not being neutral but it...

BILL PRYOR: That's not right. The First Amendment does more than that and what this Virginia law is doing is what the First Amendment itself does and the First Amendment not only says that there shall not be an establishment of a religion nor shall there be any law prohibiting the free exercise thereof. We have long had, for centuries, had, in this nation, laws that expressly protect religious expression that expressly note that religious expression is not disfavored, that it is protected and that is all this law does.

WALTER DELLINGER: Well, you see, I strongly agree with that, I just don't think that's all that this law does and, in fact, the argument that the law accommodates religion is met with the answer that a statute that provides for a moment of silence for each student to use as he or she sees fit, also fully accommodates the desire of some families, parents, rabbis, parishioners that the time be used to pray, that's why it is something that's any business of the government to go and add the word prayer. Now, an earlier Supreme Court case was a slightly easier example for my side of this debate because in the earlier case of Wallis against Jaffee, there already was a statute that provided a moment of silence. They passed a new law just to add the word for prayer so that everybody could officially vote that that was the collective governmental wisdom, that's where I think the line was crossed.

MARGOT ADLER: Now, Attorney General Pryor, do you have a question for Walter?

BILL PRYOR: Well, Walter, I heard you say the rule today that I've heard you say before, government prayer bad, private prayer good. What I cannot understand is why you do not follow your own rule here, where neither the government nor a religious majority has sponsored a prayer but any prayer that does occur with the expressed allowance of silent prayer has to be purely private?

WALTER DELLINGER: Well, I think this is the hardest and the closest case but it does seem to me that it is precisely because the government itself has no need, it's the gratuity of the government deciding for or against whether to put prayer in that constitutes the endorsement. Again, it's not the student praying that is unconstitutional nor even the creation of the occasion, it's the government's official imprimatur. I think that's stronger, for example, in the case like the Texas football case which, I think, will excite a number of our listeners and audiences since football and prayer were joined at the hip and on southern Friday nights in much of this country. It was defended they having a prayer right before the football game as being a choice of the students, a one minute open forum, but students don't get up and debate the war in the Middle East during this moment before the football game and was designated for prayer or meditation or some other sportsmanship message. It wasn't an open forum. You couldn't say winning is not the most important thing, winning is the only thing or let's cream the other team, you could only either pray or talk about one other thing closely related to it by the government's own order and, it seems to me, that that really does cross the line into the collectivization and the governmentalization of prayer and that those on the court who believe in private religious expression ought to be and are surprisingly not equally fervent that the government ought not be telling people what religious views they ought and ought not be expressing.

BILL PRYOR: There's a problem with that and the problem is that the view of those four dissenters, Walter, has so infected, not just the law and just not misunderstanding among lawyers and judges about what the First Amendment requires, it has infected public school classrooms and there was evidence in the legislative record in Virginia, including our mutual friend, Jay Secula, who testified before the Virginia legislature, that many teachers and principals believe that the decisions of the Supreme Court, the separation of church and state, somehow banishes any expression of religion from the public school and when the Virginia legislature reacts, just as Congress did in passing the Equal Access Law and in other examples, when the Virginia legislature reacts to that and makes it clear, no, that's not the case, it's not unconstitutional.

MARGOT ADLER: What about that?

WALTER DELLINGER: I believe it's unnecessary for the state to put in its code prayer, though I fully agree with Attorney General Pryor that a number of school officials, particularly in the '70's...it was almost, if you'll pardon the expression, an unholy alliance between a lot of secular school officials who believed that, because public premises were involved, there could be no religion and who actively discriminated against religious clubs and religious expression, joined with people who wanted a constitutional amendment that would lead to the government collectivization of prayer, all of them said and told everybody that prayer and God have been expelled from the public

schools. I think that was never the law but I do agree it was a problem. What we did when I headed the Office of Legal Counsel, was to send school guidelines to every single school superintendent in the United States of America and we made it clear, both sides of this principle, that where you allow voluntary clubs and activities, the Fellowship of Christian Athletes is equally entitled to meet, where students can read book reports of the students choosing to other people, if they can choose a book about religion, if they can write a biography of a great person, they can choose to write it about Jesus, where the valedictorian can choose her subject, she can speak about religion. Where a university funds student publications, it can not in any way discriminate against religious publications. Where you can hand out literature on the campus of...in a general way, students are allowed to that, you hand religious literature, we made this all clear but we also made clear that it's not for the government itself to say that's what these activities are for.

MARGOT ADLER: This is NPR's Justice Talking. I'm Margot Adler. Thirty states have laws that mandate or authorize a moment of silence at the beginning of the school day, are these laws a call to prayer? Do they serve a legitimate secular purpose. If you're just joining us, we're having a debate at the Federalist Society Conference in Washington, D.C. And now I'd like to go into the audience at that conference and take some of your questions and comments. First, let me find my mike, see if it works, it does. Start right here.

MAN: My question is for General Dellinger. If I recall from constitutional law, the endorsement test has to do with whether an ordinary person, a member of the general public, would understand from the state action, that the state has effectively endorsed religion. If I recall from first year tort law as well, the question of what a reasonable person would do under the circumstances, say in an ordinary negligence case, is a factual question that is usually not settled by a court but which is instead assigned to the jury so, my question for you General Dellinger is, how can we confidently say, how could a court confidently say that the presence of the word prayer in a statute by itself would lead a reasonable person to believe that the state was endorsing prayer, is that not more properly a factual question that should go to a jury?

WALTER DELLINGER: Mr. Sales (indistinguishable) was one of the last people I had a chance to teach, Ken Starr was one of the earliest I had a chance to teach and it's an excellent question and I do think that under a view of the law that what matters is whether people perceive there to be an endorsement that you might have difficulty establishing that the placing of the word prayer in the statute met that factual test, I really agree with that. I think, however, that I don't agree...I agree with you about what the law said, I don't agree that the law is right and I think it's wrong both ways. People will tell you that putting a...there were 3 or 4 dissenters that thought that Ohio couldn't, on a first come, first served basis, allow the placing of a Christian cross in the Capitol Square because people might wrongly assume that the government was endorsing it. It wasn't, you know, the next week there could have been a pro life or a pro choice or pro democratic display but...therefore, I think it matters what the government actually does. What the government had done in Capitol Square is truly create a neutral forum and where they've done that, even if some citizens misapprehend it as being an endorsement, I wouldn't strike it down. On the other hand, even if students, pupils would not see it as an endorsement. I think it's invalid. The state legislature has all told us that this is what the moment is for so, I think you're right about the existing law. I've got a little bit of trouble but I think the law is wrong, both ways on that. That the mere fact that...a lot of people say that if you allow the Fellowship of Christian Athletes to meet on the public school campus, some might think you're endorsing. Well, that's too bad. They have a right of equal access notwithstanding that misapprehension in my view. You correctly state what's in the law, however.

MARGOT ADLER: Let's take another question.

WOMAN: My question is also for General Dellinger. You mentioned back in the point about whether the legislature might have included this because there is widespread misunderstanding as to what students' rights in school actually are, the '70's but in just 2 or 3 years ago, Emily Zardickie was prevented from starting a Fellowship of Christian Athletes club in her Florida high school. Last month a girl was suspended for wearing a shirt that mentioned God in a pro life context to school. A kid was told not to wear a Star of David because it violated the gang symbols policy that the school had and that was only a year or 2 ago. This...I see examples of this constantly because I cover it in my job. It's obvious to me that many, many schools, despite the fact that they've received the federal government guidelines about religious expression in public school, have no idea really what those rules are that isn't it conceivable that perhaps putting this in as one option, not the preferred option, just an option stated, is helping to get across, again, to people who seem to have trouble understanding these principles, what the law actual is.

WALTER DELLINGER: It seems to me that...I think your point is very well taken and that in every one of those examples that student was exercising his or her constitutionally protected rights and wrongly being barred from doing so. I don't think that the state's...and I believe it's fine to give legal guidance and policy guidance that it's wrong for school officials to suppress those religious activities. I don't think the statutory code is where we usually put legal advise and that's why...I know it's a debate over...I think we cross the line when you make it part of the code of Alabama law that this is a moment for prayer, because then, I think, you're starting down the road of government collective endorsement of religion.

BILL PRYOR: This is an instance, Walter, where the legislature wanted to change the law, take a moment of silence law that was discretionary in Virginia and make it mandatory, put a provision in that would require the attorney general of Virginia to defend the law and made it clear that this problem that really does exist out there, should not be read by the school administrators who have to now administer this new mandatory moment of silence. Let's take the words of the president you served, Bill Clinton, who said, in 1995, some students in America have been prohibited from reading the Bible, silently in study hall. Some students have been prevented even from saying grace before lunch. Some school officials and teachers and parents believe that the Constitution prevents any religious expression at all in public schools, that is wrong. It's a rare occasion when I find myself in agreement with Bill Clinton, but he was right and this is a problem that

continues to persist. I think the guidelines that the department sent out were good guidelines but, guess what, we still have this problem in Alabama and my office, with the superintendent of education in my state has had to issue the same kinds of guidelines to continue to get out the word. What's wrong with the legislature? They are the lawmakers making it clear when they changed the law that everyone remember this is what the First Amendment requires.

WALTER DELLINGER: Well, I do agree with that. I wrote those words in fact....

And I still agree with them and I don't think it's wrong for the government to convey that information. I know you're going to think this is a very precious line that I'm drawing. I'm not even sure that preambulatory language or statements by the legislators would be a problem for a neutral moment of silence. I think it's unnecessary for the government to say in the law itself as being set aside for prayer.

MARGOT ADLER: Bill Pryor, I'm wondering...you've given a lot of examples and the audience has given a lot of examples of people who felt that they couldn't exercise religion freely in the context of school, what about the other side of that? Where do you think abuses could be possible in coercive, in other words, where do you think there could be coercive prayer in the moment of silence? Do you think there's a point where the line could be crossed? How would you determine if the moment of silence was abused? Where there be a certain case where it could be in your opinion?

BILL PRYOR: Well, if the moment of silence, this law in Virginia, were followed to the letter, I don't believe that it could be coercive. Now, if you were to take an example from my state, a tragic example of a couple of years ago, where at the beginning of a school day, a teacher forced an Orthodox Jewish child to bow his or her head, you know, that, I think, is not just complying with a moment of silence, that is the kind of coercion that is not only a disgrace, it is unconstitutional but if this law, as it's written in Virginia, which requires a 60 second moment of silence for...and each child has his or her individual choice, fully protected to do whatever they want during that moment of silence so long as it is silent, I don't believe that can be coercive.

MARGOT ADLER: Let's take another question from the audience. Let's...I should...

MAN: I'd like to ask General Dellinger...

MARGOT ADLER: Let's get a few for Pryor by the way.

WALTER DELLINGER: He's right so people don't need to ask him questions.

BILL PRYOR: It's always nice to be the home team.

MAN: I just don't understand exactly where you're drawing the line. You said quite a few times that if prayer is mentioned in the statute, even with this...or other purpose, it's no good. What if prayer were mentioned among 5 other things or if it were mentioned with 10 other silent activities, 100, where would you draw the line and how could constitutionally make any difference whether prayer is mentioned with a general clause or whether there is other specifics with it. How can that possibly make a constitutional difference?

WALTER DELLINGER: That's a fair question and I think when you take the basic principle that private prayer is good and government prayer is bad, the marginal cases are always going to be where you think the government itself is...become the active agent responsible for the prayer, okay. Now, if government has an open forum and prayer is one of many possibilities, the choice then of one among many by the individual speaker is not a governmental choice. So, there is a point at which I would convert over and it's not ever going to be a bright line but if you tell people that you're going to create a public forum and they could either speak about prayer or broccoli. I don't think you can say it's a government, it's an individual private choice. They chose prayer, they chose not to speak about broccoli and that's getting very close to the Texas football case, for example, where they elect a student speaker who can give a very narrowly circumscribed message in which a religious invocation is one choice and there's one other little choice but there's not much else. The government, it seems to me, has inappropriately entered the arena of deciding what we should do and there are abused. We've talk...you were very right about the abuse we talked about but there are abuses...when you have a school that has a spoken prayer where everybody has to stand and recite and you don't have to attend that but you give up your right to go to the high school football game when collectively people are making some people feel as if they are religious strangers in their own public schools by governmental action and not just by private choice then I think that too is something we should be concerned about.

MAN: Yeah, this question is for Mr. Pryor. Notwithstanding current Supreme Court jurisprudence in the First Amendment and this is an establishment case, hadn't we misunderstood the Establishment Clause. Wasn't the Establishment Clause intended to prevent an institutional national church, wasn't it more directed towards that kind of thing rather than the problem of state endorsement or even more problematic, the requirement for secular purpose because your example of this prayer clause, you explained it as some kind of secular purpose which is really problematic if we're going to talk about prayer at all.

BILL PRYOR: Right.

MAN: And that would be my question.

BILL PRYOR: I agree with you that we have, in many ways, not only misunderstood the Establishment Clause which had not only the narrow purpose of prohibiting an established state church but really the narrow purpose of an established federal church because when the First Amendment was enacted, of course, there were state that had established churches but, I think that not only have one, and sometimes not been honest about the history of the Establishment Clause. I think that, in some of these contexts, there's a legitimate First Amendment question if we assume that the First Amendment, of course, applies to the states which now, thanks to the 14th Amendment, passed after the Civil War, we do. I think the real question is a free exercise question and a free speech question. In the example that I gave of the Orthodox Jewish student in Alabama being forced by a teacher to bow a head, to me that's not so much a question of an establishment of religion, that's a question of the free exercise of religion or the freedom of speech and that, I think, is where we can draw the line a lot in a lot more fair and tolerant way.

MAN: I have a question for both generals on the platform. And I take off on General Dellinger's talk about perception. How do you reconcile and have you reconciled with the average person's belief that the law is consistent. The discussion you're having on what is a much more gray area, with the fact that people always see instruments of our government actually having prayer, God, in their institutions, including our presidents saying God Bless America, Congress opening up with prayers by religious people and even the Supreme Court having at its doorway the Ten Commandments.

WALTER DELLINGER: I'm not sure that I can make consistent the approval of legislative chaplains. I'm dubious that that is valid for the reason you can't distinguish it. I do think that when presidents speak about their religious views, even invoking the God that the president worships, that government officials have also a private side that can't be completely broken off from their government life so, I'm much more comfortable with a president speaking of the wellsprings of his own beliefs and we want to hear from a president personally and other government leaders and they shouldn't have to censor out their religious beliefs, then I am comfortable with having the legislature pass something in the statute books. I know that's a fine distinction because the president is always a government...always... (indistinguishable) a government official is those who have been in OLC will, in the audience, will attest but presidents could sometimes must speak their own views as well, even when they're addressing the nation in a governmental capacity.

BILL PRYOR: I think the question was a good one and the question was, how can we reconcile what are still prevailing government sponsorships of prayer, not only public prayer but government sponsored prayer that still occur in institutions of government including the Supreme Court, including legislative chaplains, including the Montgomery, Alabama City Council or County Commission, which begins a meeting with a prayer, how do we reconcile it with these decisions particularly in the area of public schools and it's not an easy reconciliation. Now, the fact of the matter is that the founders did not view an acknowledgment of God or prayer as a violation of the First Amendment. Now, granted, we didn't have widespread public schools and what the court has said in this area, of course, is that children are different, they're impressionable. That we are sending an almost dangerous message to them with a government sponsorship of prayer. You know, that's why I said earlier in this debate, I find that question about the teacher-led prayer more difficult than Walter does because kids hear all kinds of things with which they don't agree and one of the things they learn as citizens of this country is that they have freedom of conscience, they have the right to their own beliefs but that doesn't mean that they're going to always agree with what they hear. And, our institutions still do recognize that there can be acknowledgments of God and that our institutions have always presupposed the existence of God, that we derive our rights from God, not from government, that was the critical difference in the founding of America.

MARGOT ADLER: Bill, given what you said, what do you think about the posting of the Ten Commandments in public schools because, of course, some people would argue that, for some religions, certainly Hindus and others, several of those commandments go against their belief.

BILL PRYOR: Well, the Supreme Court of the United States ruled, in 1980 in a case from Kentucky, Stone versus Graham, that you cannot have a permanent posting of the Ten Commandments in a public school classroom so, as a lawyer, I would say it's a settled question...

MARGOT ADLER: But, personally.

BILL PRYOR: ...now if you ask...personally I think it's pretty hard and disingenuous to defend the court's decision, again, unless you're recognizing that children are this special group of citizens who have to be kept away from the dangerous messages of religion. You have a hard time reconciling this with the notion that the court that handed down that decision, it's a 5 to 4 decision, itself has multiple depictions of the Ten Commandments in its own courtroom and it's not just one, folks. There are many depictions of the Decalogue in the Supreme Court of the United States. It's carved on the doors to the courtroom, there's a tablet 6 feet tall directly above where the Chief Justice sits, there are little brass medallions all along the railings with depictions of tablets with the Roman numerals 1 through 10 and there on the right-hand wall, at the top of the wall, is a frieze of ancient lawgivers with Moses, 6 feet tall, holding tablets with Hebrew letters, I wonder what it is.

MARGOT ADLER: Let's go back in the audience and take some more questions and comments unless, of course, Walter has something to say.

WALTER DELLINGER: I'm not ever going to run for Attorney General of Alabama to get to Bill Pryor. You know, part...while...part of the problem is that we don't think of the school teacher as the government, do we. You know, I think if this debate were about whether the government could post a religious message chosen by the government in every IRS office and direct IRS agents to tell everybody that

came in to be audited, that the IRS agent could say, I'm going to lead us in prayer.

MARGOT ADLER: They're going to feel they need it at that point.

WALTER DELLINGER: We would be horrified that the government was doing it. Ordinary people, realistic people see the public school teacher Ms. you know, Jones that they remember from the 4th grade, don't see her as an IRS agent. It takes years of careful training in constitutional scholarship to realize it is a matter of law, the IRS agent, you know, the director of the Internal Revenue Service and the school teacher are both the government and that's why I think it is sometimes hard for people to understand, you know, why we think that "government officials should not be making the religious decision.

BILL PRYOR: But there's a reason, there is a critical difference here and there's a commonsense reason why we see a difference in the school and it's not the teacher, Walter, it's not just to focus on the teacher, the problem is, when we send, as parents, our children to school, we expect more than we do from an audit with an IRS agent. We expect our children to be instilled with values that will make them good citizens and millions of Americans think that job is not performed adequately when religion or religious values are excluded and that's why it's more difficult.

MARGOT ADLER: But they can send their kids to Sunday school or Saturday school.

BILL PRYOR: They certainly can but the problem with that is that a child who has to be educated and reared every day doesn't just need that message one day out of seven.

MARGOT ADLER: Let's go on to another question.

WALTER DELLINGER: Well, let me follow-up on that. The other side of that coin is that the parents who have a constitutional right to arrange for the religious upbringing of their children have the right to insist that the state, through the public school, not teach a religion that's contrary to theirs and that's the other side of the coin that you just articulated and perhaps you can respond to that.

BILL PRYOR: Well, that's the reason I am not, even though I think the question is more difficult than Walter would allow. I'm not troubled where the court has drawn the line and, I agree with you, the real question in these cases is not about establishment, the real question is about free exercise, freedom of conscience and free speech, just as you stated it.

MAN: The State of New York just adopted a measure setting aside a public school classroom for Muslim students to use during the season of Ramadan to pray, I'm wondering, Walter, if you think that is a permissible accommodation of their free exercise rights or whether it's an impermissible establishment of religion. Actually, I'd like for both of you to respond.

WALTER DELLINGER: I think that's an interesting question and I think that the answer would be if the school makes lots of efforts to accommodate individual decisions that there be prayer or similar activities then I would be comfortable with it where it's truly a matter that students are doing. If you otherwise facilitate people being able to exercise their religion by, you know, by doing it. If other groups with similar needs could do so then I think one could defend that. If you move just beyond silence into these other prayer activities that Bill Pryor thinks are a close case, I represented a number of religious groups in the Texas football prayer case, the American Jewish Congress and a number of other organizations, and one of the points that that amicus brief made is that government involvement in religion is bad for religion from the wellsprings a view pointed you've often expressed, the...you know, what happens is, when you have government prayer, what follows with it is the government censorship guidelines. Back in Lee versus Wise when they would have an officially designated prayer at graduation, they wouldn't stop there, they would then say, but you must not utter the word Jesus, you must not give a sectarian prayer, the prayer has to be reviewed by some government official, that is inevitably what happens. You either get government sponsorship or something that really makes people religious strangers in their school or you get government officials censoring prayer. I don't see it as any good role for government in determining the content or whether there should be prayer and the First Amendment saves us from that by both prohibiting all forms of official prayer while both preserving and protecting all forms of truly private prayer.

BILL PRYOR: I'm heartened to hear that New York, which has been, you know...my state, Alabama, is the source of most Establishment Clause cases. New York has to be the primary venue for cases involving free exercise violations and it was just this last term of the Supreme Court, again, in the Good News Club case, where New York was, once again, slapped down by the Supreme Court because they wouldn't let a Bible club on school premises after school hours. I'm heartened to hear that they're making that kind of allowance for Muslim students during Ramadan. That, to me, is a good sign for New York.

MARGOT ADLER: Let's take another question.

MAN: This is, I guess, primarily directed to General Dellinger. Even if you accept the notion that a moment of silence is not government coercion and even you accept, going further than that, that being subjected to prayer in public events, Congress and In God We Trust on a coin is not coercion, I fail to see how you cannot consider it to be coercive to require an atheist, such as myself to say the Pledge of Allegiance clause which says, one nation under God. I'm an American citizen just like everybody who has religious beliefs and I understood your earlier comments of you...were dismissing, out of hand, the notion of any effective constitutional challenge to laws which require the Pledge of Allegiance. If I misunderstood you, please clarify.

WALTER DELLINGER: Let me, yeah, let me be quite precise. I believe that a school may organize students to say the Pledge of Allegiance but I do not believe that any person can be coerced to say the Pledge with or without the word God in it. I mean, the Supreme Court said that and I strongly believe and I don't think we would want to be, you know, a lot of people are worried about what would happen if Elian Gonzolez went back and were organized to recite messages chosen by the government, I think we don't ever want anybody required to recite a speech organized by the government, that that really is across a very big road. Understand there's some people will be uncomfortable that others are reciting and they are not but that, to me, does not make it, at that level, unconstitutional but certainly nobody should be coerced into saying that or making any other pledge, in my view.

BILL PRYOR: I agree.

MARGOT ADLER: Last question. General Pryor, could Congress pass a law tying federal funding for schools to an exercise of moment of silence in the classroom? Would it be constitutional?

BILL PRYOR: This is federal education funding. I don't think...

MARGOT ADLER: Federal education funding.

BILL PRYOR: ...that would violate the First Amendment but I'm running through the federalism challenges to this...this spending clause statute which is my new hobby, spending clause.

MARGOT ADLER: That's why we asked you this at the Federalist Society.

BILL PRYOR: You know, if the federal funding is for education and particularly has some relation to ensuring that there are going to be reasonable accommodation in schools for release time programs or extracurricular activities like Bible clubs, there's a close relationship there, I wouldn't have a problem with tying that to a moment of silence but I, at least as a matter of policy, if not law, I'd object to these extraneous strings that have nothing to do with the funding purpose that come down from Congress upon the states.

MARGOT ADLER: Any thoughts?

WALTER DELLINGER: I believe it's constitutional. This was constitutional when Congress tied federal funds to schools providing equal access to religious groups on the same basis as all other groups. If the law itself passes, constitutional musters, I believe a neutral moment of silence would, Congress can say, we want that and we want...and I very strongly believe in the equal access principle that Congress did adopt as part of a national mandate. I'm less uncomfortable about national mandates, however, than many people in this room.

MARGOT ADLER: We're just about out of time. It's time to give our debaters a last chance to make some final brief remarks. First, Attorney General Bill Pryor.

BILL PRYOR: Well, I return to my last sentence in my opening statement. There is nothing dangerous about a classroom of silent children. In fact, many parents in the United States would find it a refreshing sight and so, I think, would many teachers and...with our tradition of not only respect for religion but also a healthy hostility toward government sponsorship of religion. I think that the Commonwealth of Virginia struck the right balance. It is...this is, after all, the home of Thomas Jefferson where the first guarantee of religious freedom was enacted and, I think, they have followed in his tradition.

WALTER DELLINGER: I believe...

MARGOT ADLER: Wait. And now, a closing statement from Professor Walter Dellinger.

WALTER DELLINGER: Well, I believe that Attorney General Pryor and I agree on about 99% of the issues in this area and I think there's a growing consensus along the area that distinguishes between government religion and private religion which, I think, is quite encouraging. I think, when I first got into this issue in the late '70's, there were many people that felt that if there was a public premise involved, you had to exclude religion all together even if many other voices and many other views were free to be heard. On the hand, there were those far more who were willing to have government self-composed prayer and collectivize us into reciting the government's own prayer words. In other words, there were two camps. Prayer is always good and if we need government muscle to make you do it, we'll get it and those, on the other hand, who saw prayer as always bad and we want to discourage it wherever we can, even if it's a product of private choice. I think we've come much, much closer together. There's been a wonderful consensus that the line ought to be, whether it's government or private prayer, not where it occurs, that there's equal access to funding for religious speech as well as all other speeches. It's a little bit troubling still, in my view, that I think 3 Justices on the court have it wrong one way and 4 Justices have it wrong the other way. That is, the courts further apart than the country is on this, though the results are always right. Thank you.

MARGOT ADLER: Former Solicitor General Walter Dellinger and Alabama Attorney General Bill Pryor, thank you both and thanks to Dean Router and Leonard Leo of the Federalist Society for their assistance with this program. We close this edition of Justice Talking with this thought from Henry David Thoreau: "Silence is the universal refuge, the sequel to all dull discourses and all foolish acts...where no indignity can assail, no personality can disturb us."