SHOWCASE PANEL I

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

Sponsored by: Federalism & Separation of Powers

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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.