

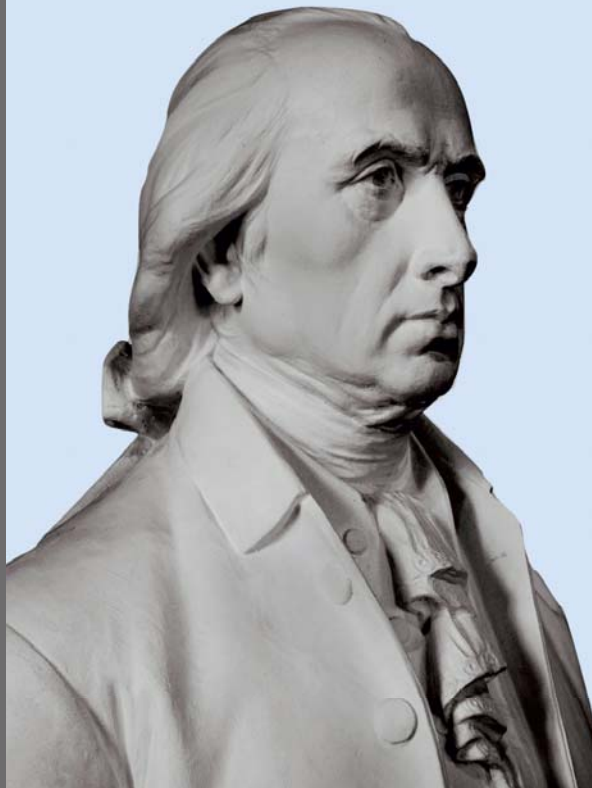


THE **Federalist** PAPER

THE MAGAZINE OF THE FEDERALIST SOCIETY • FEDSOC.ORG

Summer 2016

- 6 Student Division
- 8 Lawyers Chapters
- 10 Faculty Division
- 12 Practice Groups
- 14 Executive Branch Review Conference
- 16 Short Videos
- 17 Justice Scalia Memorial
- 18 Law & Innovation Project
- 19 Membership



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

Federalist No. 78

Dear Friend,

The Supreme Court just wrapped up its 2015-2016 Term, and the Federalist Society has been bringing you expert commentary on the most important cases all year. See inside for just a few of the videos, podcasts, articles, and blog posts we've released, and go to fedsoc.org to watch, listen to, and read more.

The past few months have been filled with fantastic events across the country. One of the highlights of the spring was the annual Executive Branch Review Conference. The conference brought together experts from all different areas of law to talk about the burdens imposed by executive overreach, and how to reign in the executive branch to unleash innovation.

Our Student Chapters finished the school year strong, hosting many debates and speakers throughout the spring semester. The Stanford Student Chapter hosted a symposium on intellectual diversity in legal education that featured insightful commentary from professors, administrators, and students across the ideological spectrum.

Lawyers Chapters across the country have hosted events honoring the memory of Justice Scalia. Many Federalist Society leaders were privileged to attend a large memorial in Washington, DC that featured reflections from Justices Thomas and Ginsburg, among others.

Please send any comments or suggestions to katie.mcclendon@fedsoc.org. I look forward to hearing from you!

Katie McClendon
Director of Publications

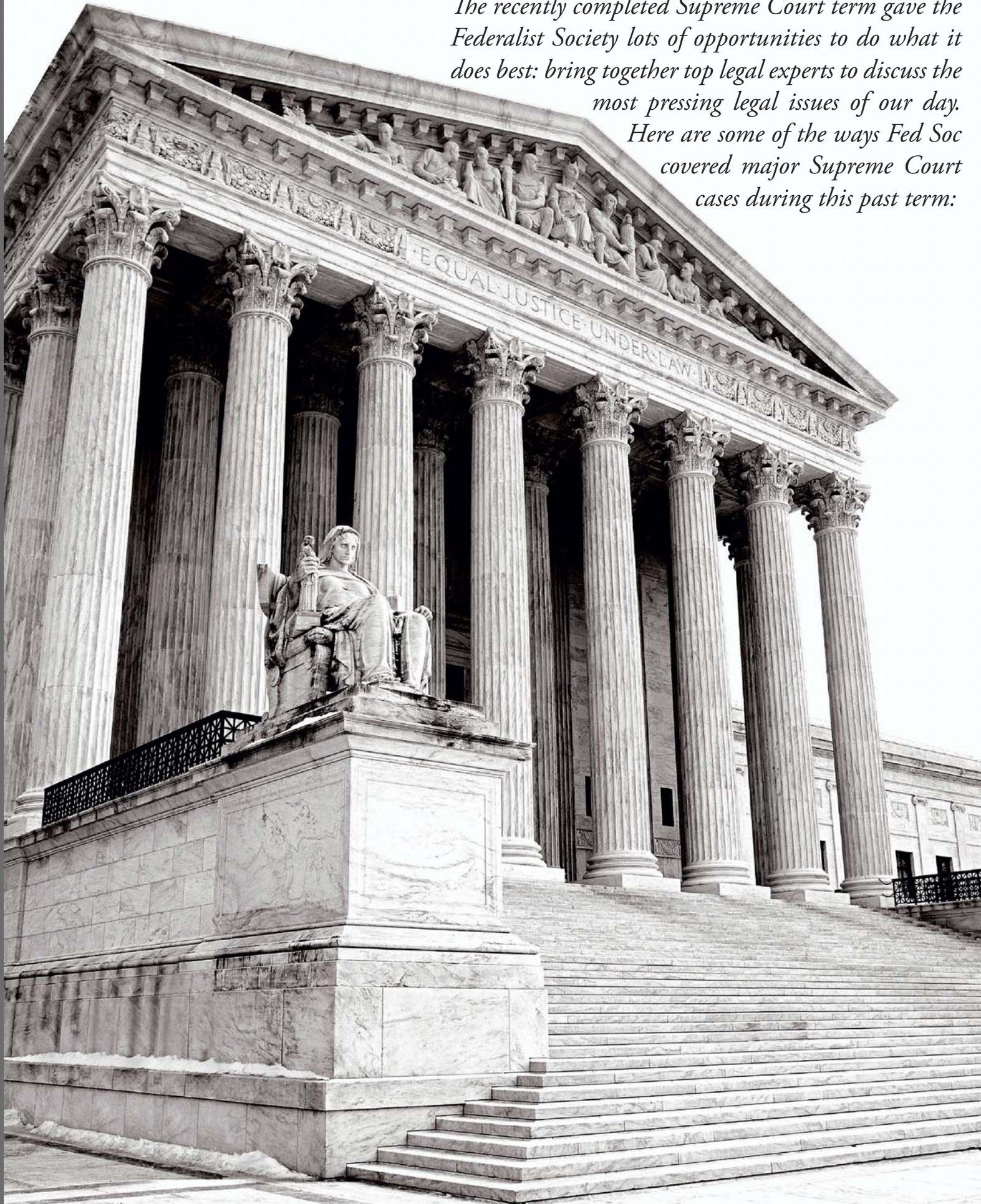


NATIONAL LAWYERS CONVENTION
Thursday-Saturday,
November 17-19, 2016

The Mayflower Hotel
1127 Connecticut Avenue NW
Washington, DC 20036

The theme of this year's convention will be the jurisprudence and legacy of the late Justice Antonin Scalia. Register online soon at fedsoc.org.

The recently completed Supreme Court term gave the Federalist Society lots of opportunities to do what it does best: bring together top legal experts to discuss the most pressing legal issues of our day. Here are some of the ways Fed Soc covered major Supreme Court cases during this past term:



Watch

Short Videos

Unions v. First Amendment
featuring Ilya Shapiro

Whole Woman's Health v. Hellerstedt
featuring Robin Fretwell Wilson and Teresa Stanton Collett

Gateway to Freedom: Right of Assembly
featuring Adèle Keim

The Voting Rights Case
a debate between Derek Muller and Hans von Spakovsky

Zubik v. Burwell
featuring Carrie Severino



Live Events

A Discussion on Friedrichs
featuring Mike Carvin at Columbia Law

Why the Little Sisters Are a Big Deal
featuring Douglas Laycock at Michigan Law

Fisher and Affirmative Action at Institutions of Higher Education
a debate between Cindy Buys and Peter Kirsanow in St. Louis

Recycled Tires Meet Religious Liberty at the Supreme Court
featuring Jordan Lorence at UCLA Law

Listen



Case Preview, Courthouse Steps, and Post-Decision Teleforum Calls

America Invents Act Again at Issue: Cuozzo Speed Technologies, LLC v. Lee
featuring Kristen Osenga

Overregulating Overtime?
featuring Tammy McCutchen and Elizabeth Dorminey

Whole Woman's Health v. Hellerstedt
featuring Brianne Gorod and Lee Rudofsky

I Declare Bankruptcy?: Puerto Rico v. Franklin California Tax-Free Trust Decided
featuring David Skeel



SCOTUScasts

Friedrichs v. CTA
featuring Richard Epstein

Kansas v. Carr
featuring Kent Scheidegger

CRST Van Expedited v. EEOC
featuring Kenton Skarin

Sheriff v. Gillie
featuring Jennifer Mascott

Bruce v. Samuels
featuring Elbert Lin

Read

FedSoc Blog

U.S. v. Texas (The Immigration Case)
by Josh Blackman

Implications of the Friedrichs Non-Decision
by Tom Caso

Little Sisters of the Poor Win Big in Obamacare Case
by Roger Severino and Elizabeth Slattery

Restoring Public Trust: In Foster v. Chatman, Supreme Court Strikes Blow Against Prosecutorial Misconduct
by Evan Bernick

Fisher II, Academic Mismatch, and the Constitution: A Legal Issue, or Just a Policy One?
by Alison Somin



Federalist Society Review

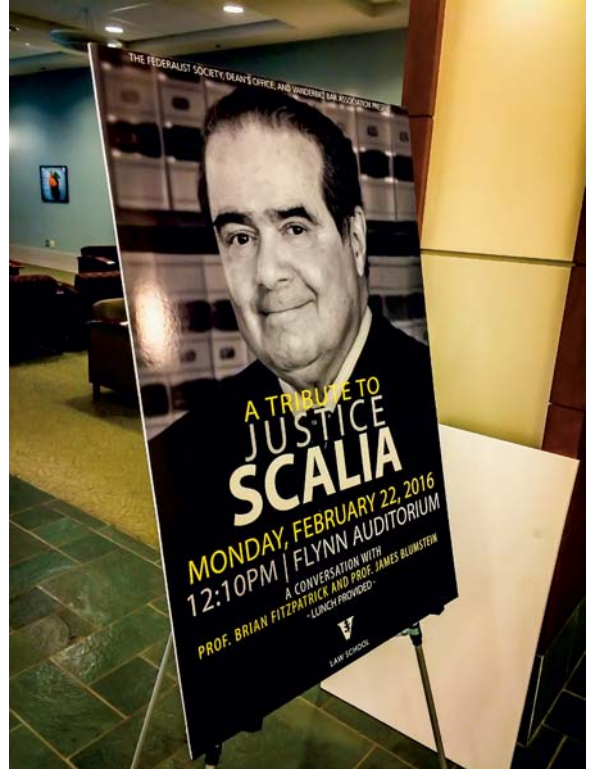
Hawkes: Wetlands Jurisdictional Determinations and Federal Judicial Review
by Damien Schiff and Mark Miller

What's at Stake in Cuozzo v. Lee?: Petitioner's View
by David Applegate

Evenwel v. Abbott: The Court Shanks Its Punt on "One Person, One Vote"
by Ilya Shapiro and Thomas Berry



The UT Student Chapter hosts a discussion with 9th Circuit Judge Alex Kozinski and Texas SG Scott Keller.



Vanderbilt's Student Chapter hosts a tribute to the late Justice Scalia.

Student Chapter Events

Yale Alumni Event with Judge Brett Kavanaugh on the Fed Soc Rooftop



Student Leader Profile: Shiva Logarajah

*Former President of the Columbia Student Chapter
Chair for the 2017 National Student Symposium*



How did you get involved in the Federalist Society, and what made you decide to become a leader in your chapter?

There were two things that really attracted me to the Federalist Society. The first was a steadfast commitment to debate and an openness to all points of view. I was struck by this as a 1L going into Federalist Society events and hearing views from across the political spectrum. It was not something I expected from an organization that is characterized as “conservative/libertarian.”

The second thing that I found at the Federalist Society were great mentors and overall just kind-hearted people. I would not have made it through my first year of law school without the friends and mentors I gained through my Federalist Society chapter.

It was because I felt the Federalist Society made such a positive impact on campus through these two channels—debate and mentorship—that I decided to become a leader in our chapter. It’s great when peers, from across the political spectrum, time and time again come up to me and

say, “That was a great event, I don’t think I’ve ever considered point X or point Y.” And I am thankful for the opportunity to “pay it forward” for the mentorship I received with the current 1Ls (and 0Ls) who are entering Columbia Law.

What did your chapter accomplish in the past year while you were at the helm? What are some of your favorite events that your chapter put on?

This year, our chapter continued our tradition of hosting stellar events on campus. A day-long symposium on *Government Enforcement in the Financial Sector* attracted current and former government officials and members of the judiciary; that was by far our marquee event. But an event we had with Mike Carvin—with then-Solicitor General Don Verrilli in the room next door—definitely fired up our members.

Our biggest step forward as a chapter, however, was in our recruitment and mentoring of new 1Ls. These 1Ls are now active student leaders in our chapter and are a big part of why we are hosting the Student Symposium at Columbia Law in 2017.

What have been some of your favorite things about being involved with the Federalist Society so far?

One of the great things about being involved with the Federalist Society has been the community and relationships I’ve been able to establish. In connection with nearly every move I have made related to school or my career—whether it be picking classes, applying to clerkships, or evaluating job opportunities—I have picked up the phone and called somebody I’ve met through the Federalist Society for advice. That is something I am truly grateful for. And, maybe more importantly, I’ve made some of my closest friends in law school through my involvement with the Federalist Society.

What are your favorite things to do when you’re not studying?

I enjoy watching Dallas-area sports (Go Cowboys!), traveling, and reading nonfiction. But, most importantly, I enjoy all the stellar Fed Soc programs we have on campus!

Thank you for speaking with us, Shiva. We look forward to another great year with you in a leadership role in the Federalist Society!

DC Lunches

Our DC Lawyers Chapter hosts monthly luncheons featuring guest speakers. Check out a couple of our favorite luncheons from this spring!

Renewing democracy in America

The DC Lawyers Chapter invited Senator Ben Sasse to address its April luncheon at the Liaison Hotel. Senator Sasse pointed out major issues that many leaders ignore, and painted a picture of what is needed to renew Americans' faith in institutions and the political process in this country.



Senator Ben Sasse

Restoring our republican Constitution

Professor Randy Barnett of Georgetown Law spoke to the DC Lawyers Chapter in a May lunch at Tony Cheng's Chinese Restaurant. He discussed his new book, *Our Republican Constitution: Securing the Liberty and Sovereignty of We the People*. Read more about the book in the Faculty Division section on page 11.



Prof. Randy Barnett

In Memoriam

Gerald Walpin

Sept. 1, 1931—June 24, 2016

The Federalist Society joins the family, friends, and professional colleagues of Gerald Walpin of New York City in mourning his sudden and tragic passing on Friday, June 24th. Jerry Walpin was a man of tremendous character, integrity, and patriotism, and his commitment to the principles of limited, constitutional government have been a source of great inspiration.

Jerry was an original member of the Federalist Society's Board of Visitors, as well as the first chairman of the Society's Litigation Practice Group and an advisory board member of the New York City Lawyers Chapter. A speaker at Federalist Society programs, he valued academic freedom and the spirit of debate as means of seeking truth.

Though the Federalist Society mourns the loss of Jerry Walpin, we have as well a sense of gratitude and joy for having had the benefit of his friendship, wisdom, intellect, and tenacity.

Requiescat in Pace.

Eugene B. Meyer, President, The Federalist Society

Young Lawyers

Our DC Young Lawyers Chapter came together for a summer reception with Senator Cory Gardner on the Jones Day rooftop!



Save the Date

The Second Annual Texas Chapters Conference is coming up.

Friday-Saturday • September • 16-17 • 2016

AT&T Center • UT Austin

Register now at fedsoc.org.

Junior Scholars Colloquium

The Faculty Division's annual Junior Scholars Colloquium took place on June 17-18, 2016 in Annapolis, Maryland, in an environment conducive to both scholarly reflection and convivial discussion. Eight junior faculty members presented competitively selected unpublished papers and received comments from senior faculty members and the other participants to help improve their scholarship. Each junior scholar whose paper was selected and who participated in the conference received a \$1,000 prize.

Winners

Wesley (Jud) Campbell, Stanford Constitutional Law Center
Making the First Amendment

Nathan Chapman, University of Georgia School of Law
Due Process Abroad

John Inazu, Washington University School of Law
Unlawful Assembly as Social Control

Dmitry Karshedt, George Washington University Law School
Causal Responsibility and Patent Infringement

Charles Korsmo, Case Western Reserve U. School of Law
The Audience for Corporate Disclosure

Irina Manta, Hofstra U. Maurice A. Dean School of Law
Branded

Jonathan Mitchell, Stanford Law School, Hoover Institution
A Text-Centered Theory of Equality Jurisprudence

James Stern, William & Mary Law School
The Essential Structure of Property Law

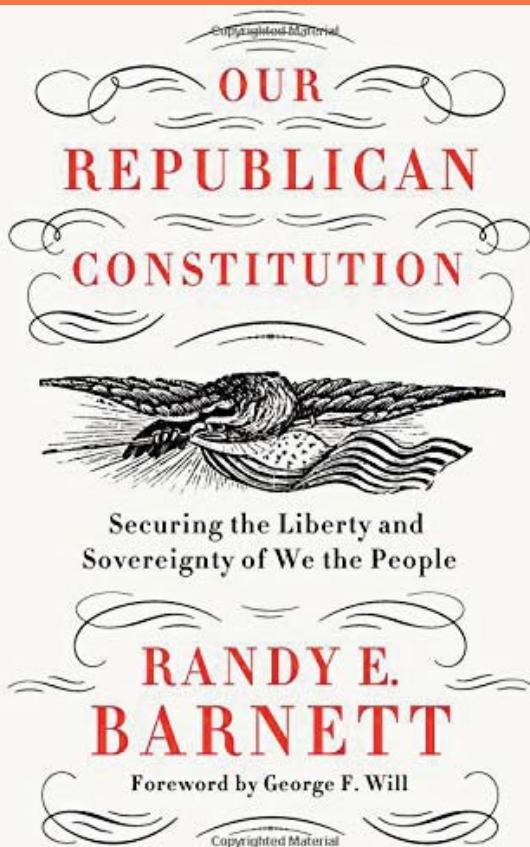


Professor John D. Inazu of Washington University School of Law has just published *Confident Pluralism*, a book that explores how Americans should handle life in a nation that is increasingly characterized by intense polarization and deep differences of opinion in every area of life. Prof. Inazu's book has been praised by, among others, Prof. Michael McConnell of Stanford Law, Prof. William Baude of Chicago Law, and Prof. Rick Garnett of Notre Dame Law.

CONFIDENT PLURALISM

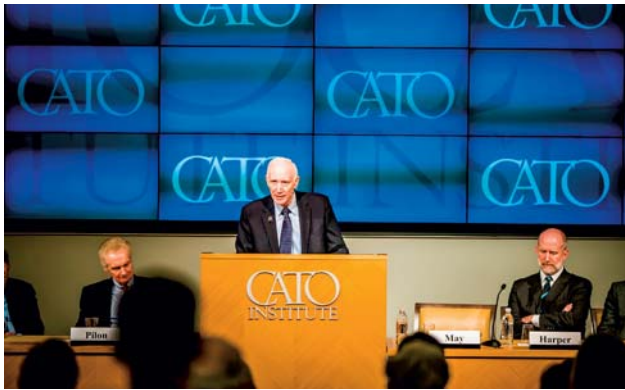
Surviving and Thriving through Deep Difference

JOHN D. INAZU



Professor Randy E. Barnett of Georgetown Law has just published *Our Republican Constitution*, a book that dives into history and constitutional law to consider where American constitutionalism went wrong and how the Constitution can be revived to serve We the People. His book has been praised by legal scholars, politicians, and popular commentators alike. See Ilya Somin's review of the book in the latest issue of the *Federalist Society Review* at fedsoc.org/publications.

IP & First Principles



The Federalist Society’s Intellectual Property Practice Group joined with the Cato Institute’s Center for Constitutional Studies to co-host a panel discussion of a new book by Randy May and Seth Cooper, *The Constitutional Foundations of Intellectual Property*, and related issues. The lively panel featured Randy May, one of the authors, along with Cato’s Jim Harper, GMU’s Eli Dourado, and Prof. Richard Epstein of NYU Law; Roger Pilon of Cato moderated.



IRS & DOJ



The Federalist Society co-sponsored with the Claremont Institute an event titled *Our Partisan Bureaucracy?* at the National Press Club. The event featured remarks from Prof. John Eastman of Chapman Law and the Claremont Institute, Cleta Mitchell of Foley & Lardner, Hans von Spakovsky of the Heritage Foundation, Robert Weiner of Arnold & Porter, and Dean Reuter of the Federalist Society as moderator. Panelists discussed recent partisan activities of the IRS and DOJ.



SEC at the NPC

The Federalist Society's Corporations, Securities & Antitrust Practice Group hosted a panel discussion at the National Press Club featuring former SEC Commissioners Paul S. Atkins, Annette L. Nazareth, and Troy A. Paredes. The three former commissioners reflected on their tenures at the SEC, and also provided their perspectives on several of today's most important financial regulatory issues and questions. Jeffrey T. Dinwoodie of Davis Polk moderated.



Blog, Pubs, Teleforums



The Fed Soc Blog continues to be a great source of regular and timely legal commentary from Federalist Society experts. We just changed the name of our legal journal from *Engage* to the *Federalist Society Review*. It features great scholarship from top experts, which you can access through the Publications tab on our website. We continue to host live teleforum conference calls on big legal developments, difficult legal issues, and major Supreme Court decisions. Join us at fedsoc.org.

EXECUTIVE BRANCH REVIEW

THE FEDERALIST PAPER • SUMMER 2016 • WWW.FEDSOC.ORG



The Federalist Society's Fourth Annual Executive Branch Review Conference took place on May 17, 2016 at the Mayflower Hotel in downtown Washington, DC. The EBR Conference is devoted to thorough and diligent analysis and discussion of how the executive branch is operating, and whether it is fulfilling or overstepping its constitutional role. This year, the theme of the conference was *Law and Innovation*. Panelists focused on how executive actions and agencies aided or stifled innovative advances in the marketplace, and how the executive branch should responsibly regulate new and developing industries.

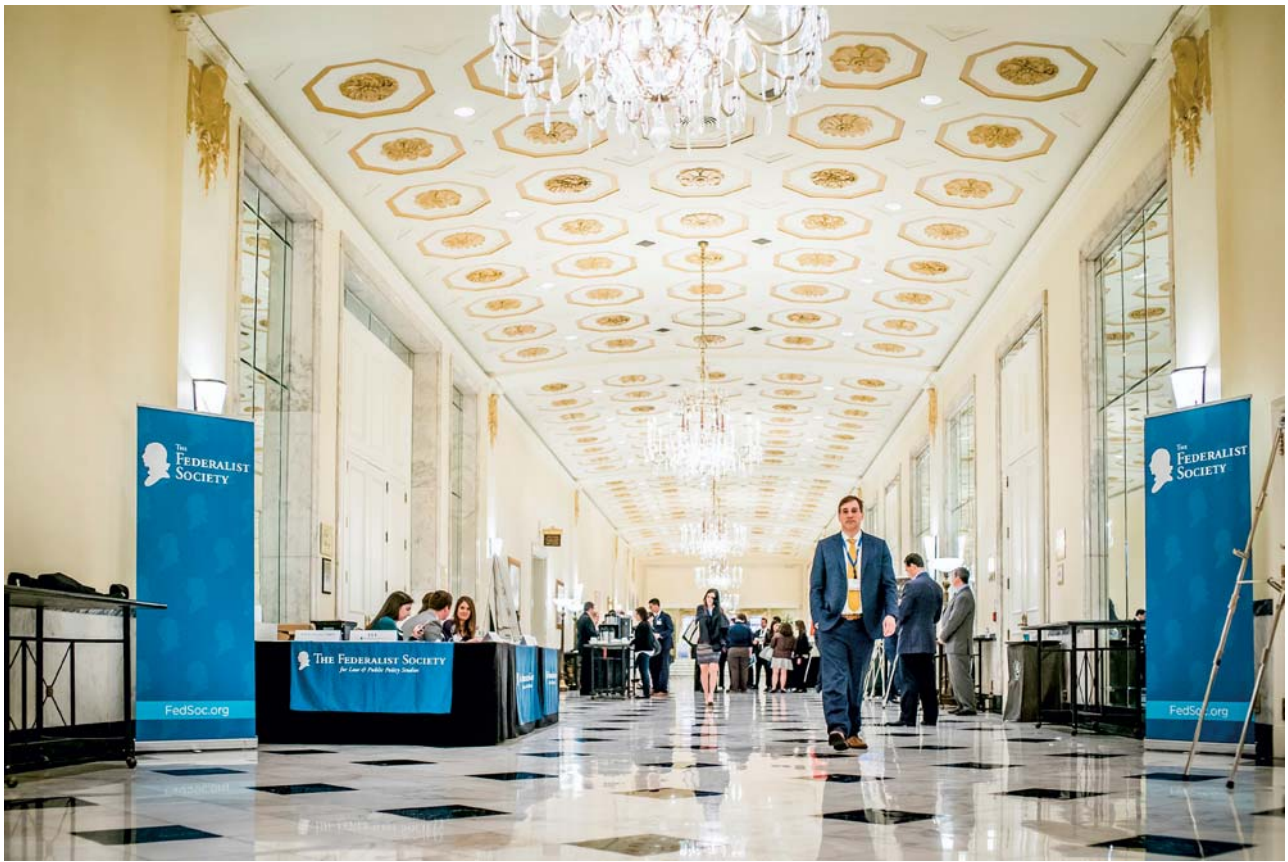
Headlining the conference was the plenary panel entitled *Congressional Regulatory Reform Proposals*. After an introductory address by Senator Heidi Heitkamp of North Dakota, panelists discussed regulatory reform proposals being considered by the 114th Congress. These proposals aim to ensure that new agency regulations make Americans better off, and that old regulations are evaluated and modified as necessary.

Across five other panels, experts such as Judge Laurence Silberman of the U.S. Court of Appeals for the D.C. Circuit, Professor Michael Greve of the Antonin Scalia Law School, Federal Trade Commissioner Maureen Ohlhausen, and Gail Heriot of the U.S. Commission on Civil Rights shared their insight and analysis on rulemaking procedures, regulation, patent law, disparate impact, and other topics that significantly affect the ability of Americans to innovate and thrive.

If you missed the event, don't worry—audio and video of the whole conference is available on our website at fedsoc.org/events.

Thanks to Tim Courtney, Fed Soc's Assistant Director of Practice Groups, for summing up this great event for us. Don't miss next year's EBR conference!

CONFERENCE

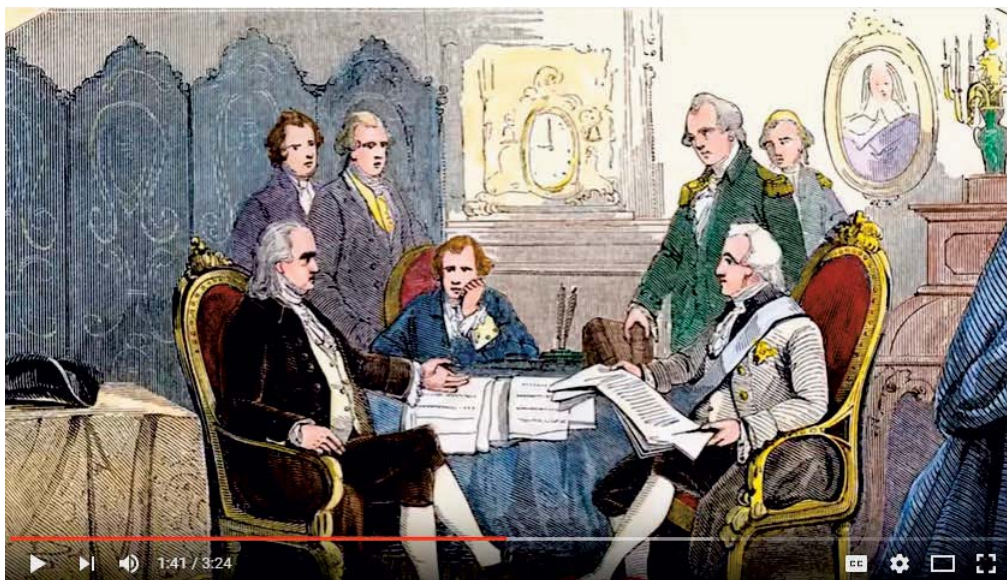


SHORT VIDEOS

The Federalist Society maintains a YouTube channel and space on its website where viewers can watch short videos on legal topics.

In addition to posting videos of our live events, the Federalist Society also produces original videos about important legal issues, ranging from analyses of issues at stake in specific Supreme Court cases to explanations of broad legal concepts. Some videos introduce viewers to significant legal figures, from Founding Fathers to contemporary Justices.

Subscribe now at youtube.com/thefederalistsociety.



*John Jay:
The Reluctant
Revolutionary*
Walter Stahr

John Jay was a central figure in the American founding, but he is largely forgotten today. In this video, historian Walter Stahr, author of *John Jay: Founding Father*, discusses the life of John Jay and his role in forming our nation. Jay negotiated the Treaty of Paris, was the first Chief Justice of the U.S. Supreme Court, and was Governor of New York, among many other accomplishments.



*Are Patents Under
Attack in the
Supreme Court?*
Adam Mossoff

Recent Supreme Court decisions have arguably made it easier to invalidate patents. The Court has also made it more difficult for patent owners to enjoin infringement of their rights and riskier to assert their rights in court. In this video, Adam Mossoff considers whether the Supreme Court is striking the right balance or wrongly undermining an important property right.

JUSTICE SCALIA MEMORIAL



A memorial service was held to celebrate the life and work of Justice Antonin Scalia at the Mayflower Hotel in Washington, DC on March 1.

Speakers:

- Eugene Scalia (Welcome)
- Rev. Paul Scalia (Prayer)
- Justice Clarence Thomas
- Judge Laurence H. Silberman
- Catherine S. Courtney
- Justice Ruth Bader Ginsburg
- Professor John F. Manning
- Justice Joan L. Larsen
- Mary Clare Murray



The Federalist Society joins in celebrating the life and work of Justice Scalia. Justice Scalia will long be remembered for his intelligent, principled, and tenacious dedication to our Constitution and to the faithful interpretation of the law as it is written.



Justice Ruth Bader Ginsburg offers her reflections on Justice Scalia's life and their friendship.



Justice Clarence Thomas speaks about Justice Scalia's life and work at the memorial.

LAW & INNOVATION PROJECT

New Project

The Federalist Society's new Law & Innovation Project—funded by a generous grant from the Diana Davis Spencer Foundation—was officially launched in May at our Fourth Annual Executive Branch Review Conference (see photos and details on pages 14-15). The Project is designed to identify and highlight the agency rules and regulations that are doing the greatest harm to our economy and entrepreneurialism, in order to create the pressure necessary for positive change.

Early Successes

- 12 working groups assembled with more than 130 confirmed members and consultants
- 4 working group meetings held so far and 7 more scheduled
- 3 filmmakers are competing for the opportunity to make our documentary about law and innovation

Coming Soon

- A new webpage devoted entirely to the Project
- The first short video in the Project's video series
- Teleforum calls and op-eds about law and innovation issues
- Student and Lawyers Chapter events nationwide

Working Groups

- Antitrust and Consumer Protection
- Cyber and Privacy
- Energy and Environment
- Enforcement and Coercion
- FDA and Health
- Financial Services and Corporate Governance
- Information Technology
- Intellectual Property
- Labor
- Race and Sex
- Regulatory Process
- State and Local

If you have questions or comments about the Project, please contact Deputy Director Devon Westhill at devon.westhill@fedsoc.org.



Member Profile: Professor Lillian BeVier

Professor Emeritus at UVa Law

Member of the Federalist Society's Board of Visitors



When and how did you originally get involved with the Federalist Society?

As I remember it, my first involvement was as a speaker at the Student Symposium at Stanford in 1986. I expect I was invited because the topic of the Symposium was *The First Amendment* and I had written law review articles that probably persuaded the student organizers that mine would be a sympathetic voice. Gene Meyer has told me that, sitting at lunch on the Saturday of the Symposium, I uttered the following sentiment: "This is a great organization. Too bad it can't last." Never have I been so happy to have been so wrong.

What has your involvement looked like since then?

Soon after attending my first Student Symposium in 1986, I became the Faculty Advisor to the UVa Law School chapter; I remained in that role until I retired in 2010. I attend as many Student Symposia and Lawyers Conventions as I can, often as a panelist. In 1999, I became a member of the Society's Board of Visitors. One of my most fun and encouraging Fed Soc activities has

been speaking to student chapters at many law schools. This has been fun because Federalist Society students are—without exception and despite being often beleaguered by the intolerance of their classmates and professors—cheerful, engaging, and smart. And it's been encouraging to observe Federalist Society principles gain purchase.

What are some of your favorite things about being involved with the Federalist Society?

There is nothing I *don't* like about being involved with the Society! Since I wholly embrace the principles on which the Society is founded, I'm heartened to share a sense of common purpose with others who share my allegiance. I admire the intellectual depth of my Fed Soc faculty colleagues, as well as their steadfast commitment to the preservation of freedom and the rule of law. I love, too, how stimulating and fun they are to be with. At the National Lawyers Convention, I relish renewing friendships and reconnecting with long-time allies; and the panels and speakers are always completely substantive and interesting. Finally, I greatly respect Society's national

leadership. Gene Meyer, for example, is a visionary and incorruptible leader, and the Board of Directors has been steadfast in its stewardship since Day 1.

Are you working on any projects or teaching any classes now as a professor emeritus?

Since retiring, I have co-taught, with Federal District Court Judge Amul Thapar, an intensive one-week seminar called *Judicial Philosophy in Theory and Practice*. For the "theory" part, students read scholarly articles on a variety of judicial philosophies. For the "practice" component, we study Supreme Court opinions as well as several of Judge Thapar's decisions, testing them against what we understand the theories would demand. Judge Thapar is a superb teacher, and our students have been deeply interested, eager, and bright. This coming January, we will focus on the judicial philosophy and decisions of Justice Scalia and on the arguments of his critics.

Thank you for speaking with us, Prof BeVier, and for your wonderful service to the Federalist Society!

The Federalist Society
for Law and Public Policy Studies

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