TRANSCRIPT

The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates

Edited Transcripts from the Panel Discussions Held in Phoenix, Arizona on November 3rd and 4th, 1995*

DR. MICHAEL BLOCK: Before we get started, I think it's appropriate that we give some formal recognition to some people who made this conference possible: John Norton, Chairman of the Goldwater Institute, and Gene Meyers, presently with the Federalist Society, are here with us today.

This conference emerged out of a lengthy discussion that I had with one of the Goldwater Institute's family members, Mr. Steve Twist, who was the Chief Assistant Attorney General for Arizona, and now is an attorney in private practice in Phoenix. Among the other things that Steve mentioned at the beginning of this conference, was that we should try to cooperate with the Federalist Society. I must say that is one of the best suggestions that I have ever received, and certainly the best suggestion I have received on this conference. It's been a very productive and enjoyable collaboration. Thank you, Steve.

Also, a big thank you to Leonard Leo, the director of the Federalist Society's Lawyers Division, Mary Caslin-Ross, and Jeff Flake, the Executive Director of the Goldwater Institute—all of them have been quite helpful. Also, a special thanks to Mary Gifford of the Goldwater Institute, who has spent countless hours putting together this project. Thank you all.

About eighteen months ago, at the Goldwater Institute's annual dinner here in Phoenix, Margaret Thatcher, in her speech after accepting the Institute's annual Goldwater Award, stated that the greatest bulwark of liberty is the rule of law. I use Margaret Thatcher's statement because it was perhaps the most concise declaration of how each of us feels in this room today. It is not our intention, and certainly not my intention, to engage in

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1. President, Goldwater Institute; Professor of Economics and Law, University of Arizona; Chairman, Goldwater Institute Academic Advisory Board; Chairman, Arizona Constitutional Defense Council; Visiting Senior Fellow, Progress and Freedom Foundation.
court-bashing or to minimize the importance of the independent judiciary. The purpose of this conference is to shed some light on one of the most vexing questions of our day: What is the proper role of the federal courts in a constitutional system with self-government as its central feature and competing sovereign states as the proper engines of much of its public policy? Over the next two days, you will hear from federal judges, constitutional scholars, political scientists, attorneys, public policy activists, academics, governors, state legislators, state supreme court justices, and Members of Congress—a pretty good line up.

I'm pleased to announce that these proceedings will be transcribed and published in the Arizona State Law Journal. I'd appreciate if people would give us the benefit of their comments as we go along.

I. PANEL DISCUSSION: THE ANTIFEDERALISTS AND THE FEDERAL JUDICIARY

In The Federalist No. 78, Alexander Hamilton assured that the national judiciary would be "beyond comparison the weakest of the three departments of power." The Antifederalists cautioned, however, that the national judiciary would tend to expand its own jurisdiction as well as Congressional power "to the diminution, and finally to the destruction," of the authority of the states. Were the Antifederalists prophets or pundits? What is the appropriate role of the federal courts in our federal systems?

HONORABLE JOHN GREENE: Good morning. When I was asked to moderate this, I was very flattered. I'm a card-carrying member of the Federalist Society, and I am a great admirer of the Goldwater Institute.

The first thing I did was get out my trusty Federalist Papers to reread something that I hadn't seen in a long time. As you know, Hamilton, Madison, and Jay wrote the Federalist Papers in order to support their advocacy for popular ratification of the Constitution in New York in the winter of '87 and '88. I find it amusing that John Jay played a very small role in that, not because he was not up to the task, but—those guys were quite interesting those days—he got involved in a street fight in New York City, and he was unable to participate the way he wanted to. What a guy,

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2. President, Arizona State Senate; Of counsel, Snell & Wilmer, Phoenix, Arizona. Senator Greene is a member of the American Legislative Exchange Council and received that organization's Outstanding Legislator Award in 1992.
they say. Unlike today’s people, who like to talk, those guys were real fighters.

The Federalist Papers appeared in most of the major New York City papers, as you know, and were not necessarily credited with the success, ultimately, of New York supporting the Constitution. I believe that everyone will agree that they are probably the most important and authoritative works on the meaning of our Constitution. But I also think it’s important to put those documents in the proper perspective for the purposes of any discussion of our Constitution. That is, they were written not based on a pure academic desire to educate—they were written to persuade. It is clear that they had a very difficult task trying to persuade citizens that a strong central government was important, while quieting the fears of too strong a government. Some bizarre things occurred. As historian Garry Wills points out—and some of the folks in this room have actually written articles and have mentioned this point—there was a certain ambiguity that was forced upon Publius as a propagandist. Wills goes on to say that the ambiguity was built into the very term “federalism,” which itself means living together under a treaty. He says the term was more properly applied to the Articles of Confederation. Yet the advocates of a stronger government—those people who were advocating the Constitution—commandeered that term, he said, leaving the hapless defenders of the old system to become Antifederalists. So we’re here in a debate talking about Antifederalists who were actually more properly called Federalists.

Elbridge Gerry in Massachusetts, stuck with a label that he didn’t appreciate, insisted that the proper terminology should have been ratifiers and antiratifiers, or, as he said, the “rats” and the “antirats.”

Despite any ambiguities contained in those papers, I don’t believe there is much doubt on the feelings of Hamilton and Madison, at least as they stated it in the Papers, with respect to the role of the judiciary. In Number 51 Madison said, “In Republican government, the legislative authority necessarily predominates.” As a legislator, I can relate to that, particularly with things that are happening in our state. But this is not the forum for that. And also, as the conference brochure indicates, Hamilton stated in Number 78 that the judiciary is, beyond comparison, the weakest of the three departments.

It seems clear to me—which frankly is not saying much, because I’m not a scholar—but it seems clear to me that much of the federal judiciary today does not subscribe to Madison’s and Hamilton’s stated viewpoint. It’s also clear to me that the debate, which started over two hundred years ago, is far from over on what the role of the judiciary was intended to be, and what it should be. Were the Antifederalists right? Were they pundits or prophets? Was our
system doomed to failure from the very beginning? Or perhaps did something happen that Hamilton and the other federalists could not possibly have envisioned in 1788 which caused the problems which we perceive today?

We have, this morning, some very distinguished experts who will figure all of this out, I trust, and give us the straight story in a manner which I believe that I might even understand.
The Antifederalists and the Federal Judiciary

The Antifederalists, of course, were the opponents of the new proposed Constitution. Their central claim was that it would not establish any form of confederacy, as its proponents claimed, but would result in the consolidation of the states into a single, all-powerful national government. They therefore claimed, with some justification, that they were the true Federalists and that the so-called Federalists were really nationalists who had stolen their proper name. They were, of course, correct that the Constitution created the potential for a totally centralized government. This potential was largely realized with the New Deal in the 1930s, which consolidated control of business and the economy in Congress, and with *Brown v. Board of Education*\(^4\) in 1954, which began the centralization of control of all issues of domestic social policy in the national Supreme Court.

The centralization that the Antifederalists foresaw and opposed was probably inevitable and predictable by any thoughtful observer of the new governmental scheme. If it is possible to divide sovereignty, that is, to combine partially autonomous polities within a single area—which is doubtful—the Constitution cannot be seen as a serious effort to do so, even after the adoption of the Tenth Amendment. First, the powers granted the national government are much too broad and undefined to be effectively limited. Second, the Constitution provides, of course, that in case of conflict with state powers, the national powers are supreme. Finally, and most devastatingly for any hope of limitation, conflicts are to be resolved by an arm of the national government, the Supreme Court.

The only real protection the states had against federal power in the beginning was that they could make a credible threat simply to leave, a threat that was always implicit and sometimes made explicit, and at first, more often by the North than by the South. The states had, after all, voluntarily joined the Union; why should they not be able voluntarily to leave? The Constitution, unfortunately, was seriously defective in having no express provision on this obviously very important matter. But all marriages begin in hope and optimism—usually misplaced—and the parties are naturally reluctant to dampen their hope and optimism with a realistic and

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3. A. Dalton Cross Professor of Law, University of Texas School of Law. Professor Graglia provided the editors with a written copy of his panel remarks.

open recognition of the very real possibility that the merger will not prove to be a happy one.

The question was finally settled, of course, by the Civil War. Northerners had, unfortunately, grown so fond of their Southern compatriots that they were more willing to kill them than to continue on without their companionship. So South Carolina, it turned out, did not have the rights and the status of, say, Lithuania or Slovakia. Most important, it did not have the right to disassociate that today, as in the case of Quebec, is hardly even considered controversial. The North’s successful invasion and subjugation of the Southern states ended any notion that they were real states, that is, political entities with some degree of autonomy.

The Antifederalists’ well-founded fear that the Constitution created, not a federation, but a unified national government, extended to the Constitution’s provisions for the judiciary. As Herbert Storing, the historian of Antifederalism, put it, “Here, too, the Anti-Federalists thought they saw the tracks of a consolidating aristocracy.” By far our most important source of Antifederalist thought on the judiciary is the “Letters of Brutus,” sixteen essays published in the New York Journal and Weekly Register between October 1787 and April 1788. It is generally assumed that they were written by Robert Yates, a lawyer and judge, who was, with Alexander Hamilton, one of New York’s delegates to the Philadelphia Convention. Since Yates generally voted contrary to Hamilton, an ardent nationalist, the New York delegation was neutered, causing both of them to leave.

The Letters of Brutus are the Antifederalist counterpart of the essays of Publius, written by Hamilton, Madison, and Jay, and later published as The Federalist. Brutus has been called “the most brilliant of the Antifederalist writers” and “the most formidable antagonist of the immortal ‘Publius.’” He was, Herbert Storing said, “the most foresightful” of Antifederalist writers, who “very accurately anticipated” the future of federal judicial power. His insight and prophetic powers are, indeed, little short of astounding in that he was able clearly to see and specify, before the Constitution was yet put into operation, what would prove to be the most profound defect in the system of government it created, the uncontrolled power of the Supreme Court.

Even though the power of judicial review is not explicitly provided for in the Constitution, Brutus foresaw that it would be exercised by the Supreme Court. He also saw that the result would be that the Court “would be exalted over all other powers in the government, and subject to no control.” “I question,” he said, “whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible.” In England, he pointed out, judges are made
independent by being given tenure of office during good behavior, but their
determinations are subject to correction by the House of Lords, a branch of
the legislature. In addition, Parliament can correct the judges’
misinterpretations of law, without overturning the judgment in a particular
case, by simply passing a new law.

Under the Constitution, however, Brutus pointed out, “the judicial . . .
has a power which is above the legislative, and which indeed transcends any
power before given to a judicial by any free government under heaven.” The
Constitution makes

the judges independent, in the fullest sense of the word. There is
no power above them, to control any of their decisions. There is
no authority that can remove them, and they cannot be controlled
by the laws of the legislature. In short, they are independent of the
people, of the legislature, and of every power under heaven. Men
placed in this situation will generally soon feel themselves
independent of heaven itself.5

The strength of Brutus’s arguments is shown by the lack of realism in the
attempt by Publius—that is, Alexander Hamilton in Federalist No. 78—to
answer them. Far from possessing immense and uncontrolled power, the
judiciary, Hamilton asserted, “from the nature of its function, will always be
the least dangerous to the political rights of the Constitution, because it will
be least in a capacity to annoy or injure them . . . . The judiciary . . . has no
influence over either the sword or the purse . . . . It may be truly said to
have neither FORCE nor WILL, but merely judgment.” The judiciary is
“beyond comparison the weakest of the three departments of power”; indeed, quoting Montesquieu, “the judiciary is next to nothing.” He failed to
note, however, that the judiciary Montesquieu was talking about was not a
judiciary with the power to invalidate legislative acts.

Perhaps not entirely satisfied with these assertions in Federalist No. 78,
Hamilton addressed the question again in Federalist No. 81, where he states
that “the supposed danger of judiciary encroachments on the legislative
authority . . . is in reality a phantom.” This is so, he repeats, because of
“the general nature of the judicial power” and “its total incapacity to support
its usurpations by force.” “It can be of no weight,” he argues, “to say that
the courts, on the pretense of a repugnance, may substitute their own
pleasure to the constitutional intentions of the legislature,” because “the
observation, if it prove any thing, would prove that there ought to be no
judges distinct from that body.” In other words, since judges can always

misbehave, you cannot protect against judicial misbehavior without getting rid of judges. This, however, simply ignores, again, Brutus’s central point that the new federal judicial power would include, unlike any other, the power to question the authority of the legislature, which greatly increases both the likelihood and the seriousness of judicial misbehavior. In England, Brutus noted, judicial misbehavior could be controlled by the House of Lords and corrected by Parliament, but these options are not available in the unprecedented situation of a final tribunal claiming the power to trump the legislature.

Hamilton’s only real answer to the obvious problem of uncontrolled judicial power created by the Constitution was his repeated assertion that the judges could be impeached: “This,” he said, “is alone a complete security.” Hamilton, however, misstated the power of impeachment. It is not true, unfortunately, that judges can be punished, as Hamilton said, for “their presumption” in usurping legislative power. According to the Constitution, judges, like other public officials, can be removed from office only upon conviction of “Treason, Bribery, or other high Crimes and Misdemeanors.” As President Jefferson was soon to discover when his party attempted to remove Justice Samuel Chase from the Supreme Court, impeachment was a “farce,” “not even a scare-crow.”

Hamilton’s basic defense for judicial review—later adopted and followed by Chief Justice John Marshall in Marbury v. Madison⁶—is that, without the power, constitutional limits on legislative authority, such as prohibitions of bills of attainder or ex post facto laws, “would amount to nothing.” The argument is fallacious, as Brutus could easily show:

[T]hose whom the people chuse at stated periods, should have the power in the last resort to determine the sense of the compact; if they determine contrary to the understanding of the people, an appeal will lie to the people at the period when the rulers are to be elected, and they will have it in their power to remedy the evil; but when this power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to control them but with a high hand and an outstretched arm.⁷

Hamilton’s lack of realism and candor is nowhere more evident than in his response to Brutus’s obvious point that a body able to invalidate the acts of another is superior to that other. Judicial review, Hamilton boldly replied,

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6. 5 U.S. (1 Cranch) 137 (1803).
does not "by any means signify a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both . . . ." That is difficult to take seriously. Judges—lawyers in robes, unelected, not subject to electoral control, and holding office for life—are to be seen as protecting the people from their own elected representatives whose continuance in office is dependent on the people's support. Hamilton, like Marshall after him, claimed that judges would invalidate only acts in "evident opposition" to or "irreconcilable variance" with the Constitution. Because legislators are able to read the Constitution, however, and are ordinarily very little tempted to violate its few restrictions on representative self-government such acts almost never occur. But what if judges should not confine themselves to this very limited function? "To avoid an arbitrary discretion in the courts," Hamilton responded, with an equal lack of realism, "it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." I could not agree more, but unfortunately, Hamilton neglected to point out just how this was to be done. The very last thing that can be said of the Supreme Court is that it is bound down by strict rules and precedents.

Hamilton, the ardent antidemocrat—at the convention, he proposed a plan for a type of elected monarchy—defended judicial review, in the manner of all antidemocrats since, as a necessary antidote to "those ill humors" to which the people are unfortunately subject and to which judges are happily immune. Like all defenses of judicial review, the argument comes down to no more than the assertion that the people are not to be trusted and are in need of protection from themselves by a superior class of beings, the judges.

The truth is precisely the opposite. There is no class of people more subject to "those ill humors," to passing intellectual fads, than judges, a class of intellectuals manqué, persons who avoided education by going to law school, hungry for the accolades of academics, in thrall to every new visionary scheme coming out of academia, and eager to rise from obscurity to fame by authoring daring innovations. We can do no greater service to American government and the common good than to make clear that of all government officials it is judges that are least to be trusted. This is hardly surprising, considering, first, that they are all lawyers, persons skilled only in the manipulation of words and trained to regard truth as an obstacle to be overcome. Second and even more important, judges are the public officials least to be trusted simply because they are the public officials least subject to control. They are also the only officials clad in priestly robes and installed
in temples, things not calculated to grant immunity from Lord Acton’s dictum on the effects of uncontrolled power.

Other than Brutus, the most insightful Antifederalist writer on the judiciary wrote under the name of the Federal Farmer, usually identified as Richard Henry Lee. Perhaps his most striking contribution was his anticipation of the insight articulated by Alexis de Tocqueville many years later. Tocqueville, who observed and commented on American government and society with what seem in retrospect prophetic powers, stated:

The President, who exercises a limited power, may err without causing great mischief in the state. Congress may decide amiss without destroying the Union, because the electoral body in which Congress originated may cause it to retract its decision by changing its members.

But if the Supreme Court is ever composed of imprudent or bad men, the Union may be plunged into anarchy or civil war.  

It happened, of course, that the Court was composed of imprudent or bad men when the *Dred Scott* decision was handed down, denying Congress the power to prohibit slavery in the territories. The result, just as Tocqueville warned, was that the country was plunged into civil war. I have never fully understood why that event, involving the deaths of over 600,000 American men, has not been taken as a definitive demonstration that granting judges the power to invalidate the acts of legislators is not an improvement in the science of government, but a terrible mistake.

Like Brutus, the Federal Farmer saw that the judiciary was likely to be not the least dangerous branch of the new national government, as Hamilton claimed, but the most dangerous. In terms that Tocqueville was to parallel almost precisely, he warned that, “When the legislature makes a bad law, or the first executive magistrates usurp upon the rights of the people, they discover the evil much sooner than the abuses of power in the judicial department; the proceedings of which are more intricate, complex, and out of their immediate view” and which “only a few professional men are in a situation properly to” observe. “In this country,” he continued, “we have always been jealous of the legislatures, and especially the executive, but not always of the judiciary,” even though:

we are in more danger of sowing the seeds of arbitrary government in this department than in any other. We are not sufficiently attentive to the circumstances that the measures of popular

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legislatures naturally settle down in time, and gradually approach a mild and just medium; while the rigid systems of the law courts naturally become more severe and arbitrary, if not carefully tempered and guarded by the constitution, and by laws, from time to time.\textsuperscript{10}

It is now widely recognized that the Antifederalists were right in seeing that the Constitution created a potentially all-powerful national government, leaving no area of policy-making exclusively for the states. The consolidation of power in Congress and the President that has taken place can be justified, however, to the extent that it is what the people seem to want. The people did, after all, elect Franklin Roosevelt President four times. No such justification is available for the centralization of power that has resulted from the Supreme Court’s usurpation of the policy-making authority of the states. The American people have never elected and would be most unlikely to elect Brennan and Blackmun to anything—the people of New York soundly rejected Arthur Goldberg when, after his resignation from the Court, he foolishly gave them the opportunity to do so.

The Antifederalists, particularly Brutus and the Federal Farmer, saw the Constitution’s potential not only for concentrated legislative power, but also for despotic judicial power. It has been to the detriment of the welfare of the nation that their warning has gone unheeded. It would make for a healthier and more realistic understanding of the role of the Courts in our system of government if students were not subjected to the specious reasoning of Hamilton in \textit{Federalist No. 78} and Marshall in \textit{Marbury} without being given the writings of Brutus and the Federal Farmer as an antidote.

\textsuperscript{10} \textit{Federal Farmer No. 15} (Jan. 18, 1788), \textit{reprinted in 4 The Founders’ Constitution} 232 (Philip B. Kurland & Ralph Lerner eds., 1985).
PROFESSOR ERWIN CHEMERINSKY: It is an honor and a pleasure to be with you this morning. I hope, therefore, you won't find me ungrateful or a rude guest when I tell you my theme this morning is that the Antifederalists aren't relevant. And I give you three reasons why the Antifederalists don't warrant our consideration.

First, the Antifederalists lost. They lost in 1787, and they lost in the historical events since. There's a reason why, when we study the Constitution in junior high school civics, we don't study the Antifederalists. There's a reason why the Antifederalists aren't in constitutional law case books. There's a reason why the United States Supreme Court doesn't quote Brutus. It's because he lost.

It was a close fight, but the states ratified the United States Constitution, and they rejected the views of the Antifederalists. Moreover, historical events since 1787 have thoroughly repudiated the Antifederalists. Most notably, the adoption of the Fourteenth Amendment was a clear rejection of much that the Antifederalists argued about.

The Fourteenth Amendment, as we all know, dramatically changed the nature of American Government. It said that states could not deny equal protection of the law. It said that the states could not deprive individuals of life, liberty, or property without due process of law. It gave the Congress, under Section 5, the authority to enforce this mandate. Of course, the federal judiciary also possesses the authority to enforce this provision.

The events of the twentieth century have further confirmed the repudiated teachings of the Antifederalists. The modern society, with all of its technological complexity, demands a federal government. We can argue over its scope, and we can argue over what its law should be, but there needs to be a federal government, contrary to what the Antifederalists might have thought in 1787.

If we want to talk about what the Reagan victory in 1980 meant, we don't read the speeches of Jimmy Carter. If we want to know what the Clinton victory in 1992 meant, we don't read the speeches of George Bush or Ross Perot. So to know what the Constitution means, we don't look to the writings of the Antifederalists.

There's a second major reason why the Antifederalists are irrelevant: They weren't very good prophets at all. Their predictions did not really come true. The main prediction that we're talking about this morning is the prediction that there would be the aggrandizement of power in the federal

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11. Legion Lex Professor of Law, University of Southern California Law Center. Professor Chemerinsky is the author of INTERPRETING THE CONSTITUTION (1987), and FEDERAL JURISDICTION (2d ed. 1994).
judiciary—that federal judges would be despots. I think the historical record concerning the federal judiciary’s expansion of its own power here is quite mixed, with as much evidence pointing against that conclusion as for it.

Let me give you an example: In 1833 the Supreme Court decided the case of *Barron v. The Mayor and City Council of Baltimore*.

The issue then was whether the Bill of Rights would apply to the states. The particular question was whether the Takings Clause of the Fifth Amendment would apply to state and local governments. Chief Justice John Marshall, obviously a Federalist, said that the Bill of Rights was meant just to restrict the federal government, not the state and local governments. That was a tremendous restriction of the power of the federal judiciary, and it came from the Supreme Court.

Consider the doctrines that the federal judiciary has crafted from the very beginning to limit its own authority. In *Hayburn's Case*, an opinion of the Justices in the first years of the Supreme Court, the Supreme Court said that the federal judiciary could not issue advisory opinions—that the federal court would only hear cases if there is an actual dispute to an adverse litigant and the federal court decision has a substantial likelihood of making a difference. The federal judiciary didn’t have to do that. If it was really bent on aggrandizement of its own power, it might have done otherwise.

In this century, the Supreme Court has crafted elaborate standing doctrines to restrict the federal judicial power. Even cases presenting fundamental constitutional rights are frequently dismissed for lack of standing. Think of the 1982 Supreme Court case *Valley Forge Community College v. Americans United for Separation of Church and State*, where the Supreme Court said that the federal judiciary could not hear a claim by taxpayers that the federal government violated the Establishment Clause by giving property to a religious institution. Think of the 1984 Supreme Court case, *Allen v. Wright*, where the Supreme Court said there’s no standing to challenge the federal government’s grant of tax exemptions to private schools that discriminate.

It is not just the standing doctrine. Under the political question doctrine, entire clauses of the Constitution are not judicially enforceable because the Supreme Court says they pose nonjusticiable political questions. The Republican Form of Government Clause in Article IV, Section 4, which provides that the United States shall guarantee each state a republican form

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13. 2 U.S. (2 Dall.) 409 (1792).
of government, has never been enforced by the judiciary because, ever since
Luther v. Borden\textsuperscript{16} in the 1840s, the Supreme Court says that cases under it
are not justiciable. Whole areas of constitutional law are nonjusticiable.
Challenges to foreign policy virtually always are dismissed by the federal
courts as nonjusticiable.

All of this suggests to me that the federal judiciary has not been uniformly
bent on aggrandizement of its own power. It is wrong to talk about the
power of the federal courts without also considering the limits on the federal
courts, and many of these limits are self-imposed.

There is a third and final reason why it is not worth focusing on the
Antifederalists: It’s good that the Antifederalists lost. There needs to be a
federal judicial power. As I just listened to Professor Graglia, his arguments
were not really against the federal judicial power, they were against any
power of judicial review, be it the federal courts or state courts, to declare
laws unconstitutional. I believe that this argument misconceives the nature of
democracy. American democracy is not simply majority rule; rather, it is a
constitutional democracy. The majority rules within the bounds of the
Constitution, and the limits of the Constitution only have meaning if there is
somebody there to enforce those limits. That is why there has been, and
needs to continue to be, the power of judicial review.

To illustrate the need for a federal judicial power, consider three easy and
obvious illustrations: First, there’s a need for a federal judicial power so as
to ensure the free flow of commerce among the states. When the Judiciary
Act of 1789 was drafted, the main focus wasn’t on creating federal question
jurisdiction. There was no federal question jurisdiction in the Judiciary Act
of 1789—that wasn’t created until 1875. The main concern was having
diversity jurisdiction, to assure the free flow of commercial transactions.
Similarly, there is a need for the federal judicial power to have a dormant
Commerce Clause to make sure that one state did not discriminate against
the goods and services of other states. The experience under the Articles of
Confederation taught that parochialism was a real problem, and thus there
was a need to make sure that such matters did not just go to state courts that
might be biased, but to a more independent federal judiciary.

Second, there is a need for a federal judiciary to protect what Carolene
Products\textsuperscript{17} called “discrete and insular minorities.” There are groups that the
political process will not adequately protect and that electorally accountable
state judges can’t be trusted to protect. Most obviously this is racial
minorities. In the years after the Civil War during Reconstruction, there was

\textsuperscript{16} 48 U.S. (7 How.) 1 (1849).
\textsuperscript{17} United States v. Carolene Products Co., 304 U.S. 144 (1938).
an urgent need for federal courts to protect the rights of the newly freed slaves. State courts could not and would not do this. If you look at the 1950s and the 1960s, there was an imperative that the Jim Crow laws that segregated the South be ended. The Southern states' political processes were not going to do that. Congress was not likely to do that. It was incumbent on the federal courts to do it.

There are other discrete and insular minorities. I believe that prisoners, for example, will get no protection from the political process. They have no political constituency. The only way to protect prisoners from inhumane treatment is a federal judiciary.

Third, and finally, there is a need for a federal judiciary to protect individual rights. The most notable example here is freedom of speech. History—not just American history, but the history of civilization—teaches us that government often has an overwhelming desire and power to censor. Who is going to stop government from censoring but for the courts; especially but for the federal courts?

Last term, the United States Supreme Court in United States v. Lopez, for the first time since 1937, struck down federal laws exceeding the scope of Congress's commerce power. Last term, in Adarand Constructors v. Pena and Miller v. Johnson, the Court struck down affirmative action efforts. Last term, in Rosenberger v. Rector of the University of Virginia, the Supreme Court struck down the state effort to deny funding to a religious group. Now, in front of the conservative Congress, there are bills to tremendously expand the power of the federal government to fight terrorism. There are proposals that the federal government get involved in products liability as the federal government has never been involved. What this suggests to me is that conservatives and liberals both want to use the government to serve their own ends, and what we really disagree about is not the existence of power, but how it should be used.

JUDGE ALICE BATECHDEL 22 I want to make sure that everybody knows that my function here is not to persuade anybody that there's no need for the federal courts. According to Leonard Leo, my function is to use some 20/20 hindsight to talk about a couple of examples that show how accurate the Antifederalists' predictions actually were. I would preface that by saying that

22. Judge, United States Court of Appeals for the Sixth Circuit. Judge Batchelder is a member of the Federal Judicial Advisory Committee on Bankruptcy Rules.
I believe that Professor Graiglia probably has the better of the last two arguments, from my own perspective.

As a matter of fact, I probably should start this whole thing off with a bit of a disclaimer, which is to say that it's a daunting experience to be up here with a bunch of academics. For a long time, I thought that Professor Graiglia pretty much knew everything, but that was before I spent several days at a seminar with him in Santa Fe and discovered that he thought that there was a misprint in the reported version of the Supreme Court's decision in *Church of the Lukumi Babalu Aye*,\(^{23}\) because it said that among the animals that were being sacrificed and having their entrails decoratively strewn about the streets of Hialeah were guinea pigs. Lino said, that, of course, is obviously wrong: They must have meant guinea hens, because guinea pigs were cute little furry creatures that lived in your kitchen, and who would eat one? But the fact is, Lino, my kids have pictures of people in the Dominican Republic eating guinea pigs. So while yours may have been furry, in your kitchen, live, theirs were furry, in the kitchen, and quite dead.

Everybody knows that professors get to spend hours on end thinking about the kinds of ideas that are being thrown around here this morning, splitting hairs and taunting students and writing law review articles to drive judges crazy. I'm just one of those judges who is perpetually being driven crazy both by law review articles and by the students that these professors have trained. Everybody knows that judges, or at least many of us, operate with sort of bathtub minds. I fill mine up for whatever I have to do today by way of my case-load, and, when that's done, I pull the plug and I fill it for tomorrow.

So from that perspective, I do want to make just a few observations here about what I think was the prophetic power of the Antifederalists, and I do think that it is well worth looking at what they said. After all, just because someone is wrong does not, in fact, mean that he was irrelevant. Hopefully, we can learn from people who were proven—actually, not even wrong. Just because you lost, I suppose is what I really mean, doesn't make you irrelevant. I think we have learned over and over in this country from those who have lost, that perhaps we might have done better to have paid them heed at the time.

One other quick aside, and that is that because we're focusing today on the Antifederalists' view of the judiciary, another of their views—which was that the ideal representative in a republican form of government would be someone from among the electors and generally like them—is not really relevant to our discussions here. But I come from a household where two

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branches of government are represented. I’m on the federal court, and my husband is the speaker pro tem of the Ohio House of Representatives. When he’s around and in the audience, I always like to quote George Clinton, who was the Antifederalist who called himself Cato, who said, and I’m pretty sure he was really referring to the legislative branch when he said this: “There are no such talents necessary for government, as some who would pretend to them about possessing them would make us believe. Honest affections and common qualifications are sufficient. Great abilities have generally, if not always, been employed to mislead the honest and unwary multitude and draw them out of the plain paths of public virtue and public good.”

I want to focus just on a couple of things that Brutus wrote, a couple of which Professor Graglia has quoted already. But among them, Brutus said, specifically, “The judicial are not only to decide questions arising upon the meaning of the Constitution in law, but in equity. By this, they are empowered to explain the Constitution according to the reasoning spirit of it without being confined to the words or letter, and in their decisions they will not confine themselves to any fixed or established rules, but will determine according to what appears to them the reasoning spirit of the Constitution. The opinions of the Supreme Court, whatever they may be, will have the force of law because there is no power provided in the Constitution that can correct their errors or control their adjudications. From this court there is no appeal. The judicial power will operate to effect in the most certain, but yet silent and imperceptible manner, what is inevitably the tendency of the Constitution. I mean an entire subversion of the legislative, executive, and judicial powers of the individual states.”

He went on to say, in Number 15 of his letters, “They have made the judges independent in the fullest sense of the word . . . .” This, of course, Professor Graglia has already quoted, but I think it’s worth rehearing: “There is no power above to control any of their decisions, there is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.” Of course, they didn’t have the benefit of knowing that perhaps there would be some women who might have a crack at it.

Further, Alexander Hamilton, in Federalist No. 78, rather cavalierly cast the judicial branch as being the least dangerous. George Mason, you may recall, in his remarks explaining his refusal to vote to ratify the Constitution, said, “The power of construing the laws, would enable the Supreme Court of
the United States to substitute its own pleasure for the law of the land. The errors and usurpations of the Supreme Court would be uncontrolled and remediless."

There are two cases that are easy and fun to point to, which kind of point out just how prophetic that was, and it doesn’t matter, it seems to me, that there are lots and lots of instances in which the judicial branch has imposed limits on itself. That is important, but it doesn’t negate the fact that the ability which Brutus and the other Antifederalists foresaw was really there. The easiest place to start, I think, is probably Griswold v. Connecticut,24 and I know that everybody in the room is familiar with Griswold. In that case, Justice Douglas wrote the majority opinion striking down a state statute which prohibited the use, regardless of the circumstances, of contraceptives in any form.

Justice Douglas wrote the majority opinion, which is quite short. I reread it several times in preparation for my remarks here, and concluded that I don’t understand it now any better than I did at the time that I first read it when I was in law school, because it still doesn’t make any sense to me. First, he cast the entire issue in terms of the Fourteenth Amendment Due Process Clause, sort of, by saying “Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment.” He then ran through a number of First Amendment cases in which the Court had found that the First Amendment included such unenumerated rights as the right to educate one’s children in the schools and subjects of the parents’ choice, the freedom to associate, and privacy in one’s association, and concluded from those cases—and this, of course, is what everyone remembers from Griswold—that “the foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.”

He then ran through the Bill of Rights pointing out the privacy penumbras emanating from various of the amendments, including this statement, in isolation, with absolutely no explanation whatever: “The Ninth Amendment provides: ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’” That is, in fact, what the Ninth Amendment says, but there is no further discussion of it. He then held that the relationship at issue, i.e., the marital relationship—not the right at issue, which was the right to use contraceptives—lay within the zone of privacy created by several fundamental constitutional guarantees, and that a law which forbade the use, rather than sale or manufacture of

contraceptives, sought to achieve its goals by means “having a maximum destructive impact on that relationship. Such a law cannot stand in light of the familiar principles so often applied by this Court that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”

So Justice Douglas used the Ninth Amendment, among others, to create a zone of privacy within which the state could not broadly regulate. And this he did having prefaced his opinion by saying “we do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife.” So I suppose the obverse of that would be “as to these laws, we do sit as a super-legislature.”

Chuck Cooper, who will be appearing later on in this program, points out in his lecture entitled “Original Intent and the Ninth Amendment,” which is published in Eugene Hickok’s The Bill of Rights: Original Meaning and Current Understanding—points out that a federal statute such as the one in Griswold v. Connecticut would violate the Ninth Amendment. Nowhere in the Constitution or Bill of Rights is there an enumerated right to privacy, much less any enumerated right to use contraceptives, and therefore, such rights are reserved to the people vis-à-vis interference from the federal government.

But the only way, it seems to me, that Justice Douglas (although he did it without any actual discussion) and Justice Goldberg, whose concurrence is very heavily grounded in the Ninth Amendment, can get to the conclusion that the Connecticut statute, a state statute, was unconstitutional, was to find that the statute violated the Due Process Clause of the Fourteenth Amendment because the penumbral privacy right implicated by the marital relationship was fundamental to the traditions and collective conscience of our people. And, in fact, Justice Goldberg said that the Ninth Amendment required the result that such a right could not be infringed by the states—by the elected representatives of the people, in whom that unenumerated right reposed.

Justice Black, on the other hand, understood, I think, that Justice Goldberg’s reading of the Ninth Amendment was greatly increasing the power of the federal court, and he said so. I don’t think I will go into detail

about how he put it, except to say that in his dissent he specifically said, "The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, however it is finally achieved, will amount to a great unconstitutional shift of power to the courts, which I believe and am constrained to say will be bad for the courts and worse for the country."

That case stands out as one in which something that seemed to be fairly clear was used in a way that, at least to me, is anything but clear, and it's particularly interesting because that is the case to which we all point when we talk about penumbras. Penumbras, at least in the dictionary that I use, are defined as "marginal regions or borderlands of partial obscurity," and emanations are defined as "something impalpable (as light, odor, or effluvium) that arises from a material source." Now, with those two definitions, I suppose it's not to be wondered at that there are still some skeptics who are concerned that a constitutional right which must be divined from marginal regions or borderlands of partial obscurity formed by effluvium, may perhaps reflect the pleasures of the individual members of the Court rather than the substance of the Constitution itself. Some of us might even wonder how a marginal region or borderland of partial obscurity could, under any stretch of the imagination, give life and substance to anything. Indeed, why would it not be the case instead that the life and substance must be there first in order for the marginal region to exist at all? Some of us, of course, haven't been consulted.

A more disturbing example, though, of a case in which the Antifederalist prophecies were proven to be true, I think, is the 1990 decision of Missouri v. Jenkins.26 That is, of course, now Jenkins I. That is the case in which, I am sure you are aware, the district judge in Kansas City directly imposed a tax on a school district by ordering that the property tax rate be increased by almost one hundred percent in order to provide the funds to build the schools and implement the programs which he had decreed were necessary in order to carry out his desegregation orders. The court of appeals affirmed the order, but said that, in the future, the district court should not set the tax rate itself, but rather should order the school board to submit a levy to the state tax-collection authorities, and should enjoin the operation of the state constitutional provisions prohibiting the board to tax at that rate without a vote of the electorate.

The Supreme Court in a five-to-four majority opinion, declined to address the constitutional issue of whether the federal court could, in fact, impose a tax. But it decided that, as a matter of comity, the district court had abused its discretion in imposing the tax directly. The Court said "it is accepted by

all the parties, as it was by the courts below, that an imposition of a tax increase by a federal court was an extraordinary event.” That may stand out in the annals of Supreme Court understatements, I should think.

It went on to say that, “In assuming for itself the fundamental and delicate power of taxation the District Court not only intruded on local authority, but circumvented it altogether.” Now, having thus spoken, it should have followed, I would think, that the Court would have said that this delicate and fundamental power is not, and never has been, a power of the judiciary on any level of government. But what the Court actually went on to say is, “Before taking such a drastic step the District Court was obliged to assure itself that no permissible alternative would have accomplished the required task.” I guess then, in the absence of a permissible alternative, this impermissible alternative was okay.

The Court relied on *Griffin v. County School Board of Prince Edward County*\(^\text{27}\) to hold that a court order directing a local government body to levy its own taxes is plainly a judicial act within the power of a federal court. So, the Court said, the district court could and should have required that the school district impose the tax. The Court said:

It is, therefore, clear that a local government with taxing authority may be ordered to levy taxes in excess of the limit set by state statute, where there is reason based in the Constitution for not observing the statutory limitation . . . . Here the [school district] may be ordered to levy taxes despite the statutory limitations on its authority in order to compel the discharge of the obligation imposed on [it] by the Fourteenth Amendment. To hold otherwise would fail to take account of the obligations of local governments, under the Supremacy Clause to fulfill the requirements that the Constitution imposes on them.

The Court went on to say that in the future the district court should order the appropriate taxing body to impose taxes at the rate decreed by the court and enjoin the operation of any state laws that would limit such a tax levy.

Well, first of all, it’s important to note that *Griffin*, the case that the Court was relying on, was a case in which the Court simply held that the district court had the authority to order the county supervisors, who were the taxing authority, to “exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain, without racial discrimination, a public school system in Prince Edward County like that operated in other counties in Virginia.” That was a situation in which the power to tax was clearly there, and the taxing authorities simply said we’re not going to levy

\(^\text{27}\) 377 U.S. 218 (1964).
any taxes because we’re not going to have an integrated school system in this county that is supported by tax dollars. That is a far cry, it seems to me, from saying that Griffin stands for the proposition that a federal court has the authority to order the local taxing authority to levy taxes in violation of the state constitution, which was what was going on in Missouri v. Jenkins. And the dissent in Jenkins pointed out that what was going on here was that the state constitution prohibited the school board from levying taxes at the level demanded by the district court without a vote of the electorate of the school district, and that there was nothing about the Missouri Constitution’s provisions that offends the United States Constitution—the power to tax is not, and never has been, a power of the judicial branch. Here in this case, not only was the federal judiciary arrogating to itself that power, it was doing so at the expense of the authority of both the state and the local governments, and, perhaps even more fundamentally, at the expense of due process, because it has always been a fundamental right in our system of government that the power to tax has been in the hands of the electorate either directly or through their elected representatives.

It’s possible, of course, that Jenkins I will simply languish as sort of an oddity without precedential value, because in Jenkins II—although it doesn’t in any way affect the decision having to do with the power of the judiciary to levy a tax—earlier this year, the Supreme Court said that the remedy which the district court had ordered was far too broad, and it would have to take another look at it. So perhaps the need for funds at the level that would require the taxing will no longer be there. But regardless of whether that turns out to be the case, the dissent in Jenkins I sounds a clear alarm, it seems to me, and forcefully demonstrates that the Antifederalists’ view of the power of the judiciary was very, very well taken.

One quick point for those of us who are inclined to believe that Brutus’s crystal ball was pretty clear: there may be some hope in the last few years. Justice O’Connor has made a couple of ringing statements in regard to what federalism really means, and the continuing importance of the states in the scheme of federalism. I would call your attention to her opinions in Gregory v. Ashcroft and in New York v. United States, in both of which she points out that the states really do play an important role.

The Federal Farmer, one of the Antifederalist publications, voiced particular concern about the insidious workings of precedent. And that, of course, is what I was talking about here. The Federal Farmer said, “A bad

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law immediately excites a general alarm; a bad judicial determination, though not less pernicious in its consequences, is immediately felt probably by a single individual only, and noticed only by his neighbors and a few spectators in the court."

It's kind of fun to note that more than fifty years before the Federal Farmer made that observation, Jonathan Swift made a similar, although nastier one, through Gulliver's explanation of the English legal system to the Houyhnhnms. First of all, he pointed out—and I wasn't going to say this except for Professor Graglia's comments—that "lawyers are a breed of men raised from birth to prove that black is white and white black, depending upon who is paying them." But, he went on to say, "it is a maxim among these lawyers that whatever has been done before, may legally be done again, and, therefore, they take special care to record all the decisions formerly made against common justice and the general reason of mankind. These, under the name of precedents, they produce as authorities to justify the most iniquitous opinions, and the judges never fail of directing accordingly."

PROFESSOR DANIEL LOWENSTEIN:31 Good morning. Judge Batchelder said she was daunted by being paneled with a bunch of academics. I'm very happy, therefore, to be able to assure her that there's a cure for that problem. It's a cure that's one hundred percent guaranteed effective, and it simply consists of spending more time with academics. The only problem is that this is very likely a case in which the cure is worse than the disease.

I told Leonard Leo when he invited me to appear on this panel, that I don't think I would know an Antifederalist if one came up to me and slapped me in the face; and when you say Brutus to me, I think of a character in Shakespeare's play Julius Caesar whom other characters in the play refer to as the noblest Roman of them all, but seems to me to be the greatest schlemiel in all of Shakespeare. But if this American Brutus was saying that the federal judiciary is indeed a dangerous branch and especially dangerous to the states within the federal system, I believe that this Brutus was on to something and had considerably more perspicacity than Shakespeare's Brutus did. If you read that play, he's just wrong every time.

What I intend to do here this morning is to talk about what I regard as a recent and spectacularly egregious example of the danger that the federal judiciary poses to the states—namely, the so-called racial gerrymandering

cases Shaw v. Reno and Miller v. Johnson. And I have to say by way of preface that it’s somewhat disturbing to me that those who, like Professor Graglia, express concern over this question of the future of the states have been, at least to the best of my knowledge, entirely silent on the very serious inroads that these cases represent. In fact, it causes me to be somewhat skeptical about the sincerity and the seriousness of the people who express these views.

The concept of federalism that I adhere to is sometimes referred to as “marble-cake federalism,” in contrast to “layer-cake federalism.” It may have been the conception of many of the original Framers of the Constitution, that the way we preserve the separate role of the national government and state governments is to define the subjects over which each will have jurisdiction. But that has not been the way it’s worked out. For better or worse, in my view, it’s inevitable. So it doesn’t make much sense to talk about whether it’s better or worse.

There’s a well-known scientist, Morton Grodzins, who I think is most associated with this idea, who demonstrated that in almost every subject matter that you could think of that government deals with in this country, the three levels of government—federal, state, and local—tend to play important roles. They work cooperatively with each other. They work competitively with each other. They work in disharmonious oblivion to what the others are doing, and they relate to each other in every good and bad way you can think of just about every issue.

So, although I have no particular objection to the Lopez case, which Professor Chemerinsky referred to, where for the first time in decades the Court said Congress passed a law that is outside the power given to it in the Constitution, I regard that as a cul-de-sac. The Court is not going to be able to protect the role of states by that method, which is premised on the layer-cake notion of federalism.

So what is necessary if we live in a system of marble-cake federalism, where the powers are all mixed up and the activities are all mixed up? What is necessary? What should we be looking for? It seems to me that the most important thing is that we nurture the states as effective and autonomous polities where each one operates so that, instead of one system, we have fifty-one systems, and we have all the creativity that comes from that, we have all the tension that comes from their competing with each other, and, I

32. 113 S. Ct. 2816 (1993).
think, as a check on one another. If you are serious about federalism, that is what you have to regard as the absolutely crucial point.

So that's background. Now, let me turn to the racial gerrymandering cases. I have a problem here: The racial gerrymandering cases don't just stand on their own. They are the culmination of a long, complex, and arcane history, and I want to make sure that people know what I'm talking about, but not get bogged down in that history. Let me try to, as briefly as possible, explain what these cases are about. Some of you, I know, are very well-versed in these, but some of you probably only have a fairly vague notion of what they are about.

When the Congress passed the Voting Rights Act in 1965, I think everybody, including most supporters of the Act, recognized that from the standpoint of federalism, this was very, very strong medicine. Not only were some laws in some states—such as literacy tests for voting—struck down, but the federal government could go in and send registrars to register people to vote in the covered states. Also, every time covered states wanted to change their election procedures, they had to get preclearance, theoretically from a court in the District of Columbia, but as a practical matter in almost all cases, from the Justice Department. Very, very strong medicine.

This was a real intrusion into the states, and, if you think back to my point of the states as autonomous polities, it was going not only to the state in some general sense, but right to the heart of the system of democracy and representation in the states—very strong medicine. A majority of the people in the country at that time, and I think almost everybody now, believes that the problem that existed warranted that strong intervention, and certainly, I think everybody now agrees, the law was an enormous success in the sense that, whereas progress had been very, very slow in getting the right to vote for African Americans in the South over a period of decades, within a few years the impediments to voting were just about eliminated. That was a tremendous accomplishment at a significant cost to federalism—a cost that was well worth paying.

That could have been the end of the story, in a sense, except that in 1969 the Supreme Court decided a case called *Allen v. State Board of Elections*, in which they said that this preclearance thing—where you have a state that wants to change a rule or law, it has to go to the court or the Attorney General—doesn't just apply to who can vote, or things directly relating to the act of voting. They said it relates to other aspects of the electoral system, and particularly the most important one that was involved in that case, when a county in Mississippi wanted to change the method of election of their

county commission from a district system to an at-large system, that was a change that required preclearance under the Voting Rights Act. That was an enormously important decision, and it was a very short step from that, in one later case, to say that every time that you do a legislative districting it has to be precleared.

Well, as you know, states ordinarily have the option of not changing the law. But when it comes to districting, the state has to do that every decade because of the one-person, one-vote rule that the Supreme Court had read into the Constitution in the 1960s.

Now I'm just going to skip over a whole bunch of history and go to 1982 when Congress several times had amended the Voting Rights Act— I think the last time was in 1982—and they put life into a section that previously had not been a very important part of the Voting Rights Act: Section 2, which applies to every state, not just the so-called covered states. What they did was they said first of all—and Section 2 essentially prohibits discrimination on voting against racial minority groups, and language minority groups, and so on—it violates Section 2 now, after the 1982 Amendments, if the effects of the system work against these groups. This was to overrule a Supreme Court decision that said that the procedure had to be intended to have that effect. Now, it just has to have the effect.

Then they added a second paragraph that tried to elaborate on this. I can't quote it from memory, but it was definitely the result of a compromise. It seems to require a certain amount of conscious assurance, when the state is doing something like districting, to make sure that minority groups get to elect candidates that they want to elect. There also was a proviso that we're not requiring proportional representation. I think whatever your view of that statute is, one has to sympathize with the Supreme Court, which was given the job of putting meaning into something that the Congress deliberately made devoid of meaning because that was the only way they could reach a compromise.

In 1986, the Court took on the task of putting meaning into it in the case of Thornburg v. Gingles.\textsuperscript{36} I won't go into the details, which are complicated, but certainly the Court said that under certain circumstances, and those circumstances very commonly exist, the state is required to assure that there are sufficient numbers of majority-minority districts—that's the term used for a district in which some minority group such as Latinos or African Americans constitutes a majority. A majority of what is controversial—population, voting age population, the majority of voters—but

\textsuperscript{36} 478 U.S. 30 (1986).
a majority of something. It’s a majority-minority district and *Thornburg* certainly requires the state to do that in a lot of cases.

Now we come up to the 1990s. We have a new census and the states are adopting redistricting plans to take into account the new census, and the Department of Justice, in those states that are still subject to preclearance, which is most of the South and some other states, was taking a very hard line. They were requiring, I think it’s pretty fair to say in many instances, that the maximum number of majority-minority districts that you *can* create, you *must* create, if you want to get preclearance. It’s an oversimplification, but not, I think, a particularly unfair one. This was certainly stretching the *Thornburg* case. Why they were doing it, it’s hard to say, but my best guess is that it’s a combination of civil rights zealots, who probably tend to populate the Civil Rights Division of the Justice Department, being looked upon with perhaps an unusual degree of passivity by the Bush Administration, in the belief that cramming African Americans into districts will be cramming Democrats into districts, and therefore making the surrounding districts less Democratic.

So, in any event, they did this. One of the prongs of the *Thornburg* test was that in order to be required to create these majority-minority districts, the minority community had to live in a compact area, so you could draw a compact district around them. That was largely ignored by the Justice Department. For example, North Carolina did a congressional plan where they created one majority-minority district. The Justice Department said we think you can make two, and we won’t allow the plan only to have one. Well, their idea of where the second one would come from was one that was very convenient for the Republican Party because it would have made the plan much more Republican. The Democrats in North Carolina said, well if that’s the way you are going to be about it, we will create a second black district, but we will be very creative about it and make it run down the highway, and it will be a Democratic plan. And that’s what they did.

Thus, the weird shapes, or the creative shapes, that emerged in North Carolina in those days were a combination of the fact that the Justice Department was ignoring the compactness requirement, together with the fact that states said that if you’re going to make us do this stuff, fine, but we want to do it in our own way, and we have other objectives as well.

That was the situation that faced the Supreme Court when these racial gerrymandering cases came up. Particularly *Shaw v. Reno* and *Miller v. Johnson*. *Shaw v. Reno*, the first case, was a challenge to this North Carolina plan because of this weird-shaped district, and the Court, in a fairly odd decision by Justice O’Connor, said, well, this district is so oddly shaped
that it can rationally be explained only as something that was driven solely by race. That is the premise for the decision. It happens to be a premise that is factually false. The requirement of creating the second black majority district was imposed on North Carolina; the weird shape was in order to make it consistent with Democratic objectives. But that was the premise, false though it was, and the Court said, now you’re drawing classifications based on race, and that is constitutionally suspect, and we’ll send it back for a trial and see if you can show a compelling state interest.

That trial was held, and the lower court found that there was a compelling state interest for doing this. That case is, of course, back in the Supreme Court and will be decided this term, but in the meantime, earlier this year, the Court handed down Miller v. Johnson which was tried—or retried—in the wake of Shaw, under the Shaw criteria, and in that case, the lower court struck down a Georgia district and, therefore, congressional plan, under Shaw. That went up to the Supreme Court, and the Supreme Court affirmed. There was one problem with Miller in terms of the Shaw opinion, and that was that the Miller district is not likely to be mistaken for something drawn by Piet Mondrian, but, as districts go, it’s not that weird-shaped. What makes it a creative district is that district goes around and picks up corners of different cities in different parts of the state, and picks up the black population. So it is not the shape, but it is a creative district.

The Supreme Court in Miller backed-off of this preoccupation with shape and said the real thing is whether the district is created predominantly for reasons of race, and if yes, it triggers strict scrutiny, et cetera. One of the defenses that the state made was that it was the feds that made us do it. The Court said that might be a compelling state interest, but we’re not so sure the feds were right to tell you. You really didn’t have to do it, because they were being excessive in their interpretation of the Voting Rights Act, so that’s not a defense. All right. That’s what the decision said.

Now, why do I think that this is egregious from the standpoint of federalism, and that the Wall Street Journal and the National Review and others of that ilk are betraying their lack of seriousness about some of the things they profess to believe in by celebrating these decisions? Well, it seems to me that if you take the problem presented by the 1990’s districting there are four plausible approaches to take, depending on your views of how race should be dealt with: a radical view, a liberal view, a moderate view, and a conservative view.

The radical view—the radicals I’m talking about are people like Lani Guinier, who is the most famous—I don’t think they are fans of these decisions, but I do believe that they are the only ones who rightfully should
be able to take any aid and comfort from any of these decisions. Their view is, look, we told you this all along; the majority-minority districts are palliative—it’s not a real solution; we won’t ever get full minority representation; what we need is proportional representation, so that minority groups can much more openly, much more overtly, be represented as minority groups. That’s the radical view. Very consistent with Shaw and with Miller and, in fact, those who support proportional representation. I am certainly not one of them. But supporters of proportional representation have taken great heart from these opinions because they say this is the only way that the Supreme Court is leaving us to accomplish the objective of racial minorities getting elected in large numbers. It may be that most of the people in this room don’t believe in that objective, namely, of assuring a certain amount of minority representation in the legislatures, but a lot of people in the country believe in that, and the radicals are saying the only way to get that now is to change the electoral system around. That’s the radical view.

The liberal view is that these cases are wrongly decided because what was done was a good thing. Who cares about the weird shapes? We really should have more blacks in the Congress and in state legislatures, and liberals point to the fact that since Reconstruction there had never been a black from North Carolina, and this is a great thing. Now we have two members, and now the Supreme Court is messing around with it. So the liberal view is very straight-forward. These cases are just wrong because the Voting Rights Act should be interpreted in the most aggressive way possible, which the Justice Department is doing.

The moderate view, I would say, is to stick with Thornburg and to say that the Justice Department was going too far. All we really need to do is give them better instructions, so that the states will realize they don’t have to go to these lengths, but they will, consistent with Thornburg, create a certain number of majority-minority districts.

Now for the conservative view, which is the one that I want to concentrate on for various reasons, including the nature of the audience I’m addressing. What do I mean by the conservative view? I am accepting the view of race that underlies these opinions, partly because I somewhat agree with it (I’m rather ambivalent on this question), and partly for the sake of argument. That is to say, that there should be no artificial stimulus; some racial group getting more representation or getting a certain amount of representation. That’s just an obnoxious goal for the government to be setting, and I’m just going to accept that as given. But I still say these decisions are disastrous, given that assumption.
What should they have done, given that view? Well, I think they had a choice of two things: they either should declare that Section 2, as they interpreted it in *Thornburg*, is unconstitutional, or they should do what Justice Thomas proposed in the case of *Holder v. Hall*,\(^\text{37}\) and say, oh dear, we were wrong, and Section 2 doesn’t require any of this stuff at all; in fact, the Voting Rights Act doesn’t apply to anything except allowing people to vote, and making sure the voting gets counted right. I think that is very, very weak from the standpoint of statutory interpretation, but at least it’s a way of getting from here to there, and if you don’t like declaring laws of Congress unconstitutional, maybe it’s a preferable way of getting there. The end result is the same either way.

But the Court didn’t do that. If they had done that, what they would have been doing would have been removing this federal pressure and saying leave it to the states, let the states decide how they want to draw their districts. That seems to me to be a view our old friend Brutus probably would think was a good idea. But given what they did, they have done the exact opposite: they are squeezing the states out of the process because they have not yet—they may, but they have not yet—cast any doubt on the requirements of the Voting Rights Act. So the Voting Rights Act says be race conscious, be race conscious, be race conscious; do this, do this, do this. And you have to do that. And now *Shaw* and *Miller* say that once you’ve done that, stop being race conscious—don’t think about race. And I think that’s very difficult.

I think that’s very difficult for an individual psychologically. Suppose I say, for example, I don’t want anybody in this the room to think about, or form a picture in your mind of, Winston Churchill wearing a top hat. I’d be willing to bet that nobody in the room was thinking about Winston Churchill wearing a top hat until I said that, and then anybody who is listening to me—both of you—probably immediately got an image in your mind of Winston Churchill wearing a top hat. To say do race, do race, do race, and now stop—how can you say that and then be completely oblivious to the racial consequences of your districting after you’ve already taken into account all the things that you have to do to comply with *Thornburg*? How can you individually do that? Now, impose that on a political process, and how is a legislature, and all the lobbyists, and all the interest groups that are trying to have a bearing on the reapportionment law—how are they supposed to do that? What the Court is saying is that you must go this far; you cannot go any further. It seems to me that that means you have no room for discretion whatsoever. This is squeezing the state out of a process that is at the center of its need to be an autonomous polity, to be able to decide through its own

\(^{37}\) 114 S. Ct. 2581 (1994).
political processes what the system of representation is going to be in that state. That, to me, is the heart of the problem, but there are some other things that are worth mentioning briefly.

The Shaw-Miller doctrine creates so many questions that there is complete uncertainty. This is a formula for allowing federal judges to decide to draw district lines for states, and if you believe that federal judges go about deciding redistricting cases without regard to their own political views and partisan preferences, there's a bridge in New York that I'd like to sell you. The federal presence here distorts redistricting politics with the Shaw-Miller gloss added on. It means that if minority groups in the state push for their proposals the same as other interest groups are doing, they run the risk of making the whole plan unconstitutional. So how are the political pressures supposed to be balanced when one of them is suddenly put under a federal cloud? Well, there are other things, but I'm running out of time. This is sort of the beginning of a writing project for me. The paper that I intend to write eventually will probably be called “Why you don't have to be liberal to hate the racial gerrymandering cases.”

Thank you.

MR. GREENE: We have a few minutes or seconds for questions and answers. I also encourage the panelists to jump in and defend themselves.

QUESTION: I have a question for Professor Lowenstein. It seems to me an odd sense of protection of federalism and the autonomy of states to say that the Supreme Court is interfering with the ability of states to do exactly what the Justice Department compels them to do in redistricting. In both the Miller case and the Shaw case, the state legislatures were rejected when they attempted to redistrict. The Justice Department, in pursuit of its own clearly erroneous view of the Voting Rights Act, refused to allow those states to draw their political boundaries the way they thought right.

So, can you explain to us how the Supreme Court is interfering with the autonomy of the states by telling the states that at least the Fourteenth Amendment limits the Justice Department’s intrusion into how they would draw their own lines?

PROFESSOR LOWENSTEIN: Because the Supreme Court is blaming the victim.

The victim is the state, and the Justice Department says we can't get our plan cleared unless we do this, so we do it. We have a lot of other things on our mind besides race. Also, we don't want all our political objectives to be
destroyed because we didn’t comply with the Justice Department, so we’ll accommodate the Justice Department. I think that given the racial policy of the Court, what they should do is rein in the Justice Department. Now, the moderate way to do that would be to say to the Justice Department, stop doing this because you’re not acting consistently with Thornburg. The conservative view, I think, would be to say stop doing it because we are now saying that Section 2, either because it’s unconstitutional or because we are changing our interpretation of it, simply does not require race conscious districting, period. In that case, the states won’t feel pressure from the Justice Department, or from the federal government at all. They will do the redistricting the way they want it.

QUESTION: In the context of both of those cases, there really was no way for the Court to go back and undo what the Justice Department had done. It was presented with state statutes passed by the states under the compulsion of the Justice Department, and as we all know that work in this area, that it is almost always—ninety-nine percent of the time—cost prohibitive to challenge the Justice Department’s denials of preclearance.

PROFESSOR LOWENSTEIN: I agree that Shaw and Miller would not have been the ideal vehicles for the Court to implement its race policy in a way, to me it seems, that would make sense and would be consistent with principles of federalism. They could have found another vehicle, or they could have written the Shaw case saying this is a ridiculous claim that these plaintiffs are making. The underlying problem here is that maybe Section 2 is unconstitutional or maybe the Justice Department was acting way beyond its bounds. They could have invited the right kind of case. So I think your point is correct in a kind of technical sense, but they have so much control over their agenda and over the way they want to operate, that I don’t regard it as a particularly substantial concern.

QUESTION: This question is primarily for the panelists who defended the Antifederalists. Once you accept the position of the Antifederalists, and argue that the judiciary should not have this much power, is there a danger then that Congress will assume too much power, and if not, why not?

PROFESSOR GRAGLIA: There is indeed a danger that Congress will have too much power. The central fact is that all government is dangerous, which is why we should try to have as little of it as is feasible. The best means for controlling government power are federalism, keeping government close to
the people, and democracy or, more accurately, republicanism, government by officials chosen by the people and subject to their approval at regular elections. Policy-making by the Supreme Court violates both of these principles: it is both totally centralized and totally undemocratic.

Hamilton and Marshall, who are largely responsible for judicial review, thought it would be a conservative force, a brake on change. With *Brown v. Board of Education* in 1954, however, it became an initiator and accelerator of change. Since that time, all or mostly all major changes in American domestic social policy have come not from elected legislators but from judges and ultimately the Justices of the Supreme Court acting in the name of the Constitution.

Now, there are just two things you need to have about constitutional law. First, it has virtually nothing to do with the Constitution, as I could easily show if I had time. The abortion decision did not come about in 1973, for example, because the Court discovered something in the Constitution that had not been noticed before. Second, the Court's controversial constitutional decisions of the last four decades have not been random in their political thrust. They have served almost uniformly to enact the policy preferences of the political left. The ACLU never loses in the Supreme Court, even though it does not always win. The Supreme Court bans prayer in the schools; that is the ACLU position. It orders busing for school racial balance; that is the ACLU position. Vagrancy control, pornography, new rights for the criminally accused, abortion, aid to religious schools, and so on endlessly, the Supreme Court's decision is always the ACLU position. This is no coincidence, and it is why the academic left, well represented by Professor Chemerinsky, supports and defends judicial review.

Now, Professor Chemerinsky, like all defenders of judicial review, will say in response, what we have is not a democracy, but a *constitutional* democracy. A constitutional democracy, however, turns out to be no democracy at all, but policy-making by judges in the service of left-wing causes. Ninety-eight percent of constitutional cases involve state, not federal, law and nearly all of them purport to be based on a single constitutional provision, the Fourteenth Amendment, and indeed on four words: "due process" and "equal protection." You can be sure that the Justices don't reach their liberal decisions on a vast array of difficult questions of social policy by studying those words.

But who will protect the rights of prisoners, for example, Professor Chemerinsky has argued, if not for judicial review? The real question, however, is not one of protecting the few and limited rights the Constitution grants, but of creating new rights. But new rights do not come from the sky
or some higher order of beings. In a system of self-government, the question of the scope of prisoner rights is to be decided by the elected representatives of the people, not by unelected judges pretending to discover new rights in, as Judge Batchelder said, "penumbras" formed by "emanations" from the Constitution.

PROFESSOR CHEMERINSKY: I'll be very brief. Professor Graglia said, I think, that constitutional law is a guise for enacting liberal policies. Nonsense.

The best evidence I can offer of that is the last term of the Supreme Court. Look at the decisions: *Lopez*, which I already mentioned; the case that approved drug testing, *Vernonia School District v. Acton*; the two affirmative action cases, *Adarand Constructors v. Pena* and *Miller v. Johnson*; the prisoners' rights case, *Sandin v. Conner*; the two cases with regard to the Establishment Clause and speech, *Pinette* and *Rosenberger*; and the case that substantially eliminated federal school desegregation efforts, *Missouri v. Jenkins II*.

I will agree that between 1954 and 1969, out of all American history, we had a liberal Supreme Court. That was atypical. But hardly now could we say that the Rehnquist Court is a guise for enacting liberal policies.

Moreover, there is a Constitution, and it must be enforced. We can argue over whether we want the Court to find unenumerated rights or not. We can argue whether *Griswold* was a desirable decision, although it seems clear to me that the Constitution must be interpreted to protect privacy and a right to use contraceptives. That seems to me a fruitful subject for discussion about which people can disagree. But it doesn't seem to me at all useful to talk about whether there should be a power of judicial review. The judiciary is essential if the Constitution is to be enforced and have any meaning.

My final comment is that we should be careful about drawing generalizations from limited examples. Judge Batchelder gives two examples of judges' decisions she doesn't like: *Griswold v. Connecticut* and *Missouri v. Jenkins*. Although I agree with both of these decisions, even if one grants that they are misguided, it proves little about the judicial process. I can point to lots of silly laws that legislatures have adopted in the course of American history, and say that based on these silly laws, we're better off without the power of the legislature existing. It seems to me that generalizations are very

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dangerous. What we really should be talking about is what is the appropriate content of judicial review, not whether the power exists or not.

PROFESSOR GRAGLIA: Unfortunately, it is not true that, although we had a liberal Court from 1954 to 1969, we now have a conservative Court. The sad truth is that not one of the major controversial decisions of the Warren and Burger Court eras has been overruled; not abortion, pornography, prayer in schools, Miranda, vagrancy, and so on. It is important to understand that for a liberal, a “conservative” Court is not one that gives conservatives victories they can’t get in the political process such as it gives liberals; a conservative Court for them is merely one in which liberal victories come less frequently. A conservative victory comparable to Roe v. Wade, for example, would not be just to overrule Roe v. Wade and return the issue to the political process—which the Court, of course, refused to do—it would be to hold that for a state to permit abortion is unconstitutional. It would be, to take another example, not merely to overrule the decision banning prayer in the schools, but to hold that the states must provide for prayer in the schools. Then we would have a conservative Court giving conservatives positive victories the way it has given and continues to give liberals positive victories. That day has not come, and I do not expect to see it come.

II. DEBATE: GOOD ORIGINALISM, BAD ORIGINALISM, AND THE NATURAL LAW DEBATE

[This is] a debate on the subject of natural law, original meaning, and the Constitution. Dr. Harry Jaffa of the Claremont Institute will defend a theory of constitutional interpretation that includes invoking the natural law principles of the Declaration of Independence to construe constitutional text. Former U.S. Assistant Attorney General Charles Cooper will argue instead that the natural law approach is a form of activist judicial overreaching.

MR. STEVE TWIST:41 We meet at this hour for a vigorous and challenging debate—this will plumb the depths of the meanings we ascribe to the phrase “original intent.” In this debate we will hear two brilliant scholars

41. Attorney, Phoenix, Arizona; Special Counsel, NRA Crime Strike; Senior Fellow, American Legislative Exchange Council. Mr. Twist is a member of the Victim’s Bill of Rights Task Force, the Morrison Institute, and is a legal consultant to the Goldwater Institute’s project on federal mandates.
study its contours, it recesses, and the veins of its core and determine if it flows beyond the text of the Constitution itself and reaches deep into the Declaration of Independence and the inner chasm of the laws of nature and of nature’s God.

About one principle the contestants do not share a disagreement. Professor Harry Jaffa allows that “the notion that the Justices of the Supreme Court may in any way alter or amend the law of the Constitution by importing into it ideas or principles drawn from outside the Constitution itself, is utterly abhorrent to sound jurisprudence.” “Like Judge Bork,” Professor Jaffa continues, “I am devoted to the principle that the Justices of the Supreme Court are bound unqualifiedly by the positive law of the Constitution and that the positive law of the Constitution is to be understood in terms of the original intent of those who framed it and those who ratified it.”

So much for the area of agreement. When Professor Jaffa goes on to argue that “natural law principles”—by which he principally means those embedded in the Declaration of Independence—“natural law principles are present within the Constitution as elements of the positive law of that Constitution,” Mr. Cooper stands astride the argument and yells “stop.” This he tells us, and will today, is bad originalism—meaning not originalism at all. It is instead an invitation to judicial activism as profound and compelling as any that Justice Brennan might have penned.

Perhaps one more area of agreement might be found. Both men might also agree that extremism in defense of the original intent of the Framers is no vice, and moderation in pursuit of an understanding of that intent is no virtue.

So now we turn to the contestants.

Professor Harry Jaffa: Winston Churchill and some of his friends organized the Other Club in the early 1920s after they had been blackballed by the Carlton Club. Among the bylaws in that club was that the rules shall not in any way mitigate the asperities of political debate. I can assure you that in the exchanges that have gone on between me and Robert Bork and

42. Henry Salvatori Research Professor of Political Philosophy (Emeritus), Claremont McKenna College & Claremont Graduate School. Dr. Jaffa is author of, among other titles, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION (1994), and is a frequent contributor to the National Review magazine.

The editors encountered audio difficulties when reviewing the transcripts of Dr. Jaffa’s remarks. However, the paper on which Dr. Jaffa based his remarks has subsequently been published as Slaying the Dragon of Bad Originalism: Jaffa Answers Cooper, 1995 PUB. INTEREST L. REV. 209.
Lino Graglia and Mr. Cooper here, nothing has yet mitigated the asperities of our debate.

Professor Graglia, for example, in the article on our debate in the National Review last August\textsuperscript{43} began by saying, "Harry Jaffa has long engaged in a campaign of vilification against Robert Bork and William Rehnquist, the campaign I consider both sad and shabby." That was his introduction.

Robert Bork ended his review of my book in the National Review\textsuperscript{44}—and I might say that I wrote to Bill Buckley saying that giving my book to Robert Bork to review was like giving an Anti-Stalinist tract to Stalin to review—Bork said "written in dyspeptic prose, Original Intent and the Framers of the Constitution is one of the least coherent, least consequential, and most disingenuous pieces of constitutional theorizing on record." I don’t think he likes me.

I can thus begin this discussion, I think, by mentioning that my interest in the subject of unfunded judicial mandates can be summed up in one phrase, which some of you may have heard before—although I doubt it’s been mentioned here today, it’s likely to be mentioned at most Federalist Society meetings—that is, "taxation without representation is tyranny." That was the principle. Now, why is it tyranny? Thomas Hobbes said tyranny is merely kingship disliked, and I think you’ll find that to be the theory to which Mr. Bork and Justice Rehnquist subscribe—all denunciations of positions that you don’t believe in are simply value judgments disliked, without any objective rationale of their own.

For me, the great crisis of our time—not merely the Constitution, but really of western civilization as a whole, which is a sharp focus, I believe, in the United States today—is the profound alienation of our intellectual elites, both liberal and conservative, from the principles of the Founders. It is the root of the moral disintegration and political disintegration we see going on in our society.

I’ll give you an example of how shocking this alienation is through a letter I wrote, which is not yet published because I need to send it, commenting on a remark that Robert Bork made in the February 1995 Commentary. Bork had written an article on "What to Do About the First Amendment,"\textsuperscript{45} and the positions he took there on the limits to the Free Speech Clause, and how he viewed the religion clauses, were positions that I

\textsuperscript{43} Lino A. Graglia, God and Man in Court, NAT’L REV., Aug. 14, 1991, at 27.
\textsuperscript{45} Robert H. Bork, What to Do About the First Amendment, COMMENTARY, Feb. 1995, at 23.
agree with. This didn’t arise in a disagreement between the two of us, but one of his critics who disagreed with what he said about the Free Speech Clause had said that Judge Bork should sometime read the Declaration of Independence, and with very special reference to the right of revolution, which, of course, is not in the Declaration in those words. But the right to alter and abolish governments is a phrase in the Declaration which is interpreted correctly as the right of revolution. Bork replied to his critic, “It is particularly nonsensical to quote the Declaration of Independence’s enunciation of a right to alter or abolish government. That right was asserted against an English government, in which Americans had no say, and which they regarded as tyrannical. Having established a representative government here, the Founders proceeded to enact laws that denied any right of revolution on these shores.”

I don’t think it is possible to say something more false and more remote from the frame of reference of our constitutional fathers and the men who made the revolution than that—it just is not possible. I said the Founders never enacted laws denying a right of revolution on these or any other shores. Nor could they: the right of revolution is a natural right. Actually, the right of revolution is just another form of the right of self-defense. The establishment of a representative government may diminish, but it can’t remove, the possibility of a tyranny that may justify revolution. In the Federalist Papers and in many other places, the Founders expressed their fear of the tyranny of the majority. The fear of a tyrannical majority was a dominating concern of those who framed and ratified our Constitution. The whole system of checks and balances and dual federalism was justified on the basis of the way in which it contributed to preventing the tyranny of the majority. How to combine preventing a tyranny of the majority with effective government was a problem I think they solved very successfully.

In 1798, in the Kentucky Resolutions, Jefferson denounced the Alien and Sedition Acts and the elected government responsible for them, in terms very similar to those with which, in 1776, he denounced the King in Great Britain. These acts, Jefferson said, and successive acts of the same character, unless arrested on the threshold, tend to drive these states into revolution and blood. And if you read the Kentucky Resolutions, he repeats over and over that the men that we have elected have done these terrible things, and if they continue in that course—the long train of abuse—they will bring about a revolution. There was never any question that the right of revolution underlay all our constitutional forms of government.

In his inaugural address, Abraham Lincoln said, “This country with its institutions belongs to the people who inhabit it. Whenever they shall grow
weary of the existing government, they can exercise their constitutional right remanding it, or their revolutionary right to dismember or overthrow it.” Lincoln always insisted upon the right of revolution, and his argument against the South was not about the right to revolt, but the fact that they denied that they were revolting and were exercising a constitutional right to secede.

So I suggest to you that you could not find anywhere a statement more ill-informed—more ignorant—of the foundations of the American Revolution, and from which the Constitution emerged. It’s not possible.

Now, in my debate with Judge Bork, I made particular note of the fact, that in his book, *The Tempting of America*, he launched his campaign against what he called substantive due process. Substantive due process, he said, came into constitutional law in the *Dred Scott* case, in which Taney had invented a right of slave ownership which was nowhere in the Constitution. No one in two hundred years has ever said that the right to own slaves had not been recognized in the Constitution—it was. Later, Judge Bork tried to escape from the consequences of his own mistakes by saying he didn’t mean it wasn’t recognized, but it wasn’t authorized by the Constitution. Well, it’s true it was recognized.

Charles Cooper tried to defend Bork’s obvious mistake, which he conceded somewhat grudgingly, but he did concede it. He said Bork only meant recognized, and not conferred. So Cooper tried to defend Bork by saying the right to own slaves was not conferred by the Constitution. And as an example of a right that was conferred by the Constitution, he mentioned the Second Amendment: the right to bear arms.

Cooper, I think, has dug himself a grave even deeper than the one that Bork was already in, because the Constitution does not confer rights at all. None of the rights in the Bill of Rights are conferred by the Constitution—they are only recognized and secured. It was unquestionable that Madison, when he introduced the Bill of Rights before the Congress, was introducing rights that Madison himself called the great rights of mankind, which means the rights of man under the laws of nature and nature’s God. The right to free exercise of religion was the one which was in the foremost consciousness of Madison, Jefferson, and their generation.

Government of majority rule and minority rights had never been possible in Europe for more than a thousand years, because governments officially espoused one religion or another, and whatever was the religion of the king

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was the religion of the people. You can't have a system of majority rules and minority rights when the minority religions have no part in the political process. They have to get religion out of the political process in order to have majority rules and minority rights: you can't decide by vote whether somebody should be a Catholic, or Protestant, or Muslim, or a Jew, and so the free exercise of religion had to be made a private right which government may not infringe. It was always recognized that it was a private right by nature—that the nature of the human mind was such that the government could not decide for an individual what his conscience should tell him as to how he should worship God.

Constitutional government exists in order to secure rights with which men have been endowed by their creator. And, by the way, the words of the Declaration of Independence, and the Declaration itself, are appealed to constantly. But it's not the words of the Declaration, but the principles of the Declaration which were expressed in almost all of the documents of the American revolution. The Massachusetts Bill of Rights of 1780 and Virginia's Bill of Rights of 1776, which preceded the Declaration of Independence, expressed the same basic doctrines.

Jefferson, in his Summary Views of the Rights of British America, which is a kind of symposium, I'd say, of the American case against Great Britain in 1774, ended by saying that, "The God who gave us life, gave us liberty at the same time: the hand of force may destroy, but cannot disjoin them." What he was talking about, at that point, by the way, was that our property could be taxed only by our own consent. And you will find in the Declaration of Independence itself—although it refers to what our representatives may do with the question of taxation—the Declaration speaks not of our representatives, but our consent, which simply was more emphatic to the idea that we must consent—that our property is ours because we own ourselves. The very idea of property is grounded in the principle of nature that a man owns himself, and therefore owns the fruit of his own labor. Government is established to protect that right, but does not grant that right.

So the whole idea that rights are granted by the government is the essence of totalitarianism—it is inconsistent with the idea of free government as certainly it was known at the time of our founding.

My quarrel with Justice Rehnquist—and this is something you'll see goes far beyond the question of constitutional law—Justice Rehnquist and the one statement that he made of principles of jurisprudence, in an essay he wrote after a lecture he gave at the University of Texas in 1976. In explaining

what the nature of constitutional government was, he criticized those who ignore the nature of political value judgment in a democratic society. If such a society adopts a constitution and incorporates into that constitution safeguards for individual liberty, these safeguards do indeed take on a moral rightness or goodness. They assume a general social acceptance, neither because of any intrinsic worth, nor because of any elite origins of someone’s idea of justice, but instead simply because they have been incorporated in the constitution by the people.

I hope you will take time to reflect on the meaning of these words, which I doubt Justice Rehnquist ever did. I’m impressed myself with what he says here. He says that safeguards of the United States Constitution as a whole can be looked upon as an attempt to provide safeguards for individual liberty—that’s what it is. But, according to Justice Rehnquist, these safeguards do not have any intrinsic worth. They acquire whatever notion of worth they have by being adopted because they’re adopted—they have no intrinsic worth. In other words, there is no objective reason why we ought to have such a Constitution. I don’t think that Justice Rehnquist is particularly influential in American society, as a whole, for holding these views, and probably most people don’t even know that he had them. But what is really depressing and demoralizing is the fact that a man of his eminence should accept unquestionably such utterly repugnant views as the basis of constitutional law.

I’d also like to add to that and point out that the Constitution of 1787, as amended in 1790 and 1791, of course, had many safeguards for individual liberty. But it also had some very remarkable safeguards for slavery. According to this line of reasoning, the safeguards for slavery have the same moral goodness that the safeguards for liberty have. That, by the way, was the root cause of the Civil War. The Southerners in 1860, tutored by John C. Calhoun, insisted that safeguards for the other clauses, which were safeguards for slavery, had the same moral status as any other part of the Constitution. They demanded that free states repeal their Liberty Clause because they could not remain fellow citizens with those who morally condemned an institution that was so popular to them as slavery.

Rehnquist’s argument is to plead support for Calhoun’s position. I said this in my book, and Robert Bork frothed at the mouth at the suggestion that he or Rehnquist would have anything in common with Calhoun, but he never addressed himself to that argument.

If a constitution gains whatever moral rightness or goodness it has simply by being adopted, then whatever a people adopts acquires moral goodness from that fact. The constitution of the German people during Hitler’s regime
were laws that Adolf Hitler said express the will of the German volk—that means people. They had adopted a Nazi Constitution that acquired moral goodness by the fact that it was accepted by the German people.

Now, you see in this that there was no basis for minority rights. If a people adopts a constitution that protects the rights of some, and denies the rights of others, both of those aspects of that constitution have the same moral standings. That’s part of our disagreement with my interlocutors here, and I think that at this point I’ll turn the podium over to them.

HONORABLE CHARLES COOPER. Good morning, ladies and gentlemen. It was entirely predictable that Professor Jaffa would quote a passage from Chief Justice Rehnquist’s 1976 Law Review article entitled “The Notion of a Living Constitution.” He quotes the passage in all of his work on this subject as proof of the moral relativism and nihilism of Rehnquist, and therefore also of Lino Graglia and other originalists.

Jaffa draws this conclusion not from the quoted passage itself, but rather from what he says the passage means. According to Jaffa, in the pages of the National Review and here this morning, Rehnquist is saying that “such constitutional safeguards”—these are Jaffa’s words—“such constitutional safeguards of individual liberty as the free exercise of religion, freedom of speech, and the press, and trial by jury, do not of themselves have any intrinsic worth.”

Now, is that really what Bill Rehnquist is saying? Those of us who know him recoil from the charge, knowing that, if he did in fact say that, he misspoke, because he certainly doesn’t believe that. But let’s look again at the words quoted by Mr. Jaffa. In discussing “the nature of political value judgments in a democratic society,” Rehnquist said that “safeguards for individual liberty,” once they are incorporated by a society into a constitution, “assume a general social acceptance neither because of any intrinsic worth nor because of any unique origins in someone’s idea of natural justice, but instead simply because they have been incorporated in a constitution by the people.”

49. Partner, Shaw Pittman, Potts & Trowbridge, Washington, D.C. During the Reagan administration Mr. Cooper served as an Assistant Attorney General for the Justice Department’s Office of Legal Counsel, and as Deputy Assistant Attorney General in the Civil Rights Division. He was a law clerk for then Justice William Rehnquist on the Supreme Court, and Judge Paul Roney on the U.S. Court of Appeals for the Fifth Circuit. Mr. Cooper is co-chair of Virginia Governor Allen’s Council on Self-Determination and Federalism, and is representing Arizona in connection with activities of the Constitutional Defense Council.

I do not understand these words to mean that safeguards for individual liberty have no intrinsic worth. That is not what Rehnquist said. Rather, I understand these words to say that safeguards for individual liberty, or any other political value judgment for that matter, can be taken as accepted generally by the society only if, and because, they have been adopted by that society in its constitution. Prior to that time, political value judgments, including even safeguards for individual liberty, are not binding on the society generally—are not law—no matter what their intrinsic worth.

Any doubt about the meaning of Rehnquist’s statement, however, is removed by the context from which Mr. Jaffa rips it. Rehnquist was speaking generally on the role of, and limits on, judicial review in a nation that prides itself on being a self-governing representative democracy. Rehnquist denied that federal judges had a role of their own, quite independent of popular will, in second-guessing Congress and state legislatures concerning what is best for the country. Once a judge ventures beyond the Constitution and the laws of our society, he has only his individual conscience to call upon, and a judge’s conscience is not law. This is how Rehnquist put it on the same page bearing the passage quoted by Mr. Jaffa: “There is no conceivable way by which I can logically demonstrate to you that the judgment of my conscience is superior to your conscience and vice versa. Many of us necessarily feel strongly and deeply about our own moral judgments, but they remain only personal moral judgments until in some way given the sanction of law. [And] it is the fact of their enactment [as law] that gives them whatever moral claim they have upon us as a society . . . and not any independent virtue they may have in any particular citizen’s own scale of values.” So it is clear that Rehnquist did not, after all, make the startling statement that safeguards for individual liberty have no intrinsic worth. Rather, he simply said that the intrinsic worth of such safeguards, however great, does not make them law, binding on the society generally and enforceable by judges. Only the people, through the process of enactment, can make them law in a democratic society.

I open with this lengthy correction of Jaffa’s misrepresentation of Rehnquist’s views not just out of the sense of loyalty to Rehnquist, although I confess that’s part of it. I do so because Jaffa’s entire body of work on this subject is shot through with statements invented by Jaffa for their shock value and stuffed into the mouths of Rehnquist, Bork, and Jaffa’s other enemies. But Jaffa’s distortions are not limited to the views of his enemies, for his entire theory of constitutional interpretation is founded upon a palpable misreading of the views of Madison and Jefferson.
Jaffa claims to be an originalist. He shared Bork’s and Rehnquist’s view that the Constitution is to be understood in terms of the original intent of those who framed and those who ratified it. The purpose of his “campaign of vilification”—as Lino Graglia has aptly put it, as Mr. Jaffa noted earlier—is to prove that, in his words, “their jurisprudence does not, in the most important respect, correspond with the intent of those who framed and those who ratified the Constitution.” The defect in the thinking of these originalists lies in their failure to accept natural law principles, as reflected in the Declaration of Independence, as the governing constitutional intention of the Founders.

All of Mr. Jaffa’s thinking on the subject of constitutional interpretation is grounded upon, and flows from, the premise that, in his words, “the principles of the Declaration of Independence are the principles of the Constitution.” Most originalists agree that in some cases the principles expressed in the Declaration can inform and illuminate our understanding of the intended meaning of the principles of the Constitution. But Mr. Jaffa says that “the principles of the Declaration of Independence are indeed the principles of the Constitution.” And because “the principles of the Declaration of Independence are the principles of the Constitution, we do not look outside the Constitution, but rather within it, for the natural law basis of constitutional interpretation.” He acknowledges that his view is unorthodox, confessing that he is probably “the only living soul who has written on original intent who agrees with this central thesis.” I have no doubt that is true.

The claim that the Founders intended courts to enforce natural law in constitutional cases, however, must be examined carefully. For if it is true, then the faithful originalist must abide by it. And what is the source of this penetrating insight that Jaffa alone has been able to grasp? Well, he says that we have nothing less than “Madison’s and Jefferson’s word that the principles of the Constitution”—nowhere to be found in the Constitution are those of the Declaration of Independence—as proof for this assertion. He cites an 1825 exchange of correspondence between the two men concerning the books and other documents that the Board of Visitors of the University of Virginia, of which both men were members, were to recommend to the law faculty as authoritative sources on the principles of government.51 This correspondence led to a resolution on the subject by the Board of Visitors.

Throughout Mr. Jaffa’s writing on constitutional interpretation, he resorts to this resolution as the dispositive and singular evidence of the Declaration’s “authoritative role” in constitutional interpretation. Indeed, he says this

resolution proves, in his words, that “Jefferson and Madison believed that the principles of the Declaration of Independence ought to be taught to the law students at the University of Virginia as the principles of the Constitution.” In light of this fact, Jaffa is puzzled that the significance of the resolution has thus far eluded all but him. “In all the discussion of original intent, it has apparently not occurred to any of the luminaries—present-day conservative (and of course liberal) jurisprudence—even to consider it.” A reading of the resolution, and the correspondence that forms its backdrop, solves this mystery.

The idea of a resolution prescribing texts to the law school on the principles of government originated with Jefferson. Although Jefferson’s draft resolution apparently cannot be found, much about its content is known from Madison’s reply, which warrants extended examination.

Madison opens by agreeing generally with Jefferson’s “proposal of a textbook for the Law School,” but laments that it is “not easy to find standard books that will be both guides and guards for the purpose.” He then addresses five specific documents, all of which apparently were included in Jefferson’s draft resolution: the writings on government of Algernon Sidney and John Locke, the Declaration of Independence, The Federalist, and the Virginia Resolutions of 1799. Of the writings of Sidney and Locke, Madison says that they are “admirably calculated to impress on young minds the right of nations to establish their own governments, and to inspire a love of free ones; but afford no aid in guarding our Republican Charters against constructive violations.” And the Declaration of Independence, said Madison, “falls nearly under a like observation”—that is, it too affords no aid in guarding our republican charters against constructive violations. Thus, the Declaration, according to Madison, provides little, if any, protection against misconstructions of the Constitution.

This is, to put it charitably, a very odd way of saying that the Declaration embodies constitutional principles no less authoritatively than does the Constitution itself. Indeed, Madison’s summary dismissal of the Declaration as an aid in understanding the meaning of the Constitution contrasts sharply with his treatment of the interpretive significance of The Federalist. This is what he said: “The ‘Federalist’ may fairly enough be regarded as the most authentic exposition of the text of the federal Constitution, as understood by the body which prepared and the authority which accepted it.”

Madison concluded his response to Jefferson by suggesting the addition of Washington’s inaugural speech and farewell address, and enclosed a revised draft of the operative passage of the resolution. The revised resolution ultimately was adopted by the Board of Visitors, and this is what it said in
relevant part: "And on the distinctive principles of the government of our own State and that of the United States, the best guides are to be found in (1) the Declaration of Independence as the fundamental act of union of these States; (2) the book known by the title of The Federalist, being an authority to which appeal is habitually made by all, and rarely declined or denied by any, as evidence of the general opinion of those who framed and those who accepted the Constitution of the United States on questions as to its genuine meaning"; and then it goes on to list (3) the Virginia Resolutions of 1799; and (4) Washington's inaugural and farewell addresses.

Now, note that the four documents listed in this resolution are not described, as Mr. Jaffa would have it, as guides to the principles of the Constitution, but rather are described as guides to the principles of the government of Virginia and the United States. This is because all four of the documents listed in the resolution are indeed excellent guides to the principles of government, but only one item listed in the resolution, The Federalist, is an excellent guide to the principles of the Constitution. And The Federalist is specifically characterized in the resolution as a familiar and commonly accepted authority on the general opinion of those who framed and those who accepted the Constitution of the United States on questions as to its genuine meaning. This, of course, comports with the view expressed by Madison in his letter to Jefferson. And, while the Declaration was described in the resolution as "the fundamental act of union of these States," which it plainly was, neither Madison nor Jefferson suggested that the Declaration embodied or prescribed the constitutional principles of that continued union, which it plainly did not. In sum, Madison told Jefferson both that The Federalist is the most authentic guide to the genuine meaning of the Constitution, and that the Declaration, in contrast, offers little aid in construing the Constitution. And Madison's view was reflected in the resolution that was adopted by the Virginia Board of Visitors.

But there is yet more in the resolution that refutes Mr. Jaffa's reading of it. Were Mr. Jaffa's understanding of the interpretive significance of the Declaration as canonical to the Founders, as he says, one would expect to find this view expressed often by them—either explicitly in their descriptions of the judicial function in interpreting the Constitution, or implicitly in their own written opinions interpreting the Constitution. Surely someone would have suggested in the debate over adding the Bill of Rights that such a Bill of Rights would be entirely redundant to the principles of the Constitution. Mr. Jaffa cites no evidence of this kind. To the contrary, the other three documents listed in the resolution of the Board of Visitors contain strong internal evidence against Mr. Jaffa's thesis. The Federalist is devoted almost
exclusively to explaining the meaning of the words and phrases that comprise the Constitution's text, yet nowhere do its authors attach interpretive significance to the Declaration, let alone equate the principles of the Declaration with the principles of the Constitution. To the contrary, Hamilton's classic statement in Number 78 of the judicial function in constitutional adjudication does not even refer to the Declaration.

Similarly, the Virginia Resolutions of 1799 addressed one of the most contentious constitutional issues of the period: the constitutionality of the Alien and Sedition Acts, to which Mr. Jaffa has already made reference. Madison, as a member of the Virginia House of Delegates, authored a lengthy committee report defending the resolutions. Madison's attack on the constitutionality of the Sedition Act is among the finest examples of constitutional interpretation—of originalism—as there is to be found. Madison painstakingly analyzed the language, structure, and history of each of the relevant constitutional provisions. He looked to the proceedings in the conventions of the Framers and the ratifiers; the arguments advanced in The Federalist; and the history of the framing of the First Amendment in the First Congress. He did not mention the Declaration.

Finally, President Washington's specific references to the Constitution in his farewell address make no mention of the Declaration.

So, when one actually takes the time to examine the sole source of authority cited by Mr. Jaffa for his extravagant and counterintuitive claim that the Founders believed that the principles of the Constitution are the principles of the Declaration, one finds that it is not true. In fact, one finds that Madison certainly, and Jefferson probably, believed that the Declaration afforded little aid even in construing the Constitution. The only authority for Jaffa's thesis is Jaffa.

Which brings me to my final point. Earlier I quoted Chief Justice Rehnquist's frank admission that he could not logically demonstrate that his personal moral judgments are superior to mine or to yours. Mr. Jaffa thinks that he can. He is certain that natural justice is objectively determinable through reason, and his writing drips with the moral conceit that he is possessed of the ability, "supplied by right reason," to discern, in his words, "the philosophic truth concerning the just and the unjust; the right and the wrong; the good and the bad." That is his constitutional standard. For those who share his conservative moral values, and I largely do, Jaffa's natural justice prescription for constitutional adjudication would yield consistently satisfactorily results—so long as Mr. Jaffa is doing the adjudicating.

But natural justice also can be invoked by, say, Justice Brennan, who is no less certain than Jaffa of his ability to discern his own liberal version of
natural justice, which he calls "the constitutional vision of human dignity," and which he finds through "a personal confrontation of the wellsprings of our society." Justice Brennan’s vision of human dignity tells him, among other things, that the Constitution forbids capital punishment in all cases, notwithstanding express recognition of the practice in the Fifth Amendment. Mr. Jaffa, in contrast, believes that the death penalty is entirely consistent with natural justice, and thus with the Constitution. But neither Brennan nor Jaffa makes a serious effort to discern the genuine meaning of the Constitution on the issue: for both, the issue is determined by what is right and what is wrong.

In the case of Justice Brennan, this approach to judging yielded thirty years of consistent liberal activism. How do I know that Justice Brennan was an activist? Well, there is a test. Can you cite a single case in thirty years in which Justice Brennan cast a vote in favor of a constitutional interpretation that yielded a result that he loathed? Or even a result that he was discomforted by a little bit? I defy you to do it. Can it be that our Constitution always yields results that mirror the personal moral judgments of any one person? Professor Jaffa, can you identify a single tenet of the natural law that, if applied by Judge Jaffa, would yield a result that he loathed?

Thank you.

PROFESSOR JAFFA: Well, Mr. Cooper’s knowledge of constitutional history is very selective, but I’ll just mention one thing now, and that is the way he refers to The Federalist. If he actually read The Federalist, he would see that the words of the Declaration appear repeatedly in that document, and with great authority. Before the slavery debate, the Declaration was seldom cited as an authority—it was the principles of the Declaration. You have to remember that when Jefferson explained how he came to draft the Declaration—what he put into it—he said it was based upon the common sense of the American people, joined from letters, sermons, printed essays, and from such great folks of public right as, for example, Aristotle, Cicero, Locke and Sidney—two ancients and two moderns.

The reason why I cited that correspondence between Jefferson and Madison was because it was a correspondence between the author of the Declaration of Independence and the father of the Constitution, which I think should convey certain authority. I’ll mention just one place in The Federalist where the language of the Declaration is extremely prominent: The Federalist No. 43 is where Madison defends the right of the Convention to bypass the Articles of Confederation, and submit the Constitution directly to
the people. This was an act of the right of revolution—this was an act of altering or abolishing the federal government without the authority of pre-existing law. Where did that authority come from? It came from the transcendent law of nature and of nature’s God, which declares that the safety and happiness of the society is what all political institutions must serve, and to which they must all be sacrificed. In other words, the same authority that broke with Britain authorized the Constitution. This authority, of course, underlay the whole principle that the just powers of government can be derived only from the consent of the governed.

The fact that just powers of government could be derived only from the consent of the governed is what led Abe Lincoln, and many others before him, to say that slavery was a necessary evil, which had to be accepted in order to get the Constitution ratified, and that it was a good bargain, in that the union with slavery was better than no union at all—or that a union so weak could not control the relative limitations. Under the Articles of Confederation, there could have been no federal power to interfere with it.

The position that I’ve taken about the Declaration came to a sharp focus only during the slavery controversy, at a time when what was taken for granted by everyone was now denied by some. At the time of the adoption of the Constitution, there was no important disagreement: (a) that slavery had to be given some constitutional guarantees, (b) that slavery was evil and should be, over a long period of time, done away with. Beginning in the 1830s, the view developed that slavery was a positive good, and that led to a repudiation of the idea that the slavery provisions were necessary evils that had to be tolerated but which could not be espoused, and certainly could not govern the future government and development of the nation.

Cooper thinks that I am somehow unique in my views and that I’m out of the mainstream, but I can assure you that I am no more out of the mainstream today than Abe Lincoln is out of the mainstream today. This is from the Republican Party platform of 1860—which is almost identical with the Republican Party platform of 1856—the maintenance of the principles that promulgated the Declaration of Independence and are embodied in the federal Constitution: that all men are created equal, that they are endowed by their Creator with certain unalienable rights, among these are life, liberty, and the pursuit of happiness. To secure these rights, that governments are instituted among men, deriving their just powers with the consent of the governed, is essential to the preservation of our republican constitutions. The new dogma—that is Dred Scott—that the Constitution of its own force carries slavery into any or all of the United States is a dangerous political heresy at variance with the explicit provisions of the instrument itself.
In the Republican Party platform, the Republicans took the view that slavery had been outlawed in the territories by the Fifth Amendment, which said that no person shall be deprived of his liberty without due process of law. Judge Bork and Mr. Cooper think that the Due Process Clause of the Fifth Amendment only related to process, and has no substantive ends of its own. Judge Bork repeats this, and all his disciples do, as a kind of mantra—the Due Process Clause has no substance to it. Where does Judge Bork get the authority for that statement? From Judge Bork. He made himself an authority, and then repeats himself as the authority for his authority.

That's very interesting, but Bork in his book, which Charles Cooper defends so vigorously, and he does a marvelous job of it—I refer to him as Robert Bork's Johnnie Cochran—he makes an amazingly good argument for a very bad cause, and if the jury is as biased as the jury in the O.J. Simpson case, then he'll win the case. I hope I have a more objective jury than that. But the idea is that, according to Bork, Taney invented substantive due process because he found a right to own slaves which is nowhere in the Constitution, and thus corrupted the Due Process Clause.

It just so happens that Taney cited two provisions of the Constitution that did recognize slavery. But as far as inventing substantive due process—the ideas of the Fifth Amendment being substantive as to the status of slavery in the territories—that came from the antislavery movement. In 1844 Samuel P. Chase said that, from the moment that the Fifth Amendment was adopted, slavery was unlawful in every United States territory, and that statement of Chase was embodied in the Liberty Party platform of 1844, the Free Soil platform of 1848, and the Republican Party platform of 1856, and Bork and Cooper think that Taney invented it in 1857. I think you need to do a little reading of history.

I can't go into the details now, as there wouldn't be time, but I believe the interpretation of the Fourteenth Amendment and the Due Process Clause of the Fourteenth Amendment, as well as the Equal Protection Clause, depends decisively upon understanding the relationship of the Fourteenth Amendment to Dred Scott. The Fourteenth Amendment begins by saying that persons born in the United States shall be citizens of the United States and of the state which they were born or reside in. The Thirteenth Amendment, you see, outlaws slavery, but Taney and Dred Scott said Negroes could not be citizens, whether freed or enslaved. Now, they were freed, but they were still not necessarily citizens. So the Fourteenth Amendment made them citizens, and the Equal Protection Clause was a supplement to the Citizenship Clause by saying that citizens shall not be second class citizens. Equal protection of the law was an attempt to prevent what actually happened, of
course, when at the end of Reconstruction blacks certainly became second, third, fourth, or fifth class citizens in the states of the former Confederacy, and in some of the free states as well. But the point is that, to understand the meaning of the Due Process and Equal Protection Clauses, you have to understand the relationship of that amendment to existing constitutional law, which was still that of the *Dred Scott* decision even after the Civil War.

I think that if you look at the *Brown*\(^{52}\) case, for example, you find that what Warren did, and what the Court supported, was simply to say, we don’t know what the Fourteenth Amendment meant, so we’ll say what it ought to mean. Well they could have found out what it meant. The opinion that the Court should have given in the *Brown* case was Justice Harlan’s dissenting opinion in the *Plessy*\(^{53}\) case, which said that the Constitution is color blind. Why is the Constitution color blind? Because the Equal Protection Clause reversed what Taney said about Negro citizenship, and what Taney said about Negro citizenship was based upon his allegation that Negroes were not included in the Declaration of Independence.

So the Declaration of Independence was fundamental to the *Dred Scott* decision, but it was a crazy, wrong reading of it, that nobody had ever thought of beforehand. But restoring the original meaning of the relationship of the Declaration of Independence to the question of Negro citizenship in the Fourteenth Amendment laid the basis for the idea of a color blind Constitution. When Harlan said that the Constitution was color blind, he was merely saying what everyone had always understood the Declaration of Independence to mean when it said that all men were created equal.

MR. COOPER: I have consumed, actually, all of my time, but I would like just a moment to make a couple of very quick points. Mr. Jaffa says that the Constitution does not *confer* rights, it *recognizes* them, and protects them, and safeguards them. And if it were otherwise—if the Constitution conferred rights—then those rights could be taken away, presumably by the Constitution. If the law confers rights, then the law can also take away those rights. I think that comment really exposes what is one of the most vivid examples of the extent of Mr. Jaffa’s view of the powers of natural law in our jurisprudence, and in constitutional adjudication, because he quite frankly denies that the people can repeal parts of their Constitution. In other words, for example, if the people repealed the Second Amendment, the Supreme Court would be entirely warranted in saying: the protections of the Second Amendment are part of the law of nature and of nature’s God, and

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therefore, despite the people's puny effort to repeal that amendment and free themselves of its legislative restrictions, they are powerless to do so. I obviously disagree with that proposition. I think that, at the end of the day, the people are not powerless to change their Constitution.

He also makes the point that we really shouldn't concern ourselves that the Declaration was not cited as embodying the principles of the Constitution before the slavery debate, because it was just taken as common ground; and the absence of any indication of Mr. Jaffa's thesis, or that anyone endorsed it or espoused it prior to the slavery debate, should not be dispositive or perhaps even meaningful as we search, as originalists, for the meaning of the Constitution. Really, it just doesn't work.

Mr. Jaffa also suggested that the 1860 Republican Party platform outlined a view of natural rights similar to his own, and with this he demonstrates he is not unique in his views. Of course, I didn't say that Mr. Jaffa is unique in his views: I quoted Mr. Jaffa saying that he is unique in his views. But the 1860 Republican Party platform would not provide, I assure you, a persuasive authority to cite to the Supreme Court in a case in which you asked it to invoke the natural law and to ignore provisions of positive law—
even constitutional provisions of positive law—alleged to be inconsistent with natural law. Taney didn't invent substantive due process—it had been discussed in political party platforms—he was the first to apply it as a judge, with devastating, catastrophic consequences. This idea of substantive due process fathered other judicial abuses—among the most well known, of course, being *Lochner* and *Roe*.

Thank you.

**MR. TWIST:** I was happy to receive the title of moderator in connection with this panel, although this subject is not one that I'm used to being called moderate about, and it seems like the schedule has predicted that my role as a moderator is going to be short-lived given the time. But I do think there is some time to open up the general discussion here, and I know that the participants would be delighted to receive some criticisms, questions, or challenges.

**QUESTION:** Mr. Cooper, could the people by the prescribed process repeal the Thirteenth Amendment, reinstitute slavery, and would that be a constitutional repeal; and if it were, would it be, pardon the expression, right?

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MR. COOPER: Let me answer the latter question first. Of course it would not be right. It would be shameful and repugnant and wrong in every sense of the word.

But what is the alternative to the proposition that, yes, the people can order their own governmental arrangements by their own consent? It is that five Justices of the Supreme Court can rule the people. That is a proposition far less satisfying. What if the five members of the Supreme Court reimpose slavery? What if they invalidate the Thirteenth Amendment? Yes, I do think that repealing the Thirteenth Amendment—though this is a proposal that would be rejected as indecent in any event, and certainly at any gathering that I would be involved in—is nonetheless within the clear power of a constitutional majority of the people.

PROFESSOR JAFFA: I'd like to comment on that because it forms the conclusion of the printed exchange between this young man and myself. Cooper says that it would be "indecent." What does he mean by indecent? Therefore, what is decency?

Decency means that it's against the laws of nature for one human being to enslave another. This is the foundation of our Constitution. What judges would do in this context is less important than the fact that if the American people repealed the Thirteenth Amendment, they would no longer be a republican people; they would no longer have a free Constitution; and they would be something else.

Cooper doesn't seem to understand that there are moral judgments that underlie all legal judgments, and which must be accepted by a society if it's going to be a free and constitutional society. He just doesn't seem to get it.

There were many people who thought slavery was decent. A great civil war was fought, in which 600,000 people died, in order to decide whether or not slavery was consistent with free government. One side said it was, the other side said it wasn't. No matter how much he tries to extricate William Rehnquist—his own words—the fact of the matter is that William Rehnquist's words do imply that the pro-slavery parts of the Constitution have the same moral standing, the same constitutional standing right, but not the same moral standing. Therefore, it was an obligation on the American people to take such steps to put slavery to extinction. Believe me, the Republican Party platforms of 1856 and 1860 are not mere historical curiosities of a bygone age—they speak to us today more than any other documents in American history.
QUESTION: Should a court uphold a law that directed the way a man should wear his hat? I assume that Mr. Cooper's position would be that that's a silly law, of course, but we don't have any basis for striking it down. Also there are recourses and courses to remove or sack legislatures who would propose such a rule.

Mr. Jaffa, do you think the law of nature and nature's God would prohibit such a law?

MR. COOPER: No. First, the example that you cite was actually discussed in the debates on the Bill of Rights in Congress, and Representative Sedgwick made just that point as he argued that a Bill of Rights was unnecessary. Sedgwick asked where, after all, is there a power in the federal government—an enumerated power—that could possibly be understood to reach the religious activities of the people; that could possibly empower the federal government to regulate the press; or freedom of speech; or, for that matter, how a man shall wear his hat? I think that a federal court should and would strike down a federal law of that kind because there's just no federal power in the Congress to enact such a law.

With respect, again, to the comments by Mr. Jaffa on the Thirteenth Amendment question, I do not quarrel or argue at all with the proposition that slavery is against the laws of nature and nature's God, and all things that are right, decent, and just. What I quarrel with is that those formulations and standards are the constitutional prescriptions that our courts are to apply as they test the work of our elected representatives. I rather think that something more specific, something more concrete, something less subject to abuse by the Taney's, and the activists of this world, is what the Founders had in mind as a matter of constitutional government, but also as a matter of good government.

PROFESSOR JAFFA: When we speak of nature, we speak of it in contradistinction to custom or tradition. Peoples everywhere in the world have different customs. There are customs that vary all over the world.

The idea of nature was really the foundation of the idea of philosophy. Philosophy came to existence with the discovery that there was a set of uniform causes which transcended the distinctions between particular peoples. Dress is certainly a matter of convention. Whether the dress is decent or not, of course, ideas like that can vary, but still I think you'll find among all people some standard of decency which reflects a concern with the distinctions of nature. For example, the distinction between men and women and how they should behave towards each other, and how they should dress
in the presence of each other—those are things by which nature is shaped by individual customs and conventions.

And by the way, I didn’t mention this, it’s something I learned fairly recently: It happens to be true that in the enabling acts of Congress for the admission of new states to the Union, beginning with Nebraska during the Civil War, those enabling acts provide that the Constitution of the new state shall be republican in form, and there be nothing in it repugnant—these are the exact words of the law—nothing in it repugnant to the Constitution of the United States and the principles of the Declaration, and that, by the way, is purely conjunctive, not disjunctive. The Constitution and the principles of the Declaration together define the republican form of government, which the Constitution requires be guaranteed to every state. So the principles of the Declaration are in the positive law of Congress. That’s one of the reasons why I said one must go outside the framework of the Constitution to discover the principles of the Declaration. They are there in the requirement of a republican form of government.

As far as enfranchising the courts, we know that a republican form of government is based on the consent of the governed, which means that there must be reasonable provision for the citizens to vote to form their government. A line of Supreme Court cases—some of which are distressing in their incompetence but nevertheless are justified—when, for example, in Baker v. Carr,56 the state of Tennessee was found to be so badly gerrymandered that the people of Tennessee weren’t selecting their government or choosing their representative to Congress. So it would have been perfectly correct if the Court had said the republican guarantee has got to be enforced, because the Constitution says that the United States will guarantee to every state of this Union a republican form of government.

Abe Lincoln in 1861 mentioned that the guarantee is a proof that there could not be a right of secession, because how could the United States guarantee to a state of republican form of government that can secede? It doesn’t say the Declaration, or the language of the Declaration, but it says the principles of the Declaration.

One other minor point I want to make in passing: I mentioned that Cooper simply ignored the presence of the principles of the Declaration in The Federalist, but they’re there throughout The Federalist. When Madison says in The Federalist No. 39 that unless this government—the new Constitution—conforms to the principles of the revolution, it should be rejected. Where were the principles of the revolution, where the

56. 369 U.S. 186 (1962).
Constitution was mentioned, according to Madison in *The Federalist*, except in the Declaration of Independence.

Also, in this attack on me in the *Public Interest Law Review*, Cooper said that George Washington never paid any attention to the Declaration of Independence. Then he quotes a paragraph from the farewell. In that paragraph Washington uses language from the Declaration of Independence—that the right of the people to alter or abolish their government is the foundation of our whole system. John Marshall said the same thing in *Marbury v. Madison*. But because they didn’t say this was the Declaration of Independence, he thinks it’s not there.

**MR. COOPER:** Here is another example of the importance of listening to what I said, instead of what Mr. Jaffa says I said. What I said was that nowhere did the authors of *The Federalist* attach constitutional interpretive significance to the Declaration, not that they did not use phrases and even make reference to the Declaration’s phrases, or invoke principles that are contained in the Declaration.

**MR. TWIST:** Perhaps the title of the exchange could have been good penumbras and bad penumbras. At any rate, the emanations are over and thank you very much for your attention and thanks to both of our panelists.

**III. DEBATE: THE DUE PROCESS REVOLUTION**

Since *Goldberg v. Kelly*, courts have applied the Due Process Clause and other constitutional protections to recipients of government assistance and to users of public schools and other community institutions. But the rights revolution, of course, does not come without a price. Requiring the government to clear additional procedural hurdles before acting not only costs time and money, but limits the flexibility with which public officials can perform their duties. Those who defend these costs maintain that community institutions often have acted unfairly in dealing with minorities and other underrepresented groups. What are the costs and benefits of this rights revolution? How has expanding the Due Process Clause affected the capacity of community institutions such as public schools to serve the needs of disadvantaged citizens?

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58. 5 U.S. (1 Cranch) 137 (1803).
JUDGE ALEX KOZINSKI: It's a real pleasure to be here.

As I was thinking about the topic of this panel, I was reminded of a story I heard a while ago. If you can imagine, the scene is death row. It's the night before a scheduled execution. The prisoner was prepared, he's been given his last meal. The air is so thick you can cut it with a knife. Suddenly, about ten minutes to midnight, the defense lawyer comes bursting into the cell, saying "I've got wonderful news. The Supreme Court granted our petition and, in a miraculous turn of events, they actually held a hearing and issued an opinion right this evening, and I have it right in my hands." And the prisoner says, "Wonderful did they set aside the conviction?" And the lawyer says, "No." He said, "Did they at least vacate the death sentence?" The lawyer says, "No, but look, it says right here in the opinion, they got you fair and square."

That's kind of the topic we have today: What can the government do to you as an individual and how must it go about doing it? It's the subject of due process, and it will be in the form of debate.

I am really pleased: When I moderate, I often have people that I don't know, while in this case, both of the panelists are friends of mine. Mike Horowitz and I met when he was the General Counsel of the Office of Management and Budget very, very early in the Reagan Administration—he served in that position from 1981 to 1985. You can read more about him in the biography. I won't go into the details of his career, but right now he is a Senior Fellow at the Hudson Institute, and a director of the Institute's Project on Civil Justice Reform.

To my right, so to speak, is Nadine Strossen. Her resume is every bit as long and impressive as Michael's, and I won't bore you with that—you can look it up. But she is a Professor of Law at New York Law School, and the President of the ACLU.

Michael will start off for about fifteen minutes, and—I'm supposed to enforce these time limits strictly—Nadine will respond for about ten minutes. Then we will go to questions from the audience. Michael, you're on.

MICHAEL HOROWITZ: I want in my remarks to focus on a Supreme Court decision described by Justice Brennan as his favorite, as the most

59. Judge, United State Court of Appeals for the Ninth Circuit. Judge Kozinski was formerly Chief Judge of the United States Claims Court and Assistant Counsel to President Reagan. He was a law clerk for Chief Justice Warren Burger, and for Judge Anthony Kennedy, when Judge Kennedy served on the Ninth Circuit.

60. Senior Fellow, Hudson Institute; Director, Hudson Institute Project on Civil Justice Reform. Mr. Horowitz was General Counsel for the Office of Management and Budget and
important one he believed he rendered during his tenure, while serving as
the most influential justice of the century. A disclaimer first, however: As
critical as I am of Justice Brennan’s jurisprudence, I don’t want to be
associated with Lino Graglia’s view that we should withdraw from the battle
over judicial review, that we should oppose the involvement of courts in all
matters of constitutional law, that constitutional law is bogus, nothing more
than an artifice by which designing elites seize power. I believe that our job
as lawyers and judges is to get involved in the messy business of getting
constitutional law right, and that’s the spirit in which I want to approach
today’s discussion.

I want to talk about the due process-driven rights revolution—for, indeed,
it’s been nothing less than a revolution that has taken over the law during the
past thirty years or so. Waged by the Supreme Court, led very particularly
by Justice Brennan, the revolution’s jurisprudence is now deeply embedded
into the warp of government at all levels. It has radically redefined the ways
in which government actors and government institutions—particularly those
at state and local levels—are permitted to behave in their dealings with
Americans. It has empowered the judicial branch vis-à-vis its sister branches
in ways that would have stunned not only the Constitutional framers, but
John Marshall as well.

The rights revolution decreed this as its bottom line to state and local
officials: “We the courts, we lawyers, must first give our okay to what
you’ve done, and the way you’ve done it, before any decision you make is
permitted to stick.” The rights revolution thus subjected a broad range of
state and local officials including school principals, teachers, cops on the
beat, welfare officials, and parole officers, to after-the-fact, second-guessing
judicial review. In the process, and by design, it has sharply limited the
discretion and authority of those officials.

What is most sadly ironic is that the revolution was waged in the name of
the poor, for in my view it is the poor who have been the revolution’s
victims. In fact, the revolution’s rhetoric about helping the poor masked both
its devastation of the poor and the elites’ powerful self-interest in its success.
I believe that much of the revolution reflects the worst side of the American
bar—our tendency to be blind to the effects of our efforts, our tendency to
think that our rhetoric describes the realities we create, our use of law to
further our ends at the expense of those whom we say we serve.

Chairman of the President’s Domestic Policy Council Working Groups on Federalism and School
Discipline during the Reagan administration. He has published numerous articles in The Wall Street
Journal, The New York Times, and a number of leading law reviews. Mr. Horowitz provided the
editors with an edited version of his panel remarks.
We lawyers, and particularly the academics and judges who most made the revolution, got matters desperately wrong when we argued that we were on God’s side of the barricades when we empowered ourselves to second guess state and local officials, when we made ourselves the final arbiters of their day-to-day decisions. In this debate, moreover, the revolutionists not only carried the field, but were often literally able to demonize all who objected to their supercession of state and local officials as uncaring, even racist people.

In assuming that we as lawyers were the great tribunes of poor people, in seeking utopian outcomes from our efforts, we ignored lessons from the profession that is today, on the whole happily, displacing us at the center of the American public policy process. Economists don’t talk about rights, but insist that one must analyze the costs of what one does before being able to claim any credit for the benefits of one’s efforts. We lawyers arrogantly assumed, ex cathedra, that our efforts, our empowerment at the expense of others, produced all benefits, no costs. We lawyers also failed to heed medicine’s great Primum non nocerum pre-action principle—to “first do no harm.”

A further point: We conservatives have much to answer for as one analyzes the rights revolution’s intellectual and policy success—its triumphant view that expanding the power of lawyers makes the world a more caring place. It was a one-sided constitutional and moral debate that took place in the 60s, 70s, and even the 80s—and a key reason for this was that we conservatives often didn’t participate in it. Put simply, we conservatives left Nadine and her ACLU colleagues as sole occupants of the moral high ground, and allowed them to stay there without much serious challenge.

Remember the Bork hearings where Senator Simon said, “How can we confirm you, Judge Bork? I understand, you’re not for expanding rights. Isn’t that what America is about? Just giving people more rights all the time.” Judge Bork tried lamely to explain the often antidemocratic nature of rights, the fact that rights can be two-sided animals, but the Paul Simons of the world had been unchallenged too long for even the great Judge Bork to make much of a dent in their view that lawyer-created rights are the most important means by which America is made great.

Here’s a footnote: When Justice Frankfurter taught at Harvard Law School, he used to ask his classes to identify the people most responsible for our freedoms. His classes would routinely identify such figures as Jefferson, Washington, Madison, Oliver Wendell Holmes, Louis Brandeis. No, Frankfurter would say, think of such men as James Watt and Henry Ford as
the people who really set the stage for our freedoms and made it possible for lawyers' work to build on. Frankfurter was making the point, of course, that we lawyers often fail to understand that there's a world out there that creates rights wholly aside from our ministrations.

We of course have an essential role to play in the rights process; as Tocqueville has rightly pointed out, we have played a marvelous role in American history. Important as that role has been, however, it's not nearly as important as we think it to be. And when we are immodest or utopian about our work, the good we do has regularly been more than overtaken by its negative consequences.

All of which leads to a discussion of Justice Brennan's favorite decision, Goldberg v. Kelly. In that case the Court held, per Brennan J., that the due process clause required an adversarial hearing before a neutral third party before welfare benefits could be taken away from existing recipients. Goldberg thus converted state and local officials into in-effect defendants at hearings where they had to prove to a hearing examiner, at a lawyer-driven hearing, that there was a reasonable basis for their decisions. The Goldberg rationale was rapidly extended into areas like schools, housing, and parole decisions. Thanks to the Papachristou decision, it was extended to limit the discretion and authority of police officers in non-arrest, noncriminal situations, thereby barring police from asking people in the streets to identify themselves, barring them from asking suspicious people to move on. Police capacity to break up the known drug bazaars now so common on city streets, to shut down the known crack houses now so common in abandoned ghetto buildings was profoundly compromised. Administrative hearing officers—not great legal figures as a rule—gained the final word before school principals or teachers could suspend or expel unruly kids, before public housing officials could sanction or evict unruly tenants, before welfare officials could discontinue welfare payments. And, to often add injury to insult, officials such as principals and teachers became defendants in often-harassing, often-terrifying, always time consuming civil lawsuits for money damages under 42 U.S.C. § 1983.

As I've said, Justice Brennan has called Goldberg his best decision. To thus set the debate as crisply as I can, I regard Goldberg as the most anti-poor, anti-black, anti-community decision of my lifetime.

Looking at the collapse of poor urban communities and the public institutions on which poor people (but not us) rely following extension of the

writ of due process law to public decisions, I see Goldberg as an ironic tragedy for its alleged beneficiaries.

A story: When I was in the Reagan Administration, I tried to start something called the school discipline initiative. I remember when we brought twenty or so heroic public school principals into the Cabinet Room for a session with the President. The principals, to a man and woman, each had magically transformed previously horrific high schools into places with academically-performing and college-attending kids, had created schools with long waiting lists of kids seeking to get in. I remember one of the ghetto principals turning to President Reagan and thanking him for raising the school discipline issue and then saying: “When I took over my high school, you could have put a billion dollars into it, but it would have been pouring the money down a rat hole.” He then spoke of instituting a dress code, of laying down tough rules, of summarily suspending unruly kids. The suspended kids, the principal pointed out, often turned out to be his best academic performers. He said: “Once I was able to establish my rules to define success, the natural student leaders stopped playing by the destructive rules that had previously rewarded them. They’re often my best students now.” The principal went on to say that he suspended kids who didn’t turn in their homework unless their parents came to school. As he described it, some parents would complain that appearing at school would cost them a day’s pay or perhaps even their jobs, but he described himself as being unsympathetic to these pleas and committed to a no-homework, no-parent-visit, no-school-for-the-kids policy.

After finishing his presentation, the principal turned to the President and asked if the President wanted to know why he had succeeded at his school. President Reagan said that he did. “Well sir,” said the principal, “I succeeded because the American Civil Liberties Union never found out what I was doing. They would have stopped me cold had they known because I routinely violated every legal rule, every school regulation on the books.” The principal then said: “Everyone now knows what I’m doing, Mr. President, but the ACLU isn’t suing me.” He asked if the President wanted to know why. “Yes,” said the by-now-straight-man President. “Because,” the principal’s punch line ran: “they would be lynched by my community if they dared to try.” It was tragedy of a high order to see all the principals, probably the most heroic group of men and women I’ve ever been in the same room with, laugh and applaud their colleague with unbridled vigor. The lawbreaker as hero, our best men and women as lawbreakers, the law as the enemy of decent educations for our poorest and most deserving kids! Not

Other such stories can be told. There was the housing official who came to town to protest the Reagan budget cuts in public housing budgets, coming to my office to describe what it was like to live in public housing wastelands where twelve year old kids quickly learned—as if old-timers on Vietnam combat patrols—when and when not to duck at the sound of gunfire. In the midst of the official’s poignant presentation I turned to him and posed a choice. Rather than merely opposing the cuts, Option A will be my support for doubling your appropriation. Option B, on the other hand, will involve no funding increase but will give you the summary authority to evict no more than ten percent of your population. “Which do you prefer?” I asked. With mock excess, the official carefully looked around my office to ensure that no one was listening. His “Are you kidding,” response told all. He made clear how much he, and others like him, had lost the authority to manage housing projects, how much they hungered for the ability to do so, how much they thought they could do if given the opportunity. “I’ll make mistakes, I won’t be perfect,” the official said, “but what I can do for my community is far better than what’s being done ‘for’ and ‘to’ them now.”

His angry description of the counterproductive effects of courts and Legal Service Corporation attorneys in public housing projects perfectly echoed the principals’ Cabinet Room applause, perfectly captured the tragedy that had been wrought by us lawyers in the name, ironically, of helping the people who were condemning us most.

Another story: I remember talking with Frank Keating, now the Governor of Oklahoma, about a visit he and Jack Kemp made to a public housing project when Keating was HUD General Counsel and Kemp HUD Secretary. At the standard show and tell session always given to Washington bigwigs, the two were treated to a striking presentation. With great pride, the resident-presenters told Keating and the Secretary how they had “known who troublemakers were,” before going on to describe how they had organized a posse of the most menacing tenants they could find to pay late night visits to troublemakers’ apartments—with clubs and bats no less. At the “visits” they told the visitees to “clear out.” The presenters then prudently told the Secretary that the process had caused the troublemakers to leave and went on to tell him how much life had improved for the project’s decent people.

What’s a HUD Secretary supposed to do when presented a report of such vigilantism? He can’t publicly endorse it, of course. On the other hand, he knew, as many Americans do, that we lawyers have often created an unworkable regime that has effectively savaged our most needful and
deserving communities by making it harder for people struggling to make middle class norms and a decent life realities, not remote aspirations.

But matters are even worse than that, because we who established the rights revolution did not merely commit good faith mistakes about the policies we established. In the main, excepting such notably honorable revolutionaries as Justice Brennan, the revolution's founders and sustainers engaged in profoundly hypocritical conduct. While alleging that we had created the revolution's legal regime on behalf of America's poor, the fact is that we waged it for ourselves. The alleged interests of the poor provided a rhetorical cover for our own poor-be-damned designs, served to paint ourselves as caring as we pursued our fantasies, our elite desire, beginning in the 60s, for freedom from the Victorian constraints and middle class value systems under which we were chafing. We wanted more sexual freedom, more freedom to do drugs and undo marriages, more freedom to do all sorts of things then forbidden by what we thought of as our uptight, gray flannel, yet endlessly affluent culture. That's why the rights revolution really took hold.

Most of us didn't have the honesty to acknowledge that we wanted a new set of rules for ourselves, faithful to our perceived self-interests, when we recast the Constitution into a document based on what Mary Ann Glendon has aptly labeled the theory of "radical personal individualism."

Perhaps the libertarians among us believe that such an anticommmunitarian society makes for a better world, and perhaps it does for them, although nonlibertarian moralists like me have doubts on that score. But I think it impossible to make such a claim from the perspective of ghetto residents seeking, as had generations of Americans before them, to climb the American opportunity ladder.

The fact is that if we had cared about the poor, we elites would have happily sacrificed some of our own '60s and '70s and '80s rights revolution freedoms in the interest of permitting middle class values to be more vigorously enforced in America's central city ghetto communities. We would have acknowledged that the lifestyle freedoms that may have saved our achieving kids from being performing zombies often served to denude ghetto schools of desperately needed authority figures, value-based environments, and academic rigor. We would have admitted that the dissident who made life a bit more spicy for us by colorful dress or language or custom was a far less benign "dissident" in Harlem and Watts. In those communities, the actors whose conduct the revolution insulated from enforced community norms were, more likely than not, vicious dope dealers, thugs who made learning impossible, tenants who trashed everything before them.
We sunshine revolutionaries could—or thought we could—drop out while at the same time being secure in the knowledge that our educations, our money, our families, our hardwired, inculcated value systems would allow us to reenter the mainstream whenever we chose to do so. As many of us did. On the other hand, stripping away the authority of teachers, street corner policemen and parole officers, turning the welfare system into a no-questions-asked, no-obligations-imposed entitlement, had devastating consequences for people whose chance for social mobility rested entirely on their ability to learn and live by values rooted in the work ethic, marriage-based families and swift and certain punishment for violations of law.

But the rights revolutionaries were yet even more hypocritical than that. When our schools or front lawns were at stake, when we sought social stability, we simply opted out of and literally abandoned to the poor, the very institutions our rights regimes governed. The lawyers smugly certain that they were on God’s side in constitutional litigation involving public school student rights, the people who got warm feelings in their bellies for establishing due process regimes for would-be subjects of school discipline, were also my fellow parents at the private schools our kids attend. We insisted, indeed demanded, that the principals at our kids’ schools suspend children thought to be thinking of smoking dope, demanded summary expulsions of children at our kids’ private schools who menaced others or, heaven forbid, brought weapons to school. The very elites who talked about the rights of unruly tenants in those wasteland war zones called public housing projects demanded for themselves the right to evict neighbors who played the piano too loud. We freed city streets for “dissident” behavior and, largely thanks to the courts, engaged in what Pat Moynihan has called “defining deviancy down” in our urban centers—but chose to live our lives in suburban malls precisely as we were bringing due process to city streets. How hypocritical it was for us to impose a regime on the poor that we ourselves would not have dreamed of living under. How outrageous it was of us to “improve” public institutions precisely as we fled them. That we did this while smugly preening about how much we cared for the poor was, of course, the final aspect of our sanctimonious pretense.

Two final points.

First point: In analyzing a constitutional rights regime, we often forget that its mandates are administered at the appellate court level. We lawyers often experience self-congratulatory thrills at the ringing language, the finely calibrated nuances of written, rights-creating opinions. In so doing, however, we often rest our laurels on a smug illusion about the value and the
real-world effects of our efforts. Every lawyer engaged in rights revolution work, and every judge who administers it, should be compelled to regularly play the great game of "Telephone." Players of this game quickly learn that a message given to someone in the first row of an audience, successively repeated to others until it reaches the person in the opposite corner of the last row, radically alters the initial message. The process of translating a ringing Supreme Court decision to administrative hearing examiners—who generally aren't no Cardozos, by the way—should be a similar source of realism and humility for appellate courts and the legal profession. When one adds to this the fact that the attorneys representing cities, public schools and public housing authorities are often poorly paid and poorly motivated, and that they generally confront resource and competency mismatches when dealing with abler Legal Service Corporation, ACLU, and downtown "pro bono" lawyers seeking handsome "lodestar" pay under federal fee-shifting statutes, one begins to see how due process hearings often have not even been very good means of determining truth or implementing the ringing principles of Supreme Court due process opinions. Confronted with the prospect of lengthy hearings, long depositions, and personal liability hazards under 42 U.S.C. § 1983—and often counseled by attorneys paid the same salaries whether or not they work hard or ever go to trial—it is little wonder that public officials living under a due process regime often take the course of least resistance, often find it prudent to surrender rather than fight.

This, then, is a key meaning of Goldberg v. Kelly and its progeny cases. The cop who sticks his neck out and tells drug dealers to move on, finds himself, not the drug dealer, a defendant in a legal proceeding. On the other hand, the risk-averse principal who passively decides to let an unruly kid stick around, who rationalizes his way out of a decision to suspend or expel by telling himself that the trouble-maker isn't really that bad and might just be turned around by a stern verbal warning, receives Goldberg v. Kelly's safe harbor pass, finds his backside almost always covered.

Whatever the failings of local officials and their decision-making processes, and they can be many, we need to understand that the regimes we lawyers create when we make ourselves second-guessing authority figures generally leaves much to be desired, to say the least. I say this as someone who knows the glories of the rule of law, who as a civil rights law professor in Mississippi saw what it was like when Judge Claude Clayton imposed it on lawless segregationists and goons beating up kids trying to attend decent, integrated schools.

But the glorious civil rights revolution of the '60s, forever a great chapter in American history, is a far cry from its would-be successor Due Process
Revolution that shifted discretionary authority from school principals to risk-averse school board lawyers and bureaucratic administrative hearing examiners. The rights revolution ushered in by Goldberg v. Kelly not only failed; almost as terribly, it powerfully trivialized and discredited the rule of law.

My last point relates to the responsibility that we conservatives must accept for the perverse effects of the rights revolution. Until very recently, we largely served as whining noncombatants in the revolution’s intellectual and legal battles. In the main, we either adopted Lino Graglia’s plague-on-your-house withdrawal from battle, or at best were easily caricatured as green eyeshade commentators in a struggle whose moral character we regularly failed to acknowledge or understand. When asked about our views of the legal-constitutional order, when questioned about its meaning for America’s have-nots, we more often than not sounded like George Bush clones discussing “the vision thing.” As we conservatives now look at the prospect of political ascendancy in America, it is therefore critical that we understand that America is a great nation because it cares for underdogs and less-thans, because it rejects those who ask the “How many divisions does the Pope have?” Stalin question.

The fact is that we conservatives can no longer shy away from debates about the moral vision of the regime in which we believe—can no longer permit gross caricatures that make saints of Justices Brennan and Blackmun while painting Justices Scalia and Thomas as, at best, indifferent legal technocrats.

For this reason, Nadine, I’m prepared to debate you by accepting, indeed insisting on, your terms of the debate. The question I therefore put, Nadine, is, simply, whether your rights regime has hurt or helped the poor people of this county.

And I’ll tell you this: Matters will change radically once we conservatives no longer cede the moral high ground to you, Nadine; once we communicate our passion for social justice; once we acknowledge that thirty and forty and perhaps as recently as twenty years ago “your side” in the debate acted in America’s best traditions by helping to shatter the vestiges of state segregation. Once we do this, our belief in limited judicial authority, our notions of faithfulness to the language of the Constitution, our belief that the Constitution does not give judges a roving commission to do good as they see it, will be seen for what it is: a morally based means of empowering communities; a call for decisions to be made at levels and by people who know the real facts best; a return to what the author Philip Howard rightly
calls "common sense," whose "death" he correctly lays at our feet. 63 And I'll say this as well, Nadine. Once we conservatives fight for the high ground we have every right to claim, we'll finally be heard by people who know how badly they and their dreams have been shattered by a rights revolution ironically fought in their names.

Thank you very much.

PROFESSOR NADINE STROSEN: 64 Thank you very much. I'm delighted as I always am to appear before a Federalist Society Conference. I love the opportunity to exchange views with people with whom I have some very strong agreements and some very strong disagreements, and I commend the Federalist Society, as always, for bringing together a diversity of views.

I'm also particularly happy to be appearing under the aegis of the Goldwater Institute, since I consider former Senator Barry Goldwater a great libertarian. As a nice coincidence the Arizona affiliate of the American Civil Liberties Union less than a year ago honored Senator Goldwater as its Civil Libertarian of the Year. That was surprising to people who remembered George Bush's false attacks on the ACLU as being a liberal organization; here we were honoring an icon of conservatism, who was very happy and proud to receive the award.

I have here an article about that award from a local newspaper, referring to one very important thing that Senator Goldwater and the ACLU have in common, as reflected by his acceptance speech. He was quoted as saying, "The Constitution, to me, is one of the most wonderful sacred documents that has ever been put together." The executive director of the ACLU's Arizona affiliate was quoted as saying, "It shows that civil liberties is a rights issue, it's not a liberal issue; it's not a conservative issue."

Now I want to bring us back to that sacred document, sacred both to Barry Goldwater and to the ACLU, the Constitution. Because that is what is at stake in the so-called "due process revolution," the so-called "rights revolution" that Mr. Horowitz assailed. He said, "it is nothing less than a revolution" and by "it," he was referring to a series of Supreme Court decisions starting in 1970.

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64. Professor of Law, New York Law School; President, American Civil Liberties Union. Professor Strossen has published more than one hundred works in law reviews and other periodicals, and also recently authored DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS (1995), and co-authored SPEAKING OF SEX, SPEAKING OF RACE: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES (1994). Professor Strossen provided the editors with an edited version of her panel remarks.
I say, to the contrary, the revolution occurred back in the eighteenth century when we adopted the Declaration of Independence, the Constitution, and the Bill of Rights. It continued after the Civil War, when we amended the Constitution to make clear that its guarantees of individual freedom against government tyranny protected all individuals, including former slaves and others of African descent, against all government officials, including state and local officials. (By the way, what Mike Horowitz describes as government officials exercising their discretion, I view as government authorities at least potentially violating individual rights, and acting in a potentially authoritarian, tyrannical manner.)

In short, it was our nation's constitutive documents, as amended by the Bill of Rights and the post-Civil War amendments, that brought about a revolution in human rights. I am very proud to continue to support that revolution, and I'm also proud to be in the fine company of the Federalist Society in doing so. I have here my brochure for this conference, and I was pleased to read in it that the Federalist Society is founded on a number of principles, the first of which is that "the state exists to preserve freedom." That bears emphasis: The first founding principle of the Federalist Society, as well as the American Civil Liberties Union and the U.S. system of government, is that the state exists to preserve freedom.

The Supreme Court decisions that Mr. Horowitz is attacking simply gave voice to and enforced that shared fundamental principle in certain contexts where it had not previously been enforced.

Contrary to Mr. Horowitz's allegations, the ACLU has never advocated enforcing procedural due process rights in terms of some noblesse oblige to the poor. To us, procedural due process is something to which all individuals in this country are entitled, regardless of whether they are rich or poor. Mr. Horowitz is apparently particularly upset about Supreme Court decisions recognizing that these rights pertain to poor and politically powerless individuals. On the other hand, one of the many ways in which the ACLU often alienates liberals is our belief that these rights belong not only to individuals, poor and rich, but also to corporate entities and businesses. The very same rudimentary, elementary, fundamental procedural due process principles that were articulated and enforced in Goldberg v. Kelly—which happened to involve a poor person—those are the same principles that also apply in any other context, including where wealthy businesspersons or major corporations face having their property confiscated by government bureaucrats.

I ask each member of this audience to imagine yourself in a context where you would say a government official is abusing, or at least potentially
abusing, authority, and then ask yourself further whether this “Due Process Revolution” is such a terrible revolution. And is it, indeed, any revolution at all? Is it really deviating from our first principles to say that before the government may deprive you or your business of liberty or property, it must at least give you some minimal procedural protections?

I want to emphasize that that’s all that we’re talking about here: procedural due process. It was therefore confusing when Mr. Horowitz alluded to Robert Bork and his limited views of substantive due process. I happen to disagree with those views as well. But that is not what we are debating today.

We are discussing only procedural due process, and let me be very specific about precisely what that entails. We’re not talking here about elaborate procedures whereby everybody is entitled to a lawyer and a formal hearing and a transcript. To the contrary, the Supreme Court decisions that Mr. Horowitz condemns secure only minimal, basic procedural rights for individuals who face adverse government action. Therefore, these decisions impose only limited constraints on the discretion of government officials.

Let’s take the case of the public schools, about which Mr. Horowitz spent a lot of time talking. *Goss v. Lopez* 65 simply required the most elementary, informal steps before a school authority may finally suspend or expel a student. It should be noted that education experts have called expulsion the academic equivalent of capital punishment: it’s final, there’s no coming back, and it permanently ends your educational opportunities. In *Goss*, the Supreme Court merely said to school officials, before you take that irrevocable step, you must simply give the student some notice as to what your basis for doing so is. That notice may be informal and it may be oral; you don’t even have to put it in writing. What’s more, the notice may be after the fact. You may go ahead and suspend the student, or even expel the student, and only tell him or her what your reason was afterwards. The only additional right that the Court guaranteed in *Goss v. Lopez* is that the student has to be given an opportunity to respond to the stated reasons for suspension or expulsion. This may also be done after the fact, after the student has already been suspended or expelled.

Are these the kind of burdensome, complicated due process rights that Mr. Horowitz deplores? Can such bare-bones procedures really disrupt the functioning of the public schools, as he contends? And do we really want a society where a student can be denied all future educational opportunity, and the attendant opportunities to become a functioning, productive member of this society, without at least these rudimentary procedural protections—

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namely, the opportunity to respond after the fact to an informal statement of the charges against him or her?

I want to be concrete here because a lot of Mr. Horowitz's rhetoric probably gave you an exaggerated sense of the procedural due process rights at stake. Indeed, I think the problem is that our procedural due process rights are too minimal and too few, not the opposite. Shortly after Goldberg v. Kelly, the Supreme Court began a trend, which has been continuing since then, of radically shrinking back the concept of procedural due process in several ways.

First, the procedural due process guarantee is triggered only when you are being deprived of life, liberty, or property. In a series of cases that began in the late 1970s, the Supreme Court has greatly truncated the concepts of liberty rights and property rights that trigger the application of due process protections. Therefore, in many cases, the government has been allowed to deprive individuals of liberty and property without even according them any procedural safeguards whatsoever.

I would imagine that there are many audience members here who have a very robust—justifiably robust—sense of what your property rights are or should be. I warrant to you that the Supreme Court's notion is much more limited than your own. In fact, the Supreme Court has said that before something can be a property right, before the government's interference with it triggers even minimal procedural due process guarantees, it has to be explicitly laid out in a state statute; nothing else will suffice.

The Court has also sharply curtailed the notion of protected liberty interests. For example, in a case in the late 1970s, it ruled that we have no cognizable liberty interest in protecting our personal reputations. In that case, the Court held that the procedural due process guarantee was not even implicated when the police publicly circulated a defamatory statement about an individual, falsely accusing him of having been a shoplifter.

Now let me turn to the second way in which the Court's notion of procedural due process has been radically reduced since the early 1970s. Even if you pass the very high threshold of showing that you have a protected liberty or property interest, the process that is due you, before the government may deprive you of that interest, is very limited. In case after case, the Court has said you're not even entitled to prior notice and a hearing, even the most minimal hearing. In numerous cases, the Court has said that the government may take away your property and invade your freedom, without even letting you know in advance what its asserted reason is for doing so. The Court has repeatedly held that if you want to contest the

government’s action and show that it is wrongful, you may well have to settle for a tort lawsuit after your loss, seeking post hoc compensation.

So, we're hardly facing a major expansion of procedural due process rights, contrary to Mr. Horowitz’s laments. If there is any recent “Due Process Revolution,” sadly, it is the Court's allowing government officials to limit our liberty and seize our property without even the basic procedural protections necessary to ensure that the officials are not acting wrongly or arbitrarily.

Now, my timer indicates that, having been given two-thirds of the time that Mr. Horowitz had (speaking of procedural due process!), I have only about a minute left. And I'd like to use it by giving one more concrete illustration of what's at stake here. Mike Horowitz talked about public housing cases, and the ACLU recently had a widely publicized case in which we were representing some residents in a public housing project in Chicago. By the way, Mike, the ACLU doesn't operate the way your fantasized, demonized “liberals” do, going into poor neighborhoods, telling the people there what their rights should be, and then leaving for their own affluent neighborhoods, where they insist on different rights for themselves. Believe me, we in the ACLU have more than enough to do helping people who tell us what their rights are, and ask us to protect them. And they want the same rights for themselves that you and I want for ourselves.

Our clients who lived in the Chicago housing projects were no exception. They wanted the same thing that those of us who live in middle class neighborhoods want. Namely, they wanted to be free from crime. Like us, too, they preferred crime-control methods that respected their privacy and dignity over methods that treated them all like criminals, with the police ransacking through their entire homes and all their possessions.

On behalf of our clients in the Chicago housing projects, the ACLU had sued the city of Chicago decades ago, arguing that the city did not provide adequate police protection in the projects. Indeed, the Chicago Police Department admitted that it never did so-called “vertical patrols” inside the housing projects’ high-rise buildings. The officers would simply stay in their cars outside the buildings.

In desperation, after years of trying unsuccessfully to get the same kind of police protection provided in middle class neighborhoods, some people who lived in the housing projects essentially gave up. They said, if we can't have regular law enforcement, then we'll settle for sweep searches. In these sweep searches, police officers came in in full force and searched literally through everybody's possessions, emptied drawers, emptied closets, turned all the apartments inside out. In contrast to the tenants who were willing to
submit to these sweep searches as better than nothing, the ACLU’s clients were tenants who kept insisting that they were entitled to the same kind of law enforcement, and the same privacy rights, as people living in other neighborhoods. To add insult to injury, these sweep searches were just grandstanding, and didn’t do anything meaningful to ferret out guns or prevent crimes. Even the former U.S. Attorney who represented the other group of tenants, advocating sweep searches, admitted precisely that. He said, these sweep searches are just for show.

In fact, the federal district court judge who ruled in our favor, Judge Wayne R. Andersen, agreed with us and our clients that these sweep searches were as ineffective as they were unprincipled. He held that they violated cherished Fourth Amendment rights and also noted that they didn’t meaningfully redress the problems of crime and violence in the projects. (I have to note that Judge Andersen, a Bush appointee, was hardly a flaming liberal.)

I’m going to close by reading one of Judge Andersen’s statements in support of his ruling in our favor. I think it really belies Mike Horowitz’s point that there’s some kind of liberal ACLU double standard toward, on the one hand, the rights that we want for ourselves, and on the other hand, the rights we want for the poor and the dispossessed. Exactly the opposite is true, as Judge Andersen’s statement makes eloquently clear. He said:

Many tenants within the Chicago Housing Authority housing, apparently convinced by sad experience that the larger community will not provide normal law enforcement services to them, are prepared to forego their own constitutional rights. They apparently want this court to suspend their neighbors’ rights as well. Many Americans are simply fed up with crime. Although they would not dream of allowing police to search their own homes without their consent or without warrants, they support police sweeps of inner city neighborhoods. All Americans are bound together in law and in fact. The erosion of the rights of people on the other side of town will ultimately undermine the rights of each of us.

Thank you.

MR. HOROWITZ: This is a nice debate.

First: Nadine’s citation of Judge Andersen’s decision makes the very point I’ve tried to make about the Due Process Revolution. The Chicago Housing Authority, knowing the difficulty of evicting disruptive tenants without truly hard evidence of actual wrongdoing, felt compelled to institute its troublesome search waiver policies in order to achieve post-Goldberg evictions. In other words, the embedded character of a judicially
manufactured no-evictions-without-full-adversarial-hearings regime caused a desperate Housing Authority to tamper with the real, textually explicit constitutional protections of the Fourth Amendment. The case Nadine cites and the conduct it understandably condemned thus merely echoes the principals’ Cabinet Room applause.

Next, Nadine’s notion that what we are talking about is “merely” procedural in character—just us lawyers holding hearings, that’s all—seems to me inaccurate in the extreme, a disingenuous evasion of truths about power that we lawyers understand from our first days at law school: that process is substance, that control of the former determines the nature of the latter. To speak of “mere hearings” is to profoundly understate the revolutionary significance of the rights revolution.

Justice Brennan, honest and above-board as ever, did not violate his truth-in-labeling obligations when he wrote Goldberg v. Kelly. When he mandated due process hearings, he didn’t hide behind a bogus claim that he was merely allowing “just us lawyers” to do our limited thing. Process is critical, as all lawyers know—and the Goldberg decision makes that explicitly clear.

Let’s read from the decision itself, both to see its deliberate, open, honest focus on substantive welfare policy, and to see how naive, how tragically wrong Justice Brennan was in enshrining his view of substantive welfare policy into the Constitution. Talking about welfare policy, not hearings, Justice Brennan began writing as follows in Goldberg’s critical portion:

> From its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders.

So far, so good. But the opinion continues:

> We have come to recognize that forces not within the control of the poor contribute to their poverty.

Starting to get a bit dicey with its constitutionally mandated finding of fact that the poor are passive victims of their fates. But the opinion gets worse, really bad, in its tragically romantic vision of welfare and its effects:

> Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to “promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.” The same
governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it.

Even Bill Clinton doesn’t say this any more. Even Mrs. Clinton doesn’t say it—at least publicly. Yet, in Justice Brennan’s finest moment as he saw it, he made his monumentally fallacious policy views beyond the reach of democratic debate.

*Goldberg v. Kelly* enshrines the welfare trap as an organic part of the Constitution. The reality, Nadine, is that the due process revolution is not about mere hearings. Or, as you say, mere “notice.” I’ve talked to policemen on the beat, and they say that the rights revolution decisions cannot be explained away as the motherhood and apple pie “notice” mandates you’ve tried to picture them to be, Nadine. In the real world, the risk of becoming the target of hearings causes the policeman’s supervisor to tell him that he best be sure of not “making waves” as a result of his interactions in the streets. In the real world, as I know from conversations with trade associations of teachers, principals and school board officials, people will do almost anything to avoid being sued for personal liability, to avoid becoming the target of depositions, cross-examinations, hearings and the like.

When we opened the door to us, Nadine, it wasn’t quite so benign for everyone else. We lawyers are two-edged swords, to say the least, and a little more modesty about our power to harass and intimidate, a little more realism about the effect of our interventions, would be fairer and more becoming. Justice Brennan wasn’t at all stealthy about his intentions or about the action-forcing significance of his decision, and neither should you be, Nadine. One of the reasons I want communities to have the freedom to make their own mistakes is that, though it is generally unacknowledged by us, really big mistakes, really large injustices often occur when we become involved.

A last point: When Nadine says that the rights have been established for the rich and the poor, she’s again being disingenuous. The reality is that we elites live under *contract*, not constitutional regimes, and thus define the norms under which we choose to live. The ACLU doesn’t do it for us, nor would most charter members of the ACLU allow it to happen to or “for” them. We define the levels of deviance that we wish to tolerate because we depend on private institutions, where the constitutional writ of the courts generally does not reach. As I’ve noted, the last thing in the world we would live with are the regimes we have established for the poor. That’s why we have abandoned the public schools, why we’ve moved to the suburbs, why
we don’t live in public housing—so that we can define how we live and the deviancies we wish to tolerate, rather than having the courts do it for us.

To the extent that courts get involved in the lives of elites like ourselves, they generally do so in the grand common law tradition of the law at its best—the administration and construction of contracts. It is this tradition, in which courts but modestly try to figure out what we’ve decided to do for ourselves that, as Maitland and Karl Llewellyn have eloquently written, allowed the West to become truly democratic, allowed us to escape the bonds of feudal, “status” societies. Judicial enforcement of the intent of parties and communities has been essential to the growth of social mobility in Western civilization—precisely what our poorest people now most badly need. Elevating the role of contract, which to many rights revolutionary elites “merely” enforces the intentions of those less enlightened than themselves, will allow people and communities to make their own mistakes, to learn from those mistakes, to serve less as pawns and covers for the needs and desires of others, to take charge of their lives and institutions.

PROFESSOR STROSEN: I’m going to take one minute.

I am very modest by your standards, Mike. You keep trying to give me credit for the Constitution; you keep trying to give me credit for the Bill of Rights, and for the Fourteenth Amendment. It was our framers who are responsible for those liberties, and I do take great pride in helping to enforce them.

Because there are questions, and I believe in audience free speech, I’m just going to respond to one other point. But this really is the heart of the difference between us. Mike wants to allow “communities” to make “mistakes.” What are we talking about here? When we talk about communities, that’s the latest euphemism for majorities. What does a community consist of but individuals, and if we are talking about the elected or appointed officials of those communities, we are talking about the majority of such individuals acting through their chosen representatives. So, when Mike says he “wants communities to have the freedom to make their own mistakes,” he’s sanctioning majoritarian power to violate the rights of minority groups or individuals. What he celebrates as the majority’s “freedom” therefore comes at the cost of the individual’s freedom.

And while Mike touts the value of contractual arrangements, he thus flouts the essence of our social contract, our Constitution. It secures fundamental rights that no majority may take away from any minority, no matter how small that minority is, no matter how rich or poor that minority
is, and no matter how inconvenient the majority and their elected or appointed officials might find it to respect the rights of all individuals.

QUESTION: I normally dislike people who make comments rather than ask questions, but I'm going to take advantage of the opportunity and point out that Goldberg v. Kelly couldn't have been decided any other way, given the concession that was made by the government entities in the beginning that this is a right and that due process therefore has to follow. You have to shift the debate to whether you have a right to health care, whether you have a right to public housing, whether you have a right to welfare benefits. Until you get there, Nadine's right. If you recognize it as a right, you have to provide due process and that's avoiding the big issue. I think we need to get back to that big issue.

PROFESSOR STROSSEN: I want to take this opportunity to say that the American Civil Liberties Union has never, and I believe will never, take the position that there is a right to welfare, that there is a right to housing, and so forth. We simply say that if the government chooses to be involved in the business of having a welfare program, then it may not run it in a way that's inconsistent with people's fundamental rights, including procedural due process rights.

Although Mike has described Justice Brennan's statement that he read as being the heart of the Goldberg decision, I agree with you, it was not. Brennan simply had to show that the interest at stake was important, that it would have a dramatic effect on individuals and, he says, the crucial factor in this context is that basically somebody who is on welfare is, by definition, destitute. Therefore, there's an urgent need to make sure that an erroneous decision to withdraw welfare is not made.

This doesn't amount to any purported substantive right to welfare; rather, the significant adverse impact of wrongfully denying welfare benefits simply triggers procedural guarantees. Again, the government may choose not to provide such benefits to anyone, but having made the choice to provide them, the government may not deny them to particular individuals absent procedural safeguards.

QUESTION: I don't buy that last part.

MR. HOROWITZ: I take issue with the implicit assumption of your questioner that due process rights in all their trappings have to follow if there is a right to a public benefit. Due process, as we all know, is not a
self-defining phenomena, and my point is that the Goldberg decision did not need to, indeed had no constitutional basis for placing the legal system in so commanding a relationship with the executive branches of federal, state, and local governments. I disagree with the question's assumption that Goldberg "couldn't have been decided any other way" as, I believe, would Justice Brennan. He would have hardly deemed Goldberg as important as he did had that decision not been utterly path-breaking in its scope and significance.

I believe that public as well as private institutions have the capacity to engage in self-correcting conduct capable of protecting their minorities as well as their majorities, and that their informal, discretionary decision-making processes often serve the purposes of justice far more than do the systems that we lawyers define and control. Courts are so remote from real situations, in terms of time, distance, and relevant experience that when our lawyer-driven decisions get made, they are often so arbitrary as to be literally antithetical to due process. My point is precisely that the rights revolution's real-world "due process" is often as far from Nadine's glowing descriptions of it as I now am from Mars. I don't want us intervening every single time a public official is involved in a critical decision, precisely for the reason that I do not believe that due process is thereby served.

QUESTION: This a question for Michael Horowitz.

I share a sense that AFDC is not a right, that public housing is not a right. Those are public programs which we try to run in such a way as to deliver the largest benefit or the biggest benefit to the largest number, whatever that is. The social evidence—social times evidence—shows that Goldberg v. Kelly ain't it. Right. So, on that I'm with you.

And then I see situations where I say, I don't care about that anymore. I want to play Nadine's game now. There are, as you may know, on the liberal side now, a lot of people who want to at some point subordinate due process to larger interests. I'll give you one example: the official feminist line everywhere you go is that due process is a misogynist conspiracy. There can be no right to confront your accusers, we'll have to keep secret files on you, we won't tell you exactly what you're guilty of, we'll just brand you and nail you.

You see the same thing in environmental disputes. You see the same thing in these child abuse prosecutions, and on and on and on. People's lives are really on the line. Am I missing something here, or is there some difference between the two cases?

MR. HOROWITZ: A few responses.
First, my remarks are directed at the due process revolution's effects on civil proceedings, and should at most have indirect and hortatory effect on criminal prosecutions. Confronted with criminal allegations that can lead to jail, there really needs to be a battery of safeguards, some of which are explicitly guaranteed by the Constitution, while others often oblige us to construe constitutional language on the basis of practices in effect when the Bill of Rights and succeeding amendments were adopted.

Next, while I'm enormously sympathetic to the depredations caused by "official feminist lines" at politically correct universities, I'd be very wary of turning Nadine's due process guns on weak-kneed university administrators. My most basic point is the need to strengthen internal debate within university as well as ghetto communities, thereby freeing them to make mistakes, to learn from those mistakes, and to pay real prices when they fail to do so. On the whole, I believe that communities have good faith strengths and powerful battlers for decency within them, and further believe that institutional failures on this score cause people to vote with their feet and abandon them. To be sure, there will be individual victims of injustice under the regime I broadly propose, but the sorry, tragic record of the rights revolution shows that even greater injustices can result from giving courts and cross-examiners and deposition-takers and hearing officers the last word on intra-community disputes. A utopian quest for perfect justice through the medium of United States district courts is a folly that neither serves the ultimate purposes of the courts or anyone else. Before adopting this fantasy, we'd better make very, very sure, after a very careful examination of our record as lawyers, that we will not be causing more harm than good. We should also understand that the law of contracts—judicial construction of student bulletins, employment contracts, tenure provisions—has had a far better record of curbing the politically correct brownshirts who run many universities.

The record of our due process revolution interventions "on behalf of" ghetto residents in ghetto communities is about as sorry and tragic as you can get. Let's of course never say that courts ought never come in, that we lawyers don't ever serve justice. Of course we have and do and can and must, and of course a strong legal-judicial system is central to a rule of law regime vital to us all. But let's be far more modest and honest about what we can do and have done, let's learn from that, and let's not defend ourselves as lawyers in the romantic, inaccurate, indeed tragic ways that Nadine does.

PROFESSOR STROSSEN: I disagree with everything that Michael has said in his last two speeches (a word I use advisedly), but I don't have time to fully
respond to them. I'll just note that he's engaging in a couple of logical fallacies, one of which is confusing correlation with causation. We have some procedural due process rights now that we didn't have thirty years ago; our public institutions are now in a worse state than they were thirty years ago; ergo, one must have caused the other. Even if Michael's premises were correct, his conclusion would still be logically fallacious.

This kind of argument typifies a scapegoating I see going on in this society now, across the political spectrum. People are scapegoating individual rights, especially of groups that are particularly unpopular, particularly powerless. School children and welfare mothers are certainly among those groups. The suggestion is that, somehow, if they didn't have the same rights that the rest of us do, all of our social problems would be solved, or at least ameliorated.

I want to associate myself very strongly with the ruling of the federal district court in the Chicago housing projects case that I described earlier. It underscores that sacrificing individual rights of some people, in the hope that we're going to solve some frustratingly difficult societal problem, is as ineffective as it is unprincipled. As Thomas Jefferson said to James Madison more than two hundred years ago, any society that will give up a little liberty to gain a little order, will deserve neither and lose both.

Thank you.

IV. LUNCHEON ADDRESS: GOVERNOR FIFE SYMINGTON

GOVERNOR FIFE SYMINGTON: Good afternoon.

It is certainly an honor to take part in this conference, which includes a good number of the nation's leading constitutional thinkers and practitioners. My sincere appreciation goes to the Goldwater Institute and the Federalist Society for putting this gathering together. The topic is critically important.

As I have looked at your names and the subjects you are treating, I confess to wondering whether a nonlawyer can add much to the proceedings. My training is quite limited. Art history was my discipline at Harvard, and I never set foot in a law school.

So far, I have observed mainly that many Supreme Court opinions, were they works of art, would fall squarely in the impressionist school, if not the avant garde. In a discipline which seems to call for Norman Rockwells, we seem to be overrun by Pablo Picassos and Salvador Dalis.

67. Governor, State of Arizona. Governor Symington provided the editors with a written version of his remarks.
A year ago, though, I did stop by a bookstore and buy an outline called
Gilbert's on Constitutional Law. A little knowledge as they say, is a
dangerous thing, and I am now dangerous. The Gilbert's treatise rests on
my credenza and from time to time I pick it up and read from it on one
subject or another. The subject of constitutional law is complicated and vast,
and still well beyond my reach. I know just enough to know I have barely
scratched the surface.

But then, even as a layman considers the breadth of the subject, it occurs
to him that maybe he has found exactly the place to begin this discussion. It
is worth asking ourselves whether the great leaders who built our nation ever
expected constitutional law to become such a complex and comprehensive
subject.

Our Founding Fathers—and just about anyone else through the first 150
years of our national existence—envisioned federal judges primarily as legal
technicians and arbiters of private disputes. Let me deploy an understatement
for the moment, and say that we have drifted a bit from that vision. In fact,
when you really consider the lofty reach of our federal judges in modern
America, the words of the poet come to mind: Politically speaking, they
have slipped the surly bonds of earth, and touched the face of their God. No
matter what, though, remember this: Whatever claims our learned judicial
figures might make to divine insight, in the end there is one principal
difference between God and a federal judge—God doesn't think he's a
federal judge.

You may also have heard of a movie Hollywood produced a while back,
titled "Free Willy." It was a kid's movie about a whale. But when I first
heard of the film I thought it was a documentary on prison litigation. Or
perhaps a CLE film for new appointees to the bench.

It's best to laugh a little at our situation, because without some sense of
humor you could easily lapse into outrage. The Federalist Papers No. 81 in
particular, and other evidence compel the conclusion that our nation has
slipped its constitutional moorings. The essential role of the federal
judicature, as Hamilton called it, was to settle those relatively few court
cases that the Constitution assigned to federal jurisdiction.

Hamilton did list a couple of things the states would be precluded by the
federal courts from doing. These were imposing tariffs on imports and
printing money. He also said, "Whatever practices may have a tendency to
disturb the harmony between the states are proper objects of federal
superintendence and control." Even I would say that is reasonable.

But in our time, Hamilton has proved less prescient than his adversary
Thomas Jefferson on the most important question. He argued that fears of
judicial supremacy in the new union were unfounded, first because of a “total incapacity (by the judiciary) to support its usurpations by force”; and second, because of the power of impeachment vested in the Congress.

In more than two hundred years, the grand total of impeached federal judges is one. The impeachment authority is a hollow check on judicial power. More than a year ago, when I was audacious enough to suggest impeachment of a local federal judge for his “usurpations,” voices from Congress raised up all right, but only to tell me I was nuts. And that was just from my friends. The same judge has now unilaterally halted all logging in the west, in direct defiance of clear congressional intent to the contrary.

And as for imposition by force, federal judges today bring the full weight of huge fines, power to incarcerate, and deployment of federal marshals to coerce compliance with their whims. Only a week ago, the Ninth Circuit upheld a contempt of court finding against Arizona’s corrections director. This was imposed for the grave offense of attempting to deny pornographic magazines to the convicted felons in our prisons.

The sweeping ministrations of our judicial oligarchs—that is Jefferson’s prophetic term—have mounted through the years. They include many inventive creations, well-known to most of you in their origin and operation. We are learning well today why Jefferson warned, at the age of seventy-five, that federal judges are, “the most suspect source of decision in a democratic government,” and that they are, “effectually independent of the nation.” And we can easily see why Justice Felix Frankfurter more than a century later would write that, “The Court is not saved from being oligarchic merely because it professes to act in the service of humane ends.”

Much of our national life today is predicated not on the Constitution, but on a series of spectacular judicial contortions purporting to reveal what the Constitution really means. Some of the more famous judicial inventions include the “incorporation doctrine,” which applies to some but not all of the amendments in the Bill of Rights; “substantive due process” (a phrase which the unenlightened might consider an oxymoron); and, boldest of all in its own way, “emanations from the penumbra.” In the criminal law alone, we have enjoyed such inspired revelations as the “exclusionary rule”; the “Miranda doctrine”; and the “fruit of the poisonous tree,” which sounds like the title of a book Professor Lino Graglia might publish on the general subject of judicial review.

During the 1970s, we saw Justice William Brennan and the Supreme Court find the death penalty unconstitutional, even though it is specifically contemplated three times in the Fifth Amendment. And just in the past ten years or so we have seen the complete destruction of the jury selection
process, carried out step-by-step in an increasingly tortured series of Supreme Court holdings.

Sometime after becoming governor and getting involved in a lot of related policy debates, the earnest question came to mind of exactly where all this stuff had come from. Now Einstein once said that everything should be made as simple as possible, but no simpler. So here is the simplest answer you can find to that question. The courts made it all up.

For the most part, that fact has gone widely overlooked in our national political conversation. There is an occasional article in a conservative journal, some recurring discussion at meetings of the Federalist Society, but that's about it. The dominant media culture, which is so keen for cynical portrayals of elected officials, is mysteriously childlike and uncritical before the boldest exercises of judicial power.

Perhaps the mystery is cleared by observing a practical fact. The dominant media and the modern judiciary are allied institutions. The courts actually impose a lot of policy preferences that the press and the filmmakers can merely agitate for. And most of those policies are things which could not find honest enactment through the legitimate political process.

Despite the conspicuous silence about the subject, the American people are beginning to add up the mounting costs of judicracy. The criminal justice system is thoroughly ensnared, from investigation to incarceration, by endless judge-made laws of evidence and procedure and criminal-friendly corrections mandates. The system was widely considered a failure even before the O.J. Simpson trial removed any doubt. In the meanwhile, criminals continue their arrogant advance into our lives.

Journalism continues to decline in tone and public esteem, a trend some experts trace to the Supreme Court's nationwide imposition of an ill-conceived law of libel suits in New York Times v. Sullivan. Justice William Brennan, who authored that opinion, seemed to think that constitutional law should be dictated according to his personal views about "human dignity." But his thirty-plus years of making law for the country as a Supreme Court Justice tracked a near-total loss of dignity in his own legal profession.

Public schools continue their decline into deep mediocrity, under the persistent impositions of the federal courts on fine details of school management.

Race relations are backsliding, damaged as many predicted they would be by judicial mandates of all kinds governing employment law and academic admissions.

Entire industries and the people who work in them are wiped out at the whim of individual judges, who welcome extreme environmental agendas into their courtrooms and take up the Endangered Species Act as a weapon against the West.

Abortion continues to divide the country and to occur too frequently, leaving even those of us who have supported its legality to wonder: Would the nation have better handled the difficult moral questions involved had the Supreme Court not preempted public debate in the political process? The culture of our nation continues to suffer in tandem with our common spiritual life, as the Supreme Court and the lower federal courts go on developing an absurd line of decisions about public expression of religious faith. Under the current reading of the Constitution handed down from our federal courts, the state is forbidden to post the Ten Commandments in a classroom, but the state is compelled to provide a prison inmate with the requested accouterments for worshipping Satan in his cell.

These are truly distinctions which only the finest legal minds can fathom.

At the same time, inscrutable judge-made law on such things as obscenity and other sex-related businesses has made our cities home to the wholesale exploitation of women for profit. The parents of America are now raising their children in a culture where hard-core pornography is on-line, on the video racks and on TV.

In short, we have suffered an institutional role-reversal in our constitutional government. Instead of legislatures instructing the courts on which rules of law to follow in deciding cases, the courts are instructing legislatures on precisely which laws to pass and how they should be written.

If it is solutions we seek, I know of at least two. First, as I have said before, we should amend the Constitution to limit the terms of federal judges. In our system, the just price of political power is a limit on the years you are entrusted to exercise it. Twelve years will do. But still more important, the Congress must exercise its constitutional powers to constrain the authority of the federal judiciary.

For much of our current situation, the federal judiciary bears blame. It has simply been a case of judges, again making a prophet of Jefferson, willfully "enlarging their jurisdiction." But it's important to note that legislative and executive abdication are the other side of the coin. Congress has willingly designed and presidents have signed numerous laws which allow activist groups to march into federal court and have important policies dictated from the bench. The Endangered Species Act, the Clean Air Act, and the Civil Rights Act are good examples, and there are others. With or without complicity from the elected branches of government, federal judges
today sit on life-tenured thrones where they rule over the nation like so many philosopher kings. They are the self-anointed arbiters of all moral truth, ruling on all the important questions of our political, social, economic, and even our sexual lives.

When you divorce that kind of power from political accountability, you place a heavy tax on the available human capacity for humility. The fact that judicial decisions have favored liberal policy preferences is certainly irritating to those of us who disagree. For men like Robert Bork and Clarence Thomas, who have seen their lives and reputations ruthlessly attacked by leftists fighting to hold their judicial franchise, irritation is far too weak a word. But there is a deeper problem which should concern anyone who values freedom.

A nation conceived in liberty cannot survive under a regime of judicial rule. Liberty is not a concession from the government. Liberty does not flow to the people, as liberals seem to think. It flows from the people, and they enjoy it for so long as they are morally and intellectually fit to enjoy it.

Representative democracy is the means by which people remain responsible for their own freedom, and thereby fit to enjoy it. An elitist judiciary which trivializes representative democracy consumes the very means of preserving freedom.

Political liberals who celebrate and defend the dominant policy preferences of the courts should recall the warning in 1943 of Justice Robert Jackson. “This court,” he said even then, “is forever adding new stories to the temple of constitutional law, and the temples have a way of collapsing when one story too many is added.”

I will conclude with some thoughts from another judge from the past, Judge Learned Hand, who perhaps sacrificed his chance to sit on the United States Supreme Court by standing for these ideas so courageously. “Liberty,” the judge wrote, “is the product not of institutions, but of a temper, of an attitude toward life. . . A society so riven that the spirit of moderation is gone, no court can save; a society where that spirit flourishes, no court need save; [in] a society which evades its responsibility by thrusting on the courts the nurture of that spirit, in the end that spirit will perish.”

Wisdom of that sort, when it comes from a judge, carries a majestic quality which all of us can appreciate. I hope that the many esteemed legal minds here today will help to bring Judge Hand’s spirit of humility and moderation back to America’s courtrooms.

Thank you for having me, God bless you, and may God save our honorable courts.
V. PANEL DISCUSSION: ENVIRONMENTAL REGULATION AND GOVERNMENT BY JUDICIARY

Have contemporary notions of judicial review resulted in the proliferation of judicially imposed environmental mandates? Some argue that liberalized standing doctrine and "citizen suit" provisions in federal environmental statutes often permit public interest groups and individual members of a community to resolve public policy disputes in courts rather than through democratic institutions. In a similar vein, some maintain that judicial review of administrative agency action has become an avenue for second-guessing the way in which communities and governing institutions set environmental priorities. Judicial decisions often can result in staggering costs—with federal, state, and local governments assuming significant responsibilities for cleanup or remediation, reevaluation of public policy alternatives, and adoption of stringent, court-imposed standards or programs. Others respond, however, that judicial oversight is necessary in order to ensure that special interests do not capture governing institutions and thereby dilute the force and effect of environmental regulation. This panel will examine both perspectives.

Mr. Samuel Cowley. 69 I am pleased to introduce our panel and topic dealing with judicial mandates and government by judiciary in the area of environmental regulations.

This is an area of tremendous interest and, as we read again in this morning's newspaper, a focal point for ongoing and heated congressional debate.

In that debate, we can anticipate more of the basic arguments: businesses pleading for relief from overly stringent and heavy-handed regulations; from abuses in the current regulatory enforcement system; and environmentalists pleading to save the earth for future generations by toughening the current system.

Since the early 1970s, Congress has increasingly relied on private parties to enforce government requirements for public purposes. Almost all environmental statutes contain citizen suit provisions that allow any person to act as a private attorney general to enforce government regulations. Over time, the ability of citizens and groups to bring such suits against both

69. Attorney, Snell & Wilmer, Phoenix, Arizona. Mr. Cowley is a member of the Advisory Board of the Goldwater Institute, a director for the Arizona Venture Capital Conference and the Executive Service Corporations of Arizona.
private parties and government agencies has been made easier. The panel will explore the effects of this system.

The resulting proliferation of environmental lawsuits has affected everyone. It may have benefited all of us by significantly improving our environment from what it otherwise would have been. It certainly has imposed staggering costs on states, local governments, and businesses, as they have been forced to prepare for and defend litigation, and have been coerced into signing consent decrees which were encouraged by current legal rules. These consent decrees often require parties to build or stop projects or halt practices affecting the environment, all of which impose significant costs, and to otherwise make significant contributions to vigilant environmental groups.

The high visibility confrontation over the timber industry in Arizona is a local example of the effects that an environmental lawsuit can have on governments, industries, and people.

Significant questions arise regarding the current environmental regulatory enforcement system, and the significant involvement of the judiciary. What are the costs? Does the system efficiently allocate the costs? What are the benefits? Has the current system resulted in a proliferation of judicial solutions and a consequent loss of liberty, instead of solutions from elected policy-makers, or have the legislatures designed the system to effectively achieve their policy goals? Most importantly, does the system provide the framework for efficiently and effectively accomplishing legitimate environmental goals of clean air, clean water, and good environment?

We are very fortunate to have an outstanding panel today to discuss these and other related issues.

Mr. Marzulla.

HONORABLE ROGER MARZULLA: \(^{70}\) I have a riddle for you: How does a federal judge come to be responsible for the drinking water supply for more than a million people in south Texas, as well as for the design and implementation of a reservoir and water distribution system for the entire city of San Antonio, the ninth largest city in the country, and not, coincidentally, responsible as well for the resolution of decades old conflicts among the farmers, ranchers, cities, state government, industry, and recreational users with respect to the use of the water resources of the state?

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\(^{70}\) Attorney, Akin, Gump, Strauss, Hauer & Feld, Washington, D.C. Mr. Marzulla was Assistant Attorney General for Environment and Natural Resources at the Department of Justice, and is credited with designing President Reagan's executive order on takings. He is a director of Defenders of Property Rights, and serves on the Steering Committee of the Federalist Society's Washington, D.C. lawyers chapter.
of Texas? Give up? Well, the answer is found, surprisingly enough, in the environmental statutes. See, you should have read the outline.

The environmental statutes have two relevant components to this discussion that have made this marvelous new world of judicially-run water supplies, economics, and land-use development possible.

First of all, the environmental statutes impose mandates—some funded, most unfunded. But, fundamentally, as anybody who has dealt with the Clean Air Act, or the Clean Water Act, or the wetlands regulations or, for that matter, the Endangered Species Act knows, those programs are run under the watchful eye and oversight of the federal government, to make sure you do it right.

This is no surprise to those of you who live here in Phoenix, and who have, for years, operated under the cloud of a Federal Implementation Plan under the Clean Air Act, a process in which EPA would tell you how to regulate the emissions that give rise to air pollution in this town, and would override the decisions of the legislature. California has a similar consent degree that goes back to the late 1970s. The South Coast Area Air Quality Basin has never been in compliance with the Clean Air Act from its inception in 1972. So the environmental statutes provide the authority for the federal government, fundamentally, to override local legislatures, and to tell them what they must do.

Secondly, as alluded to, the citizen suit provisions of these statutes provide access to the federal courts for “any person”—I’ve just now given you the universe—to sue state and federal agencies, to require that they comply with the environmental statutes and regulations, as that “any person” may understand them.

Furthermore, the customary limitation upon access to the jurisdiction of the federal court, the thing we call standing, is fundamentally defined in terms of whether or not you happen to be someone who uses and enjoys the environment. I suggest, then, that everybody here would likely have standing to bring virtually any environmental case, at least if you were standing outside before you entered the room.

Now, I think the best way of illustrating the principles I’ve just laid out is, in fact, to give you an example. An example which I’d like to tell you is hypothetical, but unfortunately, it is not.

The case is called Sierra Club v. Babbitt. 71 You guys got rid of him, but we have had to deal with him where I live. Sierra Club versus Babbitt, the State of Texas, and a whole bunch of other state agencies. The case deals with the life cycle of the San Marcos Fountain Darter, the Comal Springs

71. 995 F.2d 571 (5th Cir. 1993).
Fountain Darter—although they share the same name, they apparently are not related—as well as a salamander and something called Texas wild rice, which are found only in this one little stream near Comal Springs.

Now, these creatures and that plant are fed by a stream which is the ultimate outcropping of waters that have been drained from west Texas to south east Texas, a distance of about 175 miles. Basically, the rivers go underground, deliver the water 175 miles away, and that provides habitat for these little darters and salamanders.

The aquifer, which is the source of this particular spring—the springs themselves, San Marcos and Comal, occupy only a few acres of the surface—the aquifer occupies about 3,800 square miles underground, and goes to depths, in places, of several hundred feet. And the recharge area—that is, the place from which the surface waters are drawn—is far, far larger than the 3,800 square miles which is occupied by the aquifer itself.

Why do I give you all of this background? Well, it is because the lawsuit that I mentioned, Sierra Club v. Babbitt, et. al., was brought for the purpose, allegedly, of protecting the salamander, fountain darter, and the Texas wild rice. The problem is that the way in which you provide the natural habitat for these creatures is to ensure the water flow, and the only way you can ensure the water flow from an aquifer that basically takes water 175 miles underground is, of course, to control everyone who takes water out of that aquifer.

The aquifer, as in this case, in fact provides drinking water for over a million people in the San Antonio area, provides irrigation water for hundreds of thousands of acres, and provides industrial uses for some of the largest chemical and manufacturing plants in the state of Texas. You can see that one poor judge, Lucias Bunton by name, in Midland, Texas, has quite a job on his hands.

Well, how is it that one poor little judge down in Midland, Texas, can handle such a massive undertaking? Of course, the truth is that he can’t. So he has gone out and he has appointed himself a monitor, a gentleman that—see, we don’t have problems with special masters, you know, the governor talked about that, so we call them a monitor, and that way we don’t run into special master problems—by the way, is a veteran monitor. This isn’t the first time he has done this. He used to be in charge of, and still bears some responsibility for, the Detroit waste water treatment plant, which is also under federal operation, developed by another federal judge up in Detroit. But he’s spreading himself kind of thin, and he is able to take care of the aquifers down in South Texas as well.
Among the duties with which the monitor has been charged, is the development of the necessary groundwater data to ascertain how water gets from point A to point B in the Edwards Underground Aquifer, and ultimately comes out at Comal Springs, and how much of that water can and cannot be withdrawn, at what points, what are the impacts of weather, and other outside influences. Ultimately, in short, he is to graph the entire picture.

Having gotten that data, he is next to develop a plan that will allocate appropriate uses and quantities for all of the water in the Edwards Underground Aquifer. Obviously, you can't do that when you have got a city like San Antonio that relies exclusively on underground aquifer water for drinking water for its population of more than a million people. So the monitor is also responsible for developing an alternative drinking water supply plan—that is a multi-billion dollar reservoir for the San Antonio area—and seeing, incidentally, that the bond measures for that plan get passed and not turned down, as they have in the past.

In his spare time, he is also responsible for a group of lawyers who came up with a plan for emergency response in the event of a drought, similar to the so-called drought of record in 1956 when the springs actually dried up. He is responsible for them being a conflict resolution group, in which all of the local agencies—recreational, agricultural, manufacturing, and other interests—are to be represented and are to come to agreement on how the waters of South Texas are to be used.

The state does have a role here. The state is responsible for passing legislation which is then to be reviewed by the monitor, and ultimately by the federal judge to see whether that legislation accurately regulates the underground water in South Texas. They tried that back in 1993, and they ran into another problem; that is that it appears that Title 5 of the Civil Rights Act invalidated the method by which the folks who were going to run the Edwards Underground Aquifer Authority were appointed. So after a year or so of civil rights litigation under the federal civil rights law, the whole thing was invalidated and the legislature had to go back, once again, and pass a new law, which has recently been challenged under state constitutional law as not being in compliance with Texas's state constitution.

Finally, as if the poor monitor didn't have enough to do, he is also responsible for reviewing the plans that the Fish & Wildlife Service come up with for providing for the recovery—remember, that's the ultimate goal of the Endangered Species Act—providing for the recovery of the salamanders, the fountain darters, and so forth, and so on. All of this, of course, is done under the aegis and authority of the federal judge.
Reading the opinion of the federal judge which set up this entire mechanism is a tour de force for anyone who believes that federal judge’s authority is in any way limited.\textsuperscript{72} Not content to state his ultimate purpose and how he was going to reach it, of protecting the creatures themselves, the judge also points out how he is also going to provide a much better and more secure drinking water supply for San Antonio. He is going to protect the pure waters of the aquifer from the pollution which might otherwise reach them through the recharge, and ultimately, he is going to bring about the resolution which, after all, needed doing among all of the varying interests that have been fighting in the political arena for these many decades over the allocation of water in South Texas.

Well, not to belabor the point, but to bring this example, which is an ongoing one, to, if not an end, a point of current conclusion, I might quote simply from one of the local mayors of a small town that is dramatically affected by the fact that the area is going to have to build these multi-billion dollar reservoirs, is going to have to set up waste water treatment plants that will actually recycle some of this water back into the drinking water supply, and so forth. He says, “Fundamentally, what you guys are telling me is we are going to have to drink our own effluent, and we are going to have to pay three times as much for it.”

There, I suggest to you ladies and gentlemen, in one pithy statement, is a summary of how the environmental statutes can affect state and local prerogatives.

Thank you.

PROFESSOR RICHARD LAZARUS:\textsuperscript{73} It is a pleasure to be here. It is always a delight to be on a panel with Roger Marzulla. Roger and I worked together at the Justice Department for many years back in the 1980s.

Dr. Greve and I have debated each other in the past. I admire his work. And, of course, like everyone else in the Environmental Law Academy, we are all, to some extent, students of Professor Stone. The Federalist Society always has the best conferences.

My role here though, I should let you know, is as provocateur—I am not a fellow traveler. The Federalist Society has some of the best legal minds, and in many ways, has greatly advanced debate, particularly in law schools.


\textsuperscript{73} Professor of Law, Washington University (St. Louis); Visiting Professor, Georgetown University Law Center. Professor Lazarus was an Assistant to the Solicitor General of the United States, and served in the Justice Department’s Environment and Natural Resources Division. He currently serves on the Environmental Defense Fund’s Litigation Review Committee and the World Wildlife Fund’s National Council.
The Federalist Society is often the focal point of some of the most interesting and intellectual debates in law schools these days. Unfortunately, the Federalist Society is sometimes a source of a fair amount of hypocrisy, and that latter point is going to be my primary focus today.

The notion of "government by judiciary" is that the courts act in a dominant role in the government. This is expressed in many ways, but is quite often the notion that the function of judges is to interpret law, not to create law, and judges should not usurp the democratic process.

This collapses into four different kinds of accusations: One is that through expansive notions of standing, the courts decide public policy issues that are better left to the legislative branch. The second is, that by engaging in statutory construction that ignores the plain meaning of the statute, the courts substitute their own view of what the law should be for what the legislature has enacted. Third, through a hard look of judicial review of agency action, courts substitute their own policy judgment for that of the agency, and impose procedural requirements that Congress does not require. Finally, that through intrusive judicial remedies, courts improperly run government—in particular, run state and local government.

The thesis or premise of this panel is that environmental protection law and regulation presents a problem of government by judiciary. I would like to make two points and a conclusion.

First, the thesis before this panel is that environmental protection law is disproportionately the beneficiary of an activist judiciary. That thesis may have once had merit, but not now. To the extent that there is still an intrusive character to judicial review in environmental law, those who make that claim are wrongly attacking the messenger, instead of the entity sending the message, which is Congress.

Second, the more appropriate objects of criticism of government by judiciary—the more appropriate targets—are those within the federal judiciary, and those who support them, who seek to undermine the environmental protection laws through extraordinary measures of judicial activism. That leads me to the conclusion that the argument of many conservatives, including many within the Federalist Society, that government by judiciary is an evil, and that environmental law is currently a beneficiary of judicial activism, is a sham.

The first point: I think there is very little merit to the notion that environmental protection law currently is a disproportionate beneficiary of judicial activism. That thesis, I think, is a relic of a very different era. There was a time in the late '60s and the 1970s, when the courts were extremely active in the environmental protection area. They affirmatively
and explicitly announced a partnership with Congress to promote environmental protection;\textsuperscript{74} to ensure, as the D.C. Circuit put it, that environmental protection concerns would not become “lost or misdirected in the vast hallways of the federal bureaucracy.”\textsuperscript{75}

These were activist courts in the '70s, and they saw themselves being assigned a significant role: They saw environmental law as quasi-constitutional in civil rights, and it was their job to protect future generations.\textsuperscript{76} They expanded concepts of standing in the '70s. They created private rights of action implicitly, and even under statutes without any other kind of textual support.\textsuperscript{77} They adopted liberal interpretations of the statutes not rooted in the plain meaning, like the creation in the first instance of the prevention of significant deterioration program in the Clean Air Act during the early '70s.\textsuperscript{78} They engaged in “hard look” review of agency actions; imposed procedural requirements for which there was no textual support; and they imposed automatic injunctions whenever there was a violation of many environmental laws without applying traditional equitable criteria. This was the kind of judicial activism that William French Smith denounced in a major speech he gave in 1981, soon after becoming Attorney General.\textsuperscript{79}

There is no such environmental protection bias now evident in the federal judiciary. The Supreme Court has cut back standing; the Court has made “plain meaning” a judicial mantra since 1984 when it decided \textit{Chevron};\textsuperscript{80} it slapped down hybrid rule-making long ago in \textit{Vermont Yankee}\textsuperscript{81} in 1978; and the Court likewise knocked down the automatic injunction rule years ago in \textit{Weinberger v. Romero-Barcelo},\textsuperscript{82} and \textit{Amoco Production Co. v. Village of Gambell}.\textsuperscript{83}

To be sure, there are still instances of injunctions against violators of environmental protection laws and regulations, including state and local governments. But that’s not because there is an activist judiciary. That’s

\textsuperscript{74} Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971).
\textsuperscript{75} Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm’n, 449 F.2d 1109 (D.C. Cir. 1971).
\textsuperscript{82} 456 U.S. 305 (1982).
\textsuperscript{83} 480 U.S. 531 (1987).
because there has been an active Congress. These cases are not instances of judicial invention or judicial overreaching. The courts, in these cases, are merely performing their assigned role, a conservative role, and that is that they are interpreting and applying the law, not inventing it.

If that was my only point, I would simply think it was sort of odd that folks in the Federalist Society were still seizing this old thesis. Perhaps they have a romantic desire to relive old battles of the 1970s. But it's not my only point. My thesis is that the argument that government by the judiciary favors environmental regulation is not just odd, but that it smacks of disingenuousness. There is currently a lot of judicial activism and government by judiciary in environmental law, but the instigators are those who are resiting the laws, not those who are promoting the law. The more appropriate target of claims of government by judiciary are those who seek to undermine the laws, having largely lost the battle to change the laws in the legislative and executive branches. And this is not mere happenstance.

In the 1980s there was a concerted effort during three administrations of Republican presidents to cut back or reform the environmental protection laws passed in the 1970s. But those efforts lost in Congress, and those efforts lost in the EPA in the face of overwhelming public opposition. They may be about to succeed now, but they lost in the 1980s.

Having failed to change the text of the relevant statutes and regulations in the 1980s, what conservatives did, including those within the Federalist Society, was to turn to their one great success in the 1980s: their appointment of a very large number of conservative thinkers to the federal judiciary. They turned to those judges to try to promote the conservative agenda in the environmental area, which they had not convinced Congress or the executive branch to embrace. They did this notwithstanding the fact that turning to the judiciary was blatantly inconsistent with the view they had previously expressed about how the judiciary should not usurp the democratic process; notwithstanding the fundamental inconsistency of that strategy with the views of federalism they had been advocating during the 1970s and early 1980s. The simple fact is that once the federal judiciary seemed to be a way to promote the conservative economic agenda, they were all too happy to rely on the judiciary.

These efforts have borne a lot of judicial fruit during the last few years. They have resulted in the creation of constitutional barriers to standing that make it very difficult to enforce congressional commands.\textsuperscript{84} Justices Kennedy and O'Connor have recognized the impropriety of such judicial overreaching, and they did not join the Court's opinion. Not so Justice

Scalia, writing for the Court. They have borne fruit by prompting lower court judges to engage in non-plain meaning statutory construction: to ignore the clear commands of the statute, to substitute the court’s own view of what the law should be, and not what Congress enacted, and the President of the United States signed. These new conservative courts are resurrecting a hard look doctrine to second-guess the environmental protection decisions of the EPA, and of state and local government. This federal judiciary is using the Commerce Clause—the negative implications of the Commerce Clause, which have no textual support in the Constitution—repeatedly to defeat and overturn countless efforts by state and local governments to enact laws intended to protect the environment within their borders.

Consider a few examples of conservative jurists’ abandonment of “plain meaning” doctrine. The Ninth Circuit’s original panel decision in Northwest Environmental Advocates v. Bell\(^85\) appears to have ignored the plain meaning of the Clean Water Act in an effort to insulate the defendants from citizen suit enforcement of state water quality standards. Though subsequently reversed on rehearing, the original panel’s reasoning very much sought to substitute its own views of sound policy for that which was enacted by Congress. Similarly, in Natural Resources Defense Council v. EPA,\(^86\) the D.C. Circuit ignored the plain meaning of the Resource Conservation and Recovery Act (RCRA), responding to its own views of sound policy, in ruling that Congress did not mean what it said in declaring that EPA must ensure no migration of a “hazardous constituent” in RCRA. One final example is found in the Supreme Court’s recent decision in Public Utility District No. 1 v. Washington Department of Ecology.\(^87\) The majority concluded that the Clean Water Act’s plain meaning generally allowed states to impose their state water quality standards on hydroelectric projects licensed by the Federal Energy Regulatory Commission. In dissent were our two Justices most closely aligned with the Federalist Society: Justices Scalia and Thomas. They managed to overcome that plain meaning of the relevant statutory in order to favor a result supported by the regulated community. Under their view, rejected by the majority, state law would have been preempted.\(^88\)

The new more conservative courts are likewise regularly invoking a “hard look” doctrine in favor of the interests of the regulated community.

\(^{85}\) 11 F.3d 900 (9th Cir. 1993), rev’d on rehearing, 56 F.3d 979 (9th Cir. 1995).
\(^{86}\) 907 F.2d 1146 (D.C. Cir. 1990); see id. at 1173 (Wald, J., dissenting).
\(^{87}\) 114 S. Ct. 1900 (1994).
\(^{88}\) Id. at 1915 (Thomas, J., joined by Scalia, J., dissenting); see id. at 1914-15 (Stevens, J., concurring) ("For judges who find it necessary to go behind the statutory text to discern the intent of Congress, this is (or should be) an easy case.").
The Fifth Circuit’s 1991 ruling in *Corrosion Proof Fittings v. EPA,* generally hailed by conservatives within the Federalist Society, imposed a very demanding level of judicial review on EPA’s efforts to implement the Toxic Substances Control Act. And, conservative lawmakers today are seeking to reinvigorate judicial review of environmental protection measures even more in new “regulatory reform” legislation that would impose extremely demanding procedural requirements and open up new avenues for industry to seek judicial review of agency compliance with those requirements.

Finally, there is no greater hypocrisy than the promotion of the Takings Clause, which is on the agenda of many within the Federalist Society. This is pure judicial activism; a pure judicial override of state and local government. Those who argued for expansive notions of regulatory takings are calling for the federal judiciary to undertake a massive overturning of state and local governmental actions in environmental law; to have the courts substitute for the legislature a balance between competing property interests; to have the federal courts substitute their views for that of the states on the meaning of state property in tort law; to have the federal courts’ view of “objectively reasonable” application of state law precedent—as the Supreme Court put it in *Lucas,*—to have that trump what the state believes its own state law to be. They seek to create a uniform federal definition of private property, to treat state law as a matter of federal law, and usurp state legislative and judicial functions in the area of property. This is not an instance of courts complying with clear constitutional commands, or simply implementing the original intent of the Framers—this is pure and unadulterated judicial activism.

You don’t have to believe me, just ask Judge Bork. I decided to bring the good book with me today: Judge Bork’s book, *The Tempting of America,* where he explicitly addresses the legitimacy of such uses of the Takings Clause, particularly those advocated by Richard Epstein, often referred to as the guru of the Taking Clause within the Federalist Society. And this is what Judge Bork says: He says that Epstein’s arguments are “not plausibly related to the original understanding of the Takings Clause”; that Epstein has “written a powerful work of political theory, one eminently worth reading in those terms, but he has not convincingly located that political theory in the Constitution.”

89. 947 F.2d 1201 (5th Cir. 1991).
91. *Bork*, *supra* note 46.
So, there may well be a threat of government by judiciary in environmental regulation, but, as Judge Bork recognizes, that threat is now not from those who seek to promote environmental protection. It is from those who seek to undermine it.

Thank you.

DR. MICHAEL GREVE: I have attended a fair number of Federalist Society functions and spoken to a lot of chapters. But the Society never ceases to amaze me: here I find myself agreeing with almost everything Richard Lazarus had to say—until Richard got to the Takings Clause. But I will leave takings aside today and focus on citizen suits and judicial review.

I wholeheartedly agree, and I think Roger Marzulla will agree, on Richard’s first point: judicial mandates are a huge problem in environmental regulation. But, says Richard Lazarus, the courts are mostly drawn or thrown into this morass by the Congress. The time when the courts inserted themselves into the debate are long gone.

This analysis is right on the money. For all the uproar about Judge Muecke and a handful of other federal district court judges who still want to run the states, environmental law is not like busing or prison litigation, where federal courts said, “Let’s turn the country upside down and see what it looks like that way.” Environmental law is largely the handiwork of the Congress, and most federal environmental laws take a very, very dim view of federalist and of local control.

The reason for this orientation is the ideological impulse behind the current environmental regime, which I have referred to as “the ecological paradigm.” The paradigm holds that everything is connected to everything else. The world is a seamless web, and whatever happens in one corner of the ecosystem may wreak havoc in another corner.

Now, if you view the world as a seamless, infinitely fragile web, you will, first, want to trump any and all local activities with government regulation, and you will want to do so at a centralized level—in Washington,

93. Executive Director of the Center for Individual Rights. Dr. Greve was formerly resident scholar at the Washington Legal Foundation, and a program officer at both the Smith Richardson Foundation and the Institute for Educational Affairs. Dr. Greve is co-author of MICHAEL S. GREVE & FRED C. SMITH, ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS (1992) and the author of THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW (1996).

94. GREVE, THE DEMISE OF ENVIRONMENTALISM, supra note 93, at 1.

D.C. or, preferably, in Geneva, Rio de Janeiro, or wherever these things are handled at an international level.

Second, you will want to intervene very intensively, down to the minutest detail. Thus, the federal Clean Air Act regulates—or aspires to regulate—every valve, every boiler, every pipe. And the regulators want to know exactly what the pipes do, where they are, why you put them in, what is in them, and how they work. Environmentalism acknowledges no formal boundaries, such as property rights or decentralized government structures. If the real world makes no distinction between what’s mine and what’s yours (since everything you do on your land affects everyone else), the presumptive case for property and local autonomy disappears.

Third, and finally, the ecological paradigm drives towards command-and-control regulation. The environmental regime that we have wipes out the discretion and flexibility with which we ordinarily invest executive agencies, because any flexibility that we build into the system might upset the apple cart and produce policy slippage and interest group capture. This is why almost all official duties that arise under federal environmental statutes are nondiscretionary or mandatory with the secretary or the administrator, as the case may be.

Where do the courts fit into this scheme? Well, when you have a centralized, intrusive, and rigid regulatory scheme, you need an enforcer and a bogey-man whom you can blame when things go awry. And the regulatory system that I have just described produces lots of paradoxical effects and unintended consequences. For example, Congress wants to say—and has in fact said—that we must have absolutely pure air, and we must have it tomorrow. Now, real people have to live with this rule, and somebody has to enforce it. But the law suppresses all the trade-offs that matter to people: What does totally clean air cost? What are the counter-productive effects of such a rule? Of course, all of us want completely pure air (tomorrow!), but we also want to drive our cars. So we are quite ambivalent about environmental regulation. If you are an environmentalist, then you must ram the absolutist rules down people’s throats. Some place, the rubber has to meet the road.

That place happens to be the courts. The courts are the ideal enforcers, because they have lots of power and because they are almost immune to political control. Unlike legislators or regulators, they never have to look at the real-world effects of the law. Every judge has a good excuse for ignoring practical results of what he does, which is as follows: “What I’m doing as a judge is not about results; it’s about the law. Congress told me I have to enforce the law, the law says I have to enforce, so I’ll go ahead and
do it. If that means running the city of San Antonio, so be it. I look to the law in its majesty and away from people's real-world concerns; come to think of it, it's my job to do so."

This is why Congress has authorized environmental citizen groups to do in the courts what Congress itself cannot do: Courts are extremely good enforcers and very good bogey-men for a regulatory system that routinely demands and produces absurd results. This is why Congress has mobilized citizen plaintiffs and courts in the environmental context to an extent that is unheard of and unknown elsewhere. You cannot imagine that we would pass a law that allows me, as a citizen, to sue the IRS Commissioner because I believe that Roger Marzulla didn't pay his taxes, and then compel the IRS Commissioner to go after Marzulla. But this is the *modus operandi* of our environmental laws.

So the courts, given absolutist environmental mandates, go out and enforce the law, and their excuse is that they have no choice. And in a way, they are right: They have no choice. Otherwise, the courts would have to defy Congress.

In recent years, federal courts have in fact begun to defy Congress. If you want to call this defiance judicial activism, then Richard Lazarus is right on his second point as well: There is a lot of judicial activism now.

In some cases dealing with health, safety, and environmental standards, federal appellate courts have in essence come to require agencies to show that the costs of regulation are in some way reasonably related to the benefits. The cases say something along the following lines: "Courts and regulators can't simply accept a congressional mandate to ignore costs altogether. It is true that the statutory language looks as if Congress instructed the agency to go insane. But were we—the courts—to take this language seriously, we would have to presume that Congress wants to be unreasonable, and we are not going to do so. We will therefore read the language, not on the basis of what it actually says, but on the presumption that Congress desires reasonable results." On this basis, courts have invalidated standards issued by OSHA, EPA, and NHTSA.

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On citizen standing, the argument runs parallel. Richard Lazarus alluded to two standing cases, *Lujan v. National Wildlife Federation* and *Lujan v. Defenders of Wildlife (Lujan II)*. In the latter case, the Supreme Court, in an opinion by Justice Scalia, declined to exercise the Court’s jurisdiction under an environmental citizen suit provision. Congress, the Court said, may not mobilize judicial authority to oppress and control the executive branch, because this allows private parties or citizens groups who have no actual stake in the controversy to pick and choose which environmental laws they want to see enforced, and which laws should be enforced more aggressively or sooner. Citizen suit provisions permit environmental groups to go court and argue that they do not like the way the Office of Surface Mining (“OSM”) or the EPA is being run, and that they want the agencies to be run differently and to set different priorities. Setting regulatory and enforcement priorities, however, is an authority that is ordinarily committed to the executive branch—certainly not to the Natural Resources Defense Council (“NRDC”) or to some federal appellate judge. Therefore, Justice Scalia said, the Court will not exercise its jurisdiction in these cases. Read for all it is worth, *Lujan II* holds that citizen suit provisions in all environmental statutes, as currently written, are unconstitutional.

I would argue such defiance is not judicial activism. The argument for citizen standing ultimately collapses into an argument for legislative supremacy, which is not the constitutional system we have.

However, my sense is that the effects of *Lujan* and of the judicial review cases that I mentioned will be marginal. The marginal effects are worth having, and the more the merrier. Still—and this is my conclusion—I think the courts have gone as far as they are likely to go in demanding reasonable regulations and in curtailing statutory standing. Every time the courts do so, they are telling Congress, “We will not go out and (pardon the expression) pimp for you and lean on the executive branch to do the things Congress itself is unwilling to do directly.” Confronting Congress in this manner is a very hard thing to do, and courts don’t really like to do it.

So the relief will have to come from the Congress. We have to go back to the Congress, and explain that for two and a half decades, we have been trying to produce environmental goods the way the Soviet Union of lore produced shoes. This is not going to work, no matter how many federal

judges Congress calls on the carpet and how often. To get relief from judicial mandates, we have to change the entire system of environmental regulation. That is the task ahead.

PROFESSOR CHRISTOPHER D. STONE101

Is Liberalized Standing “Government by Judiciary”?  

We are here to examine the liberalization of standing in U.S. environmental law.102 Specifically, critics depict liberalization, primarily citizens suits, as a strategy fostered by environmental extremists to divert major policy issues away from legislatures (where the critics assume the environmentalists would be rejected) and into the more sympathetic if unrepresentative judicial system (where the environmentalists are imagined to have a better chance of winning or, at the least, of stalling development).103 Hence the charge: that liberalized standing represents “government-by-judiciary”104—an illegitimate undermining of the democratic/representative process.

As an academic with some sympathies for liberalized standing (I once notoriously suggested conferring it on trees),105 how do I respond? First, it is at the least ironic that this charge should be leveled at the environmentalists. As Richard Lazarus points out in his companion paper,106 whatever might have been the case in the 1970s, today it is more common to find federal courts (dominated by Republican nominees!) using their power to enjoin

101. Roy P. Crocker Professor of Law, University of Southern California.
102. A comparable debate is taking place in Europe: Should the European Court of Justice (ECJ) liberalize its standing requirements for private plaintiffs who seek to bring environmental law enforcement actions under Article 173 of the European Economic Community (EEC) Treaty. See Ann M. Lininger, Note, Liberalizing Standing for Environmental Plaintiffs in the European Union, 4 N.Y.U. ENVTL. L.J. 90 (1995) (maintaining that the ECJ should liberalize standing for private plaintiffs seeking to bring environmental law enforcement actions under Article 173).
103. Even in the courts one finds criticism that environmental decisions ought to be made democratically, not judicially. See Chevron v. NRDC, 467 U.S. 837, 866 (1984).
104. I am not certain of the origin of the term that our Federalist Society conveners have adopted as the theme of the present Symposium but grew up associating it with, and can trace it no further back than to Louis B. Boudin, Government by Judiciary, 26 POL. SCI. Q. 238 (1911) [hereinafter Government]; LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY (1932) (2 vols.). Boudin was stimulated by the nullification of state legislation for alleged unconstitutionality, which had caused Justice Clifford to sound alarm against converting “the government into a judicial despotism.” Loan Association v. Topeka, 87 U.S. (20 Wall.) 655, 669 (1874) (Clifford, J., dissenting); Government, supra, at 262.
106. Richard Lazarus, supra.
environmental protection programs at the behest of unhappy property owners, often represented by conservative public interest groups. If liberalized standing is a tool, it is one available to both sides.

Second, on whomever’s behalf standing is invoked, the defendant is commonly an administrative agency. As a consequence, in deciding whether to grant jurisdiction the tension is less often between a representative branch (the legislature) and a nonrepresentative branch (the judiciary) as it is between two fora neither of which can claim to be tethered to the public will: the courts, on the one hand, and agencies, on the other. 107

Third, the charge that the democratic process is being subverted overlooks the fact that jurisdiction to hear citizen suits is based on specific authorizing legislation, including the Administrative Procedure Act, 108 the Endangered Species Act, 109 and any number of state enactments. 110 Thus, the alleged tension between legislative and judicial power is somewhat illusory. A court must of course interpret its legislative mandate, and some judges will interpret the authorizing statute more broadly than others; but we must not forget that the citizen suit is a legislative creation. A court that entertains a suit brought in the name of an endangered bird under the Endangered Species Act is carrying out the presumptive public will. If such suits are bad policy, it is Congress’s policy, not that of an overreaching judiciary.

I do not deny that liberalized standing needs to be examined. But if we are to take the task seriously we have to ask, what, more exactly, is the “liberalized standing” that is coming in for censure? And what are the right criteria for criticism?

Let me take up the definitional question first. “Liberalization” is not something we either adopt or reject. The fact is, all jurisdictions invoke a host of filtering devices to control the flow and quality of litigation they are prepared to adjudicate. The filtering mechanisms include what the jurisdiction chooses to recognize as harm-in-fact, legal causality, and (for controversies originating in agencies) as “final” reviewable action. To speak of citizen’s suits is misleading in that virtually all suits are brought, of

107. I imagine there are a number of exceptions, in which citizens suits have challenged legislative power; but the preeminent recent case of that cast is Lujan v. Defenders of Wildlife in which (albeit the controversy was initiated by an environmental group) judicial activism took the form of casting a shadow over the powers of Congress—the popular will. 504 U.S. 555 (1992).
course, by citizens. To decide whether the suit will be heard—which is what we ought to be talking about—the law must decide which sorts of injuries are judicially cognizable. If the plaintiff’s injury is slight or indistinguishable from anyone else’s, has the plaintiff (or the plaintiff’s group) a special expertise? And so on. Liberalized standing thus involves different degrees of several variables. To put it otherwise, standing is more or less liberal depending upon whether the filtering doctrines are tuned more or less restrictively. Hence, the real issue is not whether one is for or against citizen suits, but what are the arguments in favor of a more or less restrictive filtering.

We cannot examine here each and every one of these variables. Instead, to simplify the analysis, let me put the question by imagining two jurisdictions, A and B. Each has a river running through it. Into each river the respective jurisdictions’ factories discharge pollution. Each jurisdiction has made the same legislative determination: that no more than one hundred pounds of some effluent x are to be discharged into its river, per day. We can even imagine that tradable emissions permits have been issued and exchanged among the firms. The problem now is monitoring and enforcement.

Assume that the task of monitoring and enforcement in A has been entrusted exclusively to the State EPA. In B, there are agencies as well, but environmental groups are also allowed access to courts on a virtually “unfiltered” basis: that is, the group can apply for an injunction without being required to show such elements as economic or even aesthetic injury.111 Proof of violation of the standard is enough.112

Which would one prefer, A or B?

No definitive answer is possible because so many imponderables are involved. On first blush one is inclined to venture that B (with liberalized standing) will have relatively higher court costs and lower agency costs than A (which relies on agency prosecutors exclusively). But questions of political equilibria are involved: would more challenges by citizens in B’s courts also instigate more costly actions in its agencies because B’s bureaucrats wanted to protect themselves from judicial second-guessing? And an even deeper problem: if we make the reasonable simplifying assumption that each

111. It is hard to specify all the variables a “liberal” jurisdiction would relax. For example, there are strong reasons to retain some requirements of exhaustion of administrative remedies which are beyond the scope of this suggestive analysis.

112. A full-blown analysis would have to consider, as another variable, liberalized standing where the complaint is based not on violation of a legislative or administrative (or even constitutional) standard, but in a common law cause of action, e.g., one imagines a mass tort without requiring the plaintiff to particularize damage. I am not familiar with any such cases.
jurisdiction wants to establish the efficient level of pollution, over time the style and level of enforcement may influence each jurisdiction's taste and tolerance for clean water. It is possible that after a decade A will continue to believe that one hundred pounds of $x$ is the correct level, and achieve one hundred pounds; and in B ninety pounds will evolve as the desired rate—and B's citizens will get what they want, too. How do we come to grips with endogenous tastes?

While there are many unknowns, let me advance a few hunches that suggest, on balance, some prima facie virtues to B's system.

1. **Efficiently allocating compliance costs.** Given a designated level of regulation (100 lbs. per day), the incremental costs of attaining the target above some margin are converted into a sort of "user charge". Suppose most people, while favoring 100 lbs. per day are willing to accept 110 lbs. per day in preference to drawing enforcement costs from the public till. But in B those members of the community who attach the highest value to one hundred percent attainment can, through their environmental group and underwritten by their dues, move forward to secure the legislated level of attainment that most of the community found too expensive to pay for. The citizen suit has the potential to shift some portion of compliance costs away from the general tax base (agency budget) onto those who place the highest value on the environment.

2. **Attaining mandated performance levels.** It is true that B's citizen suit procedure will result in the filing of a certain number of marginal and unmeritorious cases. These will impose on B excessive demand for judicial resources and under-pollution (under-production) by law-abiding firms leery of litigation. The threat is certainly a consideration. But at least where the law being enforced has, as in my hypothetical, a bright-line character, the peril is easily overstated. The environmental group would have the burden of seducing a court into believing that 120 lbs. were pouring into the river per day, when in fact the 100 lb. limit was being attained. With limited funds, the groups cannot squander resources on low-probability cases. Moreover, while B, by making special provision for specially sensitive plaintiffs assumes some risk of supra-optimal regulation, these have to be offset against the risks assumed by A, which, relying exclusively on agents of state for enforcement, faces suboptimal regulation through agency capture and incompetence.

3. **Disciplining bureaucracies.** Generalizing on the preceding point, citizen's suits commonly arise where an agency has failed to take some action the legislature has required. Consider, for example, *NRDC v. Train*, instigated by the EPA's failure to meet statutory deadlines for the
promulgation of effluent guidelines under the Federal Water Pollution Control Act. The court, at the instance of a “citizen” ordered that the guidelines be issued no later than a date certain. 113 Such cases, in which the suit seeks no more than to require the agency to carry out the legislative will, operate in support of—they can hardly be said to undermine—democratic government. Hence, one might well expect the agency bureaucracy to be better disciplined—more accountable—in B than in A.

(4) Disciplining legislatures. Over time, the environmental legislation of A and of B are likely to vary even if the populations of the two jurisdictions continue to place the same value on a clean environment. How they will vary is harder to specify. I would imagine that in B, because some portion of the enforcement costs will be shifted onto those most willing to pay, there will be some tendency towards higher and more efficient reduction targets. On the other hand there may be a countervailing tendency for B to enact targets that are facially lower but more realistic. A’s legislature can irresponsibly mandate zero discharges knowing that the enforcement agencies (on which A exclusively relies) will nullify the unrealistic targets by selective nonenforcement. But B’s legislature, knowing that public interest groups will patrol nonenforcement, will have to mull what they want that much more soberly. Again, the effect of liberalized standing is as likely to foster as to undermine a responsible democratic process.

(5) Remedying “gaps” in the representative process. A common justification for easing access to the courts is where the inherently majoritarian legislative and administrative processes are apt to leave fundamental values unsecured. Where such situations arise in the environmental field there is a strengthened warrant for judicial review initiated through a liberalized citizen’s suit.

Consider, for illustration, the Germany seal case, Seehunde v. Bundesrepublik Deutschland. 114 In 1988 approximately fifteen thousand dead seals mysteriously washed up on the beaches of the North and Baltic seas. There was widespread concern that the deaths were a portent of an impending ecological disaster triggered by human tampering with the North Sea’s chemistry. Particular suspicion fell on titanium and other heavy metals being incinerated and dumped on the high seas by permit of the West German government. Conceivably, any of the states bordering the sea might have tried to challenge Germany’s actions. But, so long as the harm was being done on, or affecting life only in, the high seas, the authority of any

nation to sue was (and is) doubtful. Moreover, all the littoral nations were contributing to the pollution, and thus, had any of them brought suit, their case might have been be met by Germany with an “unclean hands” defense.

Who was there, then, to speak for the seals, and, in so doing, represent all the elements of the ecological web whose hazarded fortunes were intertwined? To challenge the permitting, the action was brought by German public interest groups acting as guardian in the name of the seals (whom no one could accuse of unclean hands, or fins). I am not sure that but for such a liberalized standing tack, the situation could have been brought to public attention and corrected.

Another illustration of far-reaching liberalized standing is provided by a recent challenge to the appalling deforestation that is occurring in the Philippines. Plaintiffs, all minors, sued on their own behalf and on behalf of unborn generations to cancel timber licensing agreements so as to (in the terms of the complaint):

Prevent the misappropriation or impairment [of Philippine rainforests and] arrest the unabated hemorrhage of the country’s life support systems and continued rape of Mother Earth.\textsuperscript{115}

The Philippines Supreme Court upheld the complaint on a basis that included the infringed “environmental rights” of future generations.\textsuperscript{116}

Remember: I am not advocating universal standing. I am just arguing that there are strong arguments for liberalization of some filters; and that, in all events, the argument that citizens suits foils democratic government is all too easily exaggerated.

Finally, I would like only to add that it strikes me as odd that so many people who regard themselves as conservative should mock environmentalists and the environmental movement. I do not mean merely that environmentalists are in a good sense conservatives—conservatives of our natural heritage and associated attitudes. People in other countries, and in particular countries recovering from communism, regard our environmental laws with envy. Just look at the situation in Eastern Europe; nuclear power stations, built without the watch-dogging of U.S. style environmental groups, are too often shoddily built, poorly maintained and incompetently staffed. Some in the audience may find our environmental groups shrill; but we have not had a Chernobyl, or waste procedures that, as

\textsuperscript{115} Complaint, Oposa v. Factoran, G.R. No. 101083 (Supreme Court of the Philippines, Jun. 30, 1993), ¶ 22; see IUCN (THE WORLD CONSERVATION UNION) COMMISSION ON ENVIRONMENTAL LAW, WATCHING THE TREES GROW: NEW PERSPECTIVES ON STANDING TO SUE FOR ENVIRONMENTAL RIGHTS 50 (1995).

\textsuperscript{116} Oposa v. Factoran, G.R. No. 101083, supra note 115.
in the old Soviet Union, have left great stretches of land barren and have lowered life-expectancies. However laborious and costly our environmental procedures, including liberalized standing, may be, the costs of eliminating them are almost certainly higher.

MR. COWLEY: I’d like to give each of our panelists a couple minutes to respond if they care to, and then we would be glad to get to some questions from the audience.

MR. MARZULLA: Well, I am at least happy at the inconsistency—once again I don’t agree with Richard Lazarus.

First of all, I would like to propose him for the Serbo-Croatian peace award. He has suggested that because his side won all the wars back in the 1970s and 1980s, that the continued usurpation of the federal judicial system ought simply to be accepted. Sure, we’re doing it today, we’re doing the same thing that we were doing ten years ago, and so you guys ought to give up and move on to something else. We have taken the territory; back off.

The second point goes to this whole question of Congress and Congress’s role in the usurpation of local authority by the federal courts. I will be the first to agree with what I understand to be the point that both Michael and Richard made, and that is that without the environmental statutes the courts would not be extending their authority nearly as far as they have done. My question is “So what?”

It is certainly true that if we did not have those provisions in 28 U.S.C., raising things like diversity jurisdiction, federal question jurisdiction, and so forth, the federal courts couldn’t be doing what they are doing in a lot of other contexts, too. But do we say that because the jurisdiction exists, that there is no abuse in the federal courts? Quite the contrary. My point being, that Congress has certainly opened the door. Congress, having opened the door, having handed these tremendous, shall we say, thermonuclear weapons to the federal judicial system, does not justify their use.

I would cite as just one recent example not a citizen suit, but the litigation that has been going on now for several years down in the Florida Everglades. The folks there have the opposite problem you do—they have got too much water. The results of that litigation have been, quite literally, and this is not generally publicized, the relocation of thousands of farming families and the shutdown of much agriculture and agriculture-related activities and industries in southern Florida. This is a lawsuit that has basically reclaimed much of the Everglades.
You may well say or think that’s a good thing or a bad thing, and, of course, that’s how I understood you to be largely defending it. Judicial activism is okay because it comes up with good results. But it is the process that I am suggesting needs to be looked to, and that’s ultimately the question of whether Congress, having granted authority to the federal courts, or seeking authority of the federal courts to usurp the Tenth Amendment, has the authority to usurp, yes, the Fifth Amendment Takings Clause. The federal courts, nevertheless, have the authority to disregard the Constitution, pointing instead to the statutes that grant that general authority.

Then if I make one other point, a response, once again, to the judicial activism as a dead point. Let us consider the plight of one Mr. Weitzenhoff, an employee of the Honolulu Sewage Authority, who was last year convicted of a felony violation of the Clean Water Act. Mr. Weitzenhoff was convicted because he allowed the discharge from the sewage treatment plant of quantities of water in excess of the permit. In approaching the instruction of the jury, Weitzenhoff requested an instruction that said, “If you find that Mr. Weitzenhoff did not understand the meaning of this many-hundred page permit and the thousands of pages of regulations that it implements—if you find, in short, that he did not intend to violate the Clean Water Act—then you must find him not guilty.”

The courts said that intent to violate means general intent. It means, in the context of that case, the intent to discharge the water. So the question is, “Mr. Weitzenhoff, did you discharge the water?” “Yes, I did. In fact, that’s my job. I operate the waste water treatment plant. That is what I do all day.” “Fine. Go to jail.”

PROFESSOR LAZARUS: Just a few responses. Virtually all of them are to my good friend Roger.

The first is the note that I get the “Serbo-Croatian peace award.” There is something very different going on, and that is that the territory that was taken, to embrace Roger’s characterization, was ultimately taken by Congress. I will concede the federal judiciary was initially way out there and engaged in a lot of judicial activism, but ultimately Congress took the territory. What the people—the conservatives—are trying to do now, is to take back the territory that Congress has taken. That is what I think amounts to undue judicial activism.

This is not an instance where the courts construed something as a matter of constitutional law, like a right to privacy and abortion, right of free

choice, and the court was now trying to overturn it, and liberals said, "No, no, no, no, don’t do that. That’s judicial activism. You have to adhere to precedent." I agree that’s a disingenuous argument when you are dealing with competing questions of constitutional law. You can’t sort of say, "Well, our courts did it before, so you can’t do it now." I agree. But that’s not what we have here.

We have a question of Congress taking the territory. Now, if you want to take it back, the right way to take it back is through Congress, which is what many people are trying to do. I think that is the right forum for the debate, although I would undoubtedly strike the balance differently. We are not talking about general diversity jurisdiction being enforced by the courts. We are talking about specific legislative commands and prohibitions that the courts are not inventing; they are simply applying according to distinct terms, when they do what they should be doing.

The second point has to do with citizen suits, and that is the privatization argument that Professor Stone made. I think it’s a very important argument, which is that there is an aspect of citizen suits that free market environmentalists should applaud. We’re not going to leave everything to government. We are trying to try to privatize some of these actions, and we are going to try to privatize enforcement. I should remind you that one of the major architects of such a private citizen enforcement scheme was the Honorable Ed Meese, who promoted the Federal False Claims Act amendments during his tenure as Attorney General, to provide for liberalized standing—bounties for private citizens to be able to enforce fraud in government contracting—because it made more sense to give incentives to private citizens to bring those kinds of enforcement actions, rather than just to rely on an ever expanding federal bureaucracy.

I should add that those amendments have dovetailed into the environmental area, and environmental groups are now bringing actions under the Federal False Claims Act because government contractors, as part of their contracts, often have to certify compliance with the environmental laws. So, we are now seeing environmental citizen suits being brought under the Federal False Claims Act.118

The second to last point I want to make has to do with the point that both Professor Stone and Dr. Greve have made, and that is that it all boils down to the question of compliance. We pass the law. Do we really want to have it enforced?

I think the presumption that the courts should follow is that when Congress passes a law, Congress intends to have the law enforced, and that the courts should not assume that these laws are paper tigers. We are not one of these countries who passes laws but does not intend to have them enforced, either by not allowing the citizen suits that Congress has enacted or by enacting appropriation riders to override enforcement, although that is at least a more appropriate way to amend the statutes than to invite courts to ignore their meaning altogether.

Finally, I don’t want to upset Roger too much. But in reference to the Weizenhoff case in the Ninth Circuit, I think Roger is absolutely right. I think that environmental criminal law offers an instance when the courts have misinterpreted the mens rea requirements in the environmental statutes. Roger is right. The courts have overreached, and they have diminished the intent element far beyond congressional intent, to the extent that they are not requiring any knowledge of the facts that make it a crime. I think that these judicial decisions are completely inconsistent with several doctrines within the criminal law area. I think that they are misreading the precedents of the Supreme Court. That is an area that is ripe for judicial reform because you are responding to undue judicial activism.119

DR. GREVE: I’m glad to learn that I don’t agree with Richard Lazarus after all. My expectations, too, have been fulfilled.

I will say one word about the charge of activism. Judicial activism is merely a label. You cannot give a meaning to “judicial activism” without a clear idea of an underlying, substantive baseline against which you compare judicial activism or overreaching.

The modern standing cases over the past three or four years are “activist” in the sense that the Court steps up and tells Congress that it may not confer standing on the world at large. But the cases are everything but activist in the following sense: I think for a federal court to exercise jurisdiction in a case where it doesn’t have it under Article III is activism of rather grandiose proportions. If you believe, as I do, that the private rights or common law model is the correct substantive baseline of constitutional interpretation, then everything that went before Lujan II was judicial activism, and Lujan II is the first nonactivist decision.

The same argument applies to property rights. The environmentalist position is that property is an archaic notion (as our EPA officials have informed us) and that the only right you have to your private property is the

right to maintain it in its natural state so as to support the ecosystem and whatever endangered critter might come along.\textsuperscript{120} If this is so, then yes, any assertion of judicial authority to curtail regulatory takings or to provide compensation is activism. Whereas, if you think that traditional common law notions of property should retain some force under the Fifth Amendment, judicial findings of regulatory takings are by no means inherently activist.

Let me say one thing about the privatization argument: We should all be in favor of private lawsuits. I have nothing against the deputization of private attorneys general. We did it in the Old West. We can do it in the Modern West, and we can do it in the Modern East—\textit{provided}, however, that the federal government—the Attorney General of the United States—has the authority and power to stop private suits when he or she thinks the private enforcers have gotten out of hand. The reason for retaining executive control is that, as Richard Posner has shown, it is impossible to create the right incentives for private enforcers: They either over-enforce the law, or they are attracted to the wrong sorts of lawsuits.\textsuperscript{121} For this reason, you need prosecutorial discretion, and the way you exercise that discretion when enforcement power has been delegated to private deputies is to allow the Attorney General to step in. Modern citizen suit provisions, of course, do not allow this. Citizen suits may be brought without the consent of the Attorney General, over his specific objections, and indeed against the government.

The last point I want to make about the standards: There ought to be a presumption for enforcement, says Richard Lazarus, and Professor Stone more or less agreed with him on this point. This assumes that the standards will be more or less reasonable. But this assumption, with all due respect, is flat-out false.

Most of the environmental standards on the books are absolutely insane, because Congress plays a cynical game of putting symbolic standards into the law, and then relies on others to bail it out and \textit{not} have the laws enforced. For Congress, this is a win-win game: If the standards go unenforced, Congress hauls the EPA Administrator before a committee and screams at her about foot-dragging, capture, and recalcitrance. When the EPA actually tries to enforce the standards, or when the NRDC compels the EPA to enforce the standards and the costs begin to hit home, Congress also


calls hearings; except it turns around and screams at the bureaucrats that no one in Congress ever intended such absurd policies and that federal judges are once again doing outrageous things.\textsuperscript{122} It’s a win-win game, and it’s utterly shameless and disgusting. But with a regulatory system like this, the last thing you want to do is to put it in the hands of federal judges and private litigants.

\textbf{Professor Stone}: Of course, Roger made a good point. I’d like to take the opportunity to clarify my position. I believe he understood me to be saying, in regard to the two foreign cases I drew upon as illustration, that I was defending the results as good. I’m sure that I just didn’t express myself clearly. I was speaking for a process.

The point is that courts always have an extra justification to intercede in areas where there is a disenfranchised minority; where the legislative process is reflecting certain interests and disregarding others. I was using the seal case to suggest that there was interest not just of the seals, but of everyone who lives around the perimeter of the North Sea that wasn’t being reflected or picked up by any legislative process, in Germany or elsewhere. In such a circumstance, it seemed to me, there was an extra reason for courts to step in because of the “gap” in the legislative process, and I think the same failure of representation is a feature of the Philippines future generations case.

As a matter of substantive outcome, I don’t know if the Philippines case will go too far or not. It’s on trial now. I don’t know what’s going to happen, but the whole point was that future generations don’t have a voice in the legislature. I think that can be overstated, but they aren’t directly represented, they don’t vote, and, therefore, there is this extra at least nudge of concern for the courts to oversee.

With respect to the question you put, Roger, about that San Antonio situation, which is really quite worrisome, you said, “What is the answer?” And you offered a riddle that blamed the environmental laws. I was thinking, no, that’s too superficial, really. The court has been drawn in because it’s gridlocked with everybody else. You describe a terrible situation. Everybody would agree there are so many interested players, people interested in the water, people interested in the development, people interested in agriculture, that the reason courts are being drawn into these things is because other solutions, other bodies, other forums, simply aren’t adequate to the test.

No judge likes to be called in on these things. I mean, every other spring a judge comes and speaks at our law school graduation and says, "Why are you coming in bringing all these suits? We can't handle them." That's true. But to blame environmentalism is too simple. The failure is, I think, with other bodies. Where do you go other than to court?

I agree with many of the things Mike Greve said. But I want to respond to your parting shot. You say, "Well, the worst of all possible situations is where the Congress does a bad job, but there are citizens out there like sharks waiting to snap up on it." I don't think so. I think the worst situation would be where Congress passes this nonsense, and there's no one out there to set up the dynamic that maybe makes the Congress do a better job.

MR. COWLEY: Thank you for everybody's participation. If there are any questions from the floor, I would be happy to entertain them.

QUESTION: I'd like to direct this question first to Professor Lazarus and others on the panel who may wish to comment.

If I understand you correctly, when you say that Congress passed a law, they intend to have it enforced—that thing keeps coming up. I understand that what you are saying is that if there is a statute on the books, it ought to be enforced. Now, I think the Tenth Amendment is still on the books.

Could you cite the specific language in the Constitution that delegates to the federal government the power to control, for example, the allocation of water use in south Texas, or the power to issue a Section 404 permit for gravel excavation on a tiny creek on private land somewhere in the Colorado mountains?

PROFESSOR LAZARUS: I don't have the facts to help you with one specific 404 case. But the general source of that has been the Commerce Clause to the extent that activities affect interstate commerce.

I should add that in light of the Supreme Court's recent decision in Lopez, the full extent of the Commerce Clause jurisdiction in the Clean Water Act is now up in the air, particularly as it applies to those isolated water cases. And, for those of you who haven't been following this issue, there was a case before the Court which gave the Court the opportunity to revisit the issue of the scope of the Clean Water Act's jurisdiction after Lopez, as applied to isolated waters within the jurisdiction of the Ninth Circuit. The case was set for consideration by the Court at conference three different times during the month of October. Many expected the Court was

going to grant review. I expected the Court to grant review because, in light of the Lopez case, some of those issues regarding Clean Water jurisdiction are now up in the air. But the court denied cert. this past Monday with one lone dissent from Justice Thomas. His dissent raises the kinds of arguments you are talking about, and that is the question of to what extent there is any kind of textual support there.\textsuperscript{124}

But to the extent that the question is where is it in the Constitution, I think the only place that the Court has found it is in the Commerce Clause. To some extent, the environmental statutes are going to be subjected to some revisiting based on those expansive notions of the Commerce Clause of the Courts in the '40s, '50s, and '60s.

Although I would be someone favoring the expansive notions of the Commerce Clause, your point is very well taken, and that is, if one was going to challenge the environmental laws based on judicial activism, the way to do it is to look to the expansive judicial interpretations of constitutional law upon which they are based. I think that is a much more forceful argument than the ones that look to the courts enforcing what Congress has done. So that’s a good argument in terms of judicial activism, much better than the ones we have been hearing before.

\textbf{QUESTION:} Professor Stone, you mentioned that citizen suits technically discipline bureaucrats and legislature. In what way do suits teach the meaning of the statutes to the legislature? Do the suits punish the bureaucracy for nonenforcement? What do you mean by discipline, and is that the purpose and function of citizen suits?

\textbf{PROFESSOR STONE:} I think one of the purposes of citizen suits is to get the agencies that have been invested with the jurisdiction over some statutory scheme to do what Congress has asked them to do. Suits typically involve an agency that is supposed to prepare an environmental impact statement for some sort of action and the agency does not do it. A suit is then brought in the form of a citizen suit to make them prepare it.

There’s a very good illustrative case in the Philippines in this regard where the NRDC challenged the Nuclear Regulatory Commission in regard to a projected nuclear power plant.\textsuperscript{125} The NRDC tried to bring a suit saying you have got to prepare a report since this is near earthquake territory, and the suit lost. The power plant was built. But it has now proven inoperable. I

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\item[125.] Natural Resources Defense Council v. NRC, 647 F.2d 1345 (D.C. Cir. 1981).
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understand it is costing hundreds of millions of dollars just in interest charges for this inoperable plant.

Well, if the bureaucracy had done what it was supposed to have done earlier, what Congress asked it to do earlier, the situation wouldn’t have unfolded in this manner. That’s what I mean by disciplining agencies. I understand the thrust of your question. You are quite right that perhaps unfortunately there are limited ways in which bureaucrats who do a bad job can suffer any monetary loss or even be booted out, but I meant discipline in the sense of getting them to act in accordance with the legislative standards.

DR. GREVE: May I briefly remark on the question of disciplining the bureaucracies and of educating the public and the legislature? I have some sympathy for these purposes of litigation, except I am very skeptical that the empirical evidence justifies the suspicion that lawsuits in fact serve these objectives. The idea that they do so is a guess, as Professor Stone says, and my guess runs in the other direction.

Environmental statutes—and this is something on which we probably all agree on this panel—are very demagogic, in that they suppress all the important trade-offs. Richard Lazarus has written very eloquently on this.

But the paradigm of a citizen suit is as follows: Suppose the agency is under pressure, for real-world reasons that have nothing to do with cheap politics, and says, “Eventually, we have to live in the real world. Safe Drinking Water Act standards are sufficient for toxic waste sites; the sites don’t have to meet the even tougher Clean Water Act standards.” But then, the NRDC runs into court like Rumpelstiltskin and says, “Clean must be cleaner than clean.” This is demagogy, not an educated discussion.

As to the disciplining effects of citizen lawsuits: All the discipline comes along with a lot of disruption. My favorite example is a long-running citizen suit against the Office of Surface Mining (“OSM”).126 Roger Marzulla knows this case very well because he was involved in it. Thomas Galloway, as Congressman Udall’s assistant in the Congress, played a big role in writing the Surface Mining Act. Then, Galloway went into private business as an environmental attorney to enforce the Act. The OSM did not administer the statute exactly the way Galloway wanted. So he strolled into court, found himself a judge in Washington D.C., and sued.

Now, Roger Marzulla, then with the Department of Justice (“DOJ”), had a great venue argument: The D.C. Circuit was not a proper venue for a lawsuit over violations at particular mining sites (which must be brought in

the district where the alleged violation occurred), and the statute does not permit lawsuits alleging a general, nationwide breakdown in enforcement. Roger had almost won the case on this theory—until Galloway went back to his friends in Congress and complained about this grave injustice. The congressmen told him that they would certainly pay attention to the problem. So they called up the Justice Department and said, "Marzulla, we will break your kneecaps if you pursue the venue argument. You must stop this right now."

As a result, the suit dragged on for another twelve years until the appeals court found that, come to think of it, the plaintiff never had standing in the D.C. venue.\textsuperscript{127} Now, that could have occurred to the judges twelve years earlier, and Marzulla had told them so, but never mind. Meanwhile, Galloway had sold OSM his own computer system, designed by the National Wildlife Federation, to run the OSM in a more productive fashion.

Did the lawsuit discipline the Office of Surface Mining? You bet it did. Did OSM in those twelve years do anything that is worthwhile? No. One thing everyone in this litigation agreed on is that it was all a horrendous mess. Nothing happened in the way of effective enforcement.

If you look at the civil rights regime, you look at environmental lawsuits, a lot of them shake out that way. There isn’t a lot of discipline, but there is an awful lot of disruption.\textsuperscript{128}

\textbf{QUESTION:} I have a question for Professor Lazarus, but any one of you can answer it. I would be very interested in all of your opinions.

First of all, Professor Lazarus, you said something about the various legislative issues regarding the Takings Clause. They’re moving away from the Framers’ intent. Certainly, the Framers didn’t envision citizens being engaged in litigation for a decade or more to resolve their claims against their government. Do you see this as fair? Hypocritical or not, don’t we need a legislative bright line definition of regulatory takings to take care of those claims?

\textbf{PROFESSOR LAZARUS:} Actually, when I was referring to the Takings Clause, I was referring to those who were trying to get the Court to do it as a matter of constitutional law.

\textsuperscript{127} Save Our Cumberland Mountains v. Lujan, 963 F.2d 1541 (D.C. Cir. 1992).
As Roger notes, because Roger and I have debated this issue before the House of Representatives, actually about a year and a half ago, I think that the courts can't decide where that line should be as a matter of constitutional law. I believe that's undue judicial activism. I don't think it's inappropriate for legislators to address that issue. It's entirely appropriate for the legislatures to address the issue. I would likely have Congress draw the line differently than you would, in terms of how they determined what's fair and what's unfair, but I don't think those are answers that are susceptible to bright-line judicial resolution. I do think that it's helpful to have legislatures do it.

There's a need for greater attention to be paid to distributional concerns. We need to identify those individuals who are so adversely affected by environmental laws that they should receive some legislative redress and damages. Such redress should be provided as a matter of legislative grace, as a matter of fairness, as a matter of good policy and good government, but not as a matter of constitutional law.

So the current debate is occurring in the right place, which is in Congress. I don't think it should be considered to be them just doing what the Takings Clause says. I don't think the Takings Clause answers the question. So it's entirely appropriate for Congress to consider the issue. Then, at that point, you and I would have a different policy viewpoints over how much redress they should give. But I think that should be considered in Congress. That's a very healthy development.

QUESTION: You explained what you thought the legislators ought to be doing under the Takings Clause, but what do you think courts ought to be doing? What are the parameters of the court's role under the Takings Clause, if any?

PROFESSOR LAZARUS: Basically, my current view is probably very similar to Justice Kennedy's view in his concurring opinion in the Lucas case and, to some extent, some overlap with Justice Stevens' view. That would be that I would set up a test that would not purport to have takings turn solely upon whether or not a land owner is deprived of all economically viable use, because I think that premise denies the legislature its proper role, because the whole premise of the environmental statutes is that the market isn't working, and that market prices are not accurate. So, to use market diminution as a test of unconstitutionality is totally illogical.

What I would do is set up a framework, not unlike what the Court has done in other areas of constitutional law, where the Court has had a two-
tiered approach. Where the amount of deprivation is not fairly significant, I would have the government's program upheld, so long as it met rational basis scrutiny. To the extent, however, that the government regulation started to destroy, for lack of a better term, one of those core concerns at issue in the Takings Clause, I would not then say it was, per se, unconstitutional any more than it was, per se, unconstitutional for any other constitutional clauses. I would, at that point, dramatically increase the government's burden. The government would, at that juncture, have to satisfy a stricter scrutiny rationale. They would have to show that it substantially furthered, not just any state interest, but a compelling state interest, just the same way a law has to under the Commerce Clause, for equal protection, and for free speech, and that there is a no less restrictive alternative. If the government could not satisfy that test, then the Takings Clause compensation would be required, just the same way that it was unlawful under free speech, unlawful under equal protection, unlawful under the Commerce Clause.

I think that framework is a very viable one. And I am quite unclear why the Court seems to be messing around with frameworks that don't seem to work with the Takings Clause.

**QUESTION:** I see your point. I guess the problem I have with it is that in certain respects that actually seems like a worse form of judicial activism than the hypocrites are suggesting be done by the courts, because it strikes me that what Roger, and other people in the Justice Department, and what Michael Greve's group were trying to do with the Takings Clause was to attempt to have a fairly textually-bound analysis of takings questions that don't require a lot of value judgments on the part of the courts. But it seems to me that your test, the two-tiered test, does require a lot of value judgment.

**QUESTION:** I wondered if you could comment some on the fee-shifting statutes? To what extent they affect incentives? What changes, if any, do the panelists think may be called for in these private-action, fee-shifting statutes?

**MR. MARZULLA:** I believe Dr. Greve has probably thought about this more than anybody, but I think this is an area ripe for some type of reform, because I think that the idea of fee shifting makes sense. But it's going to take more than fee shifting the way the statutes are written. It becomes much more of a bounty, which then creates some type of perverse incentive.
DR. GREVE: I despair of our ability to get the incentives for litigation right. In addition to the very theoretical article by Posner and Landes, the subsequent scholarly discussion on fees and recoveries in private enforcement actions shows that Posner’s argument—you cannot get the fees in these cases exactly right—is by and large correct. 129

One reform that is overdue in citizen litigation is to require that there shall be no recovery to prevailing parties above actual cost. The rate at which public interest firms are reimbursed is the prevailing market rate in the geographical area. My own firm, for example, is reimbursed for its work—not on citizen suit cases, I assure you, but on really good cases—at the rates of Akin, Gump or Skadden, Arps. Needless to say, our lawyers do not get paid what lawyers at Akin, Gump are paid, so there’s a huge windfall built into these cases. Prohibiting such windfalls might help to overcome some problems with private enforcement.

I want to distance myself from the argument that the recovery of legal fees is the reason why environmental groups bring citizen lawsuits. It is not, but the fees do warp the incentives.

PROFESSOR STONE: Two comments: First, I agree with Mike that it ought to be underscored that most of the cases that are brought by the major environmental groups are not brought for fees. And, in fact, in many cases in the environmental area there are no fee awards. It’s not like securities litigation. Under the securities laws you get a lot of problems with strike suits, because the counsel want to get paid and likely will get paid. Most of the environmental cases aren’t, I think, of that style.

I’d like to raise a related point: Where fees are available in the environmental area, it is worrisome that some plaintiffs may be prompted to go for these huge structural reliefs in order to show the court that they did a “big thing” worthy of big fees. If this happens—I don’t know—some caps on fees might be appropriate.

VI. PANEL DISCUSSION: JUDICIAL MANDATES AND THE CRIMINAL JUSTICE SYSTEM

The federal judiciary has played a central role in shaping the parameters of state and local criminal law enforcement. The Supreme Court, for example, has been responsible for setting

detailed, nationally uniform standards respecting pretrial interrogation. Moreover, through the Cruel and Unusual Punishment Clause of the Eighth Amendment and the habeas corpus provisions of federal law, the courts have intervened significantly in the states’ administration of prisons and the death penalty. Some maintain that such judicial supervision is necessary in order to protect criminal defendants and prisoners from the arbitrary and unfair exercise of government power. Others contend that judicial mandates respecting criminal procedure and prison administration have unconstitutionally wrenched discretion from state and local governments and have imposed unreasonable and unwarranted costs on society. This panel will explore the role of the federal courts in monitoring the criminal justice system and will assess the real-world effects of judicial micromanagement of criminal law enforcement and prison administration.

JAY HEILER:¹³⁰ Good morning. It’s a pleasure to be back here today with all of you, and it’s my pleasure to introduce to you this morning the first speaker, Justice Fred Martone of the Arizona Supreme Court.

Throughout much of yesterday it was open season on judges and the judicial branch of government, but there’s one, at least, who has survived the buckshot and come to address us this morning.

One thought that came to mind in listening to yesterday’s proceedings was how little our political culture in the United States has managed to remember the differences between judging and other forms of public service. That failure, while we generally attribute it to judges, is also endemic among executive and legislative officials as well. If you look closely at a lot of the legislation that is generated by the United States Congress—has been generated, at least prior to the seating of the current Congress—you get the sense that this has been done almost by design.

Lately I’ve been spending some time with the biography of Judge Learned Hand, who is well known to all of you. But less well known is his favorite professor from Harvard, a fellow by the name of James Bradley Thayer. Professor Thayer, Hand wrote, “was to imbue us with a skepticism about the wisdom of setting up courts as the final arbiters of social conflicts, [a skepticism] which many of [us] always retained.”¹³¹ Hand also wrote that Thayer saw, “pretty plainly what would result if the courts [made]

¹³⁰ Deputy Chief of Staff to Governor Fife Symington of Arizona. Mr. Heiler was formerly Assistant Editor of the editorial section of the The Richmond Times-Dispatch, was Virginia’s Assistant Attorney General for Organized Crime and Racketeering, and was General Counsel and Director of Operations for an environmental instrumentation firm.

themselves into what is really a legislative body with a veto. He foresaw that and said that the only way for them to behave was to pull back and have a certain moderation."  

Now, I can tell you from firsthand experience as an eyewitness that holding back and striving self-consciously for moderation are traits primarily useful for an executive to insure that he will serve only one term, and yet regarding judicial temperament, the very same inclinations which can ruin an executive are essential attributes of a wise judge.

As you will see, Justice Martone is one who carries those attributes with great intellectual force and integrity. In 1992, he was enthusiastically appointed to the Arizona Supreme Court by Fife Symington. While there he has led a noble and occasionally lonely life in fairly consistent opposition to the fairly consistent, but clever, liberal activism of the Feldman Court. He has been especially forceful in his review and frequent dissents from the Feldman Court in criminal cases, of which I want to give you just a couple of quick examples.

Not long ago the court handed down an opinion in *State v. Greene*, a case in which a young woman was brutally raped and, attendant to that rape, she was also beaten severely before and after. The defendant was convicted, and the sentence enhanced because of the physical injuries inflicted on the victim. The supreme court threw out the enhancement of the rape convict’s sentence on the grounds that the injuries inflicted were inflicted during the kidnap of the victim, as opposed to during the rape. Justice Martone in dissent wrote that the injuries inflicted took away the victim’s physical and mental ability to resist. The injuries allowed the defendant to more easily rape his victim repeatedly. To say otherwise, would be shocking news to the victim.

In the second case, which involved probably the most notorious killer in Arizona, a fellow by the name of Vickers, one of his several murder convictions was recently thrown out for the second or third time by our supreme court on an ineffective assistance of counsel claim. Dissenting from that holding by the court, Justice Martone suggested that he would not throw out the conviction. He did, however, agree with the court to refer this ineffective counsel to the bar for action, but he said, “I would do more. The people ought not have to bear the expense of yet a third trial in an otherwise indefensible case. I would enter an order requiring Malanga, the counsel, to pay all fees and costs associated with the retrial of this case.” That is a

132. Id.
refreshing perspective that is not commonly found in much of our criminal judicial review today.

There is also a record that’s building of Justice Martone’s principle dissent from the court’s direction in civil cases. Perhaps most notable is a recent escalator case in which Justice Martone dissented from the Feldman Court’s attempt to “constitutionalize the law of torts,” which dissent drew him a sharp and pointed reply from the Chief Justice.¹³⁵

I am very pleased to introduce this morning a person who I respect tremendously on both a personal and professional level, Justice Fred Martone.

JUSTICE FREDERICK MARTONE:¹³⁶ I want to thank Steve Twist for the kind invitation to speak here today and thank Jay Heiler for that introduction. I appreciate the thought of it all.

I’ve been asked to talk about federal courts and federal jurisdiction from a state court perspective. That’s kind of a tough charter, a tough task. Maybe even an uncomfortable one. After all, I’m not presiding over federal cases, so it could be fairly asked, what do you know about them? I will deal with it by doing what I think I might know something about, and that is the allocation of jurisdiction between state and federal courts. This is something that all lawyers and judges are familiar with and have been familiar with since law school. The question that I want to ask, from an empirical point of view, is whether our perception about an expanded federal role is reflected in the day to day work of the United States courts.

Let me set forth some first principles, though. One is that each generation of Americans has to confront the question of federalism from that generation’s own perspective. We see that in the Federalist Papers two hundred years ago. We see that in the Civil War and post Civil War amendments to the Constitution. We see that in the New Deal sixty years ago, and we’re seeing that today in the Contract With America. There’s something kind of nice about that in the sense that it’s a living organism and each one of us gets our shot on the flesh of what it is we think federalism is all about.

A couple of axioms. The first is that it really is beyond dispute, and ought to be beyond dispute, that both the United States courts and state courts have legitimate roles in our framework. That’s a given. Another given is that within the federal framework the Supremacy Clause is alive and

¹³⁶. Justice, Supreme Court of Arizona.
well and ought to be. If jurisdiction is otherwise valid under the Constitution, then the Supremacy Clause means something and ought to mean something.

The final initial observation is that the Civil War probably did settle some things. I think we need to come to grips with that. It’s too late in the day to be arguing about some of the issues that probably were settled in the last century.

Jurisdiction of courts. We know that there is a whole area of exclusive federal jurisdiction. We know that there’s a whole area of exclusive state jurisdiction. But there’s an enormous overlap of concurrent jurisdiction and that’s what I want to look at today. That is, to see the extent to which the elasticity of Article III of the Constitution has enlarged the scope of concurrent federal jurisdiction and to ask the fundamental question: Is that what we want?

I’m going to take an inductive rather than a deductive point of view. I’m not going to begin with constitutional theory, describing the United States as a government of limited powers, and the states as governments of general powers. I believe that. Of course that’s true. And those of us who studied federal courts in law school know that the federal courts are courts of limited jurisdiction and the state courts are courts of general jurisdiction. Instead of beginning with theory and then ending up with some sort of a thesis, I want to begin with the facts and then see if that’s where we want to be. The question that I ask is whether there is congruence between theory and fact. What in fact are the federal and state courts doing? What do we really want them to do? And would a visitor from another country who was unfamiliar with Article III of the Constitution somehow be able to intuit federal judicial power under Article III by looking at the actual work of the federal courts?

Before we get to the facts, one other observation is that Article III is really an elastic concept. The “arising under” federal question jurisdiction under Article III means that Congress itself expands or contracts the role of federal jurisdiction when it enacts statutes. If the Congress has the constitutional power to enact it, Article III will pick it up.

Finally, the last bit of theory. I think we have this intuitive idea that the federal courts are and ought to be involved with national and international concerns, and the state courts are and ought to be involved with local concerns. Of course, the big question is what is local and what is national? That’s another tough question. But I think if we had an understanding of that basic distinction, it would be useful when we start looking at what the courts actually do.

Let’s get to the facts. What do the courts actually do? By courts, I mean the United States District Courts all over this country and the state trial
courts of general jurisdiction. Now, I exclude from all of this the appellate courts, and I exclude from all of this the limited jurisdiction courts in the states, which frankly have more cases than all the other courts put together. I exclude the municipal courts, the justice of the peace courts, and other limited jurisdiction courts.

According to the National Center for State Courts, the United States District Courts in 1991 had approximately 253,000 filings. All the general jurisdiction state courts in the United States had over 13,000,000 filings. Now, I realize that filings are not fungible and that there is more to the scope of litigation than the mere filing of a complaint. Nevertheless, that fifty-to-one ratio supports the notion that the bulk of general jurisdiction work is, in fact, going on in the state courts.

Honing in on what the United States District Courts do, I think you might be surprised by this. I was when I got the data from the Administrative Office of the United States Courts. It publishes a large compilation of data about the work of the district courts. In fiscal year ’95, the United States District Courts had a total of 239,013 cases, of which 49,693 were diversity cases and 53,881 were state prisoner petitions.

I know you don’t have a chart in front of you, but that suggests to me that nearly half of the federal filings relate to the litigation of state claims and the complaints of state prisoners about their state court criminal conviction, or the conditions of their confinement in a state institution. Until I had seen this data, I had an impression that the litigation of state issues in the district court was significant, but I had no idea that it was quite that large. By the way, those figures do not include pendant or ancillary state claims that are attached to a single or multiple federal claim. These are just exclusively diversity cases.

Looking at the criminal cases in the United States District Courts, there were 62,524 cases filed in fiscal year ’95, of which 22,329 were drug cases. Now, think about that. One third of the federal criminal docket consists of drug cases. Focusing on the District of Arizona, which has a little different ripple, probably caused by the fact that we’re a border state, fifty percent of the civil filings in the United States District Court for the District of Arizona are prisoner cases. The vast majority of federal question cases in the District of Arizona are brought by state prisoners and a full thirty-nine percent of its felony case load are drug cases.

Let me quickly compare some of that to the work of the Superior Court of Arizona, which is in fifteen counties, a trial court of general jurisdiction.

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There were 28,000 plus felony filings; there were 49,000 plus civil filings; there were 45,000 plus domestic relations filings, of which 28,000 were divorces; and there were over 13,000 juvenile delinquency filings. In all of this, the state courts frequently litigate federal issues just as the federal court litigates state issues. This is especially true in the criminal department where federal constitutional and procedural issues, such as those litigated in suppression, identification, or voluntariness hearings, really are the tail that wags the dog. Judges in the other divisions, too, are resolving federal claims, such as Section 1983 claims.

I'd like to focus on four of these observations. The first one is diversity jurisdiction. Not many state court judges quarrel about diversity jurisdiction and not many states do either. I have a feeling this is largely driven by economics rather than principle. It's convenient to have another court try your cases for you. It means you need fewer judges and fewer court houses. In this age of federalism, we don’t hear many states or state judges raising the question of diversity jurisdiction. In one sense, Article III's inclusion of suits between citizens of different states does suggest some kind of federal notion to the idea of state citizenship. In another sense, it’s clear that it was there because there was some sort of feeling that the local courts of the state might have some prejudice towards out-of-state litigants. I don’t know whether that’s true anywhere in the United States. I don’t believe it’s true here. At least in my career as a lawyer and a judge, I don’t ever remember anybody talking about forum selection in terms of prejudice. Forum selection was always driven by other factors, usually tactical litigation factors. The fact of the matter is that the jury pools and judges, for the most part, are drawn from the same constituency. So you have to ask yourself: from where does this prejudice come?

My guess is that we ought to be asking ourselves whether the time has come to abandon diversity jurisdiction in the United States District Courts. There are some people who have frankly admitted that it is a federal social program that subsidizes otherwise well-financed nonfederal litigation. If that is true, then we ought to put it in the pot of the debate. I share these statistics with you because I’m of the view that the litigation of diversity cases now in the United States District Courts would not be a great burden to the state system.

The second observation from the data relates to state prisoner suits. I was surprised by the sheer number of them. Presumably, these are federal habeas attacks on state criminal convictions and actions under 42 U.S.C. § 1983. The numbers are probably the result of something that was reported in this month's ABA Journal, and that is that we are incarcerating more
people these days.\textsuperscript{138} I think the \textit{ABA Journal} reports three to four times the numbers of persons in prisons now than were there just twenty to thirty years ago. If that’s true, perhaps that accounts for this, rather than something more malevolent. I don’t know, but I have seen my share of prisoner petitions, both as a Superior Court judge and as a judge on the Arizona Supreme Court. I think it’s safe to say that, for the most part, these are fairly insubstantial claims. I mean let’s be honest about it, many of these seek pencils and carbon paper and assert other such grievances. You have to ask yourself whether those are the kinds of claims that ought to be the business of our United States District Courts?

Part of the problem could well flow from the inadequacy of state procedural mechanisms for the resolution of state prisoner grievances. I know in Arizona we have no administrative review in the Superior Court from the prison system. Prisoners have to go by way of special action, which is, for those of you not from Arizona, an extraordinary writ. The scope of review is a little bit more narrow. It could be that if we cranked up a better in-state mechanism for the resolution of prisoner grievances by way of administrative review, some of these federal claims would not be necessary. We probably also ought to ask the question whether the time has come to think about amendments to federal jurisdictional grants, even to the extent of jurisdictional amounts in these sorts of cases.

Let me turn to federal habeas corpus. I had occasion to go back and look at the history of federal habeas corpus in a skeletal way. I surprised myself. I guess these are things that, if I learned them, I had forgotten. I have an interest in them because, as you know, federal habeas review of capital criminal convictions consumes quite a lot of time of the United States District Courts. Since those criminal convictions have been affirmed by our court, we have some personal association with these cases.

The Judiciary Act of 1789 extended federal habeas review only to federal prisoners, and it was limited to the question of jurisdiction. In 1867, it was extended to state prisoners, and to other federal claims. But even by 1915, if the federal claim was decided by the state court, the federal court would not consider it.

It wasn’t until \textit{Brown v. Allen}\textsuperscript{139} in 1953 that federal habeas review was expanded to the relitigation of federal claims that had already been decided by a state court. This is a relatively recent phenomena, developed in our lifetime. I’ve tried to come to an understanding of federal habeas review. I

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\footnote{139}{344 U.S. 443 (1953).}
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reread the recent Supreme Court case of Schlup v. Delo.\textsuperscript{140} From it, I gathered that the complexity of federal habeas review is truly byzantine. I confess not to fully understand it. The views expressed by the members of the Court are so divergent and reflect such different departures about the issues that it is very difficult to come to a good working understanding of federal habeas review. It matters to us in the state courts and particularly to us in the Arizona Supreme Court, when it comes to our death penalty litigation.

We have approximately fifteen to twenty death penalty cases per term. They’re enormously consumptive of our time, as you might imagine. They probably take fifty percent of our law clerk time. They probably take more than twenty-five percent of our judicial time, for fifteen to twenty cases a year. We give them first class scrutiny. We work hard on them.

There is, of course, federal habeas review of these convictions. After the case leaves our court, there is a petition for writ of certiorari to the United States Supreme Court. After that, there is an automatic notice of first petition for post-conviction relief in state court. That takes quite a bit of time. Sometimes there’s a second or successive state court petition, and when that’s over, there is a first federal habeas petition in the United States District Court. Then it is on to the Ninth Circuit for review, certiorari denied, back to second federal habeas petition, et cetera, et cetera, et cetera.

The process is well known to everybody. I don’t know anybody who is genuinely satisfied with it. It is a complex process, one that denies finality. The multiplicity and duplication are extraordinary. The time it takes is embarrassing. Justice Scalia once described the path of the capital litigation process as scandalous and, in my view, it is scandalous. It’s scandalous for us to be reviewing cases that are eighteen and twenty years old. It raises the question that if we can’t do it any better than that, consistent with fundamental fairness, then maybe we shouldn’t be doing it at all. It’s time to think about federal habeas reform. It’s obviously time to think about state reform as well. Federal habeas reform is something that I think would delight not only state court judges, but also our colleagues on the federal bench. They have as much difficulty with these cases as we do. This is no fun for anybody. Congressional reform of federal habeas corpus is an idea whose time has come, with or without reference to the propriety of capital litigation.

One last thing on federal habeas review. It is unique in the sense that it is real appellate review of state court criminal convictions by a collateral District Court. To my knowledge, it doesn’t go on anywhere else. There’s

\textsuperscript{140} 115 S. Ct. 851 (1995).
direct appellate review of the resolution of federal issues, but federal habeas review is collateral review of issues that have been litigated and, unfortunately, the ordinary rules of claim and issue preclusion, collateral estoppel, don’t help. I went back, because I knew the members of the Federalist Society would be interested in the Federalist Papers, and read Federalist No. 82 by Hamilton, that great nationalist. He said, when describing the concerns that existed in this large area of concurrent federal and state jurisdiction, “I perceive at present no impediment to the establishment of an appeal from the State courts to the subordinate national tribunals.” I found that to be shocking, but his prediction of two hundred years ago has become a reality in federal habeas review of the state resolution of federal claims.

Let me turn to the last area of our inquiry, and that is the federalization of crimes through the Commerce Clause. If you look at Article I, Section 8, of the Constitution of the United States, which grants Congress certain powers, you will just see a few crimes. One of them is counterfeiting, that’s Article I, Section 8, Clause 6. Others are piracies and felonies on the high seas and offenses against the law of nations under Article I, Section 8, Clause 10. I suppose that if you subscribe to the rule of construction, expressio unius est exclusio alterius, you will say that’s it; that’s the entire litany of substantive criminal offenses. But no. The Commerce Clause is lurking there, granting to the Congress the power to regulate commerce among the states, the Indian tribes, and with foreign nations. Therein lies the rub.

I want to illustrate this with drug offenses. Remember that over a third of the federal felony case load are drug offenses, and nearly forty percent in the District of Arizona. They are the bane of the existence of our federal colleagues. The statute is 21 U.S.C. § 841(a) which makes it unlawful to manufacture, distribute, dispense, or possess with intent to manufacture, distribute or dispense a controlled substance. Sounds fair enough. Section 801 of that same title contains Congress’s findings in connection with this statute. These findings are extraordinary. Maybe you’ve seen findings this expansive in other legislation. I have not had occasion to check out other statutes, but this one’s pretty interesting.

The Congress said in Section 801 that “[c]ontrolled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate. Federal control of the intrastate
incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.” That is, I think, a fairly expansive understanding of the Commerce Clause. What this means is that if you sell a twenty dollar rock of cocaine in downtown Phoenix, it's a federal case. Now, I understand that the practices of the United States attorneys around the country are such that they couldn't possibly deal with all these cases. They work out arrangements as to what threshold sort of case it is that they're going to prosecute in the federal courts. But we know what the practical effect of the statute is on the court in terms of its felony case load.

There may be some limit to all of this. As you know, in the school gun case last year, *United States v. Lopez*, 141 the Supreme Court of the United States, in a five-to-four decision, put some life back into the limitations imposed on the Congress by the Commerce Clause. It struck down a statute which had “nothing to do with commerce.” The Court resolved the ambiguity about whether the effects on interstate commerce had to be substantial or not by adopting the “substantially affects” test. It did not “wish to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States” or else “there never will be a distinction between what is truly national and what is truly local.”

That’s an interesting opinion written by the Chief Justice. We do not know what it portends for the future. I question whether or not the statute that we just went through with respect to drug offenses would survive scrutiny under *Lopez*. I don’t know whether any of the United States Courts of Appeals have had to address that statute in light of *Lopez*, but before *Lopez* was decided they had upheld the statute against constitutional attack and accepted, basically out of hand, those congressional findings that I read to you.

Let me sum up with some observations and some suggestions. There are two fundamental questions when it comes to the allocation of concurrent state and federal jurisdiction. One is the constitutional question of whether Congress has the power or whether it has exceeded it. The other one is the practical one. Even within the undisputed power of Congress, for example, diversity jurisdiction, federal habeas review, and crimes that clearly do have some substantial effect on interstate commerce, the scope of that power is quite wide. How should Congress exercise it? By what standard should it be exercised? When we looked at the statistics and saw the kinds of cases the federal courts are resolving, is that what we had in mind for the work of our national courts? I propose a functional approach by which Congress

would make decisions about the work of the federal courts. While none of them are dispositive, I think if one considers all of them, we might see a different kind of allocation of concurrent jurisdiction.

The first question I would ask if I were in Congress is whether it is international and national, or is it local? I don’t know whether we ask that question anymore, but we ought to. Is there a critical need for national uniformity? Uniformity isn’t always good. There are occasions when diversity produces creativity. Does it work? Does the assertion of congressional power to expand or otherwise define jurisdiction work? Does federal habeas review work? How effective are the state courts at it? In terms of diversity, I think the state courts would be quite effective at the resolution of their own state claims. We even have federal diversity courts certifying state law questions to us for resolution. What is the effect on the federal courts of congressional expansion of their jurisdiction? My federal colleagues tell me about their work in trying drug cases, in federal habeas review and the endless prisoner petitions. Is that what we want our federal courts to be doing, or would we prefer them to be addressing great national problems? What is the effect on other federal and state institutions? Can you imagine the effect federal expansion in areas like these drug offenses has on federal institutions, including the need to construct federal prisons?

My question is, in the end, if this functional approach makes sense, just in terms of a practical appreciation for federalism wholly apart from the principles that underlie federalism, how do things like diversity jurisdiction, federal habeas review, the federalization of crimes, and prisoner petitions stack up to what we want our courts to be doing? Congress has the power to expand and contract within its legitimate constitutional role. I’ve been surprised that the states have not taken more interest in this area. I suspect it’s because of economic considerations. In the end, I think maybe these economic considerations have retarded reform. So thank you very much for hearing me out.

JUDGE EDITH JONES. Thank you very much, Justice Martone.

I agree with much of your critique about the need for a reconsideration of the areas in which the federal courts ought to be participating in matters that impinge on matters of local concern, and particularly on matters of crime. That brings us to the topic of our panel discussion this morning which has to do with judicial mandates and the criminal justice system.

142. Judge, United States Court of Appeals for the Fifth Circuit. Judge Jones often lectures on bankruptcy issues and participates in the activities of the American Law Institute.
This is a matter that I think is very important in a society which has largely lost its bearings in terms of being able to condemn conduct as criminal. We see the results of our moral uncertainty in the rising rates of crime and, in something our panelists probably won't be able to get to, the horrifying youthfulness of criminals that we see today. For instance, in a recent case, a thirteen year-old baby-sitter smothered the two little children she was responsible for because they were crying too much. It is a very pertinent question to ask in examining our national status with regard to crime whether there are judicial mandates that have impeded or hindered the effectiveness of society.

Our panelists today will discuss the two most significant aspects of the impact of judicial mandates. Dr. Block and Mr. Bronstein\(^{143}\) will discuss the criminal justice system once convictions have been obtained, and that has to do with so-called prison reform litigation. I'll read you a quote from a prisoner who sent a letter to a federal district judge as my concluding comment here, but suffice it to say, that when two out of every five of the appeals filed in federal court are from prisoners, and 99.5 percent of those lack any legal or moral merit whatsoever—claims such as the medic gave me Tylenol instead of Tylenol-Plus or Advil, or my rights were abused because I was served baloney sandwiches, or I was subjected to cruel and unusual punishment because I started a fight with a prison guard and my goodness, he hit me. One has to consider whether these rights of prisoners within the prisons haven't gone a little bit too far.

The other side of the debate is going to be Professor Cassell and Professor Rudovsky who will be talking about judicial mandates in the realm of obtaining convictions; in particular, the famous Miranda decision, which is not a constitutional principle of law, but is within the penumbras of the Fifth Amendment. It says that certain parts of a confession, those that are not accompanied by the prophylactic warnings, cannot be admitted in evidence. We don't see those kinds of cases in the courts because Miranda—the suppression rules, the identification rules, and so forth—Miranda's systemic impact on criminal justice is that convictions are never obtained.

As a result of these various mandates, there are two pertinent impacts, totally unforeseen by the people who engaged in the litigation, that have occurred. One of them, of course, is that the purpose of the trial, as we've seen in the O.J. Simpson case most recently and most dramatically, is no longer focusing on the accused of the particular crime, but on whether the police handled the case correctly. Too often, under the auspices of clever attorneys, the focus is totally lost, or, indeed, the conviction isn't even

\(^{143}\) Mr. Bronstein withdrew his panel remarks from publication.
pursued by the prosecutors because of these problems. The other effect, which I also think was unforeseen, is that these cases have assisted in creating a general criminal mentality among the populous: I'm innocent until proven guilty; the crime is not my fault; the fact that I got caught may be my fault, but the police are just as bad as I am; and once I'm in prison, I'll have more rights than I'd have if I were out in the world.

I just want to show one perspective of our criminal justice system. One of our district judges printed part of a letter from a lady he had sent to prison for two four-year terms, to run consecutively. She said she was going to write him yearly and give him an update. She says, "I quickly learned two things about prison. Number one, it's not very different in there from outside. You form friends, have activities, work, eat, sleep, and carry on with your life. In fact, once you settle in, it's not bad at all. I can't recall the last time I had time to read or crochet. It's nice to play dominos on a Saturday or Sunday afternoon, without a worry or care. On the outside I worked seven days a week. All of a sudden I found myself removed from want. Food, clothing, housing, medical care, everything is provided. Actually I'm surprised more people don't come to prison. It beats living in the streets by a long shot."

DR. MICHAEL BLOCK.\textsuperscript{144} I don't think that I'm able to follow that—that was a hard act to follow. Let me only disclaim one important aspect of the description of my background. I don't have a law degree. It is true that I was on the sentencing commission, and it is true that I teach at a law school, but I don't have a law degree, so you'll have to bear with me. I'm going to approach this as an economist dealing with a legal issue.

I've entitled my brief talk "Federal Judicial Mandates and Prison Conditions: Some Facts and Some Theory." Let me briefly review a few interesting facts, and then try to say something about what I think they mean. I even brought a clip chart to draw a few graphs, so that your stereotypes of an economist are not broken by my presentation.

In 1970, as far as we can tell, no state prisons were under federal orders or consent decrees. In 1993, forty state correctional authorities were under some form of court supervision for overcrowding or other constitutional violations. So there has been a rapid growth in the number of prisons that are actually run, in one form or another, by the federal judiciary. I know something about Arizona, in particular because I serve on the Constitutional

\textsuperscript{144} President, Goldwater Institute; Professor of Economics and Law, University of Arizona; Chairman, Goldwater Institute Academic Advisory Board; Chairman, Arizona Constitutional Defense Council; Visiting Senior Fellow, Progress and Freedom Foundation.
Defense Council. One of the issues that has been constantly before the Council—the Council was designed to try to use litigation to expand or carve back some areas of state sovereignty—one of the areas that's constantly been in front of the Council is the area of federal judicial control of prisons. Let me give you a list of the items covered by court orders or consent decrees in Arizona: prison mail, including the requirement that the Department of Corrections allow three twenty-five-pound packages at Christmas time for each inmate; restrictions on mental health care; there are restrictions on, and actually permissive regulation of, legal access; there's restrictions on double-bunking; there are requirements for medical and dental care; there are requirements for inmate programs; there are restrictions on prison discipline; there are restrictions on the hair length policy of the Arizona Department of Corrections; and there's even a policy by the federal courts on hot pots—in April of 1995, Judge Muecke issued an order barring the Arizona Department of Corrections from interfering with prisoners having hot pots in their cells, and an order was given as to how many hot pots can be in each cell.

In terms of inmate programs, let me read you some details of these inmate programs. As part of the consent decree, the State agreed to provide inmates with work, educational, and recreation programs at the central unit in Florence. Specifically, the Arizona Department of Corrections must maintain an inmate work program to include industrial, agricultural, maintenance, and service jobs that will ensure employment of all eligible inmates pursuant to classification decisions. Two, it must ensure that educational programs include high school and college-level courses, and vocational programs that provide instruction in marketable job skills are available to all inmates. Third, it must ensure there are sufficient recreational programs, to include both athletic and cultural activities, available to all inmates, and they must document any instances where restricted enrollment precludes knowledgeable inmates from participating in the program assignment and ensure that the inmate is enrolled in the program on a priority basis at the first available opportunity.

That's some of the detail in terms of the requirements. I was going to read something about our housing requirements, but I think that should give you a good idea of what is going on here and what's at stake. Are these programs and standards really required under constitutional provisions? Especially under the cruel and unusual prohibition of the Eighth Amendment?

As I said, I'm not a lawyer, but clearly, using the common sense standard, and I know that that's not often used in the courts, those
requirements don’t sound like they’re necessary to avoid cruel and unusual punishment. My lawyer friends tell me that the law, at least as expressed by the Supreme Court, doesn’t require that degree of accommodation, that comfortable of an environment, or, as in a letter that the judge cited, a comfortable existence didn’t seem to be required by the Eighth Amendment. I’ll let the lawyers deal with the technicalities of the court decisions, but as I understand it, a much lower level would be allowed.

Now, what does all of this mean? Well, two things. One, since 1960, expenditures per inmate have increased almost twice as fast as income, and over twice as fast as the standard poverty level. So what you have, in some rough sense, is the living standards of prisoners increasing more rapidly than the living standards of the law-abiding, and we’ve had that now over the last three decades, in terms of what that implies.

I’d like to reinforce the stereotype of an economist, and turn for a minute to putting up a simple graph. Let me put up what you all recognize from “Econ I” as a simple graph. Let’s put on this vertical axis, starting with zero here, the cost per inmate. So that’s the cost per inmate and it increases upward. Let’s increase downward on the vertical axis, in terms of the number of crimes in the society. Then let’s put on the horizontal axis the number of prisoners. Now, this, you know, looks like what you’ve come to expect from an economist. And now let me draw a relationship, which again seems common sense to most people, but has involved economists in debates now for almost three decades in terms of empirical evidence, and that is that the lower the number of prisoners in prison, the lower the number of people actually committing crimes who are put in prison, the higher the crime rate. So, let’s look at this relationship that essentially the more people you put in prison who commit crime, the lower the crime rate. So, you could plot it and it would look like this relationship, so let’s call this the crime relationship.
Now, let's look at the relationship between costs per inmate and the number of prisoners. Economists have this funny notion that not only are criminals rational, which is really what's behind this, that the more you threaten people, the less crime they do. It's really a very sophisticated concept. It seems to be very controversial. Let's extend that to the fact that political institutions are responsive to costs and are basically rational, and that the higher the cost per inmate, the fewer inmates that will be put in prison. So, essentially you have a prison inmate relationship that looks like this. It's in some sense the demand for prisoners by the political institutions. You've heard this argument—you hear people whose orientation is often more liberal than some of us in the room—you can't afford to imprison, it's too expensive. In some sense they're right. The policy choices as cost go up tend more and more towards less imprisonment.

Let's use these two relationships then to get at the issue of what's happening when we move up the cost of imprisonment. Let's say that there's some basic level of cost per inmate that's dictated by the constitutional prohibitions against cruel and unusual punishment. You can argue whether we should have that or not, I think that's an open argument intellectually, but it's not an open argument practically. So we have some
lower bounds in terms of the habitability of prisoners. That imposes some minimal costs that gives you some level of prisoners in the society that translates into some minimal level of crime that you’re always going to have, given whatever other characteristics there are. So, you have some minimum level of care and that translates into a level of crime.

What happens when you push up the cost per inmate? As you push up the cost per inmate—get them up here where they look like something equivalent to the little chart that I handed out, which rates the ten best jails in the United States, you notice they have video, and meals are rated—push up the habitability of prisons, push up the costs of dealing with prisoners, and essentially you’ll get a public reaction to have less prisoners. The vote for less prisoners is essentially a vote for more crime, because as you push up the cost of crime, the equilibrium number of prisoners in the system goes down, the amount of crime goes up. And it’s even slightly worse than this because there are two ways to increase the cost of housing prisoners: one may be just the cost of dealing with prisoners, which doesn’t affect their living standards, that would keep this relationship stable, but what if you make prison life nicer, like the lady in the letter that was quoted; it’s not such a bad place. The nicer you make it, the more that this shifts out. Then essentially the nicer it is, the higher the level of crime.

It’s even a little worse than just this blue line. But that’s a lecture for graduate courses. On an undergraduate level, all you really have to know is that essentially there’s no free lunch. In all the discussion about the fact that we’re making prisoners better off, every dollar above whatever the minimum is, imposes a cost in terms of crime for the law-abider, and there is no way around that.

There is some argument, yes, about where this level is. But I think there’s pretty broad agreement now that, at least in Arizona and I suspect in other states, the court orders and the consent decrees that we’re involved in now have levels of cost way in excess of what is constitutionally required. And the policy implication I think of these diagrams is that to the extent that there’s a trade-off between how well prisoners live, and that’s really the cost per inmate, and what the crime level is, that’s a decision that needs to be done in the political process. That’s not a decision that you want handled in the federal courthouse. In terms of what we can tell in terms of analysis, since you have that trade-off, you want that trade-off done through the political process and not through such an isolated body as the judiciary.

Thank you.
PROFESSOR PAUL CASSELL:145 Before prisoners can receive their constitutional right to a hot pot, we must somehow convert them into prisoners. That’s the subject that I want to talk about today: What should we be doing as a society in terms of apprehending criminals? In particular, I want to look at the federal mandate that’s imposed under the rubric of interpreting the Fifth Amendment Self-Incrimination Clause; the case arising, of course, from this State, Miranda v. Arizona.

It’s important to understand that Miranda, viewed in historical perspective, is a federal judicial mandate of questionable roots. For many, many years in this country, the admissibility of confessions was determined on a basis of voluntariness, in which the court examined all of the circumstances surrounding police interrogation and made a voluntariness determination.

In 1966, the Supreme Court jettisoned all that—consider it the judicial equivalent of strip-mining—throwing away everything that had gone on before, and decided that the admissibility of confessions would be determined on the basis that custodial interrogation was inherently coercive. Based on this fiction of coerciveness, the Court then promulgated a series of rules that had to be followed in all cases. You’re all familiar from television programs with the famous Miranda warnings, but perhaps more important are the other technical requirements in the Miranda decision. Of prime importance is the waiver requirement, that is the requirement that a police officer essentially say “mother may I” before the interrogation begins, and if the suspect says “no,” no questions—no matter how reasonable, no matter how restrained—are permitted. Also, if at any point during the questioning the suspect says the magic words “I want a lawyer,” no questioning is permitted.

In a minute, I will present evidence suggesting that Miranda results in the release of tens of thousand of dangerous criminals every year. But some may argue that this cost is just a general feature of constitutional rights—that it is no surprising news. But the Miranda rules are not simply an exercise of Article III judicial power interpreting the Constitution. Judge Jones rightly reminded us that the Miranda rights are not constitutional rights; instead the Court has told us that the Miranda rules are only “suggested safeguards,” whose purpose is to reduce the risk that the Fifth Amendment prohibition of compelled self-incrimination would be violated.

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145. Associate Professor of Law, University of Utah College of Law. Professor Cassell has written a more extended version of his panel remarks, which appears in The Costs of the Miranda Mandate: A Lesson in the Dangers of Inflexible, “Prophylactic” Supreme Court Inventions, 28 Ariz. St. L.J. 299 (1996). References to studies and cases mentioned by Professor Cassell can be found in that article.
The result is that they go beyond any constitutional requirement, by the Court's own admission. For instance, in *Oregon v. Elstad*, 146 a 1985 case, the Court stated that the *Miranda* exclusionary rule "sweeps more broadly than the Fifth Amendment itself, and may be triggered even in the absence of a Fifth Amendment violation." This is not just a view of the right side of the Rehnquist and Burger Courts. Justice Marshall, for instance, admitted that *Miranda* is overbroad "in that its application excludes some statements made during custodial interrogation that are not, in fact, coercive."

Because the Court, by all accounts, has gone boldly beyond the bounds of the Fifth Amendment with its mandate, the immediate question is how far does it decide to go. The Court has posited careful cost-benefit analysis as the determining factor. The *Miranda* decision, the Court explained in 1986, embodies a "carefully crafted balance designed to protect both the defendant's and society's interests." Exactly how the Court makes this careful balancing determination remains a mystery. As Judge Jones reminds us, the Court never sees cases in which the suspect doesn't confess, and therefore cannot be prosecuted.

So, given that the Court has nonetheless told us that it has managed to balance all the interests, I think we can fairly ask how could we know that the benefits of the mandate outweigh the costs. Here, any rigorous empirical assessment of this question leads quickly to the conclusion that *Miranda*’s staggering social costs outweigh any conceivable offsetting benefits.

At this point, I'm going to shatter your illusion of a law professor—I actually have some numbers, like an economist. A number of before-and-after studies measured *Miranda*’s effects. In Pittsburgh, before *Miranda*, about 49% of all suspects confessed; after *Miranda*, the confession rate fell to 30%. New York County’s confession rate fell from 49% to 15%. Philadelphia had about a 20% drop. Seaside City in California just a 2% drop. New Haven, Connecticut, adjusting for confessions that were not admissible under the *Miranda* requirements—about a 16% drop. Kansas City, Brooklyn, New Orleans, and Chicago all show similar results. The only city where a reported confession rate increased after *Miranda* is Los Angeles. There's a technical problem with that study, which is that it compared the number of confessions before to total number of statements afterwards. Obviously, that includes nonincriminating statements, so one would need to revise that substantially. The District of Columbia had only a modest change in confessions. It turns out that in 1967, the District of Columbia police did not bother to follow the *Miranda* rules. So it's not surprising that there's not much change in the confession rate.

All of these are 1966 and 1967 studies, and you might say, "Okay, maybe there was this effect on confessions immediately after *Miranda*, but what has happened over time?" Here it's not possible to look at confession rate statistics, because nobody has collected data on that particular point over a long period of time. So we're forced to look for a surrogate measures, and here, I submit, we find clearance rates—the rate which police officers claim to have solved crimes. Fewer confessions would show up as lower clearance rates for two reasons. First, sometimes without a confession a police officer may not be able to clear a crime. The officer just might not be able to figure it out, or come up with enough evidence to charge a particular crime. Secondly, sometimes without a confession a police officer might be able to solve one crime but not others. If a burglar leaves a house with a television set under the arm, that might be enough to convict for that crime, but it might not, without a confession, allow a police officer to clear twenty other crimes in the same neighborhood committed in the same way.

At this point, let me ask Steve Twist to put up a chart showing violent crime clearance rates—violent crimes being the area where *Miranda* might have the greatest effect. Notice that in 1950 about 65% of all crimes were cleared, and that we bounced around 60% until 1965, the point depicted as "Miranda" on this chart. Then suddenly, in a three year period, we see a sudden dramatic drop in clearance rates, and the clearance rate has remained around 45% ever since. What was it that in a three year period caused a sudden dramatic shift in law enforcement effectiveness in solving crimes? My hypothesis, obviously, is that *Miranda* is responsible. What other factor, call it the "X" factor if you will, could be accountable for this charted change in a three year period?

Let me provide one more piece of information. You might say that the number of crimes was going up in the ’60s maybe because cops just got overworked. This next chart depicts clearance rates versus crimes, and you notice the total number of crimes was not just increasing in the ’66 to ’68 period, but was increasing throughout the charted period. The critical point for crime clearance rates, of course, is whether the number of crimes could be the “X” factor explaining this drop in clearance rates. No, it’s not, because it doesn’t follow the kind of pattern that one would need.

I’ve looked at other factors that one might look at: number of police officers, dollars spent on law enforcement, population in the crime prone ages of fifteen to twenty-four, unemployment rate; and none of these looks anything like the “X” factor that you would need to explain the drop in

147. This chart is reprinted in Cassell, *supra* note 145, at 307.
148. This chart is reprinted in Cassell, *supra* note 145, at 308.
clearance rates. Running multiple regression analyses, the standard technique that economists like to use for handling these sorts of issues, it appears (although my analysis is preliminary) that most of the drop is still attributable to a change in the structure of law enforcement effectiveness starting in June of 1966, the year in which the Miranda decision came down.

Now, what other "X" factor am I overlooking? What is it, if not Miranda, that caused this drop in crime clearance rates? Some of you might be thinking police brutality. After all, if cops were using rubber hoses in 1965 and stopped using them in 1966, sure, we end up with fewer confessions. And we should be happy about that, not sad. But this can't be the explanation for the drop in clearance rates, for at least two reasons: First, coerced confessions were rare before Miranda, and here we can't just look to a couple of isolated anecdotal examples of the type that Professor Rudovsky might offer. What we need to look at is overall impressions of the level of police brutality. Police professionalization increased in the 1950s and early 1960s so that, at the time of Miranda, President Johnson's Commission on Law Enforcement and the Administration of Justice reported that, "Today the third degree is almost nonexistent." So I agree with the University of Chicago Professor Gerald Rosenberg, who last year conducted a comprehensive assessment of the evidence and concluded that what evidence there is "suggests that any reductions that have been achieved in police brutality are independent of the Court, and started before Miranda." So changes in the extent of police brutality cannot be the explanatory factor.

Even if you don't agree with me on that point, you then confront a second difficulty: Why is it that Miranda would make somebody who was using a rubber hose in 1965 put it away in 1966? Justice Harlan made this point powerfully in his Miranda dissent: "Those who use third degree tactics and deny them in court, are equally able and destined to lie skillfully about warnings and waivers." So the bottom line on any kind of reasonable cost benefit analysis is that the Miranda mandate has imposed tremendous costs on society, costs that the Court has yet to even publicly acknowledge. That any benefit of this decision could possibly outweigh these tremendous costs is quite dubious.

But I want to turn now to a more general point: The Miranda mandate, like other federal mandates, has imposed an inflexible requirement on the states that has prevented experimentation and reform. Miranda urged the states to look for other alternatives, but in the thirty years since the decision, no states have really been able to do that. The reason is not hard to discern: Any jurisdiction that departs from Miranda would risk wholesale invalidation
of criminals' convictions if the Court, some number of years later, decided that the alternative chosen by that state did not pass constitutional muster.

Let me sketch one possibility that has been blocked by the Court's *Miranda* mandate. We could, for example, allow police agencies to videotape all stationhouse interrogations, and audiotape all custodial interrogations outside of the stationhouse. With taping in place protecting from police abuses, society could then relax the features of *Miranda* responsible for this confession rate drop, and, in particular, the feature of *Miranda* that the empirical evidence identifies as most costly—the requirement that police officers must ask the suspect, “Do you want to talk to us?” and if he says “No,” that’s it—no questioning is allowed, no matter how reasonable. We should eliminate that, and we should also eliminate the requirement that questioning stop whenever the suspect says the magic words, “I want a lawyer.”

Let me submit that this would be a better accommodation of competing interests here. Videotaping would provide better protection for suspects against abuse, and at the same time it would provide more confessions for society because empirical evidence suggests that videotaping does not inhibit suspects from talking. The overarching point here is not that videotaping is better than *Miranda*; the overarching point is that something is better than *Miranda*. The undeniable tragedy of *Miranda* is that it has petrified the law of pretrial interrogation, and made it impossible for the states to modify or explore to find these better alternatives.

Since *Miranda*, there has been no chance to experiment. As *Miranda*'s thirtieth anniversary draws near, it's time for the Court to end the monopoly created by the *Miranda* mandate. It will no longer do to assert that *Miranda* created acceptably small costs to society—compelling evidence suggests otherwise. Similarly it is no longer tenable for the Court to maintain that *Miranda* is the best possible accommodation of the competing concerns—certainly society must have learned something in the last thirty years that could be used as a profitable modification of the *Miranda* rules. Once the Court allows the states needed flexibility in this area, we can begin the kind of experimentation and reform that our society deserves, as we begin to bring our criminal justice system into the twenty-first century.
PROFESSOR DAVID RUDOVSKY: 149

Miranda: Maligned But Still Right

I will be responding specifically to the points that Professor Cassell has just made about Miranda. Let me start off, however, by suggesting that it is somewhat curious that we are discussing Miranda—and the “handcuffing” of police that it has allegedly caused over the past thirty years—when during this same period of time we have increased the prison population in this country by over five hundred percent. We now incarcerate more people per capita than any country in the industrialized world.

It is also a period of time in which there is literally an epidemic of police abuse in this country. I practice law in Philadelphia. This year six Philadelphia narcotics officers have been convicted in federal court for a series of criminal rights violations. Over a three year period, these officers, all part of a special narcotics squad, beat and terrorized suspects, stole money, stole narcotics, fabricated search and arrest warrants, lied in court proceedings, and framed individuals, many of whom spent time in prison. The District Attorney of Philadelphia has already agreed to the reversal of over seventy convictions and is examining over 1,400 other cases with an eye towards reversing those as well. The FBI is currently investigating scores of other Philadelphia police officers.

Similar criminal activity led to the arrest of over thirty police in New York City. In New Orleans, the police have killed a civilian who filed a complaint of police abuse and have regularly terrorized the black community. In Los Angeles, Mark Fuhrman became a star in the Los Angeles Police Department, even as he openly articulated and manifested the worst kinds of racial bigotry. The war on crime, and more specifically, the war on drugs, has led to a crisis in policing. The African-American community is in many areas the victim of on-going police abuse and corruption.

The theme of Professor Cassell’s remarks appears to be that the protection of individual rights in this country is somehow incompatible with effective law enforcement. In this approach he echoes the theme that unites

149. Senior Fellow, University of Pennsylvania Law School. Professor Rudovsky manages many criminal defense and civil rights cases in his own law practice, and has argued two cases before the Supreme Court that involved government wiretapping and police misconduct. Among other publications, he is the author of THE RIGHTS OF PRISONERS: THE BASIC ACLU GUIDE TO PRISONERS’ RIGHTS (Rev. ed. 1988); POLICE MISCONDUCT: LAW AND LITIGATION (2d ed. 1980); and THE LAW OF SEARCH AND SEIZURE IN PENNSYLVANIA (2d ed. 1980). Professor Rudovsky provided the editors with a written version of his panel remarks.
virtually all of the criticism of judicial attempts at controlling and deterring police violations of the Constitution. I think that’s wrong and I will analyze *Miranda* from that perspective. *Miranda* is based on the supposition that custodial questioning is inherently coercive. For *Miranda* to be right, the Supreme Court had to be correct about three fundamental principles. First, that the Fifth Amendment’s privilege against self-incrimination was meant to protect against both formal and informal compulsion to disclose information. That is, pressure to speak, even though not backed by legal process, is covered by the Fifth Amendment. Professor Cassell and other *Miranda* critics do not take issue with this point and so I will pass it quickly.

The key point in *Miranda*, therefore, was whether or not custodial questioning by police officers is inherently coercive. I think that is where the debate really lies: Does this kind of interrogation “compel” one to speak, even where it does not, in the application of the voluntariness test, “break the will” of the suspect not to speak? The Court was on strong ground in asserting that police conduct that falls short of severe physical or psychological abuse can violate the Fifth Amendment. Surely, if one’s Fifth Amendment rights are implicated simply by the threat of a small fine or single day’s incarceration, incommunicado interrogation poses even more pressure on a criminal suspect.

If the police do not have to inform the suspect of the right to silence or counsel, the suspect has no clear idea of his rights, how long he will be held if he does not speak, whether he can contact counsel or his family, or indeed, whether the police will resort to third degree tactics. Even casual attention to the tactics used in “NYPD Blue” demonstrates how coercive the interrogation room atmosphere becomes in this situation. Police do not need rubber hoses, night sticks, or guns to the head in order to coerce statements. To suggest that incommunicado police questioning is not coercive is to ignore the realities of the stationhouse. If Oliver North could validly complain that compelled testimony before a Congressional Committee, where he was fully represented by counsel, violated his Fifth Amendment rights at trial, can we really deny the kid from the ghetto who is at the police station without money, without power, and without resources the same kind of protection?

The final issue, therefore, is whether the Court was correct in adopting a conclusive presumption of coercion, applicable to all instances of custodial interrogation. Is it correct to say that when a sophisticated defendant is asked a single, simple question and then confesses he has been “coerced”? It is certainly true that, as a theoretical matter, one can conceive of instances
of custodial interrogation that lack any indicia of coercion. If so, is a per se rule justified?

The answer is very clearly, yes. In many contexts the Court has adopted per se rules to avoid having to decide difficult factual disputes in a small minority of cases. Indeed, in the criminal procedure field many per se rules favor the police and prosecutor. Thus, under the Fourth Amendment, police are permitted in every case to search persons, cars, and other areas, incident to a lawful arrest to protect against destruction of evidence or physical harm—even where in a significant number of cases there can be no fruits of the crimes and where there is absolutely no danger to the officer.

In the interrogation arena, the Court well knew the impossibility of fairly determining factual claims of coercion and therefore adopted the per se approach. To avoid having to decide each case factually, the Court ruled that all questioning is disallowed, unless appropriate warnings are given. Seen in that light, the “warnings” give the police the opportunity to overcome the Fifth Amendment protection. Having found inherent coercion, the Court could have stopped there and said no questioning, or it could have required the presence of counsel to ensure that any waiver of rights was voluntary. What the Court did instead was a compromise: If the police give the warnings and the suspect waives her rights, questioning is permitted.

_Miranda_ does nothing more than even the playing field for the poor, uneducated, and unsophisticated. The Fifth Amendment protects every person’s right against self-incrimination and that right should not be dishonored by exploitation of ignorance or lack of resources.

Professor Cassell’s major attack is based on his view of the “harm” caused by the _Miranda_ ruling—fewer confessions and fewer convictions. As I stated at the outset, on its face this is a curious argument given the literal explosion of our prison population in the three decades that followed _Miranda_. But I recognize the possibility that we could be imprisoning even more people if _Miranda_ in fact was an impediment to the clearance of cases.

I do not think that Professor Cassell proves his point. First, the early law enforcement critics of _Miranda_ (e.g., former District Attorneys Arlen Specter (Philadelphia) and Yvelle Younger (Los Angeles))—who made similar claims—have since stated that the early studies were seriously flawed and that _Miranda_ in fact does not impede law enforcement. Second, one cannot convincingly attack _Miranda_ on the ground that the rate of confessions may have been reduced. Let me use my experiences in Philadelphia as a guide.

Professor Cassell asserts that confessions in Philadelphia have dropped some fifty percent. Well, I have practiced criminal law in Philadelphia for
the past twenty-eight years and I can verify that the number of confessions have certainly come down—but with virtually no negative impact on law enforcement. Before *Miranda*, arrestees were routinely questioned and gave statements in cases where police did not need confessions. You do not need confessions to prove most drug cases or street crimes where the perpetrator is caught in the act. Moreover, police would get confessions to “clear the books.” Twenty outstanding burglaries? A confession takes care of all of them (and clears twenty cases), but the impact on the defendant is often minimal. To the extent detectives stopped this practice one would expect a sharp decline in the clearance rates. In the serious cases in Philadelphia, for example, homicide and rape cases, there has been virtually no change in the rate of confessions or in the overall clearance rate.

For argument’s sake I will assume that *Miranda* has had some effect on the clearance rates. One would expect that from a ruling that restricts police power. And I have no doubt that the rights granted to suspects and defendants under the Fourth, Fifth, Sixth, and Fourteenth Amendments have a significant impact on clearance and conviction rates. We could have the highest clearance rate in the world, I suppose, if there were no restrictions at all.

Professor Cassell concedes that constitutionally required restrictions on police powers will and in some cases should have this impact, but asserts that because *Miranda* is flawed from a constitutional perspective the costs involved cannot be written off as a consequence of enforcing constitutional rights. As I have already stated, notwithstanding the Court’s retreat from *Miranda*, I think it states proper constitutional standards.

A Department of Justice study (of which Professor Cassell was an author) criticized *Miranda* for its “radical egalitarianism.” It seems to me that in a system of criminal justice, if nowhere else, we ought to strive for egalitarianism (radical or not). People ought to have rights or not have rights without regard to their wealth, their sophistication, or their standing in society. If the Fifth Amendment is not an appropriate mechanism, find a better balance. If you do not like the Fourth Amendment’s restrictions on police powers to search and seize, don’t argue about the exclusionary rule, argue about the merits of the Fourth Amendment. Without specific and enforceable protections—including exclusion of evidence at trial—the Constitution becomes a voluntary honor code.

To reverse *Miranda* would be a large step in differentiating the kind of justice we have in this country, based on factors of wealth and power. In a system that is already stacked against minorities and the poor, further enhancement of inequalities should not be a social priority.
JUDGE JONES: We will now have rebuttal.

DR. BLOCK: I just have a couple of short comments. I think, Al, your inability to accept the Republican Congress is an indicator of your inability to accept also the evidence on the relationship between punishment and crime. There is a body of evidence out there about the relationship between punishment and crime that doesn’t violate common sense. You’re left in a very strange position if you really think that punishment and prisons are irrelevant in terms of crime control.

But that brings me to a larger issue and maybe because I’m an economist, I can speak to it. I was sitting here listening to the discussion of Miranda and Al’s discussion, and I’m wondering what a visitor from another planet might think. Because what never gets mentioned is what the ends really are. It appears to me that the ends of the procedural system are essentially truth-seeking—not procedure for procedure’s sake. The discussion of all these constitutional niceties in terms of only their own content gets a little bit more removed to me than the larger issue of, yes, we have rules against self-incrimination, you have rules against compelled confession, not because they’re nice in and of themselves, but because it provides a mechanism of getting to the truth. A system that compelled erroneous confessions would essentially have even higher crime rates since people would think there’s no connection between my actions and eventual solutions. It seems to me that one of the things that’s missing from part of this debate is the ends, not in terms of controlling crime, but rather the intermediate position of getting to the truth.

JUDGE JONES: I agree with that. I agree that there are two systems of criminal justice, but I think you can look at it from the standpoint of the victims. There’s a system of criminal justice that protects those of us who are mainly white, well paid, able to afford housing in decent neighborhoods, and go to schools in non-crime-ridden areas, from crime. Then there’s the other system of justice, which means typically the immigrants and the undereducated and the underprivileged, and the blacks who are left to rot in public housing and ghettos where there’s no effective prevention of crime, and no way for them to protect their children from the influence of the people who are being predators upon them every day and every minute that they live. Until we correct that problem, it seems to me, I have very little blood left to spill for the innocent criminals.
QUESTION: I have a question directed to Professor Cassell. It seems to me that the fallacy of what you’re saying is that you are attempting to lower crime, which obviously is one of society’s biggest problems, by lowering the controls of government, the government’s power against the individual, and it seems to me that the perfect model for you would be a totalitarian system in which the violent crime clearance rate would be perfect. But I know you don’t mean that. So, I was wondering what role or what value do you assign to individual freedom and to the principle of equal justice under law which was underlying Miranda?

PROFESSOR CASSELL: I assign those important values, and that’s why I thought I was quite clear in outlining that my proposed alternative to Miranda is not a totalitarian system, as your question suggests, but videotaping police interrogation. Interestingly, not one word during Professor Rudovsky’s presentation as to why an “epidemic” of police misconduct, as he called it, which apparently is going on during the watch of the Miranda regime, wouldn’t be better checked by having videotaping of police questioning. And at the same time, I pointed out that if we shifted to that, and allowed police officers more freedom while operating on videotape to get confessions, then we could have our cake and eat it too. We can better protect against police brutality and still obtain more confessions.

QUESTION: The twenty years or more passes in regards to Miranda. About two years ago we had the Temple murder case where four individuals confessed to a crime they did not commit. So it does show us that Miranda has not cured all of the situations. I’m particularly interested in the fact that Madison pointed out that the judges are not angels and thus he advocated a check and balance, and this dual system of federal and state has worked rather well in Arizona because we have had overreaching at different times corrected by the Federal District Court when that occurs. I dread to think what would occur if we had the system that existed prior to 1960. Have you any suggestions as to what we would use to replace the Miranda rule and the dual system?

PROFESSOR CASSELL: Yes. The Temple murder confessions that you talked about are actually something that I cite prominently in support of my argument that Miranda is the wrong way to go. Remember those false confessions were obtained under the Miranda regime, so it’s not clear

whether that ought to be directed to me or Professor Rudovsky as an indication that the system is flawed.

Another point to be made about those confessions is that The American Lawyer did an exhaustive investigative review of that case. The American Lawyer concluded that if those four individuals had gone to trial—fortuitously the real murderer was discovered before they were to go to trial—their only hope of winning was to rely on a tape that had been made of their interrogations. Fortuitously again, the police officers in that case interrogated on a tape. So my suggestion is, let's get rid of the inflexible Miranda mandate and look at some of these other options like taping. The Temple murder case is a good illustration of the kinds of benefits that could come from exploring these alternative regimes.

PROFESSOR RUDOVSKY: Just to get one point across, there's nothing to stop any police department from using these other options, and many do now videotape confessions. There's nothing in Miranda or anything else that prevents them. You recognize the substitute. That's a different question. It seems to me if that's right, if videotaping as a substitute is what we have to be looking for, you have to go further, and you have to say nobody, whether they're warned or not, has a right not to speak to the police. Then you're talking about a huge change in American jurisprudence.

It may be right. Maybe we should move to the European method where we have independent magistrates question suspects, take it out of the stationhouse, but that means a total reworking of the way our criminal justice system works. Maybe it would be a better system. We ought to look at that, but it seems to me you can't simply say let's videotape, unless we grapple with a hard issue: What do you do with the person, like you or me, who comes in, and the police want to question us, and we say I'd rather not talk to you. Unless you're willing to say you have to talk in those situations, then you're differentiating both on knowledge and money.

PROFESSOR CASSELL: I have a very similar point: I'd say you don't have to talk, you do have to listen to reasonable questions for a reasonable period of time. In other words, the police officers are entitled to pose reasonable questions.

PROFESSOR RUDOVSKY: I'm going to know not to talk and somebody else is going to have to know they have to respond to that. If they think they are going to be held there twenty-four or forty-eight hours, they have no idea

where they are going and no idea what's going to happen to them. It seems to me you're creating again a dual system of justice.

PROFESSOR CASSELL: I just don't think we should hold up as the ideal the murderer who refuses to talk. What happened to the notion in society that we think confessing to committing violent crimes is actually a good thing?

PROFESSOR RUDOVSKY: Maybe it is. The Fifth Amendment says, and I don't think anybody disputes it, that if you don't want to speak in response to police questioning for a trial, you have a right not to. Now, maybe the Fifth Amendment was a mistake, but I hear this all the time in these debates: Let's go back to original meaning. The original meaning was exactly that, if you want to get rid of that, okay. But don't differentiate based upon what somebody knows.

PROFESSOR CASSELL: I just want to go back to the meaning that existed in this country from 1789 to 1965. I see nothing radical or revolutionary about that.

QUESTION: Mr. Rudovsky, first I want to thank this extraordinarily provocative panel. I want to ask Mr. Rudovsky about at least two statements that he's made. The first is the notion that it is the poor people who are more likely to speak to police than middle class people—white middle class people like ourselves. My own experience and my own sense is, that it's likely to be precisely the reverse of that. The sophisticated criminals who've had exposure to the system find it more easy to say no than people like us, who perhaps are arrested for the first time, and are much more subject to that kind of coercive interrogative pressure. So I'm not sure, and I want to ask you: Isn't this yet again some measure a middle class benefit offered in the guise of helping the poor. I want to ask you on what basis you make the assumption?

The second one is one that troubles me. I want some help and some discussion here. You said that it is obviously not in the interest of poor people or anyone to confess. I ask you, why is it not in the interest of a guilty person to confess to the crime that he or she may have committed? A philosophical but an important question.

PROFESSOR RUDOVSKY: It is a philosophical question, and when I say that I try to say it in a narrow way. That person's self-interest at that time, in terms of what is going to happen to that person in his or her life, is not to
confess. There’s no way that anything, even if it’s exculpatory, that you say
to the police in the police station is going to ultimately help you. In a very
narrow sense, I’m talking about self-interest. It may not help the rest of us
because you may be acquitted, but your self-interest is not to give the police
more evidence to convict you.

QUESTION: Well, that’s your judgment and I wanted to ask, and you’re
talking as you say this in a narrow sense. My question is whether in a
broader sense, even for the individual, whether it is not more in his interest
to confess if, in fact, he or she is guilty of the crime. I want to pose it, that’s
all.

PROFESSOR RUDOVSKY: First of all, there’s plenty of time between the
time they’re picked up and incommunicado in the police station to decide,
based on the advice of a lawyer, and talking to family, what they are going
to do when they come to trial. A lot of people plead guilty, and some people
may do it out of a sense of “I want to get it off my chest, I’m willing to
accept punishment.” If they want to do that, fine. It seems to me, at a
minimum, that we ought to require before somebody makes that step—at
least what the Fifth Amendment seems to me to suggest—that at least you
know what you’re doing; that the only person there is not just the police
officer whose aim is only one. If you read any police manual, you know
what that aim is and that’s to get a confession at that point because they
know how to use that in court, or at least they can make an intelligent
knowing decision, regardless of whether it’s good for you or bad for you. I
can live with it and a lot of people plead guilty simply because of that reason
or other reasons—the weight of the case against them and everything else. If
they want to make that moral personal choice, that’s fine. It shouldn’t be
done in a dark room in a stationhouse. That’s point number one.

And point number two, your first question, questioning my observation,
and I suppose it is based on my experience mainly, but it’s mainly people
who don’t know, who are not knowledgeable, who are not sophisticated. I
think most of us, when we are brought in, would call a lawyer. I see it time
and again. It’s not a situation where when you’re ignorant and have no
money, if you’re not told that you have a right to a lawyer, you can do it
now. I don’t know if there are studies on that—who does, who doesn’t—
mainly my observations are my own personal experience in this area and
talking to other people. I suspect that police would probably back me up on
that.
PROFESSOR CASSELL: One small point: Empirical studies show professional criminals are more likely to invoke their rights.

QUESTION: In a tough question I wanted to pose to you, to what extent does the shift in the criminal process, making the police officer the object of the process, the presumptive sense that the criminal process needs to protect against the excesses of the police officer, rather than the criminal, not set in effect a kind of counter reaction on the part of police officers? I ask you this not rhetorically, but do you recognize the possibility that your efforts have in some measure created the Fuhrmans we have today in the police departments?

PROFESSOR RUDOVSKY: Somebody’s going to suggest that Mark Fuhrman is the result of the due process revolution, and Mark Fuhrman is the racist, the framer, the bigot, the awful cop he is because the Supreme Court has said you have to respect the Fourth and Fifth Amendment. Nonsense. Not Mark Fuhrman; not the five officers in Philadelphia; not the twenty officers in New York; those are thugs in police uniforms. I’ll tell you why some of them turn from simply not telling the truth at trial to thugs: It’s because prosecutors and judges sit there day in and day out and accept everything they say. I don’t even put the blame on the police departments’ doorsteps, they have plenty of blame to share for not having a good internal affairs division, for not investigating complaints against these kinds of officers—one of the officers in Philadelphia had twenty civilian complaints against them in a two-year period, all dismissed, all alleging the same kind of activities. I put as much blame on prosecutors and judges who day in, day out hear this testimony and sit there and say, “I believe the police officer.” I’ve talked to police officers about it, and they say, “We can say anything in court and get away with it.” So I simply disagree fundamentally with the notion that a police officer, because he’s unhappy with the constitutional rulings that have come down, then goes to excesses. Maybe some do, but it seems to me there is some problem then with our hiring and training of police officers, not with the Constitution.

DR. BLOCK: I think your comment does lead to an interesting possibility of thinking outside the box in the sense that confession, if you’re guilty, is more efficient overall. This system reward that as opposed to reward not telling the truth and imposing larger costs on all of us.
VII. PANEL DISCUSSION: JUDICIAL ENGINEERING OF SOCIAL POLICY—COSTS AND BENEFITS

Is it ever appropriate for courts to initiate significant social reform? Some maintain that courts are institutionally incapable of developing and executing workable social policy and constitutionally prohibited from engaging in such activities. Others respond that courts, by virtue of the nature of their business and the shortcomings of the other branches of the government, are bound to be political institutions and therefore will necessarily become involved in initiating reform. On this view, the relevant question is not whether courts ought to be involved in social reform, but rather, whether there are particular areas within courts that are best equipped to provide leadership. This panel will explore these competing views about the role of the courts in initiating social policy reform.

HONORABLE EDWIN MEESEx 152 Ladies and gentlemen, it’s a real pleasure for me to participate in this session of the conference, and I regret that some other commitments kept me away from the other portions that have taken place so far. But, as I heard from those who were here, you have had some very lively sessions, particularly the last one, so we will try to continue to maintain that liveliness in this session, even though we recognize that being the first session after lunch makes us perhaps the toughest one in regard to keeping the audience awake. But that is why we have assembled a very outstanding panel here to do that, and I’m pleased to serve as moderator, and I will mention them in just a moment.

Our topic this afternoon is the judicial engineering of social policy, costs and benefits. When Alexander Hamilton characterized the judiciary as the least dangerous branch of the government, I’m sure he could not in his wildest imagination contemplate some of the things that have taken place in regard to what that judiciary does and that have evolved over the following two hundred-and-some-odd years since he made that statement.

Today we have federal courts that are literally running prisons in most of our states and many of our county jurisdictions. They are deciding not just how many prisoners can be kept in a particular institution, but they’ve gone into such things as the size of law libraries, the legal assistance that should be provided to inmates, the kind of athletic equipment and recreational

152. Ronald Reagan Chair in Public Policy, Heritage Foundation, Washington, D.C.; Attorney General of the United States, 1985-88. General Meese was Counsellor to President Reagan, and served as a member of his Cabinet and the National Security Council.
equipment that should be provided, dietary and food matters, religious activity, and a whole variety of things having to do with what most people have contemplated as an executive function in the management of penal institutions.

As a matter of fact, this solicitude or interest, at least on the part of the court, on what goes on inside prisons has generated something in the neighborhood of 20,000 to 30,000 prisoner lawsuits per year in the federal system, which have ranged all the way from the quality and type of peanut butter given to inmates in the commissary, to the size of jeans issued as clothing, and to a variety of other matters of similarly somewhat lighter weight than some of the usual momentous matters that appear before the federal courts.

Likewise in school districts, the federal courts have been deciding issues like school boundaries, curriculum, and budget allocations. One judge even tried to levy taxes, which probably would have horrified Alexander Hamilton, and might have doomed the entire idea of a federal government had they foreseen this. It would have been the idea of a judge trying to levy taxes upon taxpayers. Of course, they have been very much involved in busing and similar matters pertaining to school districts.

We have also seen federal courts involved in terms of social engineering affecting the personnel practices of police and fire departments, and going far beyond that in terms of training and a variety of other matters.

Then, of course, there have been the activities of the courts in regard to the racial and gender composition of employment which have ranged far and wide, often in meticulous detail, sometimes even appearing to violate directly the 1964 Civil Rights Act.

Well, the list goes on. There have been attempts—in some cases they were successful—to get the federal courts into becoming arbiters of hair and clothing styles. Or, even more recently, we have seen a suit that was at least threatened, but so far as I know has not yet been filed, that the federal court should decide how the size of crowds at large demonstrations in Washington, D.C., is measured. I still am interested. I wish they had filed the suit, because I would like to see: (a) the issue of standing, (b) the cause of action and, (c) how they felt they could alter a discretionary decision that is not, so far as I know, compelled by statute by a federal employee. But we may never get there. Apparently this has been eclipsed by other events. We may never get to learn what novel theories they would be proceeding on, let alone what the novel reaction by the judges might be.

Now, obviously, some of these activities and social engineering by the courts are actually derived from constitutional rights provided in the
Constitution. Others rest upon somewhat novel theories of judicial power. And many actually are the fault of Congress by enacting statutes, establishing new rights, new causes of action, or other bases for judicial intervention.

When we look at this, we have to not only look at the basis for judicial involvement in social engineering, but I think we have to look at methodology, because many times judges recognize they cannot leave the bench and take days at a time, or weeks at a time to inquire into every aspect of how prisons are run or how school boards make decisions, and that sort of thing. So we have had a somewhat unique concept develop in the federal courts, and that is the use of special masters, not for what has been traditionally their purpose, which is to find facts and report those facts back upon which a judge can make a decision. Instead, we have had special masters used essentially to perform executive functions, such as within the prison system in terms of actually giving orders to the officials who are, themselves, responsible not to the courts, not even to the federal government, but to the state administration that they serve, and to the state voters who elected that administration.

So we have some interesting cross-currents between the concepts of separation of powers, and certainly between the separation and allocation of constitutional authority between the federal government on the one hand, and the several states on the other. With the courts so involved, in these rather unusual ways, in social engineering a number of questions are raised.

First of all, what really is the constitutional basis for the court becoming so far involved in matters which certainly, at the time of the Founders, would have been left to the states in the first place? Further, under very few circumstances could anyone have contemplated them being matters for the judiciary.

Second, are the courts capable of carrying out this kind of activity once they embark upon it, since these are executive functions? I mentioned the issue of the special masters, but, in fact, how good are decisions that are made and how good is the delegation of authority?

And that leads to another question: Third, what checks are there then upon the courts when they embark upon essentially executive or even quasi-legislative functions, because, particularly in the federal system, they have life tenure in order to give them the independence they need for judicial decisions, and since even their emoluments of office cannot be reduced during their terms, then what are the checks? And does this suggest then that there may need to be, or is there, a role for appellate courts that goes out of the way of simply handling usual appellate jurisdiction, or should
there be a role in which they are far more inquisitive about the role of federal district courts in dealing with this social engineering we are talking about?

A fourth question comes up. If you have federal courts making executive and legislative decisions, what is the people's recourse? With the political branches, of course, the answer is always that you can vote them out of office, but you can't do that with judges.

Therefore, since most of these decisions normally benefit a special interest group of one sort or another who have brought the suit in the first place or have gotten the courts involved in the first place, then who is there to enforce the rights of the general public interest? I think this is most starkly highlighted in the Kansas City case relating to the judge imposing a tax, which certainly affected far more people than just the beneficiaries, and the special interest group, and the schools.153

And finally, on what basis then can we evaluate the courts' activities when we do weigh the costs and benefits? That is a question that I know some of our panelists are particularly interested in. What are the costs, what are the benefits, and what kind of an objective assessment can we make of it?

Well, to answer these matters, we have the five panelists before us. It's a pleasure to have Professor BeVier lead off our panel today, and I ask you to join me in welcoming her.

PROFESSOR LILLIAN R. BEVIER:154 Thank you.

It is a great pleasure to be here. I am not sure that my remarks are quite up to the task of keeping you awake after the fireworks that we have had at lunch and at the last panel, but I hope that I have a couple of things of substance to say that you will find at least interesting.

I was given ten minutes, which is very hard for a law professor. My theme is that of comparative institutional advantage as between courts and legislatures at making broad social policy decisions, and in terms of articulating the major aspects of that theme, this is something that I think can be done, although admittedly painting in a very broad brush way in the short time that has been allotted to me.

Let me get right to the point. The separation of powers—the legislative, executive, and judicial branches—is, of course, a familiar principle of our constitutional scheme. It's usually thought of in terms of the contribution it

154. Doherty Charitable Foundation Professor of Law and Merrill Research Professor, University of Virginia Law School. Professor BeVier serves on Governor George Allen's Council on Self-Determination and Federalism, as well as on both the Policy Committee of the National Association of Scholars and the Legal Advisory Board of the Center for Individual Rights.
makes to our great system of checks and balances, whereby we preserve ourselves from the overreaching tendencies of the federal government by dividing power among the three branches of the federal government and letting them, or rather almost encouraging them, to encroach upon one another's domains rather than encroaching upon ours. But separation of powers, in my view, has another function as well: It divides the labor of governing.

The founding generation instinctively understood the concept of specialization of labor and its political analogue, what I will call comparative institutional advantage. They embedded it in our government structure. They embedded the notion of comparative institutional advantage when they assigned each of the three branches of the new government the kinds of governing tasks for which each branch was institutionally best suited. I share what I take to be the founding generation's intuition that the way a branch of government is designed to work profoundly affects the kinds of governing jobs it ought to do. And I am going to try to spend my next few minutes this afternoon developing this particular theme.

When I speak of the way a branch of government is supposed to work, I have reference to a number of aspects of what we might call its institutional design: the way it gets the information upon which it bases its decisions; the kind of decision-making processes in which it engages; the means it has available to it to implement its decisions; the manner in which its human agents are held accountable for the results—for the social costs and benefits, if you will—of its decision.

I know this sounds pretty abstract, but if you compare the legislature with the judiciary along these dimensions, I think you will begin to get a feeling why, at least as compared to legislators—by the way, I don't mean to say that legislators are very good at making social policy, just that as between legislature and the courts, legislatures are probably better at it—as compared to legislatures, judges are not very good social engineers. In fact, I think judges are pretty lousy at social engineering. The reason is because it's not the job that the courts were designed to do. Asking judges to make and implement broad social policy is a little bit like using your lawn mower to cut your hedge. We can't stop you from trying to do it, but we can tell you pretty confidently that it's not likely to work very well, and you are very likely to get hurt in the process.

Think about how legislatures are designed, about the model of the legislative process that the Constitution embodies, and compare it with the judicial one. First of all, legislators get their information from the broadest possible range of citizens and they set their own agenda. The Constitution
itself, in fact, in the First Amendment, guarantees to all citizens the right to inform their representatives about what they think and about what laws they want passed. And there are no constraints of relevance or probative value or anything of the sort on the kinds of information that legislators may consider.

Judges, on the other hand, are limited by the Constitution to considering only cases and controversies. They are not entitled to set their own agenda, at least not by the Constitution. They have to wait for parties to bring them the live disputes. The kinds of information that judges can consider are strictly limited by rules of evidence. The information has to be relevant to the facts of a particular case at hand; it has to be probative of the matter at issue; and, for the most part, one of the parties must have entered the relevant evidence into the record. This is putting aside matters of which judges are able to take judicial notice, which really is a fairly limited set. Nobody except the parties to particular litigation has a constitutional right to be heard in the litigation. Indeed, far from inviting broad public participation in the decision-making process, the judicial process repels it by confining judges to considering only the facts and the arguments presented to them by the parties. Thus, even though non-parties may have a very substantial stake in the outcome of some particular litigation, they have no right to present their side of the story. They have no right to be heard.

Now, we very much value due process of law. Due process of law means that we have to give the parties their day in court. But what it also means is that we are constrained not to give anybody else a day in the parties’ litigation. What that means, of course, is that the judges consider a small data set—a very small piece of the world—whenever they take even major litigation on.

The legislative process is designed to be fairly rough and tumble. It’s a partisan game. Outcome is generated by compromise, log-rolling, special interest deal-making. None of it is very pretty, but that’s the way the system is supposed to work. It’s not very elegant, but it is inclusive.

The judicial process, putting the O.J. trial aside if we may, stands in stark contrast. It is sedate, it is disinterested, it is, above all things, especially at the appellate level, supposed to be guided by rationality. Outcomes are generated by deliberation about facts as they have been presented in court, and by the cogitation of the judges on the legal and constitutional arguments offered by counsel.

In enacting their will, legislatures are limited only by their own imaginations and by their notions of what penal or remedial or regulatory structure is most apt to bring their goals to fruition. They can tax, they can spend, they can fine, they can imprison, they can create agencies, build
buildings, establish armies. The list of the enforcement mechanisms that they can employ is practically endless. They can’t abridge freedom of speech. They are not supposed to establish religions. They are not supposed to enact ex post facto laws or prescribe cruel and unusual punishment. But, basically, legislatures retain an incredible array of enforcement options.

Courts, on the other hand, can do very little, at least in theory. I think one of the problems with special masters is that they represent an example of courts departing from at least the notion of judges’ enforcement powers. Courts supposedly can award damages, and issue injunctions, and punish for contempt those under their jurisdiction who disobey their orders. This, by the way, doesn’t mean that judges’ decisions don’t have impact on taxing and spending, and so forth, but it does mean that courts directly don’t have the power to tax and spend. They have neither sword nor purse. And without the power directly to tax and spend, I think it’s at least fair to say that their enforcement options are severely constrained. This shouldn’t matter, of course, since their decisions are not supposed to cure society’s problems, but rather to resolve past disputes, and thus, to be purely retroactive. They ought not need the power to tax and spend to do the job they were designed to do.

Finally, let’s look at this issue of accountability. I want to just take one little piece of the accountability puzzle here. What happens to the human decision-makers when their decisions turn out badly? What prospects for punishment do legislators face? Well, most obviously they’re subject to control at the ballot box, and we know from how hard they run for re-election while they are in office that this threat of not being re-elected is one that they take very seriously. We also know, after the election of November of 1994, that the threat of not being re-elected has become, after a fairly long time in limbo, rather real again.

How are judges’ feet held to the fire? What mechanisms exist to hold them accountable when their decisions go awry? They have life tenure, which, as we all know, means that they can never lose office on account of the substance of their decisions. They might find themselves subjected to professional criticism from members of the bar, colleagues on the bench, or from the academy. Perhaps their decisions will be reversed by higher courts who, themselves, are also manned by life-tenured unelected judges, but there are no formal constitutionally mandated mechanisms for holding judges accountable for the results of their mistakes. They can’t be fired, even if they do a lousy job.

In a society as complicated and diverse and multifarious as ours, in which the engine of social reform is so easily stalled, shouldn’t we prefer that broad policy initiatives come from the branch of government whose access to
information and citizen input is unlimited rather than constrained; whose remedial and enforcement options are broad and forward-looking rather than narrow and retrospective; whose mistakes and overreachings need not be merely the subject of powerless scorn from the disenfranchised, but whose blunders can be punished by removing them from office? To me, the answer from a comparative institutional standpoint is pretty clear. It is legislatures, not courts, that should set the policy agenda, and legislatures, not courts, that should attempt to lead us into the future.

Perhaps you think I am just being an institutional purist about this. Maybe I am missing the point—what matters is results. So what if your lawn mower wasn't designed to clip your hedge, the question is, how does your hedge look when you're done clipping it with the lawn mower? Likewise, so what if courts weren't designed to do broad social policy-making. The question is, are they any good at it despite their institutional shortcomings? What are the results and the consequences of their intervention?

As it turns out, I think judges are not just worse than legislators, they are positively bad at it. Once again, the wisdom of the Founding Fathers is confirmed. As they seemed to have known would be the case, the consequences of judicial policy-making are not pretty. They almost never are what the judges intend.

We have heard today many references to what one commentator in this field has referred to as the pleasing illusion that judges are simply protecting an existing system of rights. But society cannot be transformed by judicial mandate; life is too complicated, too interdependent, there are too many cultures, too many ways of looking at the world, too many ways of doing things for judges to be able to make all the decisions necessary to mobilize all the changes in the way people actually do things that would be necessary to get society to move in the direction that they try to order it to go.

James P. Wilson is one of a growing number of academics who's actually studied what happens when judges try to intervene massively, or do intervene massively in the day-to-day doings of government agencies. And he's noticed that, first of all, their interventions end up empowering—guess who—lawyers and professionals, rather than managers and doers. He asserts, and I think I agree with this, that judges are best at issuing clear self-enforcing rules such as "stop excluding blacks," not "improve educational performance"; "stop torturing prisoners," not "improve rehabilitative results." He points out that, while judges are plenty smart—they can master technical data, they can understand economic implications—the problem with them is that they are unaware and ignorant of organizational facts. No outsider, particularly not judges, really could be capable of understanding,
much less of managing, the complex bureaucracies with which they are dealing.

Wilson's analysis brings to my mind the notion that a judge attempting to initiate broad social change or to reform a complex bureaucracy should remember the story of the blind men trying to describe an elephant. Each one of them had a grasp of a different part of the elephant. Of course, for each one of them, the elephant was exactly that small part that they were able to feel with their hands, and was only that. Remember that it is inevitable that judges will be aware of only part, that they are institutionally incapable of grasping the whole and then figuring out the interplays among the various parts. And remembering that story—that reality—they should proceed with caution, lest they and we get trampled by their mistakes.

Thank you.

PROFESSOR PETER SCHUCK:\textsuperscript{155} Thank you.

In listening to Lillian, I, of course, agreed with a great deal of what she said. But I was struck by the irony of a law professor criticizing the system in which judges enjoy life tenure and they cannot be fired from their jobs even if they become incompetent at it. As an academic, I thought that she uttered a very subversive thought, and I hope you don't take the reform suggestion seriously.

The discussion during this conference has been entirely concerned with public law, so I thought it would be useful to identify some of the themes that we have been discussing in the public law context and see how they apply in the private law context—particularly the law of torts.

In doing so, I am struck by the extent to which many of these themes are repeated, but with somewhat different focus and variations, in the area of torts. It's all the more striking because of the rather important differences between public law and private law in these respects, differences that encourage the very phenomena that we are examining this weekend—that is, robust judicial policy-making.

In common law areas, the legitimacy of judicial initiative, policy-making, and creativity is not in question in the same way or to the same extent as it is in public law, where other law-making institutions have usually supplied the source of law that the judges are supposed to apply. So there is much more freedom available to common law judges.

\textsuperscript{155} Simeon Baldwin Professor of Law, Yale Law School. Professor Schuck has published numerous books and articles touching on administrative law, mass torts litigation, immigration and race relations, and health and safety regulation.
Second, there are no judicial mandates in tort law because, outside the area of nuisance, there is no injunctive relief and damages is the sole remedy that tort courts order. The prospect of liability for damages leads the defendant to decide how it will respond to that incentive. In the public law context, where injunctive relief is so commonly employed, courts have the power to mandate and order a particular activity.

Even in tort law, however, judicial mandates occur in those situations in which courts refuse to enforce contractual alternatives to the tort system. In effect, the courts are saying that it is either the tort system or nothing. Medical malpractice law is an example of this.

So, judges in tort cases begin with a legitimacy that is often denied to judges, especially today, in the public law context, and seldom have recourse to the kind of mandates that trigger the concerns that have been expressed here.

Third, the decision-making by tort judges is less visible. Usually there is no government agency, and no public interest groups with a systematic litigation program to pursue.

In tort law, precedent is less important because cases are relatively easy to distinguish from one another due to the factual richness and variety of tort cases. It is relatively easy for judges to simply disregard precedents, or what may be the same thing, distinguish them away.

Tort law is also a very fragmented system. Instead of the relatively uniform system of federal law that we have been discussing throughout this conference, we have fifty different systems, each with its own rules, procedures, and policy considerations.

In addition, the doctrinal standards themselves, the substantive law of torts, provides additional opportunities for the judge to innovate. They are notoriously vague, open-ended, and permit the decision-makers to infuse their own values into the outcome. There are no institutional competitors to tort judges, except for the market's contractual alternatives. And as I will suggest in a few moments, the courts have quite systematically tried to preclude the use of contractual alternatives in many areas of tort law, particularly in medical malpractice.

And then, of course, there is the jury, an extremely important decision-making institution in the area of torts. In the other areas that we have been discussing, juries are less important because plaintiffs usually seek injunctive relief.

The jury, in the area of tort law, is a kind of _deus ex machina_ which fosters judicial irresponsibility because it enables the judge to pass on the difficult policy questions—disguised, to be sure, in traditional doctrinal
terms—to a small group of people of no particular competence, indeed selected by lawyers precisely because they lack any very sophisticated understanding of anything at all except the business of daily life. This is an important competence, of course, but it may have little to do with many kinds of disputes that they are called upon to decide.

Under the pressures of contemporary tort law, the jury has been transformed from its original constitutional role under the Bill of Rights, which was to be a bulwark against central authority, a populist institution, into a policy-making agent of an activist government.

Consider the role of juries in rendering punitive damages, in which it seeks to send messages and make social statements of one kind or another. This has constituted the jury as a policy-making body in many respects, although their verdicts are so opaque, so Delphic, that the messages they send often are not very clear. As a policy-making institution, therefore, they are especially prone to some of the difficulties that Lillian just mentioned.

There are many examples of the expansion of the judicial role in tort law, and of the courts’ arrogation to themselves of policy-making functions. I shall mention a number of the areas, just to give those of you who are not familiar with this particular area a sense of the enormous variety and breadth of the domains in which this expansion of judicial role has occurred. Then I want to go back, as I said earlier, to the medical malpractice area and devote more concentrated attention to it.

First, there is the broad area of products liability, including the more specialized areas of vaccines, contraceptives, and other mass toxic torts, as they have come to be called. Here, tort law now strongly influences the marketing, distribution, and design of these products.

Recreational activities have been directly affected by this expansion of tort law, especially programs of after-school activities, school athletics, dances, and other sorts of activities that have had to be canceled altogether because of the fear of liability, a fear that contractual alternatives are not permitted to circumvent.

Another area is that of auto-related accidents. Here, the enormous increase of auto insurance rates, resulting not only from changes in the tort doctrine itself, but from the transaction costs associated with the tort system, has led to a number of very unfortunate consequences. In the state of California, for example, more than one-third of the drivers on the road carry absolutely no liability insurance.

The courts have also expanded accountant’s liability, creating new causes of action against accountants who already have contractual obligations to those who hire them. The exposure of accountants to liability to disappointed
investors who invest in the accountants' clients has expanded enormously over the last ten or fifteen years. This is a tort that literally did not exist until the early 1970s because the courts refused to recognize this particular type of claim.

_The Wall Street Journal_, just last week, carried an interesting story about some of the perverse consequences that have followed from this new liability. It has driven accounting firms to alter the way in which they keep records and conduct audits—not necessarily in the direction of more competent audits, but in the direction of protecting themselves against liability through fraud and other techniques that disserve the public.

There have also been expansive changes in the law of landowner liability, where some very large judgments have been awarded. Many of these landowners are people like you and me who simply own a house in which somebody may be injured, who are not capable, as businesses sometimes are, of redistributing those losses among large numbers of consumers or shareholders or employees.

 Emotional distress and various phobia claims have been a growth industry in tort law, greatly complicating the problem of resolving tort claims. Today, virtually every asbestos claim that has been filed, for example—there are several hundred thousand such claims, and they are still coming—has annexed to it a claim for cancerphobia by those who are not yet ill and who may never become ill but who, because they have been exposed to asbestos, now have a tort claim that virtually all courts will recognize and compensate.

A spate of new tort theories called wrongful birth, wrongful life, and even wrongful living have been sustained by courts in many jurisdictions. For those of you who have not had the pleasure of reading these cases, it is now a tort in some jurisdictions for an individual doctor or a health care provider to intervene to try to save the life of one who claims that he would rather have died and instructed his providers to that effect. Again, this tort literally did not exist until about ten years ago.

Pure economic loss was a loss for which the courts traditionally denied a remedy, yet the courts now recognize such claims even in situations in which there are existing contractual relationships and first-party insurance such that any disappointment on the part of the plaintiff could be rectified without resort to tort litigation.

The number of areas in which new torts have been created and existing torts have expanded, then, is large. It is true that courts have begun to retreat from their recent expansions in some of these areas; some scholars maintain that the high water mark was reached between the late 1970s and the mid-1980s, but it is hard to be certain until more time has elapsed. As
Chou En-lai said when he was asked about the effects of the French Revolution, "It's too early to tell." The same thing can be said about the ebbs and flows of tort liability. Even if it has indeed crested, it may be too late to remedy some of the unfortunate consequences that have resulted from it.

The first unfortunate consequence is an enormous increase in the uncertainty with respect to legal rules, an uncertainty that has encouraged risk averse actors to withdraw from many areas of socially valuable activity.

Here, I would analogize to something that Michael Horowitz said yesterday when discussing due process jurisprudence and the asymmetry of risks that government officials face: They know that they may be sued for acting wrongfully, whereas they will not be sued for failing to act. The uncertainties of tort law create a similar set of asymmetric incentives.

A second unfortunate consequence is the grave threat that an expansive tort law poses to precious socioeconomic institutions. The institution of liability insurance, which is absolutely essential for the tort system to have any meaning at all in contemporary society, is particularly vulnerable. More generally, however, the course of judicial decision-making that I have described has delegitimated contracts as a mechanism for ordering social relationships, expressing values, and allocating risks.

A third consequence that is common to all of these areas of tort law is the generation of very high transaction costs, which keep most victims from even entering the tort claiming system. Most people cannot use so costly a system, regardless of the merits of their claims.

Unfortunately, the legislative responses to this expansion of liability and its adverse effects have been extremely crude and spasmodic; in many respects they have made matters worse by attacking symptoms rather than causes.

I wish to mention one other theme that is common to these disparate areas of tort law. The law schools, by which I mean both professors and student-edited journals, have been egging the judges on. Judges are expanding tort liability in response to a set of professional incentives which are magnified when those who are supposed to think deeply about such matters urge the courts to perform ever greater feats of consumer protection, wealth redistribution, and risk spreading—goals that the recent expansion of tort law often defeats rather than achieves.

Now, let me apply some of these themes to the area of medical malpractice law. In some respects, medical malpractice might seem like a very poor example for my argument. After all, plaintiffs assert a very small percentage of the meritorious claims that are potentially available to them.
An excellent empirical study published in the early 1990s suggests that well under ten percent of the actual instances of malpractice result in claims by victims. And even with the judicial expansion of medical malpractice liability, defendants win a high percentage of the litigated cases. Finally, legislators have responded quickly and decisively to the health care industry’s complaints about the expansion of medical malpractice liability, although these responses have been more swift than wise. One might imagine, then, that medical malpractice is really not an example of problematic judicial policy-making.

Yet medical malpractice law remains an impressive paradigm of what is wrong.

First, medical malpractice law’s substantive rules of liability and damages have led to costly defensive medicine and to ineffective procedures, such as electronic fetal monitoring, and to the overuse of dubious, often dangerous procedures such as Cesarean sections and hysterectomies.

Second, the transaction costs of medical malpractice litigation are exceedingly high. The cost of lawyers, the cost of expert witnesses, the delays that are required in order to even get a case to trial, the inevitable appeals, and so forth, make it extremely difficult for anybody, even the most seriously injured victims, to enter this system. The vast majority of meritorious claims are screened out. Liability insurance rates have been driven up. The availability of health care has been reduced, especially for people who live in poor communities. Again, echoing a theme that Michael Horowitz discussed yesterday, it is poor people—people who must rely on public hospitals, community health centers, and a severely limited number of doctors—who are the principal victims of this system.

The courts have repudiated the contractual alternatives that might have helped to remedy this tragic situation. By refusing to enforce contracts that vary the terms of medical malpractice law, the courts require all consumers, in effect, to purchase an insurance package—that is, through the portion of their health care fee that goes to purchase tort malpractice insurance—which no rational consumer would choose to purchase on the open market. The courts have refused to enforce contractual alternatives to the tort system even though there are often safeguards against exploitation of patients such as the fiduciary duties and ethical obligations of providers, reputational concerns, and a doctor surplus, which requires doctors to compete for the allegiance of their patients.

Finally, there is a high degree of organizational activity on the demand side of the market that didn’t exist ten or fifteen years ago. Nevertheless, consumers, even when organized in health maintenance organizations, are
not permitted to contract with physicians as a way of getting out of a medical malpractice system that victimizes them in a very real sense.

Thank you.

JUDGE A. RAYMOND RANDOLPH: 156 Do federal courts make social policy? Should they? There are easy answers to both questions. Of course they do—sometimes. And of course they shouldn’t—sometimes.

They do, Judge Friendly believed, “not because this is particularly desirable, but because often there is no feasible alternative.” 157 They shouldn’t because they are not good at it and because the federal judiciary is, in any event, not a branch of government the Constitution entrusts with this responsibility.

In thinking about judges making social policy, I am reminded of Samuel Johnson’s line about dogs walking on their hind legs: “It is not done well; but you are surprised to find it done at all.” 158 Well, maybe no one should be surprised. Judges have been making social policy for quite some time. Justice Holmes recognized almost a century ago that the courts of his day dabbled in social engineering. He wrote in a letter that law drew its life from considerations of what courts thought to be “expedient for the community.” But, he added, the courts “rarely” mentioned this consideration. 159

Holmes was immersed in the common law tradition. And the common law is filled with instances of judicial policymaking, for good or bad. One example, known by all first-year law students, is the doctrine that contracts contrary to public policy are void. 160 I once won a case on that ground for former President Nixon. The criminal lawyer representing the Watergate burglars sued Nixon, claiming to be the third party beneficiary of a contract between Nixon and the burglars to pay their legal fees if they got caught. The district court looked up the public policy and found that the supposed


158. JAMES BOSWELL, 1 THE LIFE OF DR. JOHNSON 287 (Everyman ed. 1967).

159. OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 10 (Harry C. Shriver ed., 1936) (“The very considerations which the courts most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. We mean, of course, considerations of what is expedient for the community concerned.”).

contract violated it. A version of the same doctrine cropped up in *Bob Jones University v. United States*.\textsuperscript{161} The Supreme Court ruled that the IRS could not grant tax-exempt status to a private school that discriminated on the basis of race. Why? Because the relevant provision of the Internal Revenue Code contained an implicit condition that the institution must be serving public policy.\textsuperscript{162} Another example, actually derived from the law of equity, now appears in the Uniform Commercial Code—the doctrine that courts may refuse to enforce contracts viewed as unconscionable when made.\textsuperscript{163} What, you may wonder, is so unfair that it shocks the conscience? And whose conscience matters—the court’s or the “public’s”?

Three well-known tort cases could be described as judicial engineering. Judge, and later Justice, Cardozo is famous for his decision in *MacPherson v. Buick Motor Co.*\textsuperscript{164} The decision recognized that the duty of care of an automobile manufacturer extended not just to the dealer to whom the manufacturer sold the car but to the dealer’s customer as well. Hence, MacPherson could sue Buick for the injuries he suffered when a wheel collapsed due to defective spokes, a result explained by Professor Prosser as based on “[T]he public interest in human life and safety.”\textsuperscript{165}

Justice Roger Traynor of the California Supreme Court went one step further in a famous concurring opinion, likening tort liability to the presence of hidden defects.\textsuperscript{166} He thought, as Professor Richard Epstein has pointed out, that “his expanded strict liability regime” would “allow losses to be spread across the broad class of consumers, each of whom would suffer a modest cost increase” and would “impose useful incentives on manufacturers to take imperative measures to ensure that their products reached the market free of defects.”\textsuperscript{167}

For decades, Judge Learned Hand has been widely praised for his opinion in the *Carroll Towing* case.\textsuperscript{168} Our court recently commended the Hand opinion to the Occupational Safety and Health Administration, which

\textsuperscript{161} 461 U.S. 574 (1983).
\textsuperscript{162} Id. at 591-96.
\textsuperscript{163} U.C.C. § 2-302(1) (1989):
If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
\textsuperscript{164} 111 N.E. 1050 (N.Y. 1916).
\textsuperscript{165} WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 97, at 651 (4th ed. 1971).
\textsuperscript{166} Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944) (Traynor J., concurring).
\textsuperscript{167} RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 221 (1995).
\textsuperscript{168} United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).
Congress charged with the duty of imposing "reasonably necessary or appropriate" health and safety standards on the nation's industries.\textsuperscript{169} The facts of Carroll Towing are, for my purpose here, unimportant. Judge Hand found no "general rule" to govern his decision, so he supplied one in the form of a cost/benefit analysis for determining negligence. Under the Hand formula, due care is a function of three variables: the probability of an injury if precaution is not taken; the gravity of the anticipated loss if there is an injury; and the cost of precautions needed to prevent the injury. Judge Hand expressed this in a formula—liability depends on whether cost of prevention is less than probability times the anticipated loss.\textsuperscript{170} Carroll Towing is an instance of judicial engineering if there ever was one. As Judge Posner put it, the rule of decision expresses the judgment that "society would be better off, in economic terms," to forget about accident prevention if the cost of prevention exceeds the benefit of accident avoidance.\textsuperscript{171}

These common law cases settled private disputes. The decisions doubtless had far-reaching effects, yet I cannot imagine a serious argument that the Constitution or some other authority disabled the courts from acting. Of course legislation could have supplied a rule of decision. But in the absence of legislation, a legal dispute had to be resolved, and the proper function of the courts was to resolve it. No matter what the outcome—liability or no liability—courts would be setting social policy.

Is it a different matter when federal courts are enforcing legislation? Not necessarily. Congress all too frequently enacts legislation with "many of the basic policy choices unmade, leaving essentially legislative choices to the courts."\textsuperscript{172} Judge Bork was exactly right when he wrote that, as a result, the federal courts "must address not merely conventional 'legal' issues but broad and profound questions of economics, sociology, political philosophy, criminology, and the like."\textsuperscript{173} Thus, if one objects to judicial policymaking—and there is good reason to object—not all of the blame can be laid at the courthouse door. Take antitrust law. As Judge Bork has pointed out, antitrust law is open-textured, governed by highly general provisions much like those in the Constitution, and most of it is judge made.\textsuperscript{174} Have the courts, particularly the Supreme Court, been making social policy in antitrust cases? Of course they have. The important question has not been whether

\begin{itemize}
\item \textsuperscript{169} International Union, UAW v. OSHA, 938 F.2d 1310, 1319 (D.C. Cir. 1991).
\item \textsuperscript{170} 159 F.2d at 173.
\item \textsuperscript{171} Richard A. Posner, \textit{A Theory of Negligence}, 1 J. LEGAL STUD. 29, 32 (1972).
\item \textsuperscript{172} ROBERT H. BORK, THE ANTITRUST PARADOX 412 (1978).
\item \textsuperscript{173} \textit{Id.}; see, \textit{e.g.}, United States v. Anderson, 59 F.3d 1323, 1335 (D.C. Cir.) (Randolph, J., concurring), \textit{cert. denied}, 116 S. Ct. 542 (1995).
\item \textsuperscript{174} BORK, \textit{supra} note 172.
\end{itemize}
the courts were making policy choices, but whether those policy choices were good ones.

On the other hand, when legislative programs are administered by agencies, the role of the courts can and should be curtailed. This was not always appreciated in my court, the D.C. Circuit, particularly in the 1970s, when judicial policymaking sometimes took the form of rejecting agency decisions.

Three of the more notorious examples reached the Supreme Court. The first dealt with surface coal mining. This activity scars the landscape. And so the D.C. Circuit used—or rather, misused—the National Environmental Policy Act to halt surface coal mining in a large portion of the western states, only to be reversed by the Supreme Court.175 Our court imposed detailed procedural rules on the Atomic Energy Commission’s licensing of nuclear power plants, only to be reversed again.176 The Supreme Court, realizing that these judicially fashioned rules stemmed from antipathy toward nuclear energy, warned the court to stop imposing its view of what was “most likely to further some vague, undefined public good.”177 Matters came to a head when our court rejected EPA’s definition of a “stationary source” under the Clean Air Act.178 Reversing once more, the Supreme Court issued its now familiar Chevron opinion, requiring reviewing courts to defer to reasonable agency interpretations of unclear statutes.179 Those agency interpretations, the Supreme Court admonished, represent policy choices and are for the political branches of government, not the judiciary.

In each of these three cases, an administrative agency had given its contemporary view of what policy should be promoted and how. And the agency, at least in theory, not only possessed expertise but also was more responsive to the electorate than the judges who saw fit to substitute their vision of social policy. Federal agencies have another built-in advantage. Each is unitary. There is only one FCC setting cable TV policy, one EPA setting Clean Air Act standards, one FERC, one OSHA. The federal judiciary is another matter. Often, in conferences such as this, and in the law journals, the focus is almost exclusively on the Supreme Court. This

177. 435 U.S. at 549.
179. 467 U.S. at 865.
greatly distorts the picture. Those who suggest that federal courts should be devising social policies had better take a closer look at the modern federal judicial system.

There are thirteen circuits and more than eight hundred judges. But that is only part of the story. On the courts of appeals, we now have potentially more than six thousand panels handing down tens of thousands of decisions each year. On our court alone, which is authorized for twelve judgeships, there are more than two hundred possible panels. On the Ninth Circuit there are more than three thousand possible panels. The federal courts are supposed to constitute one judicial system, "one whole," to use Hamilton’s phrase in The Federalist No. 82. But if this were ever true, it is today unfortunately a myth. Furthermore, the circuits are now pretty much legally compartmentalized. The D.C. Circuit generally cites only Supreme Court and D.C. Circuit cases. The Seventh Circuit generally cites only Seventh Circuit cases and so forth. What gets decided in one circuit is decidedly not the law of the country.

How then can the lower federal courts even begin to engage in any effective judicial engineering of social policy? Judges, like everyone else, have different visions of what is best for the country. Set us loose, and no coherent national social policy could possibly emerge. Of course, the Supreme Court stands as a unifying force. But even if it were inclined to do so, the Court is scarcely able to hear enough cases to resolve even the existing conflicts among the circuits.

The inability of the federal courts to speak with one voice is far from the only problem, nor is the fact that federal judges are unelected. Courts act only at the behest of litigants. Cases are presented at random. These sporadic forays may give courts a skewed impression of what is generally happening. Cases with the most outrageous facts spawn the most far-reaching decisions, although such cases may be far from representative. All the while courts remain at the mercy of the litigants and lawyers who appear before them. Everyone knows that the quality of lawyering varies considerably, and with it so does the information provided to the court upon which it is to formulate its decision. Consider also that the judicial arsenal is extremely limited. In civil litigation, courts can grant or refuse to grant awards of damages, or they can issue injunctions or declaratory judgments. And that is about it. The legislature, on the other hand, can bring about

social changes through the taxing and spending power. It can issue grants-in-aid, create agencies, adjust laws that prove unworkable, issue comprehensive legislation covering large portions of a subject, balance principle and expediency, and calculate whether the benefits are worth the costs.

Nonetheless, twelve years ago, a witness before a congressional committee estimated that, at the time, federal judges, using the power of injunction, significantly controlled six hundred school districts; had ordered pervasive reforms in prisons in thirty states; had issued decrees affecting 270 local jails; and, in many states, had placed under judicial control mental health systems, public housing, welfare programs and even state fishery departments.¹⁸² I do not know if these figures were correct then, and I surely make no claim that the situation twelve years ago reflects the current state of affairs. But I can say with some assurance that twelve years in the life of an injunction is not a very long time. And that is part of the difficulty.

Unless the wrong to be righted is defined with some specificity, one cannot measure whether the injunction has cured the problem. And so it remains in effect. Segregated school districts must become “unitary” before they are released from court orders. But what is a “unitary” system? One of the principal considerations for release, the Supreme Court recently said in Freeman v. Pitts,¹⁸³ is compliance with the injunction. But shortly after comprehensive decrees are issued, they may begin to take on a life of their own. The rights to be redressed begin to merge into the remedies. Resistance to the court’s general edict is typically met by more and more detailed commands. Courts administering the decrees start acting as legislatures or agencies engaged in rulemaking, and they are perceived as such. Principled decisionmaking yields to expediency.¹⁸⁴ What are the minimum standards for a prison bathroom or medical facility? How much of a raise, if any, should school teachers receive? What is the appropriate number of students per class? There is only so much money to go around, and a single district judge has only so much time.

Where do we go from here? I have no ready solution. As Mark Twain knew, “It is easier to stay out than get out.”\textsuperscript{185} The danger, as I see it, is that as each generation grows more accustomed to the judiciary’s setting of social policy, ever more intrusive judicial engineering will begin to be seen as ordinary. I can only hope we are turning the corner, and that such misperceptions will fade over time. All too often today, attorneys trying to end their oral arguments with a flourish ask our court to “send a message.” The press too seems to think this is what we are supposed to do. But sending messages is not the judiciary’s function. Our duty is to decide cases according to legal principles. That is what we do best, and that is all judges can reasonably be expected to do well. If government at any level thinks society needs transforming, it must be the politicians who make the attempt—at the risk of losing the next election.

HONORABLE ROBERT MCCONNELL.\textsuperscript{186} Given the time, I’m going to pick up in the context of the debate about what we do if we are concerned about of judges making social policy; if we are opposed to it, or opposed to certain social policy. I’ll pick up the debate there, and some points that have already been made certainly were being developed by Judge Randolph. The federal judiciary—I’ll focus there. Who are they? Where do these people come from? Do they all just appear and start doing manipulative things with our society?

The fact remains before us that a significant number of the federal judiciary have been appointed during the terms of Ronald Reagan and George Bush. They were appointed out of a process that looked at, was concerned about, and focused on “judicial activism.” Ed was a part of that process. I was a part of the process. That was a focus and a concern of those administrations. Did the nominees, once on the bench, all go bad? Are they staying out of the decisions that we are concerned about? I think not.

The point is the Constitution is not the only thing federal judges are interpreting. It’s statutory law. We have a situation where federal social policy has been drafted and, in conjunction with presidents, enacted over a long period of time by a one-party Congress. Good or bad, social policy has essentially followed the philosophy of one congressional majority for a long time.

The statutes that these judges are interpreting—the decisions they are rendering—if you don’t like them, I submit that the range of distinction

\textsuperscript{185} MARK TWAIN, FOLLOWING THE EQUATOR 187 (1897).

\textsuperscript{186} Attorney, Gibson, Dunn & Crutcher, Washington, D.C.; Mr. McConnell was Assistant Attorney General for the Justice Department’s Office of Legislative Affairs. He is a founding member of the Editorial Board of DOJ Alert and a member of the Editorial Board of Public Administration Review.
between the judges is not as big as you might say on first blush; that if you
get Judge “X” who gives what you find to be a very offensive decision
reaching far beyond what you want the judge to do, if you got the judge of
your choice, the one that you traveled to Washington to cheer during their
confirmation hearing, you might have gotten the same decision. Why would
you have gotten the same basic decision? Because of the statute.

I’m responding mostly to a debate that I hear time and time again, of
people trying to resolve judicial activism, decisions that aren’t liked, by
running around seeking litigation that might be found to be the silver bullet,
the case, the argument that can be the watershed of changing the direction
that came out in a particular decision. The Lone Ranger rode off in the
sunset a long time ago, and the silver bullets went with him.

It is the social policy branch of our government that requires more
attention from those that are concerned about the decisions of selected
federal judges, whether you are in favor of them or against them. The
Congress is going to write the statutes. There is going to be change. There is
an opportunity, indeed, if you don’t like them, to work with a new
Congress, to adjust things.

I served on Capitol Hill, and in the Justice Department. I will tell you
that I watched litigators who were extremely happy with major decisions that
they got out of the courts and circuits and out of the Supreme Court that
were contrary to the philosophy of the majority of Congress. I constantly
warned, “Do not celebrate. Wait until two days from now.” Why? Because
the following morning there would be a press conference on Capitol Hill,
five or six Senators, or five or six Congressmen announcing “The Court
doesn’t know what we meant. We are introducing legislation to overturn that
decision.” And Congress would do so in many cases.

That is the public policy forum, the primary public policy forum we
have, and I think that when we are looking at the judiciary, when we are
looking at decisions that we think go too far, whether they have to do with
prisons or school districts, let’s go back and look at the statutes that they are
interpreting. Let’s go and see just how much definitive guidance was given
by Congress. Let’s see what presumptions they ask the Court to make.

I’m not here to praise the federal judiciary and every one of its members.
That is not my cause. There are many I am not happy with. There are many
decisions I am not happy with. But I often think the debate and the outrage
that people have about judicial decisions finds its way into believing, “It was
that judge. If we just had gotten another judge,” or life tenure, or whatever.
The fact is that it takes a long time to pursue change in Congress. It is an
arduous, difficult, cantankerous process, but that is, as we’ve heard from
other panelists, the process where all the views are heard. They are fought out. Sometimes what you seek is not passed by Congress. Sometimes what you want gets enacted twenty-five years after you start your effort, but that is the difficult federal process that we have, where our policies are set at the national level. Then you can go back down to the state level—I’m focusing on the national—where you have social policy made and those statutes enacted that judges then must interpret.

You have now many of the people that are arguing about or complaining about the judge. It is not the non-Reagan appointees that are making decisions. Many of the decisions are being made by judges who I don’t believe change their stripes; who I don’t believe have changed their view on activism, but judges who are honestly dealing with the statutes that must be addressed if we want to change social policy.

JUDGE STEPHEN REINHARDT: 187

In Praise of the Federal Judiciary

In a recent book, an exceedingly wise and knowledgeable State Supreme Court Chief Justice wrote, “The other branches of government do not like the courts very much and they devote much of their spare time to devising new schemes to punish them.” That’s what’s going on today in Washington and even in other more beautiful and luxurious resort spots. To return to Chief Justice Neely of West Virginia, he also observed peremptively “While the American system may be based on balance of power, no power, particularly the legislative wants to be balanced very much.”

I was surprised to learn last night that one of our principal failings as federal judges is that we don’t mix with the people, like politicians do—that, unlike the politicians, we don’t campaign full-time and seek financial support from wealthy contributors whose economic interests we subsequently measure against those of the less fortunate. If our removal from soliciting political and financial support is living in an ivory tower, thank God we do. The need for independence from such pressures is precisely the reason our founding fathers gave federal judges life tenure—and told us to follow the law and our conscience—not our own financial or political interests. How

187. Judge, United States Court of Appeals for the Ninth Circuit. Judge Reinhardt was formerly President of the Los Angeles Police Commission, and has published numerous articles on issues relating to constitutional law and criminal justice. Judge Reinhardt provided the editors with a written version of his remarks, which includes comments partially in response to the previous speakers and other addresses of the Conference.
interesting that suddenly, on this one issue, the will of the Founding Fathers becomes of so little concern to our conservative critics.

Some people, particularly some public officials, just don’t care much for the idea that the federal courts enforce the Constitution, and that when the state government, or even the majority of voters in a particular state violate the rights of the minority, federal judges step in. The reason we do is simple. As James Madison said in the Federalist papers: “There are particular moments in public affairs when people stimulated by some irregular passion or some illicit advantage or misled by the artful misrepresentations of interested men may call for measures which they themselves will afterwards be most ready to lament and condemn.” Madison went on to say in those historic papers, and his words are particularly fitting today when the assault on the poor and the weak is in full swing, “A common passion or interest will in almost every case be felt by a majority of the whole, and there is nothing to check the inducements to sacrifice the weaker party.” Or as Madison put it even more simply: “If a majority be united by common interest, the rights of the minority will be insecure.” It is clear from the context of Madison’s comments that the interest to which he was referring was an economic self-interest—or, as Hans Linde described it—“The pursuit of wealth.” Sound familiar? It does to me. Surely, one of the critical issues that we are dealing with in the nation today is the desire of economic royalists to be free of government regulation—to return to the days when they were free to pillage and steal, free to accumulate unlimited wealth and power, and to do so on the backs of the less powerful—the working men and women of this country—all of this in the name of seeking freedom for the individual—much in the name of federalism.

Yes, as Madison would surely agree if he were here today, it was a wise decision indeed to give the federal courts the authority to protect and ensure the constitutional rights of the weak, the poor, the powerless, the minorities of all kinds. And when, reluctantly, we have to order state authorities to comply with the Constitution, it is—we should all agree—a sad day for the nation. But what is sad is not that we federal judges are saying—comply with the law, damn it—what’s sad is that we are forced to take a step that we should never have had to take. Don’t blame the cop for arresting a criminal, and don’t blame federal judges for enforcing the Constitution. Blame the lawbreakers, blame those state officials who fail to fulfill their lawful obligations.

If the states had done their job properly there would have been no need for The New Deal, let alone all of the subsequent federal programs. The federal government, like the federal courts, filled a vacuum and did the job
that state and local authorities refused to do. Perhaps the states' failure was understandable. We are after all no longer thirteen separate colonies, devoted primarily to agricultural interests, and reachable one from the other only through days or weeks of horse-drawn travel. We are a modern society. We are a nation—a nation in a world that the wisest of our Founding Fathers never could have envisioned. What happens to the children of Mississippi affects the children of Oregon and the fate of the factory workers of Maine and Massachusetts is ultimately felt even in the loveliest parts of Arizona.

I won't bother to list the New Deal programs of the 1930s and 1940s that saved our free market system and avoided a revolution—programs founded largely on the Commerce Clause. But I can tell you that the states did nothing to help America or Americans survive—and as Franklin D. Roosevelt accurately stated, left to their own devices, they never would. While all that may be largely a political rather than a judicial matter, the unwillingness or inability of states to fulfill constitutional mandates serves as critical background for a whole variety of constitutional problems that necessitated and still necessitate intervention by the federal courts.

Without the intervention of the federal courts, in many of our fifty states, this society would still be segregated by law. We heard the cry of States Rights here yesterday. When I was in law school, I heard that cry all the time. "The states have a right to segregation;" "to Nullification;" "to defy federal law;" "to treat Negroes like property." That was the cry of the advocates of States Rights in my day. In fact, as I grew up, I heard that cry raised in opposition every time this nation tried to help those who needed assistance, those who are not like some of us here today, powerful and self-confident, uniform in appearance and ideology, in charge of our own pocketbooks, destinies, and fortunes. I heard it every time there was talk of food for the poor, shelter for the homeless, and clothing for the needy. "States Rights" was the retort from self-proclaimed patriots. And I gather from being at this Conference only a short time, not much has changed.

In any event, the federal courts have intervened when the Constitution required them to protect the rights of our citizens. Without our intervention, women throughout the land would still be dying at the hands of illegal abortionists—while the states rights advocates continued piously to trumpet their commitment to the Tenth Amendment, and to callously ignore the rights of the women involved.

Without the intervention of federal courts, states would today be treating prisoners in a far more inhumane and unconstitutional manner, continuing to subject them to conditions that would be a disgrace in any civilized nation. And if any person here, judge or not, thinks prison is a joy, I'd suggest that
she try it for a while—talk about ivory towers—what about a total absence of rationality? And who are these evil federal judges running around imposing Marxist values on true Americans? The vast majority were appointed by Presidents Reagan and Bush upon the recommendation of their Attorney Generals, with the advice of the Republican Senators. I can tell you that I’ve never met a liberal let alone a left-wing appellate judge appointed by those Republican administrations.

Without the intervention of federal courts, persons suspected of crimes, innocent or not, would still be being beaten unmercifully, tried without the benefit of lawyers, convicted through the use of perjured testimony, and deprived of fair trials on an all too frequent basis.

Without the intervention of the much maligned federal judges, numerous mental patients would still be cruelly warehoused, starved, assaulted, neglected, and consigned to lives of unimaginable purgatory.

Without the intervention of federal judges, both conservative and liberal, state and local officials, many of whom would have liked to do far more for their constituents, would not have been able to fulfill their legal responsibilities. Often, federal judges, made that possible—both politically and practically.

Yes, it’s true that federal judges can’t ensure that everyone has a chance at equal treatment by government. But they can try. They can implore, they can urge, they can encourage states to comply—and if in the end the bureaucrats resist, a federal judge can try to ensure the best possible results under the circumstances by ordering it done. He can do so because he doesn’t have to worry about being unpopular, about being voted out of office, and because he is free to view the state’s constitutional obligations with dispassion and judiciousness.

Has the intervention of federal judges worked? Sometimes. Can we find things to criticize? Surely. Have we made mistakes? Yes. Are all federal judges Solomons? Certainly not! On the other hand, would we be better off as a segregated society, a society that tolerates brutal police practices, tortures prisoners, invades the bedrooms of our citizens and forces women, even victims of rape and incest, to bear children? Or should we simply issue decisions because that’s what we’re good at, and forget about accomplishing results.

Another question that I have heard discussed here, sometimes in an Alice-In-Wonderland manner—who should pay to ensure that the peoples’ rights are preserved? That the Constitution is complied with? That the states perform their constitutional duties? Well, obviously, we should—we must—the people must. It’s not the state or federal government that truly pays—it
is we—and whether we pay our taxes to the state or to the federal government in order to ensure that the rights of all Americans will be honored is less important than whether government, all parts, does its job properly and enforces those rights adequately. In the end, we are all Americans and we must pay our share of the costs of a democratic society. We must enable local, state and national government to perform their functions properly. And when they refuse to comply with the Constitution, our alleged inability to pay is no excuse. The obligation is there—if someone has to point it out to the states and tell them to comply, that does not constitute imposing an obligation. It's just saying—do your job properly, that's what our laws and the Constitution require.

We are a great nation, with a great Constitution and a great federal judicial system. We in this room should be worrying about how to improve the well-being of all Americans—how to ensure that all of us can enjoy the type of life the Constitution envisions. We should be thinking of how we can try to bring about a society in which we can all realize our potential—in which none of us will be without jobs, shelter, food, education, health care, or individual freedom—in which we can begin to reverse the disastrous trend toward disunity and racism and the growing gap between the wealthy and the impoverished. All of us here should be talking about and worrying about these problems—about how to achieve justice.

I wish I could say that these are the concerns I hear these days from our national and state governments, or that I have heard here from Federalists and those who love to travel the nation addressing Federalist Society meetings. I wish I could say that these are the concerns that I hear from those on the payrolls of the homogeneous and complacent think-tanks that so greatly influence our national dialogue and from the other richly-funded private organizations that hold the political power in this so-called new era. Instead, regrettably, I hear mean-spirited attacks on the powerless, petty carping criticisms of the courts, niggling procedural wailings, dry and abstract intellectual concerns over process, an almost obsessive emphasis on structure at the expense of fairness, decency and equality—and the most pitiful attempts to blame federal judges for the failures of elected leadership—sad indeed!

But as a liberal I have hope and I have faith. So I continue to accept your invitations to your conferences. And perhaps some day, I can even help persuade some of you that compassion, understanding, and idealism are the qualities that will make our Constitution work and our country great. Perhaps when we develop a common understanding of the spirit and purpose of this nation, of the objectives we must seek to accomplish, our
disagreements over structure and process will seem far less important and we can once again view those concepts from a reasonable perspective.

VIII. PANEL DISCUSSION: CIVIL RIGHTS, SCHOOLS, AND FEDERAL JUDICIAL POWER

Since the Supreme Court’s decision in Brown v. Board a quarter century ago, lawyers and public policy officials have wrestled with the question of how far the federal courts may go in dismantling deliberate segregation and achieving integration in public school systems. Coercive remedies—which include forced busing and court-ordered expenditures on capital improvements of existing schools—have been the subject of much controversy. Moreover, in the wake of Missouri v. Jenkins, there has been much debate about the power of the federal judiciary to levy taxes, directly or indirectly. What have been the real-world costs and benefits of coercive judicial remedies in the area of school desegregation? What standards ought to govern the scope of judicial remedial powers in the civil rights area? Is the controversy over remedies really a disguised dispute about the nature and scope of substantive entitlements in the civil rights area, having little to do with the methods applied by courts to enforce decisions?

MR. LEONARD LEO. 188 Shortly after a judge is nominated by the president to serve on the federal bench, the Senate Judiciary Committee asks that the nominee complete a lengthy and quite tedious questionnaire. Most of the questions ask for details about the nominee’s personal and professional background. As time consuming as these questions might be, they are, by and large, a predictable line of inquiry and, for the most part, require a simple recitation of past events.

But then there was another question of a very different genre that relates directly to the investigation we are conducting here at this conference. In part, the Judiciary Committee’s question reads, “Please discuss your views on the following criticism involving judicial activism.”

And the criticism states, “The role of the federal judiciary within the federal government, and within society generally, has become a subject of increasing controversy in recent years. Some of the characteristics of this

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188. National Lawyers Division and Legal Studies Director for the Federalist Society. Mr. Leo is Vice Chairman of the ABA Committee on Separation of Powers, and is Co-Editor of THE PUBLIC INTEREST LAW REVIEW.
judicial activism have been said to include a tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far reaching orders extending to broad classes of individuals, a tendency by the judiciary to impose broad affirmative duties on governments and society, and the tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities."

This question, of course, is quite a different matter than listing all of your previous employers and disclosing financial information. With this particular question, the U.S. Senate Judiciary Committee is trying to determine what role the nominees think judges should play in our democratic society. No doubt the Senate Judiciary Committee's question was prompted by a series of court decisions from the 1970s, which, more than ever, managed the affairs of a wide variety of public institutions. With respect to public schools, the subject of this panel, judges have prescribed particularized busing plans, established hearing procedures for student discipline, ordered bilingual education, and ordered the equalization of school expenditures on teachers' salaries.

The nominee's answer to Senate Judiciary Committee's question, his response to the committee's underlying concern about the burgeoning role of the courts, is always somewhat guarded. The answer usually goes along the following lines: Judges have the duty to enforce the law, but with a due regard for the limited role of the judiciary in a democratic society. By and large, since the question I read earlier was first posed some seventeen years ago, that has been the answer of choice—or non-answer, as the case may be—for judicial nominees. Enforce the law, but respect the political institutions as best as possible.

The ambiguous responses of judicial nominees to the senate's question reflect, I think, at the very least, some discomfort with the idea of courts projecting themselves into the business of social engineering. Attorney General William French Smith aptly summarized the concern in a 1981 speech. He said, "Federal courts have attempted to restructure entire school systems in desegregation cases and to maintain continuing review for basic administrative decisions. They have a certain similar control over entire prison systems and public housing projects. No area seems immune from judicial administration." The Attorney General continued, "In the area of equitable remedy, it seems clear that federal courts have gone beyond their abilities. In so doing, they have forced major reallocations of governmental resources, often with no concern for budgetary limits, and the dislocations that inevitably result from the limited judicial perspective."
But even Judge Frank M. Johnson, who at one point or another administered and managed the state prisons, mental hospitals, and public schools of Alabama, was somewhat uneasy about judicial engineering of public policy. In a 1976 address to the University of Texas, Judge Johnson remarked "Federal judges properly hesitate"—properly hesitate—"to make decisions either that require the exercise of political judgment, or that require expertise they lack. Judges are professionally trained in the law, not in sociology, education, medicine, penology, or public administration. In an ideal society, elected officials would make all decisions relating to the allocation of resources."

No doubt critics of Judge Frank Johnson and federal judicial power of the current state will say that Judge Johnson and others are being hypocritical. Who knows? I certainly did not live during that period of time, and cannot say. But what I do know is that the opposition, or at least the kind of hesitation or reluctance respecting judicial mandates that Judge Johnson explained, are perhaps no more pronounced than in the context of school desegregation.

In his recent book, Forced Justice,189 Professor David Armor helps to explain why. Armor says, "Although the activist Supreme Court of the 1960s and 1970s delivered a host of controversial decisions on such social issues as abortion, school prayer, and affirmative action, the Supreme Court rulings on school desegregation have been among the most intrusive as far as institutions are concerned. Abortion and school prayer decisions have been limited to altering state or local laws. Although affirmative action decisions have affected the hiring and the promotion practices of firms, even here the judicial encouragement is limited to a fairly narrow band of company activities."

He continues, "In the case of school desegregation, court decisions have affected nearly every aspect of school policy and operations. Courts have ordered forced busing of students outside of neighborhood schools, required changes to curriculum and resource allocation, ordered minority hiring and mandatory reassignment of faculty, decided what schools can be opened or closed, and even demanded relocation of public housing. In some of the more extreme cases, it is no exaggeration to say that local courts nearly replaced the school boards and administrators in the running of school systems. Moreover, this intervention has not been brief. Many school desegregation cases, such as Topeka, have extended over several decades."

That is the battleground of today's panel, an examination of the role of the federal courts and ensuring the dignity and freedom of minority students.

who attend government schools. We have here a group of distinguished panelists to help us investigate this issue. Please welcome our first speaker, Tom Merrill.

PROFESSOR THOMAS MERRILL: Thank you very much, Leonard.

School desegregation, I think, presents a unique paradox in terms of talking about judicial mandates. It's probably the oldest area in the law where we see federal district judges engaged in widespread oversight and supervision of local government affairs in a manner that would have surprised, and perhaps even shocked, the Founders of this country. Yet it is perhaps the one area where there is the least controversy over the substantive rights that are being enforced in these suits.

Nobody in this country, at least nobody associated with an academic institution or prominent media outlet, argues that the system of separate but equal desegregated education that existed in this country, at least in the South prior to 1954, was substantively justifiable, or consistent with the Equal Protection Clause, or was something that we ought to think about relying upon. So there's a very broad consensus that the rights being enforced in the school desegregation suits, which trace back to Brown v. Board of Education in 1954, are ones that are, in a sense, not controversial.

Notwithstanding that broad consensus, there is, as Leonard just suggested, a continuing controversy over the role and function of district courts in desegregation suits. In fact, just last term, the U.S. Supreme Court made yet another decision on Missouri v. Jenkins dealing with extremely broad remedies that the district judge in a Kansas City desegregation case had ordered, and validated in part those remedies, and sent the case back for further consideration. The types of remedies in the Kansas City case, requiring the construction of magnet schools, requiring increases in teachers' salaries, requiring the increase in taxes, that taxes be raised by a local jurisdiction, are obviously equally controversial remedies, so that even if the right is accepted, the remedies that the courts continue to implement frequently, are not.

What I would like to argue today is that there is a misleading aspect of the consensus about the nature of the rights recognized in Brown v. Board of Education; that, in fact, if you probe the deepest surface of the Brown case,

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190. John Paul Stevens Chair at Northwestern University School of Law. Professor Merrill was Deputy Solicitor General of the United States from 1987 to 1990. He has published numerous law review articles on the Takings Clause, environmental law, civil rights, and judicial roles in the administrative state.


and the rights recognized in the Brown case, you will find various competing understandings of the rationale of that decision, and why it is that a system of separate schooling for blacks and whites, even if physical facilities are absolutely identical and equal, would, nevertheless, violate the Equal Protection Clause—a latent disagreement, at least as to what the rational analysis is for that principle. If we probe beneath the surface to try to uncover these latent disagreements in terms of the nature of the substantive right, we can begin to understand, perhaps somewhat more clearly, some of the issues at stake, and the remedial controversies over what the district courts can do in each case, so that, in fact, in order to understand what's at issue in the remedies disputes, we have to look more closely once again at the nature of the right.

With the immense benefit of forty years of hindsight, and lots of academic and judicial commentary about the Brown case, I think it's possible to identify three different reasons or arguments why a system of schooling where you have, by hypothesis now, absolutely identical physical facilities—Brown, of course, assumed for the purposes of its decision that these physical facilities were identical—with mandatory separation of race, would violate the principles of equality and equal protection.

The first might be called the color blind principle. The idea simply would be that separate but equal is bad, because separate and equal requires that you classify people by race. What's wrong with classifying people by race? Well, among other things, it's an extremely divisive thing to do socially. Some of our recent experience with affirmative action programs suggested that even the most benign attempts to classify by race give rise to intense controversy, resentment, heightened race consciousness, and so forth. That being the case, a nonbenign classification by race is even more likely to have socially divisive effects. In this respect, you might think of the Equal Protection Clause as analogous to the Establishment Clause. One rationale for the Establishment Clause would be that we don't want the government to be in the business of classifying people according to religion, giving subsidies to one religious group and not to another, for example, or subsidizing religion in general, but not subsidizing non-believers, because this gives rise to violent disagreements and discord in society, and maybe the Equal Protection Clause sort of adopts an equivalent principle with respect to race.

To some, the Brown decision stands for the proposition that what the court had in mind was a color blind principle. After all, Brown overruled Plessy v. Ferguson. What everybody remembers about Plessy v. Ferguson

193. 163 U.S. 537 (1896).
is Justice Harlan’s dissent in that case, which protested against separate but equal on the grounds that we have a color blind Constitution. So Brown can be seen perhaps as embracing the rationale of Justice Harlan’s dissent.

Also, shortly after the Brown case came down, the Supreme Court, in per curiam decisions, invalidated segregation in public bath houses, public golf courses, and public parks, without explanation. These per curiam decisions seemed to suggest, perhaps, that the principle of Brown was that you simply can’t classify by race. You didn’t have anything to do with schooling, perhaps, as a unique institution, you simply had something to do with racial classifications in general.

The second principle that can be detected in the Brown case is what Justice Thurgood Marshall, in one of his last opinions, and certainly his last opinion on desegregation, referred to as stigmatic harm. The argument here is that separate but equal violates equal protection because it sends an official message from the government to society that a minority race is regarded as inferior. They are, in fact, regarded as inferior—so inferior that they have to be kept physically separated from the white race. In this respect, segregation can be seen as kind of root defamation, a social practice which, as socially construed and understood, sends a message of inferiority and subordination to minority races that are being kept separate and apart from the rest of society.

There’s a famous passage in the Brown opinion which seems to reflect this kind of thinking. The Court said, “To separate children in grade or high schools from others of similar age and qualifications solely because of their race, generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a manner that can’t be undone.” So, the stigmatic harm understanding of Brown is another possibility.

A third possible reading of Brown would be that segregation, or separate but equal, is bad, because if you compare two social institutions, integrated education and segregated education, there are more benefits from integration than there are from segregation. Benefits, in particular for members of minority race and minority children, but perhaps benefits for other people as well. The Brown opinion rather famously, or notoriously, also suggests this particular rationale. The Court quoted from a finding of the district court to the effect that segregation has a tendency to retard the educational and mental development of Negro children and to deprive them of the benefits they would receive in a racially integrated school system. The Court stated that this finding is amply supported by modern authority, and in a footnote, which has subsequently become quite infamous, cited a number of psychological studies purporting to show that black children have higher self-
esteem in integrated and assimilated school settings. So the benefits of integration might be a third possible rationale as to why segregation is always inevitably unconstitutional.

Many black intellectuals today, including most prominently perhaps Justice Thomas on the Supreme Court, are uncomfortable with the benefits of integration argument as far as being paternalistic, and perhaps even racist; perhaps grounded in the implicit assumption that blacks are inferior and will be better off if they are given the opportunity to associate with whites and assimilate white culture and white norms. But I don't think the benefits of integration argument needs to be couched in this way. It could also be couched in purely instrumental terms: Increasing the contacts between blacks and whites may increase job opportunities for black youngsters, if whites own more businesses, have more jobs at their hands than black families do. Or, it could be couched in an impeccable multiculturalist term, that both blacks and whites would benefit if they were allowed to be exposed to the culture of other races, and the backgrounds of people of other races, and they will have a richer educational experience as a consequence.

The important point for today's purposes is that these three different conceptions of the right in the Brown case have very different implications in terms of judicial inquiry and judicial remedy. The color blind interpretation would translate into a very highly formalistic inquiry. The Court would simply ask, I suppose, "Is the school system using race as a criteria for people assignment, or is it not?" If the people assignment rules mention race, then they are unconstitutional; if they don't mention race, then the life goes on pretty much as before. This understanding of Brown, coupled with the all deliberate speed admonition of Brown II, would mean that the school boards are given some leeway or some breathing space in terms of eliminating their race-based assignment rules, but after some sort of transitional period, the use of racial criteria would be forbidden, and some race neutral basis for pupil assignment would have to be adopted. Five or ten years should be all it would take to achieve compliance with Brown, and there would be little need for ongoing supervision after that time.

The stigmatic harm understanding contemplates a more involved and protracted judicial inquiry. Since the key to this understanding is the social meaning of segregation, the intent of the school board becomes an all important variable. The Court would have to determine whether or not the board had an intention to discriminate against minority children and minority races, and would have to determine what the causal consequences of that intentional discrimination is. Thus, you have relatively elaborate trials on

questions of intent and causation; much more elaborate than the color blind principle suggests. Moreover, fashioning appropriate relief would become much more difficult.

Just to give you one example, if you have a dual school system where you have officially segregated white schools and black schools, and then you eliminate race as a criterion for selection, and adopt some neutral system like freedom of choice, parental choice, or pupil assignment as a basis for assigning students, and to continue to have a white school and a black school, the social construction of the situation won’t change. People will still understand that there’s a white school and a black school, and so you will have perpetuated forward in time the set of social stigmatizing and understanding that originates in a system of official segregation. The Court wants to undo that perception. Then it will have to get into the business of at least redrawing school boundary lines, perhaps ordering the construction of magnet schools, and things of that nature, to create a system of assignment where this perception that there is a white school and a black school breaks down and no longer exists.

The benefits of integration argument obviously has the most sweeping implications, both for the scope of liability and judicial relief. Under the benefits of integration theory, the factors like the intent of the school board, are irrelevant. Integration is always better than segregation. So whether or not there is an intended violation is obviously beside the point. The violation of Brown, under this approach, would be established simply by showing that there’s an imbalance in the racial composition of particular schools relative to the population at large. So any time you identify this imbalance, you would have to take steps to rectify it and bring the school into balance with the underlying population base. As a consequence, virtually every school system would have to be restructured to achieve the correct degree of balance. Since demographic factors and residential housing patterns are always changing, in part in response to white flight to the suburbs, judicial monitoring and restructuring would have to continue indefinitely.

I don’t have time to try to trace out these three principles in any detail in the history of Supreme Court case law from Brown to the present. It’s a very fascinating, intricate, and by no means clear cut picture. Broadly speaking, what happens is that for the first ten years or so, the Court seems to be understanding that Brown reflects something like the “color blind” principle. The Court upholds pupil placement plans, freedom of choice plans, which eliminate the official use of racial classifications, but have very little effect on the actual racial composition of schools and don’t achieve very much general integration.
Starting with the very important *Green v. County School Board*\(^{195}\) case in 1968, the Court holds that freedom of choice is unconstitutional, or is inadequate, in terms of dismantling a dual school system, and something more is required. The *Green* case held that the vestiges of a segregated system have to be eliminated root and branch, and the Court, starting in '68, sent strong signals to the lower courts that much more aggressive remedies are required.

Generalizing very broadly from this time period, I would say that in terms of formal doctrine and explanation, stigmatic harm seems to be the dominant understanding of the court. The remedial issue is couched in backward looking terms: you're trying to identify some violation of rights that occurred in the past, and trying to rectify them in the future. The intent of the school board is identified as a key variable, and so forth. In terms of practice and outcomes, however, the benefits of integration view seems to be the more compelling basis for explanation. For example, the Court approves the use of racial quotas as a yardstick to determine how far a local school board has succeeded in dismantling a de jure system of segregation. These racial quotas tend to take on a life of their own, and pretty soon, in practice, desegregation cases begin to look like what we would think a benefits of integration period would produce on its own.

I also suspect, realistically speaking, that what motivates the plaintiffs during this time, and many of the district judges, is something like the benefits of integration understanding. So, whether or not the opinions are couched in terms of *Brown* being based on stigmatic harm, benefits of integration seems to be a better explanation for the actual outcomes achieved.

Let me just try to wrap up briefly by pointing out that these three theories continue to have ongoing relevance for the Supreme Court in the struggle with desegregation controversies, and by talking a little bit about a recent decision, *Missouri v. Jenkins*, decided last term. In *Missouri v. Jenkins*, the federal district court, as you may know, ordered what could be called the creation of a Cadillac school system in Kansas City. The dilemma that the district judge faced was that de jure segregation had ended after 1954, and the system was roughly 20 percent black. By the time the lawsuit was filed in the late '70s, the system was 67 percent black. Any sort of remedy, like changing district boundaries or having cross-district busing, would probably simply produce more white flight, and be counterproductive in terms of producing increased integration.

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What the district judge then came up with was the idea that he would simply order the creation of an extraordinarily attractive system: every school would be a magnet school; every school would have first rate physical facilities and features; the teachers' salaries would have to be increased; new programs costing $200 million a year would have to be developed; and so on and so forth.

The remedy had a two-fold rationale. One was based on the theory from *Milliken II*, known as the educational deficits theory, that you could trace from past de jure segregation forward to certain educational deficits that black students experienced, and by providing this deluxe school system, you would be rectifying or overcoming those educational deficits. The second theory was that a deluxe school system would attract whites living in suburbs to move back to Kansas City because they had a superior educational opportunity in Kansas City.

If you think about it, the second rationale leads to the idea of attracting whites back into the city, and pretty clearly reflects something like the benefits of integration idea. The district court is operating on the premise that if you attract whites back into the city and achieve a greater degree of integration, it would be a good thing, presumably, for the minority youngsters of Kansas City if there were, perhaps, whites living there as well.

The *Missouri v. Jenkins* theory about educational deficits, at least on its face, appears to be based on the stigmatic harm rationale—although a considerable stretch from that principle. What's interesting about the *Missouri v. Jenkins* opinions, is that virtually none of the Justices perceive that the remedy ordered by the district judge reflects, in part, this sort of disparate understanding of the *Brown* case. Chief Justice Rehnquist, for the majority, says that what's wrong with this remedy is that it constitutes an interdistrict remedy for an intradistrict violation, a rationale which I think is suspect on logical grounds. There was no relief actually ordered against the suburban school districts. It is also suspect on precedential grounds: he appeared to be overruling the *Gautreaux* case, which some of you may know about, in the course of rendering this particular decision.

It's intriguing to ask why didn't Justice Rehnquist see the case as the perfect opportunity to try to differentiate between something like what I've called the benefits of integration theory, and something like the stigmatic harm theory, and simply validate the district court's remedy on that basis. One possibility is that the court has simply not given sufficient attention to these sorts of issues about the underlying basis of the *Brown* case over time.

The dissent, interestingly enough, does not embrace anything like the benefits of integration theory, but instead tries to justify—this is Justice Souter speaking—the district court’s decision exclusively on the grounds that it can be traced to some sort of stigmatic harm ideal such as that endorsed in the Milliken II case and the theory of educational deficits.

By far, the most interesting opinion in the case, however, is that authored by Justice Clarence Thomas. Thomas is the only member of the Court in the Missouri v. Jenkins decision that clearly perceives that, in fact, the remedy in the case flows from an understanding of the rights recognized in the Brown case. Moreover, Justice Thomas clearly perceives that something like what I have called the benefits of integration theory is responsible for the nature of the remedies rendered by the district judge.

I suspect my time is running out. And I am not going to get into any great detail about this. I have some quibbles about what Justice Thomas does in the Jenkins case. I think he overly inflates stigmatic harm and the benefits of integration, confusing sort of a public act like stigma, which is analogous to defamation, with sort of private psychological status. I think he overstates the case by suggesting that a benefits of integration case is implicitly racist, and implicitly rests on assumptions about the inferiority of blacks. I also think that he is unrealistic in his suggestion, which is very plain in his opinion, that you ought to go back to the color blind standard as a way of defining remedies and desegregation cases.

But, at the very least, Justice Thomas, for the first time, is opening up the inquiry into the relationship between the rights reflected in the Brown case and exactly what they are, and how they relate to the remedies that ought to be awarded by district judges in these cases. Obviously, this presents some very interesting normative issues: which is the correct understanding of the Brown case and what ought to be the remedies that flow from the correct understanding. My answers are that stigmatic harm is the correct understanding, and the remedies ought to be such as to eliminate all perceived messages of racial subordination or inferiority that flow from official acts of school boards—no more, no less.

I think that in a very, very meandering way, the Court may be involved in something like that position, but it certainly would help if they gave some critical thought to the nature of the rights reflected in the Brown case. Justice Thomas appears to be pushing them in the direction of moving.

Thank you.
MR. CLINT BOLICK: Thank you, and congratulations to the Federalist Society and to the Goldwater Institute for another provocative conference.

Initially, I was invited to moderate this panel on school desegregation, civil rights, and the federal judicial power, which would have been a little bit like asking a lighted match to moderate a container of kerosene. But happily for me, some changes were made to the panel and I get to be as inflammatory as I want, so here goes.

I plan to look at this issue primarily from the practical perspective of the intended beneficiaries of all of this, the school children involved. I begin with a concrete example of a little boy who I had the opportunity to represent a few years ago, who, I think more than anyone else that I have encountered in my years as a civil rights lawyer, exemplifies what has gone disastrously wrong as a result of the judicial adventurism in the area of desegregation over the last forty years. This little boy is named Mark, and in the early 1990s he was preparing to enter kindergarten and start his school career. He is black, and lives in Kansas City, Missouri. His parents were very pleased that right across the street from where Mark lives there was a school called Weeks Elementary School. As a result of the Kansas City desegregation order, this school was a magnet school providing a first rate education. So, not only would Mark’s parents be able to send him to an excellent school to start his educational career, but one right across the street where they could watch him walk to school every day, and be involved in his education. Truly a dream situation.

The dream became a nightmare. When Mark’s parents attempted to enroll him in this school, they found out that accompanying the magnet school order was a racial quota: for every two white children who agreed to enroll in Weeks Elementary School, three black children would be allowed to enroll. Unfortunately, even though there were 122 kindergarten seats in Weeks Elementary school, only four white children had enrolled, and therefore six black children were admitted, and 112 seats were held vacant. So, instead of starting school at Weeks Elementary School, Mark faced the prospect of getting up every morning, boarding a school bus, driving past his neighborhood school to an inferior school further away, solely because little Mark was black.

If any of this sounds hauntingly familiar, perhaps it is because that was exactly the factual scenario presented in *Brown v. Board of Education* in

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198. Vice President and Director of Litigation at the Institute for Justice in Washington, D.C. The Institute was co-founded by Mr. Bolick to litigate in areas of economic liberty, parental school choice, property rights, and the First Amendment. Mr. Bolick is the author of *THE AFFIRMATIVE ACTION FRAUD: CAN WE RESTORE THE AMERICAN CIVIL RIGHTS VISION?* (1996); and *GRASSROOTS TYRANNY: THE LIMITS OF FEDERALISM* (1993).
1954. Black children were being bused past their neighborhood schools to inferior schools in Topeka, Kansas, solely because of their race. This raises a very sobering question: have we perhaps traveled so far and painful a distance in forty years, only to end up in precisely the same place that we started?

The enterprise that the civil rights movement launched earlier in this century to overcome separate but equal, and to dismantle segregated educational facilities, was born of the understanding that of all of the opportunities that our society makes available, education is the most important. And Brown v. Board of Education was a very vital and revolutionary endeavor, but also a very modest one. If one reads Thurgood Marshall’s arguments before the Supreme Court, it was clear that he was asking the Court to break the back of segregation, to get in and remove the assignment of children on a race-based basis, and to substitute a race neutral basis for that. That was all he was asking the Court to do, although that was very, very important. Unfortunately, the Court has yet to fulfill that objective.

Thurgood Marshall, as a lawyer, made the argument, “That the Constitution is color blind is our dedicated belief.” If only we would implement advocate Marshall’s vision, I think so much in our society would be improved. The Court seemed to be taking exactly that step. And, of course, it faced recalcitrant Southern school districts, and even Northern school districts, that refused to do that simple step. So very vigorous remedies were unquestionably necessary.

The Swann v. Charlotte-Mecklenburg decision is viewed by many conservatives as one of the beginnings of judicial activism in the civil rights area. Yet if one goes back to that, it is almost nostalgic in its moderation: that racial ratios may be used only as a starting point to disestablish racist school systems; that if racial balance were ever to be an end in itself, the Court would be obliged to overturn such a decision. But we strayed far from there, to the point where racial balance and the imposition of school busing became ends in themselves.

In my view, forced busing has done more to destroy urban public education systems than any other single influence, period. It has done so for a variety of reasons. First of all, it has focused on racial balance and racial identification, rather than on the attainment and expansion of equal educational opportunities. It has been entirely redistributionist, and so we now see a situation where little Mark is faced with a continuing assignment, in his name, as a remedy for him, to an inferior school because he is black.

I read the other day in the Washington Post that over 3,000 black youngsters in Prince Georges County have not been allowed to attend magnet schools because they too were black. The color distinction has been exacerbated rather than reduced by remedies supposedly intended to reduce such distinctions.

Second, the phenomenon of white flight, in reality, has been a phenomenon of middle class flight. Middle class black parents have often fled the inner city, as well, to escape busing orders and inadequate educational opportunities, or sent their children to private schools. This, in turn, has led to the destruction of the tax base in urban public school districts across the country, as well as the separation of children from their communities. It is very difficult for parents to become involved in their kids’ schools if they are being bused across towns, or across district lines. I think that if polls were taken in the inner city, one would find overwhelming opposition to forced busing precisely for that reason. And there has been no concomitant increase in educational performance for the youngsters for whom all of this was supposed to be done.

Over the last fifteen years or so we have seen a variety of rationales advanced to perpetuate courts’ control of local schools. They have been, in many instances, very successful. Topeka, Kansas, recently entered its fourth decade of judicial control of public schools, for example, even though we’re now two generations removed from the original violation. The U.S. Supreme Court, however, has generally rejected these rationales. The concept of adjusting district lines every time there is a change in racial distribution was rejected in Pasadena v. Spangler.200 The concept that neighborhood segregation is a justification for continued judicial control of the school systems was rejected in Oklahoma City.201 And the notion that test scores must rise before a court may relinquish control, of course, was debunked in the recent Missouri v. Jenkins case.

Now, that was a truly impossible standard, I believe. Kansas City was being asked to do what no other urban public school system in the United States has been able to accomplish, and that is to equalize test scores. In fact, there is only one urban school system in the United States, that I am aware of, that has provided truly equal educational opportunities and higher tests scores for black children, and that is the Catholic urban school system.

Slowly but surely the courts are beginning to relinquish control. In some instances, because the judges who have controlled these school districts for almost forty years are dying, and newer judges are looking and saying, “I

don't want this mess. Let me out of it," and they are getting out of it. But also courts are relinquishing control because of what the Supreme Court is doing.

Nonetheless, the activists on the left end of the spectrum are coming up with all sorts of imaginative new theories, such as in Connecticut where they are using the state constitution to break the state into six big school districts, all of which would have one-sixth of Hartford, busing kids back and forth. Moreover, desegregation is being used as an attempt to thwart meaningful educational opportunity around the country. Right here in Phoenix, desegregation orders are being used as an attempt to thwart the creation of charter schools.

In Milwaukee, where we're defending a private-school choice program that is geared toward low income children, the NAACP moved two weeks ago to intervene in that action to argue that even though this system of private-school choice has ninety percent of its beneficiaries as Hispanic or black kids, this is a violation of desegregation. So they are trying to thwart the very reforms that are necessary to truly deliver educational opportunities to low income and minority children.

While the judicial enterprise has been dramatically unsuccessful in doing what it was supposed to do—put an end to segregated school systems—it also has been woefully inadequate in terms of delivering equal educational opportunities. The problems that gave rise to this, outside of segregation, continue to persist, particularly in urban school systems around the country. In most large cities there is a fifty percent drop-out rate; among kids on public assistance, the number goes as high as eighty-five percent. The National Assessment of Educational Performance recently reported that nationwide, twelve percent of black seniors are literate in math and English. These figures are unbelievably alarming, and they have got to be attacked. But I don't think that, by and large, the judiciary is well equipped to do this. What we need is radical school reform.

But is there no role for the courts? I do believe in a very vigorous federal judicial role in making sure that there is not actual overt discrimination in educational policies. Beyond that, though, I actually see perhaps a more vigorous role for state courts. A number of state constitutions do provide for a particular quality of education, which are laughable when you look at them, because they are not being fulfilled. For example, Illinois guarantees an efficient and high quality education. Ask parents in Chicago whether their kids are receiving an efficient and high quality education.

Should the courts impose busing remedies or tax increases in those kinds of situations? I don't think so. Tax increases have not at all, wherever they
have been tried, spurred an improvement of educational opportunities. Newark now is spending $13,000 a student, and the schools are still so bad that they were taken over by the state. I think that the courts ought to look for a much more simple remedy. Not busing, not tax increases, but simply what I would call a warranty theory. If the state constitution gives you a guarantee of an efficient and high quality education, and the government completely and utterly defaults on that promise, it ought to give the parents their money back and allow them to obtain an efficient high quality education for their children.

There is a model for this in the area of the Individuals With Disabilities Education Act at the federal level. It provides a free appropriate education to handicapped children. If the public schools default upon that, the parent is allowed to pursue a private school education that is, in fact, adequate. That is a model that could be followed profitably in the state arena.

Hopefully, we may not have to go that far because of legislative action taking place around the country. I am happy to say, for those of you who did not hear, that the United States House of Representatives voted the other day to put into the District of Columbia appropriation a low-income private-school scholarship program, and I hope the Senate will approve it. Bill and Hillary Clinton—I always like to say this line—no longer would be the only people who live in public housing in Washington D.C. who get to send their kid to private school.

Of course, the First Amendment Establishment Clause is being trotted out to thwart these school choice plans in Ohio and Wisconsin, and we have got to slug that issue out as well. But I do see reform coming from where it ought to be coming from, and that is the political branches, if only the civil rights groups do not successfully thwart those reforms.

I would like to end on that note. I have reported favorably on the direction of the Supreme Court getting the judiciary out of the education business, which it has been so abysmal in conducting, and returning control to local school districts who might be able to get on with the business of education. That is happening by a very narrow reed of one vote on the Supreme Court. Most people, of course, focus on the majority opinion, but I am much more concerned with the dissenting opinions. Justice Ruth Bader Ginsburg has stepped very easily into the Thurgood Marshall-William Brennan school of jurisprudence. The four dissenters in Missouri v. Jenkins also held firm on racial gerrymandering and in the Adarand decision last term. We are one vote away from a return to the jurisprudence of the 1970s, as far as the U.S. Supreme Court is concerned.

Justice Ginsburg, for example, chastised the majority in the racial gerrymandering cases for their judicial activism. She said you ought to defer to the local state legislatures who are drawing the lines. She was not so much an advocate of judicial restraint in Missouri v. Jenkins, where she characterized the remedy, which got so far into the trenches as to dictate the amount of raises that janitors in the school would receive, as "evanescent." I didn't know what evanescent meant, so I went to the dictionary and I looked it up. "Evanescence" means fleeting or disappearing. This remedy is not fleeting or disappearing. The only thing that's fleeting and disappearing are tax dollars in Kansas City being spent for absolutely no purpose at all, with no effect at all.

I think that what we need in this area is deference by the judiciary to local school authorities. I think they are ready to discharge those responsibilities in a good faith manner, if only they are allowed to do so. Where they don't do so, there are instances where the judiciary ought to step in, but we should no longer see a situation like in Kansas City, where a little boy, in 1995, is being turned away from a quality education because of his skin color. Those days ought to be long behind us.

Thank you.

MR. JAMES E. COLEMAN, JR.: I am at a disadvantage here. I was asked to do this fairly late in the process and, as a result, was not able to prepare as well as I think was necessary in order to present coherent views on the issue here. But what I would like to do is to react to what Professor Merrill and Clint have said, and to refocus what the discussion is.

What I mean by that is, as I understood the topic, it was to look at judicial mandates in school desegregation cases and to discuss whether courts basically are out of control, engaged in social engineering, and somehow threaten democracy. I think that the discussion, although it touched a little on that, really focused more broadly on public policy issues, perhaps even implicitly questioning the result in Brown. Although, as Professor Merrill states, there seems to be a consensus, or at least an apparent consensus, with respect to what the rights are that Brown recognized, he said if you look under the surface it's not so clear that there is a consensus.

I agree with that. It may surprise Clint to know that I agree with him with respect to Mark, and the situation that he described in Kansas City. I also agree with at least the first couple paragraphs of Justice Thomas's

203. Attorney, Wilmer, Cutler & Pickering, Washington, D.C. Mr. Coleman has served as Deputy General Counsel to the Department of Education, and has taught at Duke University School of Law. He recently co-chaired the D.C. Circuit’s Special Committee on Race and Ethnic Bias.
concurring opinion in the *Jenkins* case. To the extent that the principle involved in *Brown* is some notion that integration is inherently better than an education that takes place primarily among black children, I agree that there is no basis for that conclusion. There is no basis for the suggestion that black children can’t be educated in classes that are predominantly black. I also find that offensive. But I don’t think that that is what *Brown* was about.

I think that that may have been what motivated the district court judge in *Jenkins*, and to that extent, I strongly disagree with the notion expressed in the district court’s opinion that the state had an obligation to attract white students back into Kansas City by establishing a Cadillac school district that would somehow overcome the resistance of white parents to the integration that caused some of them to leave in the first place. I think that’s inappropriate, and I agree that that’s not something that *Brown* mandates.

Let me talk a little bit about what I think *Brown* was about, and about why I think we have a situation today where Mark, in Kansas City, is bused miles beyond a Cadillac school in his neighborhood, much in the same way that in 1960 I was bused in the Charlotte-Mecklenburg school system beyond a junior high school within walking distance of my home, to a new school that had been constructed in the county, because the black school, also in my neighborhood, did not have a seventh grade. I think that what happened in 1960 was wrong. I think that what is happening in 1995, at least to the extent that Clint has described, also is wrong.

If we’re going to talk about remedies, I think what we first have to talk about is “what is the violation”? What is it that we are trying to remedy? The catch phrase for *Brown* is separate but equal. That’s what the plaintiffs in the case were challenging. The Supreme Court’s opinion is written in terms of separate but equal: separated is unequal.

I think what Thurgood Marshall and the plaintiffs’ counsel and the plaintiffs had in mind was something different. I don’t think it was the notion that black children couldn’t be educated in schools run by black teachers, by black administrators, and sitting next to black students. I think the notion was that in a public school system, if the white majority is hostile to the education of the minority students in ways that result in the majority limiting or minimizing the educational opportunities or benefits of the educational system that are available to the minority students, the only way, the only way to ensure an equal opportunity in that circumstance is to force the majority to educate their children in the same institution in which the minority students are being educated. I think that was the notion of the plaintiffs’ contention that separate was inherently unequal, which is that if you permit a majority that is not committed to the education of black students to separate those
students into racially distinct institutions that they then could manipulate in ways different than they treat the schools to which they send their own children, then that situation is inherently unequal.

I think what the courts did in the ten years after Brown was to try to get the Charlotte-Mecklenburg school system, for example, to permit me to go to the junior high school that was white, but within walking distance of my neighborhood, and not to bus me out into the county in order to attend the seventh grade in a racially segregated school.

But that didn’t happen. The local school authorities defaulted in their obligation to correct the constitutional violation that had been identified; that the Court had recognized and condemned. Instead, there was massive resistance to the decision. In the case of Charlotte, they simply ignored the mandate in Brown. Then the courts came in and said, “Well, we are going to have to do more than that, because if the local school authority won’t do it, then somebody has to make sure that the harm from the unconstitutional violation is remedied.” So the courts began to oversee the remedies, and implementation of the remedies in these cases.

I would have preferred, and I would prefer today, that the local school authorities be permitted to run the schools. I would prefer that Mark, in Kansas City, be permitted to go to the school that is in his neighborhood. In Charlotte, for example, I think that one of the unfortunate, unintended consequences of the Swann decision was that the black schools in neighborhoods that then were identifiably black were destroyed, and important institutions of stability disappeared from those communities. Students were then bused into situations that were, in some cases, hostile; bused into situations where I think their self-esteem was lowered, where their self-confidence was destroyed. I think under those circumstances it would be difficult for anyone to get an education. So, I don’t think this notion that integrated education for racial balance is somehow inherently good can be supported by the evidence, in my view.

The notion of Brown was if we force the white parents to support the same schools that their students and black students attend, we may be able to assure that black students will get an equal education. But that did not happen. Instead, white parents fled from the cities; fled from the school districts; withheld their taxes; withheld their support for the school districts; and the courts consequently tried to force the same result in a very different situation.

I think that what we probably need to do now is to refocus on what the real problem is, which is, how to assure a quality education for minority students in the absence of majority students, and in the absence of majority
support, for public schools that are now predominantly black. I don’t think courts coercing whatever remaining white students there are to be bused around, in order to spread them out among the black schools, is going to accomplish anything useful. But I also believe that, to the extent there are still effects of the unconstitutional conduct that harm black students, the courts have an obligation to identify remedies to those harms, once the harms are accurately identified. Whether you call it sociology, or you call it pedagogical theory, or whatever you call it, what courts do normally is to identify the harm and then impose reasonable remedies. That’s true in tort cases; that is also true in constitutional cases involving education.

QUESTION: The education system that was addressed in 1954 with the Brown case was, some people don’t like the word, a socialist education system. Would it have had the same problems had it been a market education system? I address that to anybody on the panel who might have a view on it.

MR. BOLICK: There is a book that I found very helpful in assessing the nature of today’s educational dilemmas, and why we’re spending so much money on public schools. It’s a book by John Chubb and Terry Moe called Politics, Markets and America’s Schools, and it focuses on why some school districts are so good and others, namely, urban school districts, are so bad. It notes that, first of all, they are too large.

But beyond that, the nature of public schooling makes the provision of schooling a political process, which opens it up to all sorts of problems, including special interest pressures and ideological pressures, and things of that nature, that deviate from the provision of schooling. I am fairly persuaded that we do need to move to a system in which public education is not conceived of as some sort of monopoly system, but, rather, one in which the consumer is sovereign and is empowered to obtain education at the place that that person deems best.

QUESTION: Professor Merrill said, and perhaps I didn’t quite get it fully, that it is frequently said that it’s important to understand what was the real theory of Brown. We have to get Brown right and understand which of the three theories you suggested quite possibly is the real theory. I don’t think that you really meant that.

204. JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS AND AMERICA’S SCHOOLS (1990).
Anyway, I'd like to say that it shouldn't be looked at that way. That isn't the issue before us today; we have got to figure out what was the real basis of Brown. The issue before us today, obviously, is what is sensible to do.

Whether Brown was a color blind decision, which is what I think it was, and all it was, at the time, or there is the matter referred to about minds and hearts, is kind of irrelevant. The issue obviously is not what Brown really meant, because, after all, we have to figure out what Brown really meant, and that's what we do. The issue before us is what does it make sense to do, given the education problems we have.

As a specific question to Mr. Coleman, you think the courts still have a role. Clint also holds that the courts have a role, of course, namely, to continue to guarantee that there's not racial discrimination. I don't think anyone disagrees with that. But in thinking in terms of a further role, he said, namely to continue to take steps to cure the harm. My question is, what do you think is the continuing harm at this time, and what would you suggest be done to correct it?

Mr. Coleman: Well, I don't know actually what the harm is. That depends on whether the violation is continuing today. If the violation is continuing today, in other words, if there is conduct on behalf of the government that is denying to black students whatever the equal education is that the system provides, then I would imagine that the harm is educational, in the sense that what the student gets out of the classroom is being interfered with. That student has been damaged, has been damaged educationally in some way. But, you know, I don't think I can say generally what the harm is, because it depends on the school system. But it is whatever the harm is that flows from the violation.

Question: Well, the violation ended a long time ago. It's probably pretty attenuated and fanciful to think that the problems of the urban schools, which as Clint says are enormous, are really related to this. You said, for example, Charlotte, where you were still bused from a neighborhood school. I understand you said 1960.

Mr. Coleman: Right.

Question: You know, it was interesting that North Carolina was the leader in tokenism. They were not a massive resistance place.

Mr. Coleman: Right.
QUESTION: And very interestingly, by '65 at least, they were operating in pretty good faith. That is, they switched voluntarily in '65 to an all neighborhood assignment system, with a hundred million dollar program of school improvement. And, as the judge said in the Charlotte case, they probably created the best school system in the South, and it behaved in an exemplary fashion.

All that happened, and the district judge in Charlotte—I am sure you know the details better than I do, although I studied this case in great detail—was quite frank, and said, "now they are operating non-racially and a very high quality system." However, it's the case that the schools are not integrated—which, of course, was the case. This was a neighborhood system. The vast bulk of the people in this giant square mile county lived in a certain portion of the city, and the neighborhood schools meant that's where two-thirds of all black students went.

And he said quite wrongly, because he was misled by a man named James Coleman, mind you—

MR. COLEMAN: James S. Coleman.

QUESTION: James S. Coleman, a leading sociologist of his day, in fact, the author of the famous Coleman Report, actually testified in the case that they had the answer to educational problems, or the white/black performance gap—namely, integrated schools.

That turned out not to be the case, or is thought not to be the case. But this poor, foolish district court judge—a true epitome of the dumb lawyer, a know-nothing lawyer who thinks he knows everything—was the source of our problems here. Indeed, to further the problems, he had just gotten on the court—he didn't even have experience as a judge. This was his first case. And he looked at it and he said, "You know, blacks don't do as well as whites do in the schools?" He said, "I never knew that." He was the only guy in town who didn't know it.

But he no sooner learned of the problem and he learned of the answer. He said, "I have the answer, let's integrate them. If you just make the schools twenty-one percent black," which was apropos because the system happens to be seventy-one percent white, twenty-nine percent black. He said, "If we make every school that, blacks will learn." That is an extraordinary example of judicial hubris. There's no reason to think that, but he believed that.
It was simply for that reason that everything happened that did happen in Charlotte-Mecklenburg. And it wasn’t any longer any hostage theory, and I don’t think it was operating under Brown either, that the only way to ensure equality for black students—that they get the same quality education as whites, which is the absolute requirement, is there of course, as you say—the only way to do that is to mix them, so the whites can’t treat the whites better separately. I mean, happily, today that is no longer the case. Blacks have their voice in most cities, and, in any event, that’s not going to work.

MR. COLEMAN: I agree that the circumstances have changed today. As I said, if we were looking at this problem, given the circumstances today, we might have a different result. The problem is that the circumstances in 1965, 1966, and 1967 were different, and courts responded to the circumstances that existed at the time.

Unfortunately, as it turns out, I think that the Charlotte system, for example, was unfortunate. I agree with you. I graduated from the school system in 1965. At that time the improvements had not occurred, but there certainly was the promise that that was going to happen. But when there is a constitutional violation—and the premise of my remarks is that there is a constitutional violation—the only question is, what’s the remedy to that violation once you identify the harm? I think that that is something that courts do every day, and I don’t think it ought to be any different because the violation is constitutional. I mean, to the extent that what you’re criticizing is Dr. Coleman’s conclusion that an integrated education somehow has benefits beyond a segregated education without regard to whether the segregation is caused by a constitutional violation, I agree with that.

PROFESSOR MERRILL: Let me just say a couple things in response to the comments. The fact that there is this mystery about what the harm is that needs to be remedied, to me, suggests that, in fact, we need to give further thought to what it is that Brown is attempting to protect in the way of constitutional rights. If what Brown is about is prohibiting the stigmatic injury that comes from having the state declare that blacks are so inferior to whites that they have to be educated separately, then that suggests a certain set of harms to be remedied that may be very different than if what Brown suggests is that you have to have whites and blacks sitting in school rooms together, in order for blacks to finally improve their test scores.

So I think that part of this puzzling over what exactly is the harm, is intricately related to the nature of rights. The reason to examine Brown is not
because it's some kind of holy writ that has to be examined like some Talmudic text in order for us to see what the truth is, but simply that the principle reflected in Brown, that separate and equal violates the Constitution, is one we need give further thought to understanding.

I think a lot of these desegregation cases have proceeded on the assumption that any time you define any causal effect between de jure desegregation and something that's bad that's happening to black children today, that that justifies court intervention to try to correct what's bad and make it right. I just think that that is probably an over-reading of the logic of the Brown case, and leads to all sorts of judicial intervention and meddling that's unwarranted.

Actually, another question in response to Mr. Coleman's remarks that I want to throw out is that prior to Brown there were all these cases in the Supreme Court, where the Court invalidated various systems on the grounds that they were unequal, and I gather that there was a twofold strategy in Brown. Part of the NAACP—they have these extremely limited litigation resources, and couldn't continue to fight these school district by school district, and get the Supreme Court or the federal courts to order an improvement in the quality of facilities and the educational options of children—they wanted to score some kind of general knockout punch that would invalidate these things across the board, because it didn't have the resources to go case by case. The Supreme Court didn't want to have to decide these cases case by case, so they were receptive to this argument.

The problem with doing that is that once you decide the Brown case on the assumption that these systems were actually equal—which is probably a false assumption, I bet none of these systems were equal in physical facilities—then you've deflected all the energy off the direction from this mixing of races and integration, and so forth, rather than focusing the energy on the quality of the education, the teachers, the school books, the facilities, to make sure that every child, black and white, has a first class education.

So the strategy of Brown may have had a role. I have heard a lot of thoughtful black educators and lawyers suggest that perhaps there was some very serious long-term costs to this strategy in Brown of trying to deliver this knockout punch, because it did reflect the intentions the way they did it.

QUESTION: In Arizona we have, I think, 49.5% of children who attend public schools in Arizona. Here in Arizona just a couple of months ago Judge Muecke, who has come under a good deal of criticism, actually did something that a lot of people considered quite good. He actually lifted a desegregation order from one of the school districts. Two days later he
imposed a stay on his own order, but, nonetheless, he was thinking about it for a while.

Has there been any example anywhere in the country where any of these court consent decrees or desegregation orders have actually been lifted and people have been free to go on? The Kansas City case, I guess, is moving toward that, but . . .

MR. BOLICK: The answer is: absolutely. In fact, most recently in Denver, Colorado, where, after twenty- or thirty-something years, the order was finally lifted. Between 1968 and 1995 the number of white kids attending Denver public schools declined from 63,000 to 18,000. The school system has been absolutely decimated there, and the judge who really thought he knew all the answers finally threw up his hands and said, “I don’t want this any more.”

During the late part of the Reagan Administration, there was an effort by the administration to go in and close out desegregation orders where there had been no problems or concerns raised for ten years. They came under tremendous opposition to that. The theory was, if there’s no continuing violation, the Justice Department has no continuing jurisdiction. It’s got to get the heck out and get the courts out. That was attacked and abandoned during the Bush Administration and, surprisingly enough, not resumed during the Clinton Administration.

But there is one thing, and I will end on this note, that keeps a lot of school districts in, and that is that the federal government provides funds for schools that are under desegregation orders. So you come up and you say, “Hey, wouldn’t you like to get out from under this judicial order?” And the school district says, “God no, this is a source of revenue for us.” So I think that ironically and perversely that may be one of the things that is keeping so many school districts around the country under a court choke hold.

PROFESSOR MERRILL: I think there is a very systematic problem here. My impression is, from reading the appellate opinions, that a lot of these are not adversarial cases. In the modern era, the school district very often is fully supportive of the plaintiff’s proposal to keep the system under judicial supervision.

In the Kansas City case, for example, the Kansas City School Board, not surprisingly, was quite enthusiastic over the proposition that the federal district judge was going to order the state of Missouri to raise hundreds of millions of dollars to build a Cadillac school system in the city of Kansas
City. Under those sort of incentives, you don't have anybody who's arguing the support of lifting the desegregation decree and returning to local control.

QUESTION: I want to get back to the federal/state question in the area of school choice. If there was a school choice measure that came under scrutiny—I particularly address this to Mr. Coleman—how would you see it, in terms of judgments and in terms of state court versus federal court? You clearly have some doubts about school choice. Would you have constitutional doubts in general about the whole concept and, if so, would you tend to think these are things which would belong in federal or state court?

MR. COLEMAN: Well, you know, I suppose that a state could decide that it will replace its public education system with a voucher system, and that every student will receive a certain amount of money to go to the school of his choice or her choice.

My only concern—and obviously you can monitor that, you can police that, you can determine whether that's happening—my concern about that would be that the market is not going to be any better than the school system if it's not interested in actually educating the black students. So you get a group of inferior private schools for black students funded by federal money, and you get a different system of private schools for white students.

I don't know. Will that happen? I don't know. I am not optimistic that it will happen. I think that it's simply the nature of our society.

White flight was not the result of social engineering. It was the result of the decision in Brown that you could no longer have a dual school system. That's why the white parents left. I don't think that they are going to come back to a school system that is private and integrated.

QUESTION: I think they left because of forced economic class integration, much more importantly than race. In a private voucher system, it would be crucial that racial discrimination not be allowed by the so-called private schools that are obviously receiving voucher money. There's no question they couldn't discriminate, so presumably there would be no question of the black students choosing with their voucher money the best available private school.

MR. COLEMAN: The best available private school that they could get into.
MR. LEO: On that note, I would like to thank the Goldwater Institute, on behalf of the Federalist Society, for inviting us to join in this important examination. We’re honored and privileged to be a part of this program, and we hope that the Federalist Society and the Goldwater Institute can work in the future, preferably in Arizona.

I would like to thank, on behalf of both the Federalist Society and the Goldwater Institute, all of our speakers, both on this panel, and all of the others, who participated throughout the past two days. I think we have had a very thoughtful examination of the role of the federal courts in scrutinizing the activities of state and local governments.

We stand adjourned.