NATIONAL PRESS CLUB

AMERICAN CONSTITUTION SOCIETY

AND

CENTER FOR AMERICAN PROGRESS

TUESDAY, MAY 3, 2005
12:00 NOON – 2:00 P.M.

NATIONAL PRESS CLUB
WASHINGTON, D.C.

LISA BROWN: Welcome on behalf of the American Constitution Society. And thank you to our co-sponsor, the Center for American Progress, and particularly Mark Agrast from the Center, who has been an indispensable partner in planning not just this event but many others, and we are deeply appreciative. Also particularly, thank you to our distinguished group of panelists. I have to tell you as I've traveled around the country in the last two weeks speaking to ACS chapters, I keep being asked about the ideas in Jeff Rosen's article about the Constitution in Exile. I think as all of you know, it was the front-page story in *The New York Times Magazine* just over two weeks ago now. This is an incredible opportunity for us to continue the conversation that was begun in that article and then also to actually have the opportunity to ask questions of experts on the topic. The talk of the town both inside and outside the Beltway today is all about judicial nominations. And when there's a great deal of attention on ideology because of the critical role that it is playing in which judges are nominated and confirmed, it's absolutely essential that we understand what that ideology is. And a certain number of the nominees pending today are said to support the Constitution in Exile. This panel today is going to help us understand exactly what that means for both their jurisprudence and the future of American law and policy.

For the few of you who may not know ACS, let me just say that there is material outside on the organization and on upcoming events. I'd like to encourage you to join us for our national convention, which will be July 29-31 here in Washington, where we will address again judicial nominations, but also other issues ranging from the future of election law to federalism and congressional power, moral values in the Constitution to interrogation and torture in the war on terror. Once again, two-and-a-half days of programs, as one panelist described it last year, an intellectual spa for the mind. We would very much like to have all of you join us.

With no further ado, I would like to introduce Si Lazarus, who is the esteemed moderator of today's panel. Si is senior counsel at Sidley Austin Brown & Wood. He's also public policy counsel of the National Senior Citizen's Law Center. He's a trustee of the Center for Law and Social Policy and also served as associate director of the White House domestic policy office under President Carter. Si, as most of you probably know, is a prolific writer on issues relating to the Supreme Court to our third branch of government to federalism issues, innumerable issues. And Si, as much as anyone in the public interest community today, has focused attention on issues like what we're going to talk about today and has played a leading role in helping people understand that issues relating to the Constitution, relating to judges, can have a direct impact on their lives. So I think Si is the perfect moderator for today.

Si.

SIMON LAZARUS: Well, after that introduction I think I can only go downhill, and I should leave. This is a very exciting event for those of us who have been concerned about the issues involved in the Constitution in Exile for quite some time, but felt very frustrated that its profile beyond a little circle was very limited. Thanks to the efforts of Jeffrey Rosen and some others, that is beginning to change.... I really want to thank the American Constitution Society and the Center for American Progress for staging this event. And I also want to thank the panelists for coming here. Professor Sunstein has come all the way from Chicago, and we very much appreciate that. This is really a remarkable panel, and I think everyone is in for a really exciting and interesting exchange.

Briefly, I'll introduce each of the speakers when they speak. What we're going to try to do is have relatively brief, hopefully not more than 10-minute presentations by each one of the speakers followed by a substantial period of exchange among them because I imagine that there will be many things that they will want to contest and discuss. And finally we'll leave maybe 15 minutes at the end for questions from the audience if that seems acceptable to everyone. We're going to start with Jeff Rosen. Michael Greve will speak second, and Professor Sunstein will be the clean-up hitter.

Jeff, as Lisa just noted, is the author of a truly remarkable cover story in the April 17th *New York Times* Sunday magazine. If you haven't seen it, I couldn't recommend it more strongly on this subject. And he's going to discourse on that in just a minute. Jeff is a professor at George Washington University Law School. He's an expert on constitutional law and criminal procedure and on privacy. He's probably known to most of us here more as the legal affairs editor of *The New Republic*. If Lisa could describe me as prolific, I don't know what the word is for Jeff. It's hard to pick up an important magazine or newspaper these days without finding an article in it by Jeff. He's also written two very good books on privacy and national security in the last three or four years. He is, I think without question, the preeminent interpreter for non-legal audiences of constitutional and important legal developments. His ability to do this in a way that is accessible without dumbing down the law and often, indeed, making original and very profound analyses and analytical points is really unique in our period and, as far as I know, in any period that I've experienced. So without further ado, Jeffrey.

JEFFREY ROSEN: Thank you, Si. That's awfully nice. And I'm very grateful to the American Constitution Society and to my good friends, Cass Sunstein and Mike Greve, for their generosity in joining me for this exciting panel. It's a wonderful event, and, Mike, if you don't mind scowling as terrifyingly as possible, we have some photographers from The New York Times to record the great event. (Laughter.)

MICHAEL GREVE: We'll have them take <u>your</u> picture.

MR. ROSEN: Absolutely. So the response to the piece has been exciting, challenging, and frankly much more heated than I expected. It's fallen into two basic

categories. The first category suggests that the entire Constitution in Exile movement is the creature of the overheated imaginations of me, Cass, and the American Constitution Society. (Laughter.) And the fact that this panel was organized before the article actually came out may fan those conspiracy theories. The second claim is that the movement does exist, but it actually has very little influence and is just a small group of obscure libertarians about whom we should take no notice. These two theories are what the lawyers call arguing in the alternative. (Laughter.)

I don't find either of them persuasive, but I'm very much looking forward to a good, frank discussion about all this today. As to the claim that the movement is invented, much of the discussion is focused on the use of the term. Plenty of the conservatives, as I noted in the piece, say that they had never heard the phrase "Constitution in Exile" before. Cass, in particular, began to call attention to it about a year ago. And Judge Douglas Ginsburg, who invented the term in 1995, has objected that he himself has rarely used the phrase since his celebrated article in Regulation Magazine. For me, the phrase doesn't really make much difference. What I was trying to do is describe a cluster of ideas which have been percolating in the legal academy and think tanks and in the political system for more than 20 years.

And regardless of what banner you attach to the movement, I was persuaded by the reporting that it does, in fact exist. Incidentally I didn't know what to think before setting out to talk to the various people in the movement. But I was persuaded by the reporting that there is indeed a coherent set of ideas within the conservative libertarian judicial movement that can be usefully distinguished from other conservative ideas. That's why I thought the debate between Judge Scalia in 1984 and Richard Epstein was so clarifying. The difference between – I don't know if it's traditional – but longstanding conservative allegiance to judicial restraint in the economic arena with the unapologetic and candid embrace of judicial activism in the economic arena more recently seems worth pointing out. And to the degree that conservatives, after the piece has come out, are disavowing their allegiance to economic judicial activism, I think that's great. That is fine with me. If calling attention to the Constitution in Exile movement encourages conservatives to reaffirm an allegiance to judicial restraint, I think that's the best effect that the piece could have. So that's the first cluster of objections, and we'll certainly talk more about them – the degree to which this movement actually exists.

As to the second claim, the alternative claim, which concedes that this movement does exist but belittles it as a small group of obscure libertarians, I'm not terribly moved by that either. Nothing in the piece suggested that the movement was on the verge of imminent success. I tried to acknowledge that on the current Supreme Court there's only one justice whose intermittently sympathetic to these ideas, and that's Justice Clarence Thomas. And of course, he can't even be counted as an entirely reliable ally. And as Mike candidly acknowledged, it would take a whole host of Supreme Court appointments over many, many years meaningfully to change the judicial culture on the Court.

There's been a debate about to what degree these ideas will actually influence the upcoming Supreme Court battles and the choice of nominees. And this, I think, is also

worth talking about. There are meaningful, important differences among the various candidates on the short list. Many of them, it seems, have more sympathy with economic judicial activism than conservatives of an earlier generation. So, for example, Judge Roberts, Judge Luttig, Judge McConnell come from a younger generation of conservatives who were not steeped in the same Harvard legal process, ideas that taught Justice Scalia. And they may be more ready to enforce meaningful limitations on Congress's power.

Now the degree to which any candidate on the Supreme Court shortlist might embrace this movement for all its worth varies dramatically among them. And it's important for candid and fair-minded liberals not to lump them together, but to describe the differences between a more restraint-minded McConnell, a more precedent-based Luttig, and a more textualist Roberts. These are by no means indistinguishable candidates, and all are impressively able. But they seem to have enough affinity with the idea of resurrecting limitations on congressional power and property rights to make it seem to me not preposterous to note some connection between the ideas of the movement and the current judicial nominees.

Why was the reaction to the piece so angry? I was surprised by that. Some of it I think has to do with the new blog world.... It's very good for journalists to have bloggers attack them because you're reminded of the fact, which I never forget any day of my working life, that every written word is important. Every adjective matters. People care more intensely about their reputations, about being fairly described, about not being judged out of context than anything else, which is why journalism can be a blood sport. So I wasn't surprised to see many of my friends take to the blogosphere – now everyone with a modem is a journalist – and describe their feelings about the piece. But the reaction seemed disproportionate to what I was trying to do in the narrative, which was merely to describe in a fair-minded and non-judgmental way the ideas of the movement.

So what caused the anger? Mike will have some ideas about that I know libertarians at the Institute for Justice felt that they can be meaningfully distinguished from some of Mike's broader regulatory ideas. So they thought that to be lumped together into Cass's broad description was unfair to them. And that is worth discussing. Other bloggers seemed to feel, for parochial reasons that that their particular and obscure historical concerns weren't adequately attended to. But generally my conclusion is that this is the most politically tinged of all subjects. The Senate is about to explode over Supreme Court nominations, and any attempt to characterize or categorize different nominees based on their ideas in ways that have implications for the coming nomination battles to come is just as politically sensitive as could be imagined.

Now, the best response to the piece, I thought, occurred in a piece that Mike just wrote in Legal Affairs, which I know Cass did not like and which he's going to take issues with. But one part of the piece that I did like was Mike's challenging of liberals in general and the American Constitution Society in particular not to be hypocritical in these coming debates. He said essentially it's a little rich for you guys to be embracing a rhetoric of judicial restraint several weeks after you at the American Constitution Society

just held a conference at Yale Law School talking about the Constitution in 2020 or whatever it was, calling for an aggressive embrace of broad international law norms, for example, to strike down the juvenile death penalty and other unenumerated rights that represent principles of justice that majorities of Americans at the moment don't embrace. I think this is a fair-minded criticism. And I think that just as Justice Scalia said there was a moment of truth for conservatives in the 1980s when they could chose between traditional conservative allegiance to judicial restraint and the old Lochner-ite activism, so liberals at this unique moment in history face a choice: we can resurrect, recall the old banner of judicial restraint, which of course was traditionally associated with liberals and progressives from Hand and Holmes and Frankfurter to the current day, or we can be opportunistic and selective, denouncing conservative judicial activism while at the same time supporting liberal judicial activism.

When talking about activism nowadays, I like Cass's definition. He has a very good one, which I found just more clarifying than anything else. It's the neutral definition. Activism, Cass says, occurs whenever a judge strikes down a federal or state law, and restraint occurs when he upholds a law. This neutral definition doesn't descriptively say whether the activism is justified or unjustified. You can make an argument about whether First Amendment activism is good and economic activism is bad, but it just helps describe the terms of debate.

It's obvious that one reason the Senate may blow up over judicial nominations is that interest groups on both sides of the political spectrum are enthusiastically embracing activism on a selective basis. On the right, business groups and other economic libertarians for the reasons discussed in the piece are turning to the courts for victories they're unable to win in the political arena. They know that the majority of the country rejects their views, and that's why, like political losers traditionally, they're returning to the courts. But similarly – and I really do want to challenge my friends at the ACS on this point – liberal groups are doing the same thing. Pro-abortion groups, recognizing that the extreme opposition to restrictions on late-term abortion is a position that a majority of the country has rejected, are also putting an awful lot of unjustified hopes in trying to find nominees who will hand them victories they're unable to win politically.

I think the ACS has a unique opportunity to represent the vital center in these coming debates. We know that, simply judged by the polls, this Supreme Court, the Rehnquist Court, is following the election returns more scrupulously than Congress itself. If you wanted to find the most precise embodiment of the wishes of a majority of the American people, it wouldn't be the Republican Congress, it would be that Delphic oracle Sandra Day O'Connor. And this is an odd state of affairs when justices are better at putting their fingers to the polls than our representative institutions are. But the truth is, as Mark Tushnet says in his excellent new book "A Court Divided," that the Rehnquist Court has supported the views of a majority of Americans by siding with cultural liberals and economic conservatives. To a modest degree, majorities of Americans approve of what the courts have done, and it's only the aggrieved losers on both extremes who are trying to object.

So that's my challenge to you. We have a court system that by and large has sided with moderately progressive ideas in much of the culture war issues that you care about. At the moment, it's not inclined to take a hard right turn in economic matters. There are interest groups on both sides who want to press it in the direction of extremism. And in a principled, rigorous, and nonpartisan fashion, by embracing judicial restraint across the board, the American Constitution Society can play a really useful role in the debates ahead. Thank you so much.

MR. LAZARUS: Okay, thanks very much, Jeff. Typically provocative.

Our next speaker is Michael Greve. And as Jeff noted, Michael has thrown a big oar into this debate just this week with a very sharply worded critique of Jeff's article in the current Legal Times. Michael was, I guess, the founder and certainly a leader of the Center for Individual Rights, a noted conservative public interest law firm, for many years throughout the '90s. And since 2000, he's been the John G. Searle scholar and director of The Federalism Project at the American Enterprise Institute, where he has done an extraordinarily creative job of raising the visibility and dissecting the central themes behind the Supreme Court's intermittent drive to reinvigorate the concept of federalism as a constitutional doctrine. Michael has written a number of books. He writes the outlook piece for the federalism project on a – I guess an irregular or a regular basis, whichever one it is. But he constantly produces extremely provocative and interesting articles.

And with that I'll turn the stage over to Michael.

MR. GREVE: Thank you, Si. Thank you all for attending. Thanks to the ACS for inviting me here, and especially thanks to Si and to Cass and to Jeff for participating. I think I have said just about all I was going to say about the Constitution in Exile in that little Legal Times piece. Kate Rick, who's here, has additional copies if you want them. I'll just say one additional remark prompted by what Jeff just said.

One of the problems I have with the concept is that it precisely does what Jeff fears, and that to gloss over a whole lot of important differences among conservative thinkers. So for example, last November, Jeff Rosen wrote a piece in, I believe, The New Republic, which specifically exempted Judge Roberts, Judge Luttig, Judge McConnell from the Constitution in Exile crowd and said, here are three judges who don't belong in this category. And then it had other judges who do belong in it. Now, all of a sudden, Luttig et al. are supposed to be in on this crowd, and I wonder what has changed in the meantime. Similarly, Jeff rightly points out there was an important debate between Justice Scalia and Richard Epstein. So Nino is one side – or Justice Scalia is one side of this. Richard Epstein is the other. You read a lot of articles about the Constitution in Exile. All of a sudden Justice Scalia is supposed to be part of this crowd and the intellectual leader of this movement on the Court. In other articles, not written by anybody present but by Bruce Ackerman, Robert Bork is supposed to hanker for a judicial engineering of the Constitution in Exile. It strikes me that that really suppresses a whole lot of important points.

I just want to make two brief points today. The first is about the Rehnquist Court, and the second is about the New Deal. My first point – the Rehnquist Court's federalism or the Rehnquist Court. I think the target of the charge that the Rehnquist Court has shown great sympathy for the Constitution in Exile, whatever it is, has to be the Rehnquist Court federalism because on all other margins the Supreme Court has, in effect, enacted the progressive agenda – campaign finance, affirmative action, the death penalty, abortion, homosexual rights, and so forth. I actually doubt that much of that would change with an appointment or two, but even if it were to change, it has nothing to do with challenging the New Deal or a Lochnerite Constitution. And in a lot of ways, even at the federalism front, you have to worry that this is really yesterday's agitation. In fact, there's so little to that development that you wonder what has gotten the Rehnquist Court into this in the first place.

The enumerated powers decisions, *Lopez* and *Morrison* – my former organization CIR actually litigated the Morrison case; I predict that both of these decisions will be effectively overruled in the upcoming *Raich* decisions about California's medical marijuana law. And if you think federalism is this rightwing conspiracy, consider here that my opponents find themselves in an alliance with all the drug warriors at DOJ. I confidently say I'm on the other side, as is the state of Alabama. There are also, of course, the Section 5 cases and sovereign immunity cases. I have to admit I'm no big fan of those decisions or some of them in the first place. But there again, those cases have already been sharply limited in *Hibbs v. Nevada* and *Tennessee v. Lane*.

Now, suppose I'm wrong. Suppose there is really something left in the federalism agenda or that it would regain its oomph with an appointment or two. I think that even at its zenith, it's wrong to understand the Rehnquist Court's federalism as an incipient return to the Constitution of 1932 or thereabouts. What it was was an attempt to make some room for federalism within the confines of the New Deal, without challenging the New Deal. The cases say that, and they say it in a way that makes it very, very hard to expand them. Example: *Lopez* and *Morrison* say there's this distinction between economic conduct, which Congress can regulate, and non-economic intrastate conduct, which it cannot regulate. You can say about that distinction what you will, and it's a complicated distinction. But its obvious point is to move *Wickard* to one side, move *Heart of Atlanta* to one side, and make a little more room for a kind of moral federalism on issues that don't implicate these big debates over the past.

Similarly, the sovereign immunity cases try to make a bit more room for state governments without challenging Congress's authority to enact labor and entitlement statutes. For the most part, the decisions, whose reach I'd say again has already been limited, take away one single means of achieving congressional purposes, and that's to expose state and local governments to private lawsuits for damages. Any and all other avenues of achieving those same purposes remain open, and so what the decisions do is they say, Congress, look, think about it again. Think whether you want to really do this, and if you want to do it, you can surely find a way. The only thing that we won't allow is

this sort of off-budget subsidy for your favorite constituencies. Again, I'm not fond of all of these cases, but they don't strike me as undemocratic or as an assault on the New Deal.

Speaking of the New Deal, it's obviously a very big subject so I'll simply try to articulate what I think is the basic point of disagreement here. What Cass Sunstein and Bruce Ackerman and many, many lesser lights in the progressive movement or theory movement – whatever you want to call it – have in common is that they view the New Deal as a progressive enterprise. The warning about the "Constitution in Exile" is the flip side of that because if you're not for the New Deal, you're a reactionary. But it seems to me to pull that off, you have to imbue the New Deal as a whole with an intellectual content that it never had. How so? I'll give you what I think is a good example. In Cass's last book, "The Second Bill of Rights," which is very much worth reading and which you should all buy – (laughter) – one of the arguments runs as follows, and I hope I get this roughly right. One of the New Deal's constitutive or quasi-constitutional – that's my word – constitutive is Cass's - the word – commitments was a commitment against monopoly and monopolization. I think that has it almost exactly backwards because monopolization and cartelization at every level was the organizing principle of the New Deal.

Look at the cases. Virtually every one of the opinions and decisions that entrenched the New Deal, from *Nebbia*, to the canonical Brandeis dissent in *New State Ice*, to *West Coast Hotel*, to *Carolene Products*, to *United States v. Darby*, to *Wickard*, to *Parker v. Brown*,(which is not a constitutional case but surely a constitutive one): all of these cases involved government-sponsored cartels of one sort or another. And the most basic structural changes wrought by the New Deal make sense in only that light. Why the boundless expansion of congressional power under the Commerce Clause? Answer: so that the feds could suppress state competition that would otherwise occur. Why the concurrent though much less noted expansion of the states' extraterritorial powers in cases like Parker? Answer: so long as state authority is limited, people can run away from a state. They have an exit, and the states must compete. And when the state authority expands, the exit closes. And so what you end up with is what we have today, where every state basically can reach every transaction across the country with the result that the most restrictive law will naturally dominate and competition comes to an end.

Here's the disagreement: I don't think we should build on that foundation. I think we can do much better. I think the New Deal was fond of monopolization because it thought it could stabilize one sector at a time without having the instabilities rattle through the economy. We know better. That's why we no longer protect selected domestic producers against foreign competition (or at least we didn't until the Bush administration strolled into town). The New Deal looked for ways to entrench organized interests. We understand the difficulties of dislodging them. FDR, as Cass rightly says, was famously committed to trying something, anything that might work. We now understand that no matter how misguided the original experiment, its beneficiaries will manage to perpetuate it. And for that reason, we're often better off not trying. As President Reagan famously said, don't just do something. Sit there.

The New Deal had to deal with economic scarcity on a now unimaginable scale. Now our basic problem is to manage affluence. The New Deal dealt with a relatively static society where employers often enjoyed local monopolies over labor. Our problem is the opposite – how to manage mobility and rapid change. And I don't think you can get a hold of that society and the modern problems with the instruments of old. I think rights are suited to a static society. If you want to deal with highly mobile, rapidly changing society, you have to look elsewhere. My own answer is President Clinton's (believe it or not): Let's make change our friend. Let's by all means think about a constitution in 2020 and about a constitutional structure that would make sense for a more competitive open and democratic society.

What would that look like? Well, of course, in some ways you have to look backward to the Constitution first, because you have to (it's our constitutional regime) and second think because the American Constitution is far more conducive to an open democratic politics than any other federal constitution in the world, I'm afraid of –not afraid of. I'm afraid of them too – (laughter) – but mostly I'm aware of them, I hope. And so, I'd start with the actual Constitution. To give you an example that actually appears in Jeff's article: Article I, Section 10 says, "no state shall make any compact or agreement with another state without the consent of the Congress." I think that language has to mean at a bare minimum that some pacts among states without congressional consent are prohibited. Now the New Deal and successive Supreme Court opinions have basically wiped out that rule and said any compact is just fine with us. Why have they done so? Answer: yes, to facilitate state-sponsored cartels like the tobacco monopoly that we've inherited from the 1998 agreement with the state AGs And I'd just mow that down if I had my druthers, and if that means returning to a pre-New Deal constitution, I suppose that's true. But I don't know how we could have a constitutional discussion if we're not willing to enforce the text of the Constitution where it's plain.

To repeat, though, on important dimensions, the Constitution for now will look very different from the Constitution of the old Court. Most important, I'd resist the temptation to constrain state laws under the head of expansive rights and especially substantive due process. And the reason why I'm willing to let all those laws slide is that I think it's impossible to protect local monopolies under conditions of open exit and entry anyhow. So long as you can guarantee a federal structure with free entry and exit, you don't need much substantive due process. The more churning and mobility there is, the less I have to obsess over rights, whether they're Richard Epstein's rights or Cass Sunstein's rights. I'd let people sort themselves. "The genius of American federalism is that citizens choose their state and not the other way around." I wish I had said that, but Justice Stevens said it. And I agree. Thank you.

MR. LAZARUS: That's very good. Our final panelist, who is certainly not least even though he's last, is Cass Sunstein. You've already heard a great deal about him. Formally he is the Karl Llewellyn Distinguished Professor of jurisprudence at University of Chicago Law School and informally he is one of at most a handful – I would say – of the most distinguished constitutional law experts in the country. However, his work is hardly limited to constitutional law. He writes so prolifically that it is quite intimidating.

This morning I counted upwards of 25 books in the last 15 years, and even if you're as challenged at arithmetic as I am, that's a fairly formidable product.

His work spans not only all aspects of constitutional law that are important, but many aspects of law in economics. He has participated in important empirical studies of judicial and jury behavior in recent years, which is the sort of thing that most members of his profession in the academy rarely dirty their hands with because it's just too difficult. He's also a very frequent contributor to journals of opinion and to op-ed pages and is an extremely talented interpreter of abstruse legal concepts to interested nonlawyer audiences.

So without more I'll turn the mike over to Professor Sunstein.

CASS SUNSTEIN: Great. Thanks, and thanks for having me. My interest in this was spurred by two facts. First, we had a little panel a couple of years ago at my law school about the Rehnquist court, and just counting – I don't know if this is really empirical analysis, but counting suggested that the Rehnquist court has struck down just about three dozen acts of Congress since Chief Justice Rehnquist had assumed the role of chief justice, and counting suggested that this was an unprecedented record of invalidation of acts of Congress in the history of the United States. Now, the numerical measure is crude but it's not without interest, and some of the statutes that were invalidated, at least in part, included the Religious Freedom Restoration Act, the Violence Against Women Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and several statures calling for affirmative action. That is, statutes enacted by Congress.

So this seemed to me to be a puzzle. While we were puzzling over this locally, Judge Ginsburg, distinguished chief judge of the D.C. Circuit, and someone who it pains me to be associating with this because as a judge he's a person of moderation and restraint and as a human being he's someone of modesty and grace. So this really not meant to say anything about him as a judge or as a human being, but he did give a speech at the University of Chicago Law School in front of a packed audience in which he said that the Constitution was rightly interpreted in the sense that it was interpreted as written from the founding to about 1930, at which time the wheels came off the tracks.

And he said – this is the chief judge of the D.C. Circuit appointed for the Supreme Court of the United States, supported, incidentally, by me and many others for the Supreme Court of the United States. He said, at that point everything went wrong. The Supreme Court upheld the National Labor Relations Act. He said that was sloppy reasoning and he clearly thought it was wrong. The Supreme Court allowed the national government to regulate child labor under the Commerce Clause. The Court blinked away individual rights, by which he meant property rights, and did much more. So it is we have something like the not-Constitution since 1930. And he is the originator of the phrase "Constitution in Exile."

Okay, what I'm going to do now is be a little more academic than I had originally planned, so I want to step back and bit and try to figure out what's going on with this Constitution in Exile talk by Judge Ginsburg and with the 36 invalidations by the Rehnquist Court approximately since Chief Justice Rehnquist assumed the position he now holds. And what I would like to do is say that there are four strands in constitutional thinking, and the four strands pretty much capture the territory though there are epicycles. I just want to list them and say a few words about them.

The first, let's call it perfectionism, and here the most famous practitioner is the Warren court, and the most famous theorist is Professor Ronald Dworkin, who says what the Supreme Court ought to do is to make the Constitution the best it can be by putting its provisions in the best constructive light. That's pretty much a quote from Dworkin, maybe the leading legal theorist of the second half of the 20th century and he's going strong, I'm happy to say, in the 21st.

This constitutional perfectionism I think was much of the creed of the Warren court. It helped account for the creation of the right to privacy in Griswold against Connecticut, a right that had very weak roots in tradition. It helped account for the criminal procedure revolution in which the Court, with Miranda and Arizona and actually the exclusionary rule, was trying to make the best sense it could, the best constructive sense it could out of the Constitution. It helps to account for the one-person-one-vote principle, which is now widely admired, a principle which couldn't find very clear foundations in the history of the Constitution or in the precedents that the Supreme Court worked with.

The idea behind this perfectionism is that the Constitution doesn't contain the rules for its own interpretation. There is no provision that says the Constitution should be interpreted in accordance with the original understanding; that's not there. The perfectionists say we have an option of what theory to choose and oughtn't we to take that theory that makes our Constitution best? Why, the perfectionists ask, should we take the theory that would make our Constitution worst? Many American liberals are drawn to constitutional perfectionism, and that's my first on the list. It has no sustained adherents on the Supreme Court as it now stands. Marshall and Brennan and Douglas and Warren and Fortas and others were constitutional perfectionists. None of the so-called liberal justices are perfectionists in the sense that those were.

The second approach, let's call it bipartisan restraint. The practitioner of bipartisan restraint, the greatest was Oliver Wendell Holmes. Felix Frankfurter, Roosevelt's justice, was also an advocate, most of the time, of bipartisan restraint. And the theorist is an old guy from a long time ago, Holmes's teacher, James Bradley Thayer – T-H-A-Y-E-R. Those who believe in bipartisan restraint think that the Court should uphold legislation unless it's palpably, beyond all question, in violation of the Constitution. And they are committed to bipartisan restraint on principle because they are majoritarians who think that the Constitution is often ambiguous, and insist in the face of the ambiguity the democratic process should be given the benefit of the doubt.

A nice example of bipartisan restraint would be the view that just as the University of Michigan is permitted to have affirmative action programs if it wants, so the state of Texas is permitted to criminalize same-sex sodomy if it wants. Neither constitutional provision in either of those cases was crystal clear. Stunningly, not a single member of the Court reached that set of results – not one. So we have no practitioners of bipartisan restraint.

The third approach that I'd like to identify is minimalism, with a small "m." The others all have capital letters. Minimalists believe that Supreme Court justices should proceed narrowly in the sense that they shouldn't rule broadly and reach cases that are not before them, and they believe that Supreme Court justices should rule shallowly; they should think shallowly and not deeply. They should try to come up with grounds for conclusions that can be shared by people who disagree on a great deal. Indeed, one thing that makes democracy possible in a heterogeneous nation is that we find ways to agree on practices amidst disagreement on theories. We don't have to fight over whether God exits and what he's exactly like in order to decide on the tort law or on federalism.

So, too, minimalists want judicial opinions that can attract support from a range of theoretical positions. The great theorist of minimalism is the great conservative thinker Burke, who criticized the French Revolution on the ground that an abstraction involving equality was running roughshod over France's longstanding practices. Burke adored the common law because he thought it was an accretion of minimal judgments – minimalist judgments that would, over time, produce a kind of wisdom that would outrun what hubristic theorists could come up with. The practitioner of minimalism on the Supreme Court, the leading one is Justice O'Connor. *Bush v. Gore* is an emphatically minimalist opinion. It purports not to reach other problems not before the Court. If you don't love that one, you might think of the rise on the ban on sex discrimination, which grew up not out of a big theory, though big theories were put to the Court, but through an accretion of individual decisions. And so, too, the rise of modern free speech doctrine emerged not from James Madison or from Louis Brandeis or from Floyd Abrams but from an accretion of decisions by the Supreme Court.

The last approach, which is our focus today, I'm not going to call the Constitution in Exile; I'm going to call fundamentalism. Fundamentalism insists – and the play on the religious analog is intentional, though I don't mean to say anything evaluative about fundamentalism in the religious domain. Fundamentalists believe that the Constitution means what it originally meant. So the meaning of the Constitution is settled by asking what the ratifiers of the provision understood their provisions to mean when they ratified the document. The leading theorist of fundamentalism is Judge Bork. He was the original public expositor of fundamentalism and he has given it its most ample justification today.

The leading practitioner of fundamentalism on the Court is Justice Thomas. Though Justice Scalia has strong fundamentalist leanings, he describes himself, I believe to his credit, as a "faint-hearted fundamentalist," one who's not prepared to run roughshod over precedent in the interest of his theory. Which is to say that Justice Scalia

is an interesting amalgam of fundamentalism using a theory as a knife to cut through doctrine and a Burkean who's nervous about knife-wielding.

Okay, for fundamentalists, the ban on racial discrimination by the federal government is unacceptable because the Equal Protection Clause doesn't apply to the federal government. That's an easy one. For fundamentalists, neither the federal government nor the state government is prohibited from discriminating on the basis of sex. Justice Thomas has recently urged that there is no separation of church and state under the Constitution; that all the Establishment Clause – which ought not to be incorporated, in his view – all it does is to say that the federal government can't establish a religion. Therefore states, apparently on Thomas's view, can establish official religions.

The Constitution in Exile, which Judge Ginsburg identifies and defends, is the Constitution as of 1930. Fundamentalists may think that year got it wrong with respect to some things, but it's clear that fundamentalists believe that Congress ought to be forbidden from engaging in various kinds of action which is engaged in persistently over the last 50 years, which is to say that there's a clear echo of fundamentalist thinking in the Supreme Court decisions invalidating the Violence Against Women Act, the Americans with Disabilities Act, as applied to states, the Age Discrimination Act in Employment Act also as applied to states.

Now, what I'd like to do in this little exercise, it to put bipartisan restraint and minimalism to one side. I tend to like both of them, but they're not going to be the topic of the remarks that remain, and so I'll say something critical about perfectionism and fundamentalism.

There are three problems with perfectionism, what liberals have been drawn to, and here I'm endorsing Jeff Rosen's suggestion that those who believe, for example, that the government should be taking steps to make sure people have health insurance and should be eating well and be able to have decent lives, that they ought not to be resorting to courts for those goals. Their hero ought to be less Earl Warren and more Felix Frankfurter, who was a combination of a bipartisan restraint person and a minimalist.

Okay, against perfectionism, the first problem is if judges go on the task of making the Constitution the best it can be, what Dworkin wants, they may well blunder. Whatever your likes are, it's just too likely that their conception of what the Constitution's perfection consists in will be unreliable. And judges are not philosophers; they're not people who are particularly able in moral theory. There's too much of a risk of entrenched error of the sort that the *Dred Scott* case and the *Lochner* case both, for a while at least, produced.

The second problem is even if the justices are good at figuring out how to perfect the Constitution, they may make the situation bad just by insisting on what's perfect. Guess how many schoolchildren in the South were attending desegregated schools 10 years after – what percentage of African American children in the South were attending

desegregated schools 10 years after *Brown v. Board of Education*. In 1964, 1.8 percent of African American children in the South were attending desegregated schools. The increase in legal abortions was faster the three years before Roe than the three years after *Roe*, which is a stunning statistic in light of the fact that after *Roe*, almost all abortions were legal.

So *Roe* produced an increase in legal abortions, true, but the country was moving very fast in that direction in any case. If the Supreme Court shortly rules, as it's not going to, that states have to recognize same-sex marriage, there are few things that would be more devastating to the cause of equality on the basis of sexual orientation that that. It would set the cause back a long, long time. In any case, perfectionism of the liberal kind that we saw in the Warren court doesn't take democracy seriously enough. One of the rights that people have is the right to engage in self-governance, and that's why I believe that *Roe v. Wade* should be regarded now not necessarily as something that should be overruled but as something that was a blunder in its time on institutional grounds.

Now let's talk a little bit, if we can, about fundamentalism, which is my least favorite of the four. The first problem with fundamentalism, as it's operating now, is that it's not being practiced faithfully. It's too often a partisan program in legal guise. Many people – and I believe someone on the stage – has identified the Supreme Court's affirmative action cases – at least the one that upholds the Michigan Law School policy – with the Supreme Court death penalty cases. But of course the affirmative action case is a permission to the state of Michigan, not a prohibition. The problem is that the attack on affirmative action being mounted by the fundamentalists – and this to me is extremely sad – the attack has been mounted without a single word of reference to the history of the 14th Amendment. Justices Thomas and Scalia, our leading fundamentalists, have voted to strike down affirmative action programs without consulting the history at all. Justice Thomas refers to Frederick Douglass – that's fine – but Frederick Douglass did not speak for the founders of the 14th Amendment. There's a ton of history suggesting that they were fine with affirmative action programs. Maybe that reading of the history, which is the conventional one, is wrong, but our fundamentalists have said not a word about it.

Justice Scalia, with Justice Thomas's enthusiasm and the enthusiasm of many of those who want to move at least toward the Constitution of 1930 or 1920, has insisted that the Takings Clause forbids regulatory takings; that is, diminutions in the value of property that don't take away land literally. So a regulation that restricts the value of a property is a regulatory taking. Our fundamentalists in the academy, in the newspapers and on the bench are attacking regulatory takings, as is Judge Ginsburg. But the history suggests that regulatory takings were not constitutionally problematic. That's the conventional view among historians. So if you're a fundamentalist, you ought to be saying that the Court should permit regulatory takings.

Our leading historically minded justices – Thomas, our unambivalent fundamentalist; Scalia, our ambivalent fundamentalist – often haven't investigated history at all. In an astounding opinion by Justice Scalia, the Supreme Court ruled that Congress has no power – Congress has no power to grant standing to citizens to sue the

government when the government hasn't enforced or has violated environmental law. The grant of standing to citizens, Justice Scalia said for the Court, violates the case-or-controversy requirement of Article III. Guess how many paragraphs of that opinion dealt with the history behind the case-or-controversy provision? If you're thinking zero, you've got it right. There isn't a word about history. In the invalidation of the citizens' suit under the Endangered Species Act – an invalidation, by the way, which is much more dramatic than it seems because it cuts across a dozen or more environmental statutes that give citizen suits – they're unconstitutional under this made up so-called fundamentalism.

Okay, it may be that fundamentalists haven't been faithful to their own creed, but maybe that's an attack on their inconsistency rather than on their method. But let me just say a few things about their method. If fundamentalism were treated seriously, there would be no right to privacy. Privacy doctrine has dubious constitutional roots but to throw it out immediately, as Justice Scalia suggested he would in the Lawrence case, sounds a little like the French Revolution. It rejects the accretion of law that's occurred for 40-plus years now.

It would just have to be the case that the federal government would be free to discriminate on the basis of race and sex on whatever ground it chooses because the Equal Protection Clause doesn't apply to the federal government. It would have to be the case, according to the leading practitioners of fundamentalism, that the Federal Trade Commission, the Securities and Exchange Commission, and the Federal Communications Commission would be unconstitutional as independent agencies. Fundamentalists tend to believe you can't create independent agencies. It's also the case that the Supreme Court would engage in an attack on exercise of the federal power under the Commerce Clause that would make *Roe v. Wade* look like baby stuff, child's play.

Judge Posner, a Reagan appointee and a pretty consistent conservative, wrote a little essay during the Bork hearings called "Bork and Beethoven" in which Judge Posner noticed that an issue of Commentary magazine had applauded Judge Bork and his fundamentalism at the same time that it had a review of original performance – the original performance movement, which tries to play music in the original instruments. And the Commentary author said it sounded horrible – (laughter) – and that we do much better to use modern instruments. Judge Posner said, there's an inconsistency here in the approval of the backward-looking fundamentalism in one context and not in the other. What Judge Posner was getting at is if one system of interpretation produces a preposterous or ugly system of law, that surely counts against it. Judge Posner asked, if it sounds terrible, why should the American people listen?

I think it's a good question. The fundamentalists point in two – well, they have two very quite legitimate concerns. One has to do with democratic self-government; the other has to do with disciplining judges through rule-of-law constraints. But what our traditions in their best form suggest is that it's possible to address those concerns to protect democratic self-government and to discipline judges without going along a path of restoration.

Thanks.

MR. LAZARUS: Thanks very much to all of you, and we'll now have a period of time when you all can respond to each other's points. I would like, however, to exercise my prerogative as moderator, in a perhaps immoderate way, just to throw out one issue which I'd like to see you all address in one way or another, and it's this: Michael spun the Supreme Court's federalism decisions in the late '90s and the early part of the century in a very diminutive way, and he said that the Court has virtually abandoned its federalism jurisprudence, and in any event, there's nothing in the federalism decisions that could possibility portend the restoration of a Constitution in Exile, as that is described in Jeff's article and in Cass's writings and others.

But of course it's possible to spin those decisions differently, I think, and I wonder if you all might address and explain to the people here what it is in the federalism decisions; in the non-delegation doctrine that the D.C. Circuit exhumed, although it was slapped down by the Supreme Court; in the just compensation decisions over the last 20 years, that make some of us think that with some new judicial appointments, who had real sympathy for the Constitution-in-Exile set of ideas, the law could go in a very different direction, and I just would like to see some of us – all three of you perhaps address that.

And with that, the floor is open. Jeff, do you want to say something?

MR. ROSEN: I thought Mike's description really wasn't so bad actually. The idea that – (laughter) –

MR. LAZARUS: Well, you weren't supposed to say –

MR. ROSEN: No, I think it's actually a fair-minded challenge to those of us, and I include myself, since I've been a culprit here, who have been becoming hysterical at the Rehnquist court's federalism activism. Mark Tushnet says, "Defenders of real revolutions would be amused by the Rehnquist court's federalism jurisprudence, which has delivered little of what its most ardent defenders hope." And as one of the most ardent defenders, Mike's disappointment is palpable.

Now, I don't regret everything I've written about it because, as Cass says, this court has been striking down federal laws at a higher annual rate than any other in history, and it's also a little ironic, shall we say, that the most ardent defenders of majoritarianism and restraint proved in the federalism arena to abandon those principles. But that inconsistency, that hypocrisy aside, Mike is essentially correct that the Rehnquist court has been applying the New Deal model rather than challenging it at its core, and that reminds us, as we look ahead to what I believe we're talking about today are more serious challenges to the New Deal project, that it might be best to be a little bit less hysterical about what's already occurred.

But I have to say that although I thought Mike's description was fair about the Supreme Court's jurisprudence, that in no way reassured me about the radicalism of his own project, because, after all, he thinks many of those cases came out wrong. He is disappointed by the Court's moderation in those cases, and he said, candidly, I don't think we should build on that foundation; I think we can do better. And as to the Master Settlement Agreement he said, I'd just mow that down if I had my druthers. And as he told me in the piece, we want to withdraw support for the entire intellectual edifice of the New Deal. I'd just retire and play golf if I could do that.

Now that you've met Mike, you can see that he's witty and charming and delightful. You can see why I've enjoyed our conversations so much over the years and why I like him so much, but this is not a modest project, and I'm not reassured by Mike's reassurance that actually he's less interested in resurrecting substantive due process and striking down state laws than he is in applying a rather radical and robust vision of the Compact Clause that the Supreme Court has not yet embraced in ways that could just strike a stake into the heart of most of what Eliot Spitzer does and much of progressive regulation.

Mike's not shying away from the implications of his views. I don't think that he did in his speech. But many acolytes of the movement do. I was disappointed and a little surprised to see Randy Barnett, whose equally radical book "Restoring the Lost Constitution" embraces a vision of the "sweeping clause," as he calls it, the necessary and proper clause, so narrow and rigorous that it would resurrect not only a Madisonian understanding and reject the settlement of McCullough and Maryland, but would require federal courts, on a case-by-case basis, to ask whether federal laws were necessary, proportionate, appropriate, and reasonable. This would be federal Lochnerism on steroids. But Barnett purported to be shocked – shocked – when I just quoted from the end of his book, saying that this would mean the end of possessory crimes for marijuana and pornography. I'm just an academic, he said. Actually, now he's just a blogger. (Laughter.) But he said, you know, I meant nothing of the kind.

Well, this isn't really very amusing. I mean, his ideas are serious and they clearly have consequences, and the consequences are obviously radical. So I think Mike is right to remind us that the Supreme Court hasn't delivered what he hopes, and also to distinguish his views from Barnett's, which can be distinguished from the Institute for Justice, absolutely. There are differences among the leading figures within the movement – and differences among the leading judges, which are also important. But to pretend that we're not talking about a serious challenge to the post-New Deal understanding, which would wreak a serious change in our jurisprudence, doesn't seem to me convincing, and that's what I was trying to argue in the piece.

MR. LAZARUS: Who else? Anyone. Michael, go ahead.

MR. GREVE: I don't want to go back on those implications at all. I do have a problem with Eliot Spitzer and I think I can articulate it. I think one point of difference which doesn't quite come out with sufficient force in Jeff's piece (and I don't blame him

for it but) is coming out now and I'm just reemphasizing something that's been said. I really meant it when I said, look, I am not really obsessing over rights, and least of all about substantive due process. That is a real difference not only between me and perfectionism; it's also a difference between myself and Randy Barnett, and to a large extent Richard Epstein. I agree with Richard on a whole lot; I love him dearly, but we do start at different ends. I really want to start with the structure because I think rights theory is not remotely as robust as many people on the libertarian right and on the libertarian left have made it out to be.

So, just one additional word about what that means in practice and how this plays itself out. I think the takings cases that Si alluded to tell the same story, by and large, that the federalism cases tell; and that is Justice Scalia made significant progress on his formalist project, writing in *Nolan* up to *Lucas*. Since then, I think the consensus – I have to admit, I don't follow that literature very closely, for reasons just suggested –but I think the consensus is that there has been significant backpedaling from that program in subsequent cases; that Lucas, at least with respect to its rationale, has been overruled sub silentio, as some people have put it; and that the upcoming cases, or rather the pending cases, will further cut in that direction. I'm talking about the now-pending cases which turn on the public-use justification. I'm not sorry about it at all because I don't really think there is a public-use restriction, at least not one that I would entrust to the federal judiciary. That is a real, real difference between us.

Now, does that mean I want to make do without a takings clause, without property rights and compensation? No, I don't; I just think it's a valuation problem. So long as the government pays for a suitably defined set of takings, and we can discuss what that actually means, we're fine; but this is really my point there will be plenty of stuff we would have to disagree about, including Eliot Spitzer, but I again want to emphasize, mine is a somewhat different program.

MR. SUNSTEIN: I think Mike is right on the federalism cases, so that's important. So if the question is whether the Rehnquist court is embodying the Constitution in Exile, the answer is no. But who would have thought that it were? No one argues that. The Rehnquist court, if that's what we're going to talk about for a bit, it's extremely interesting. Can I give you just a little bit of data? A tiny – a little bit of data that I think bears on this? And it's that Justice Rehnquist – I'll call him Justice Rehnquist because this picks up on his votes before he was chief justice – the recent study about his votes in First Amendment cases, and he is – you know, compared to the other people on the Court, he's off the charts against First Amendment claims. So other justices are something like roughly six times more likely to vote in favor of a First Amendment claimant that Rehnquist is. Okay, fine, you might think he's just maybe a bipartisan restraint guy with respect to the First Amendment, but there are three areas in which is he very significantly more pro-First Amendment claimant than the other people on the Court in those cases. Can you guess what they are? Commercial advertising, number one – much more likely to hold for the plaintiff; campaign finance, number two; speech by a religious organization, number three.

Now, this pattern of results by someone who sometimes speaks in fundamentalist terms, has been a sharp critic of the New Deal decisions, and sometimes speaks in terms of restraint, this is very puzzling. I think this gives a clue to what's going on with the Rehnquist court. In 1980, 25 years ago, there were real liberals on that court. I don't agree with them, as you may notice. I don't like the path marked by Marshall and Brennan and Blackman – I think it's wrong – but they were there. At that point, let's say 1979 or so, the Scalia-Thomas view was outlandish, bizarre stuff in terms of the legal culture, and I think that's too harsh. That's not the right way to think about it. But now it's quite mainstream. Stevens was a kind of moderate conservative in 1980. He's definitely marked off from the Marshall-Brennan-Blackman group, and now I guess he's a liberal. Yes? Is that what they call him now – maybe the most liberal possibly on the Court? And Stevens hasn't gotten liberal in his old age; he's basically a Rockefeller Republican type or a Nixon Republican type, or a Ford Republican type.

In sum, the Court's center of gravity has shifted. So what you see on the First Amendment cases you can see in all the areas. Affirmative action has succeeded a little bit, but the real story of affirmative action is strict scrutiny is there now and it's hammered, whether it comes from the state government or federal government, most of the time. That's an exercise I think in indefensible judicial activism. And I should say I don't like many affirmative action programs most of the time myself as a matter of policy. It's the aggressiveness of the Court that's troubling.

With respect to federalism cases, the Supreme Court struck down the Religious Freedom Restoration Act. I think that's a terrible decision. Section V of the 14th Amendment is easily invoked, as Judge McConnell, incidentally, has urged in defense of the Religious Freedom Restoration Act. The Supreme Court stuck down the Violence Against Women Act, insofar as it provided a civil action. I think that's an exercise in judicial hubris, even though as matter of policy I tend to agree with much of what Mike Greve said about the disadvantages of monopoly-type matters. The invalidation of affirmative action programs at the national level isn't trivial. In fact, we can't go against states under the Americans with Disabilities Act and the Age Discrimination Act. That's not nothing.

So we don't have the Constitution in Exile, but our Constitution is fundamentally different now from what it was in 1980, and on everything important it's a little closer to the Republican Party platform in 1980.

MR. LAZARUS: Yes please?

MR. GREVE: Just very quickly, in the same vein. Last year, I was at some panel at the American Political Science Association. The political scientists have these complicated attitudinal models of judicial behavior, and they're a bit reductionist; often they're very reductionist. But what the attitudinalists on the panel I was on said – they all said, thank God for the Rehnquist Court because, to the extent that there was ever any doubt about the correctness of our models, they've been resolved. I think this is actually quite persuasive, and it leads me to a genuine question to Cass and maybe to Jeff.

Look, none of these decisions that, as you call it, "struck down" congressional enactments, could have happened without the votes, not of the fundamentalists – mind, you needed those votes too, but you needed the minimalists as well, right, O'Connor and Kennedy. So to what extent can one actually limit the sort of opportunism that you sense there and which we are not, as a general proposition, putting aside this or that case, disputing? I don't think that's endemic just to fundamentalism. It's attributable to the minimalists as well. If you track – I don't mean to be disrespectful of Justice O'Connor, but if you track decisions on identical legal subjects as to whether they involve sex discrimination or something else, I mean, boom, there's your explanation. There's one decision that doesn't fit the pattern; that's *United States v. Morrison* itself. I don't know why she voted the way she did and why she didn't write a concurrence in that case. But everything else fits right like a T.

So the short of that long-winded speech is I think it's a much more pervasive phenomenon than just opportunistic fundamentalism.

MR. ROSEN: Just one small point here. There is a good new book by Thomas Keck called, as it happens, "The Most Activist Supreme Court in History." And he tallies up the activism of the various justices using Cass's neutral definition: you're activist if you strike down federal or state laws. So who is the most restrained justice on the Rehnquist court? Just a guess. You know, so don't all talk at once. (Laughter.) It's our friend – Justice Ginsburg is the most restrained justice. Who are tied for second most restrained justices? Breyer and Rehnquist. Rehnquist is actually a pretty consistent majoritarian despite Cass's helpful wrinkle in the First Amendment arena. So who is the most activist judge on the Rehnquist court? Anthony Kennedy, surpassed only by the second most activist, Sandra Day O'Connor, then Scalia and Thomas and then Stevens and Souter.

So this is why – this is another debate, not the time for this panel, but I do question Cass's lionization of O'Connor as a minimalist in this sense. I mean, she's an activist is what she is, and the idea that it's just one case at a time is not convincing. In *Bush v. Gore*, for me that was really the logical combination of the ludicrous expansion of intervention in the political process that began with Shaw and Reno, which O'Connor precipitated throughout the 1980s. Another day we can talk about the usefulness of the minimalism – (audio break, tape change) – But the older generation of Republican conservatives represented by Rehnquist, a true majoritarian, who was shaped by opposition to the New Deal, may have more in common with Breyer and Ginsburg than some younger conservatives. And that is another reason why I think that ACS can be helpful in distinguishing among nominees.

I don't know if this is the time to introduce this exhortation but I hope that as we prepare to face a Supreme Court battle, the ACS and everyone who is thinking about this can make sensible distinctions between and among nominees. You don't want to fall into the trap of filibustering anyone who is nominated. That might be bad for Democrats, bad for restraint, and bad for liberals. Why not make distinctions?

Janice Rogers Brown, the most visible and aggressive advocate of the Constitution in Exile deserves a filibuster. But John Roberts? That is a harder case: I don't think a filibuster would be appropriate. So you can choose which categories you like but if you believe, as Cass and I do, that form of bipartisan restraint is more appealing, some of these judges are better than others.

MR. LAZARUS: I'm going to – I was just provoked by something that you just said, Jeff. I would like to ask another question of you all. The reference to Janice Rogers Brown is very interesting. She has called the decisions of 1937 that upheld the new Social Security, the National Liberalizations Act, minimum wage regulation and so forth, as a catastrophe. So there are no question that there are some people out there who are interested in using judicial power to repeal the New Deal with they can. And it was interesting that she was sent to the D.C. Circuit, not the Ninth Circuit by the White House.

I would like all of you to comment on the possibilities for having a real cockpit for Constitution-in-Exile thinking on the D.C. Circuit where it could have a real impact given the current members and the nominees that have already been named and possible other ones.

MR. SUNSTEIN: Well, I can say a little bit about that because we have some data on this. You know, the D.C. Circuit reviews administrative action and it turns out that there is – when industry is challenging agency action, if you have an all Republican panel, you are in tough shape. So there are two things to note about this. One is there is a very large difference between how Republican appointees and Democrat appointees vote on the D.C. circuit in environmental cases, and that is just an example; there are other areas that we would expect a similar pattern.

But the more interesting thing is if three Republican appointees get together, then the likelihood that any one of them will issue a stereotypically conservative vote leaps. So we see the phenomenon where there is ideological voting but there are also significant panel effects. So a Democratic judge sitting with two Republican judges tends to show pretty conservative voting patterns. So an isolated Democrat or an isolated Republican switches their ideological tendency, but when they are all three together – Republicans that is – they get very conservative. It's symmetrically true – Democrats together get very liberal, which is a reason to want diversity – ideological diversity so you don't get like-minded people going to extremes.

The link here with the Constitution in Exile – in a way we are talking about something which we see every day on a less highly visible level, which is judicial review of statutory or administrative questions where a pro-Constitution-in-Exile orientation will help determine what you do. So I don't want to name names, but there are some judges on the D.C. Circuit who are just wonderful to get if you want to regulation struck down. There are admirable and excellent judges as you know also, but there is an ideological

tendency there. If on the D.C. Circuit there is someone who thinks the whole thing is unconstitutional, at least at first glance, that is peculiar.

(Laughter.)

MR. LAZARUS: Okay, well, at this point, I would like to throw the floor open to questions from the audience. And do we have a mike to pass around or not? We do? Okay, so hold up your hand and the mike will come to you. And could you just tell us who you are.

MS. WARNER: (Cross talk) – from the Center for Constitutional Litigation. This is a comment for the three panelists on a questioning note.... All of you were introduced as particularly good at translating this dialogue for the populous, for the public. (Laughter.) There is a panel effect. (Laughter.) But I think there are a couple of things that are important as you write for the public to be clear about because – let me give two – it's easier to do by example.

I think if you asked the public these days – if you labeled a judge as activist or counter-majoritarian, that is a bad thing. I think you guys are among the people who need to be explaining that that is not a bad thing necessarily. We're suffering I think from an idea that if you have 51 percent of anything it's fine to do whatever you want, and I don't think that has anything to do with what the American experiment in Democracy is about, and clearly not with certain kinds of judging; certain kinds of judging are supposed to be counter-majority.

MR. LAZARUS: Do you have a question?

MS. WARNER: No, just a comment, and the second piece of the comment is on the same line – if you ask people that judges – whether judges should make all, I think people in general would say no.

With regard to federal judges, that is a question that can keep all of you publishing for decades. With regard to state judges, I think the custodians of the common law – I think it's absolutely wrong. And I think as you talk about this debate and bring it to the public, those are very important distinctions to make in your writing.

MR. LAZARUS: Okay, we really do want to have questions. Yes, Jeff. Just a second. We really want to have questions so at least try to phrase your pronouncement -- (laughter) – as a question. Yes, Jeff, go ahead.

MR. ROSEN: It's a good question and it's well worth debate. But to put it in the question form, why don't you guys make it clearer that we need judges to save the country from itself? (Laughter.) And I don't know – Cass can speak for himself and Mike can – I think you may have the wrong guys to make that case. I mean, my strong view -- and I'll make a plug for a new book on this topic this year – is that democratic constitutionalism really is the protection for liberties and by embracing constitutional

views that a majority of the country embraces, the Court can best serve constitutional values. By contrast, when it tries to impose the constitutional view that is intensely contested by a majority of the country, the Court often provokes backlashes that harm the causes it attempts to help.

And just when you run down quickly the main causes that many of the people in this room care about, which we have been discussing – affirmative action; abortion, when we're talking about restrictions on early term abortion; free speech; even prayer in schools in a ecumenical sense; and gay rights, but not gay marriage – you will find that moderate liberals have won the culture wars and no longer need the courts to save you from the indignities of democratic politics.

So this is a big debate but it's one that I have strong view about; I tried to urge it in my initial remarks. I hope that you don't approach these forthcoming judicial fights as ones in which vulnerable minorities have to be saved from the indignities of majoritarian politics because I don't think that's accurate. It's the social conservatives really who – representing from 20 to 30 percent of the country -- have to take positions in Congress that are rejected by 70 percent of Americans in the Schiavo case and in the judicial independence cases. They are the minorities who need the courts; you guys can fend for yourself perfectly well in the democratic process.

MR. LAZARUS: Okay, over there. The mike is right behind you.

Q: Yes, I'm Ed Spanos (ph). I write for Executive Intelligence Review. I'm a bit baffled by what – which constitution the proponents of the Constitution in Exile movement you're talking about because the constitution that was supposedly exiled in 1937 – that of 1932 or 1905, or 1923, is not to my mind the constitution of 1787; it's not the constitution of John Marshall, it's not the constitution of 1819.

There is a document that much more closely resembles I believe what they are talking about, which is the Confederate Constitution of 1861 because that – well, people should read it; it's very instructive because 95 percent of it is identical to our federal Constitution but it took out certain crucial things which related to federal powers over the economy in particular. It took out the General Welfare Clause in the preamble and in Article 1, Section 8, it took out the power to use tariffs to promote industry; it took out any ability of the federal government to promote internal improvements or what we would call infrastructure. Isn't that a lot closer – I mean, putting slavery aside for the matter of debate – isn't that a lot closer in terms of economic powers to what you all are talking about than the federal Constitution.

MR. GREVE: I don't know who you all are. I'll try to make my views clear. My own views on the commerce power are a whole lot more Hamiltonian than anybody might suspect yet. So, for example, I believe that Congress we have two problems with federalism at least in my view. One is congressional micromanagement in things that really don't belong there. The other one is congressional abdication in the face of

outrageous state aggression and over-regulation and overreach. Those are two comparable problems.

There are reasons why we got into the situation we are now in, but I believe that on the whole, congressional power to prevent state interferences with interstate commerce is a great achievement under the Constitution; I wouldn't trade it for anything.

MR. LAZARUS: In the front row.

Q: I'm Bill Doug Rivere (ph). I'm a lawyer in Sperryville, Virginia. I haven't read Judge Ginsburg's article. I haven't read Mr. Rosen's article and I haven't read Michael Greve's article. I'm going to try to read them all. So I'm a little bewildered as to how far this fundamentalist or Constitution-in-Exile-ist doctrine goes.

So let me ask a question. Where do you come – where did the fundamentalists or Constitutionalists in Exile come out on *Euclid v. Ambler* and *Shelly v. Kramer*, which were two decisions that directly impinged on individual property rights?

MR. GREVE: I suppose that is directed at me. Look, I tried to explain why my vision of this does not start with rights but starts with a general structure. If you – if the question is what do people who start at the other end, that is with the property rights, think is wrong with *Euclid v. Ambler*? Or is it wrong? They say, yeah. What happened to Justice Sutherland that day is their question.

MR. SUNSTEIN: I can say a little bit about that. It might put a more general perspective. *Shelley v. Kramer* is the case that strikes down racially restrictive covenants.... A view among many constitutional fundamentalists, that is those who believe the Constitution should be understood to mean what it originally mean – and whatever we think about the Constitution in Exile, maybe remember that idea: the Constitution should be understood to mean what it originally meant; that is the official view that Justice Thomas holds, Justice Scalia, Judge Ginsburg.

Many of these people think *Shelly v. Kramer* was wrong because the Constitution as originally understood did not in their view forbid racially restrictive covenants; that that is not what the Equal Protection Clause does. And that is a usual view. Whether it's right or it's wrong we minimalists think it's been on the books a long time, it's been built on, built from, and that it's kind of radical to fight it.

Euclid is the case that upholds a zoning regulation. A lot of the property-rights crowd hates that, and Justice Thomas and Justice Scalia have shown some interest in the property right idea; not as much as maybe some of other people the president might like but some interest in it.

Here is what gets me really frustrated I confess, which is that regulation that diminishes the value of property – the best historical evidence suggests that it is constitutionally fine. If we are fundamentalists who believe that we should follow the

original understanding, then so-called regulatory takings, of which zoning laws can be an example, are fine. No fundamentalist that I know is pushing that, which suggests we're talking – for many people, now, this is troublesome – of a partisan movement masquerading as law.

Now, Professor Epstein, my colleague – I don't think he's a fundamentalist in the sense that he really cares deeply about the parsing the history, and this isn't a knock on him; that is just not his theory of how you do constitutional law. So he's allowed to be a property rights fan. But Justice Scalia and Justice Thomas should be nervous about it.

So the answer to the question has two parts. Fundamentalists who are true to their own creed should say zoning restrictions that diminish the value of property are fine – environmental regulations -- fine unless it invades property, literally. But they are not saying that. What they are actually saying is – and Judge Ginsburg says this in his article – that the Court blinked away individual rights because it forgot about the Takings Clause. So some of them are on a program to revive the Takings Clause, which is – if you're with me; I'm using a lot of these terms – it's perfectionism in fundamentalist guise; that is it's an effort to make the Constitution the best it can be by their lights, by people who are pretending to care about the original understanding.

MR. LAZARUS: Michael has it.

MR. GREVE: This is not so much by way of comment but by way of saying something that I feel now I should have said earlier. Look, there is really no disagreement among scholars, so far as I can tell, that the Constitution did – at least as read by the Supreme Court and as understood by the Supreme Court – did assume a radically new meaning in 1937 or thereabouts. There are gradations of those views. Bruce Ackerman calls it a constitutional moment – an amendment, albeit outside the formal amendment processes. Cass Sunstein disagrees with that; I have some reservations about it; I don't know what Jeff thinks about it.

But the point is that this is not the disagreement among scholars as I see it. I think the disagreement is really: what do you do about it? And there, I don't think the term, fundamentalism, or originalism, or whatever you want to call it tells you very much. This is now, as critical of the people who adhere to those views as it is of their critics: What you have to have as an integral element of these theories is not just the substantive constitutional theory; you have to have a theory of the court and of democracy. You have to have a theory of precedent. And after you are through with all of that, you have to decide, okay, what is the normative force of the original commitments in the first place. That all turns out to be very, very messy. But it is not a debate about, did the Constitution change in 1937 or thereabouts, yes or no, because the answer is yes.

MR. ROSEN: Just on that point, Mike, because that hopefully focuses the difference between the exile crowd and traditional conservatives -- you did need a theory of the court in democracy and the traditional theory embraced by liberal and conservative acolytes of judicial restraint was deference in the face of contestability. Whether or not it

was bipartisan restraint to the degree that Cass describes, the standard story about the meaning of the New Deal was that the prohibition on monopolies, for example, could plausibly be enforced by the courts throughout the progressive era, starting with the 14th Amendment.

But once the Depression dislodged consensus about whether or not economic intervention actually was a form of special interest legislation or was legislation on the public interest, courts should get out of the business of trying to enforce principles that were actively and intensely contested by the majority of the country.

And that standard story of the New Deal was appealing to acolytes of judicial restraint because they understood that the courts – with apologies to the gentleman earlier who suggested otherwise – should generally follow popular understandings of the Constitution and should only invalidate laws when the arguments for doing so are so persuasive that people of different sensibilities can plausibly accept them.

So that is not your vision and it's not a non-respectable vision; it's a respectable vision and it has a long history, but it's a very different vision, a much more activist vision, to use the neutral definition, than one that conservatives have traditionally embraced and that is why I wrote this article.

MR. LAZARUS: Okay, I saw another hand there.

Q: Thank you. Jim Pyle with Powers, Pyle, Sutter, and Verville. I guess the question is principally for Professor Sunstein but what are the fundamentalists such as Scalia and Thomas, and perhaps you think of Madison's, theory that there was no original intent because there was no report issued that was adopted by the majority of the framers and the importance of the Court really grows as the government increasingly is in the hands of various majorities because that is what gives the government stability over time?

The second question is also what do you think of Justice Jackson's view in *Brown* when he indicated that his experience on the Nuremberg Court led him to believe that knocking down discrimination was probably important even if it had no practical effect; it could not be the official policy of the government?

MR. SUNSTEIN: Those are great questions so thanks. The first question is what about Scalia and Thomas and original intent. Scalia, I am sure, and Thomas, I think, don't like the word intent because intent is like you're in a therapist's office and trying to figure out what is inside there. And so the word they like is understanding, and by original understanding, they mean what did the people understand the term to mean generally. And if the sentences you just heard were comprehensible then their project is coherent – that is, you weren't seeing what did I intend; you were seeing what are the understanding of the words. So that is what they want.

I think it's a coherent idea. The attack which you're pointing in the direction of is maybe the original understanding – and I don't know that this was Madison's view but

some people think it was; Madison spoke both ways on this – is that posterity would be governed by the words but not by the original understanding of the words. So one view is that fundamentalism as I'm calling it; originalism as Scalia calls it – it ends up swallowing itself because the original understanding was that the original understanding wouldn't be binding. So you can't be an originalist and be an originalist. (Laughter.)

There is big historical debate about that and it's not clear the critics of originalists win that one. In the end it has to be a historical question, and I'll just tell you my view having looked at the history, which is that there is no clear winner on it. So the perfectionists, let's call them, or the minimalists can't make a quick kill against the originalists on that ground exactly.

On Nuremberg and Justice Jackson – that is a great question also. I think Brown was right and one reason it was right is that there had been a series of cases leading up to Brown and by the time of 1954, it would have been extremely difficult for the Supreme Court to write an opinion that said separate but equal is okay given the bunch of cases that had been produced before. Nonetheless, the Court was undoubtedly influenced by the fact that racial separation was a regional phenomenon that was an international embarrassment, as the Department of Justice argued.

I would kind of be nervous about Jackson's arguments about Nuremberg for the same reason that I'm nervous about the Supreme Court's general references to international law as bearing on the meaning of our Constitution. So I would prefer to say that the set of factors that made Brown right includes the fact that the Department of Justice was urging the Supreme Court to get rid of this practice on the ground that it was both intolerably unjust and an international embarrassment, which was making winning the Cold War difficult. And so that maybe would weaken the Supreme Court's internal caution about intervening in the way it did in Brown.

So if Jackson can be understood as saying something along those lines, more power to him; he is my all time favorite Supreme Court justice, but on this I don't quite agree with him.

MR. LAZARUS: Michael.

MR. GREVE: Just very briefly, maybe this helps. Here is the reason why I'm dissatisfied, or the ways in which I'm dissatisfied, with both the New Deal and with some forms of modern originalism or fundamentalism, or whatever you want to call it. I believe that when you look at the constitutional structure itself, which is what I care about, it's impossible to say that "this is the original intent" on any given question that may come before a court. The fact that we discuss these questions around court decisions is a kind of lawyers' disease.

I mean, we're naturally inclined to think, well, there has to be a right or wrong answer. But the constitutional structure itself is much more indeterminate to my mind. Moreover, it is meant to be much, much more indeterminate. I can give you a very

nationalist reading, I can give you very "states-rights" reading. I'll tell you what all the constitutional provisions are supposed to do – what structures are supposed to do: it is to keep the equilibrium outcomes within certain bounds.

Now, does that mean that nothing is outside the bounds? No, it doesn't. No compact without congressional consent cannot mean, sign anything you want guys. So there are some outer boundaries that you face. Does it means that within these boundaries you can't have better or worse conceptions of what the structure ought to look like and how to operate? No; you can have better and worse conceptions. In some ways, the New Deal is an improvement over what went before; in some very important ways it was a step backwards – that is my opinion; that is the fruitful ground on which to argue to my mind.

MR. ROSEN: A very small point on this. The hardest part of the article was defining Constitution in Exile thinking in contra-distinction to originalism. So what we came up with was Justice Scalia calls himself an originalist. Many originalists believe in two things: judicial restraint and states' rights. By contrast many Constitution in Exile people don't believe in states rights or judicial restraint. But the whole thing breaks down when you realize that some Constitution in Exile people call themselves originalists, others call themselves textualists; textualism and originalism points in different directions; others are natural law theorists.

Frankly, at this stage in the debate, I have found, as I think Cass has, originalism unhelpful as a guide to actual decision-making. It's applied so inconsistently; it means so many different things in different context that that particular debate, which was so important during the 1980s and which may well be at the center of the next Supreme Court follies doesn't tell me much about what a particular judge thinks.

Cass's category is not bad: fundamentalism – you can distinguish a fundamentalist from a restraint person or a minimalist, even quibbling or debating who fits in each of those categories. But if fundamentalism, exile thinking is characterized by a lack of deference to federal and state laws, a determination to strike them down in the name of first principles and a lack of concern about institutional and prudential limitations on judicial power – at least I know who we're talking about there.

MR. LAZARUS: Well, I think – let me just ask one little question – do you any of you think that what Justice Scalia has referred to as faint-hearted originalism, which is what he professes, could more critically be viewed as selective originalism?

MR. ROSEN: Sure, but, you know, there is a very interesting passage in the new biography of Justice Thomas, written by Ken Foskett, where Thomas authorized other justices to talk to the author. And Scalia said, what's the big difference between me and Thomas? He doesn't believe in precedent at all and would overturn any decision he thinks is wrong; I wouldn't do that. That is a more meaningful distinction than the selective originalism that Thomas and Scalia practice on different occasions.

MR. LAZARUS: We've hit two o'clock, so I think that we should probably keep our promise to you all and adjourn. It's been a long time and I hope people have learned something.

(Applause.)

(END)