KEEPING FAITH WITH THE CONSTITUTION IN CHANGING TIMES

PANEL DISCUSSION:

"CONSTITUTIONAL FIDELITY OVER TIME."

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MR. ED RUBIN: Welcome back. This is our second panel and "Constitutional Fidelity Over Time," a continuation of this inquiry into the issues of originalism. We have three panelists, who speak in the order I introduce them: John McGinnis, is a professor of Law at Northwestern, Erwin Chemerinsky, a professor of Law at Duke, and Marty Lederman, who is a visiting professor at Georgetown School of Law.

And without further ado, let's begin. They'll each speak – give a presentation for about 15 minutes and then since we have a panel that will join issue with each other, we're going to give each panelist 5 minutes to respond and then we'll throw it open to comments from the audience.

John?

MR. JOHN MCGINNIS: Thanks so much for inviting me here, particularly welcome to students. When I was a student, I very much looked forward to conventions like this. Of course they were generally conventions run by what I guess I should call in this context the other society. (Laughter.) It was a great chance to get away from the details of cases and look at larger theories of law and their relation to issues of the time. I also have to ask your indulgence. I was fine when I came to Nashville, but yesterday I got a bit ill and so I'm going to stand up to keep myself awake and I may have to stop pretty frequently for some water, but I hope to get through my remarks.

I'm going to try today to offer a defensive originalism, which I've developed with my good friend Mike Rappaport. I actually believe we need a new defense because the previous ones haven't really been wholly satisfactory, and I guess this last point shows that I have at least one area of agreement with my fellow panelists. The argument, for instance, that a judge should be originalist simply because that is what the framers intended, is not only circular, but it fails to offer any suggestion that there are good consequences that attend originalism.

The argument that originalism advances democracy is at least undeveloped, really, as we've heard, as originalism sometimes requires judges to strike down a result of the democratic process with statutes, with executive branch actions, variants of the original understanding of a constitution. Finally, the argument that the originalism offers clear rules to constrain judges than other interpretative approaches – I think that has some truth to it. For instance, by forcing judges or really anyone to look at purposes not their own, I think that is a substantial break against the all too human failings of bias. Nevertheless, the benefits of judicial constraint seem to me limited, if judicial decisions, even though they are not discretionary, or less discretionary, still impose substantial harms.

Thus I believe that originalists must try to show the content and the rules of the original understanding commands are likely to be beneficial. The virtue of originalism is not only that it ties judges to rules, but that these rules are presumptively good ones. My argument can be briefly summarized. First, constitutional provisions that originate from a good constitution making process should take priority over ordinary legislation because such entrenchments operate to establish a government that preserves democratic decision-making, individual rights, and other goods. Second, appropriate supermajority rules tend to produce desirable entrenchments. Third, the Constitution and its amendments have been passed in the main under appropriate supermajority rules, unless the norms and the entrenchments of the Constitution tend to be desirable.

Now, there's one significant way in which the supermajority rules were not appropriate. Often the exclusion of African-Americans and women – these defects have been rightly removed from the Constitution. Finally, this idea of the desirability of the Constitution requires the judges interpret the document based only on its original meaning. It was the drafters and ratifiers use of that meaning in deciding whether to adopt the constitutional provisions. It's sure that the distinctive Constitution-making process explains both why the Constitution is desirable, and why that desirability depends on its being given its original meaning.

First, let me begin with the premise that I think is generally shared by those who value constitutionalism – I'm not going to spend time defending it, really. Entrenchment of norms that can't be repealed by ordinary legislation – and that's really what the Constitution is – offers great potential benefits. Such entrenched norms establish a framework for government and establish the ground rules against the predictable dangers of majoritarian and democracy of a given day.

Entrenchments have or last long into the future, and bad entrenchments are at least as harmful as desirable entrenchments may be good. Therefore, we have to focus on the entrenchment process. It's the supermajoritarian process like that for ratification of the Constitution and its amendments that make entrenchments likely to be beneficial. A majority rules thought generally to produce ordinary legislation that's desirable. Permitting a majority to entrench norms is problematic with majorities who have a tendency to pass undesirable entrenchments.

First, because entrenched norms cannot be easily eliminated, controversial entrenchments are particularly divisive. Majority is nevertheless may tend to pass such entrenchments even if they believe that they're going to be divisive because they think they're good. Moreover, even a majority recognizes that entrenchment should have consensus support to abide this and this, they may be reluctant to refrain from entrenching norms they think are good because they might fear that in the future a not so restrained majority will entrench its preferred norms despite the lack of consensus.

Majorities also tend to be partisan. This is all of a similar prisoners' dilemma. They may also tend to rush to entrench their positions, even if they think entrenchment unwise because they can't be certain that the other party will be similarly restrained.

Supermajority rules, however, address this problem, by permitting only norms with substantial consensus and generally some bipartisan support to be entrenched. A broad consensus for the Constitution creates legitimacy, allegiance, even affections, as students kind of regard it as their common bond. Such a constitution helps individuals to transcend our differences of ethnicity, geography and make them citizens of a single nation.

The long-term nature of entrenchments also is problematic, with legislative majorities will tend to enact undesirable entrenchments because of a heuristic problem. People, psychologists tell us, are too likely to think that the same trends are going to continue in the future in stock market, and housing market bubbles that go ever upward. While supermajority rules don't address these problems directly, it improves legislative decision making and compensate for this heuristic defect. Supermajority rules are strictly agenda proposals because heuristic proposals have a realistic chance of passing. Restrictive agenda encourages a richer stream of information about the proposals.

Also the difficulty of passing and repealing constitutional provisions helps create a veil of ignorance under which citizens evaluate them, and because they're less certain of how they're going to be affected, they and their children are going to be affected, they look at them less with a parochial interest and more in the public interest. For these reasons, strict supermajority rules are likely to overcome some problems that affect – afflict, I think, majoritarian entrenchment and tend to make constitutional provisions beneficial.

In my view this kind of consensus forcing event is not as good as some abstract sense. It creates very real world benefits, taking affect of the veil of ignorance on the issue of presidential power. Considering the extent of the president's power, some citizens will realize that sometimes they like the president and sometimes they'll think of the president like perhaps many in this room think of our current incumbent of the Oval Office. Therefore, no (partial?) authority based on public interest considerations, not partisan considerations.

Rather than view the document, in fact, as a product of a few great men, I see it largely as a result of this distinctive supermajoritarian process that enacted it. For instance, to obtain ratification in the necessary nine states, the nationalists had to concede a Bill of Rights will be enacted as one of the first actions of the new government. Thus the supermajoritarian process of the Constitution making is really in my view the Big Bang of our constitutional universe, really creating the provisions that are admired around the world.

The third step to my argument is that beneficial judicial review requires originalism because it was the original meaning that was crucial to obtaining the votes and consensus that makes constitutions desirable. It certainly wasn't the meaning of Ronald Dworkin, Richard Posner or even Richard Epstein. This understanding, of course, includes the accepted meanings of the words of the time in their clauses, but of

course it includes the context of the constitutional document as well. Originalists certainly considered the structure as bearing on the meaning of the individual clauses.

And finally it includes the interpretive rules of the time. The interpretive rules are important because certain provisions might have seemed ambiguous, but their ratifiers wouldn't believe their future application would be based on interpretative rules with which they are familiar. Following the original meaning of their provisions as construed to the framers' own interpretive rules thus remains faithful to the expectation and the likely effects of the provision.

In contrast, finding a meaning with substance, or derivation, according to different interpretive rules, was not endorsed by the framers, severs the Constitution from the process that gives it its likely beneficence. If interpretive rules at the time the framers were important as I believe they are, I think, this has implications for originalism which I only briefly touch on, one important consequence of this thing – inquiry may be greater ease in reconciling originalism with precedent. Certainly in my view, the framers had a view of liquidating the meaning of a clause, through repeated construction of different branches of government and maybe I think some other ideas of common law precedent. Thus, I think I disagree with originalists who think that originalism is a (law?) for visiting long settled questions like the federal government's power over economic matters.

A comparison of the consensus – this is the heart of Constitution-making – I think shows what's wrong with theories of judicial interpretation that permit more discretions for judges and to really update the Constitution in light of new social meanings or values. First, only a very small number of justices generate norms through their decisions, but constitutional law-making requires the participation of many. Second, the Supreme Court (unintelligible) for a very narrow class of people, a group of elites. And finally, constitutional law-making a supermajoritarian – the Supreme Court is not supermajoritarian. It acts by majority vote.

In short, these several reasons suggest that doctrines fabricated by Supreme Court justices unlikely to have the beneficence of the Constitution-making process. In my view, the most serious attack of the beneficence of that process was the exclusion of African-Americans and women, the consensus that fabricated many of these provisions. The desirability supermajority rules require that all interests be reflected in the electorate. From this perspective, these defects have been largely corrected: the 13th Amendment prohibits slavery, the 14th Amendment forestalls racial discrimination, the 15th Amendment protects the right to vote, the 19th Amendment now grants the right to women to vote, and some other provisions as well.

In short, the Constitution now grants all people the freedom of white male property owners as of 1789. Of course, it's true that the Constitution does not contain some items that some excluded groups might have wanted, like a mandate for racial preferences, but given the disagreement about such policies, even today, it's implausible to believe the Constitution would have included them if all groups have been represented.

Thus the defects in the original process don't seem to me to undermine or give justification for ignoring the Constitution as amended.

One other kind of attack on originalism I think particularly resonates with the topic of this panel, the question of fidelity over time. One concerned with contemporary fidelity might say, "Well, of course, the Constitution's consensus nature made the provisions all good, but it made them good for that time." They were not, but now they are very old, and they no longer produce the benefits in a world that has changed. This kind of attack may be implicit in translation theories of the Constitution that try to translate the Constitution and update it in light of changing circumstances. This objection, I think, might have more force if the Constitution were primarily the frame or code of rules of primary conduct, but of course, the Constitution does not.

Those who framed the original Constitution never forgot that it was a Constitution they were enacting. Thus, they already took account on the fact of social change, the Constitution should only contain a framework for government that would respond to the enduring realities of human nature and the dangers of the majoritarian process, the fact that future change was already taken into account in the making of the Constitution.

The best proof of the framers' perspective lies in the Constitution itself. The Constitution permits substantial avenues to address social states. The states themselves have few restrictions on their power acts and congressional action. Their experiments to address changes can be readily adopted by other states. Congress can legislate also under the Commerce Clause and Necessary and Proper Clause, both which grants, it seems to me, Congress a very wide swap of power, although not the unlimited power that some modern case law might suggest.

Finally, the Constitution creates an amendment process by which to replace provisions that become outmoded. This, of course, not an accident, that a legal document produced by a good process allows many ways to address avenues of social change. That's some evidence of its high quality. In the face of this structure, why should one be at all confident that a climate for judges to translate the framers' values to our conditions, or to create some kind of living constitution is not instead an attempt by special interest numerical minorities or some transient majority to change the Constitution to reflect their peculiar values? Indeed, even if the Supreme Court is sincerely trying to update the Constitution, as a centralized elite institution, it lacks the ability, the structure – it seems to me – to differentiate responses to social changes from those that are simply attempting to undermine the consensus core values of the Constitution.

Debates about originalism, it seemed to me, have often resembled skirmishes between two armies that never really confront one another. Originalists talk about the rule of law and democracy, and non-originalists talk about indeterminacy, social change and the need to look at consequences of individual cases. I've tried to map out, I think, a new terrain of debate, this theory recast the old arguments for originalism sounding in the rule of law and democracy into a defense of originalism's consequences.

Originalism provides a theory of constitutional interpretation that's good consequences and yet does not force judges to assess consequences on a case by case basis – a job for which I think they're institutionally not qualified. To meet the theory on the ground that I've outlined, non-originalists must show their theories both generate better consequences and it seems to me provide some metric for assessing these consequences, and not simply some metric that depends on a narrow or particular substantive theory of the good. People disagree about that. That's why we need a framework of the Constitution, to create a framework to resolve such differences. Thus, until this challenge is met, I think originalists can defend their fidelity to the meaning of a Constitution long past as the best protection for those even still living.

Thanks very much.

(Applause.)

MR. RUBIN: Thank you, John. Erwin?

MR. ERWIN CHEMERINSKY: It's really an honor and a pleasure to be here as part of this terrific conference. I'm very grateful to Rebecca for facilitating my being here. At the very start this morning, Lisa Brown said this is part of an overall effort to develop constitutional meanings for the 21st century. In no area of human activity would we look to 18th century practices and understandings trying to decide how we should behave in the 21st century. That's no different for the Constitution.

Throughout American history, every justice who has served would say that they were paying fidelity to the Constitution in the decision making. And throughout American history, in interpreting the Constitution, the justices have looked to the text, the Constitution's structure, its goals, judicial precedent, historical practices and traditions, and contemporary needs and values. Very few justices in American history have ever described themselves as originalists, and even they are only occasionally originalists. A few examples can illustrate this. Think of the 11th Amendment: Its text says that the judicial power in the United States shouldn't extend hearing suits against state governments, by citizens of other states, or citizens of foreign countries. It's not possible to find the sovereign immunity decisions in the last decade in the original meanings of that 11th Amendment. Well, take the 10th Amendment: It says all powers not granted to the United States, or is prohibited state – all powers not granted or prohibited in the states are reserved to the states and to the people respectively. No originalist could find the anti-commandeering principles of case like *New York vs. United States*, or *Printz vs. United States*, and the original meaning of the 10th Amendment.

We've more powerfully – think of affirmative action. Many constitutional historians have shown that the original meaning of the Equal Protection Clause was very much to allow affirmative action. Where in the discussions by Justice Scalia and Thomas, the foremost originals in the court, is there any discussion of this original understanding of equal protection? Even those justices who professed to be originalists, are originalists to large extent when it serves the results they want come to.

And throughout American history, the Supreme Court in important majority opinions, has expressly rejected the notion of originalism. I think John Marshall's language in *McCulloch vs. Maryland* does that, Howard pointed to Justice Sutton's language in *Home & Loan vs. Blaisdell*. Most famously, maybe most importantly, Chief Justice Warner's language in *Brown vs. Board of Education* that we can't set back the clock to 1868, reminds us that the meaning of the Constitution can't be limited to what the framers intended.

For the last several decades, the most powerful minds in our profession have launched devastating critiques against originalism. But still, originalism theory survives. We begin this conference by discussing it. I think it's worth taking a few minutes to ask why? Because I think in order to get past originalism we need to understand its appeal. I would suggest that the appeal to originalism is based on a false allure of formalism in judicial constraint.

Originalists promise that they can constrain judges, and they say that no other theory can do this. I've participated in many debates over the years on originalism, and my opponents always say, "We have a theory. Where is your theory?" And of course, what they mean by this is: "We have a theory that can constrain judges, you don't." And I think the key refutation of originalism must be that originalism doesn't provide constraint; that no theory of interpretation can provide constraint; that the critique launched against formalism a century ago by the legal realists plays just as much to the claims of originalism today. And the arguments here are familiar, and for this audience just to recite it very quickly. For example, all constitutional law in some way is going to involve balancing, and balancing can't be determined by the framers' intent.

We'll just start with the First Amendment: free speech, free access of religion, of course, aren't absolute, and originalism can't tell us what emphasis is sufficient to outweigh it, and deciding what procedural due process requires. Inevitably, even the conservatives have to balance, and originalism doesn't have the right answers. I think that the levels of scrutiny that are used throughout constitutional law are just forms of balancing. The levels of scrutiny tell us how to arrange the weights, and all judges and justices inevitably have to use their own values in deciding what's a compelling, or an important, or a legitimate government interest. *Grutter vs. Bollinger*, the affirmative action case are such a powerful example of this. All nine justices on the court agreed that the issue before them was that the diversity in the classroom is a compelling government interest. There's no way to answer that question based on originalism, based on framers' understanding. It's entirely based on the experience and the values of the justices, and so it was that the court decided five-four on that basis.

Another reason, of course, why you can't just follow framers' intent, why even originalism doesn't eliminate judicial discretion is that there are so many constitutional provisions that require courts to use modern understandings and contemporary values. Think of the Fourth Amendment that speaks of reasonableness with regard to determining whether searches or seizures are allowed. There's no way to decide what's reasonable

except in the context of contemporary society. One of my favorite illustrations and this was an opinion by Justice Thomas, in the Fourth Amendment dealing with the automobile exception, and his opinion literally began by saying the meaning of the Fourth Amendment today is the same as it was in 1791 when it was adopted, now as to the automobile exception to the Fourth Amendment. You just have to juxtapose that to know that reasonableness has to be decided on the basis of current needs.

What's cruel and unusual punishment, or even what's equal has to be decided based on contemporary needs and values and that's why any theory including originalism doesn't provide constraint. But most importantly as many have shown, the reason originalism can't provide constraint is the problem of abstraction. Any constitutional provision in terms of original intent can be stated many different levels of abstraction. Think of equal protection. Was the goal of the Equal Protection Clause just to protect the former slaves? Was it to protect those of African descent? Is it to protect all racial minority groups? Is it to protect all groups that historically have been disadvantaged? Is it to protect any individual who's discriminated against? Each of these are reasonable levels of abstraction at which to state the intent of 14th Amendment. A fairly arbitrary choice has to be made is to what the level of abstraction is.

Even more profound in terms of originalism, I think there's a dilemma for any form of originalism. If it's going to state the level of intent at the most specific level, it's going to be the most specific level of abstraction, then originalism is absolutely unacceptable. And if the level of abstraction is stated in a much higher level, then originalism can provide no constraint. If all we're focusing on the framers' intent at the specific level of abstraction, then no one will want to live under the current Constitution. My favorite example of this is that Article 2 of the Constitution refers to the president and the vice president with the pronoun "he." There's no doubt that the framers intended that the president and vice president be male. If we have to follow the specific intent of the framers, then it would be unconstitutional to elect a woman as president or vice president until the Constitution is amended.

Indeed if we follow the specific intent of the framers we'd radically change the nature of the Constitution. *Brown vs. Board of Education* was wrongly decided because the same Congress that voted to ratify the 14th Amendment, but to segregate the District of Columbia Public Schools. It would be impermissible to protect women under the Equal Protection Clause.

Also, if we follow just the framers' intent, the most specific level of abstraction, none of the bill of rights could be applied to state and local governments. Then we couldn't have due processes a limit on personal jurisdiction. We'd have to overrule large numbers of Supreme Court cases protecting rights like the right to marry, the right to procreate, the right to custody, the right to keep the family together, the right to control the upbringing of one's children, the right to purchase and use contraceptives, the right to abortion, the right to private consent homosexual activity, the right to medical care, and so on.

The alternative though is to say we follow the framers' intent in a much more general level of abstraction. But then originalism can provide no constraint whatsoever because at the general level of abstraction the framers desired liberty and equality; almost any result can be reconciled, but the framers' intent think general level of abstraction. Barry Friedman talked about the experience of Robert Bork, but I think that this dilemma for originalism ultimately is part of what doomed Robert Bork. In his writings before going before the Senate Judiciary Committee, he advocated originalism at a very specific level of abstraction.

So for example he'd written that women should not be protected in discrimination under the Equal Protection Clause because that was not the specific intent of the framers, but that was an unacceptable position to take before the Senate Judiciary Committee, before the American people. So he shifted to a much more abstract form of originalism and said that the Equal Protection Clause could encompass stopping gender discrimination. Then though he was rightly thrown to the charge of a confirmation conversion. He was in the dilemma that all originalists have either it's a specific level of abstraction in which case originalism is unacceptable, or it's a much abstract form of originalism in which case any result can be justified and there is no constraint. The key here then becomes that originalism does not provide a constraint on judicial decision-making, no theory of interpretation can try to constraint a judicial decision.

I saw this very powerfully in a personal way as a result of an experience I had in the 1990s. From 1997 to 1999, I served as the chair of an elected commission in Los Angeles to rewrite a new city charter. A charter in California for city functions very much as a constitution: it creates the institutions of city government, it allocates powers among the branches, there's even a dimension of federalism as it creates neighborhood councils with some authority, it even includes some protection of individual liberties. The charter that we proposed was approved by the voters in Los Angeles in June of 1999.

In the last seven years, I've repeatedly received questions from government officials, individuals in the city about what we meant by a particular provision. Now, usually the question about something we never thought of, and we met many times a week for two years, but it's amazing how much the questions that have come up in interpretation are things no one thought of to discuss. Occasionally though when I'm asked the question, you know, we really spent a long time talking about that, and I think that's what our intent was. And if the person, the mayor's office, the city attorney's office agrees and say, "Would you write a declaration about that?" and if they disagree, they keep calling other members of the commission until they get somebody to write the declaration as to what they wanted to say.

Now, to me this so illustrates there's not an intent that's out there to be found in some specific level; there's the text, there's the general goals, and then there's the history and traditions that follow. And so I think that the task has to be for those who are progressives to develop a different vision of constitutional law. It's going to have to mean getting past slogans. I think the Right has done a much better job than the Left of coming with slogans. They've got slogans like, "Judges should apply the law, not make

the law," or "Judges should be umpires." Anyone who's been at law school knows that judges make the law all the time, everything even conscripts to property has judge made law. And no one who's ever been to law school believes that judges are just like umpires. Judges aren't just making the rule, enforcing the rules made by someday else. Every day the judges are making new rules.

I think we have to get past the idea that it can ever be a theory of interpretation that constrains judges. Instead, what we need to do is to advocate a vision of the Constitution that's based on what its goals were, and this is what fidelity to me seems to be about. I would say that the goal of the Constitution, with regard to separation of powers was a simple notion that generally two branches of government should have to be involved before the government does anything important. And so before the government can search somebody's house, or arrest somebody, or hold somebody in custody, or permanently incarcerate somebody, or adopt a law or a treaty – a better word – two branches of government should have to be involved. That simple vision certainly provide a basis for criticizing much of what the current administration has done for the last several years.

The vision of the Constitution has to be about protecting minorities of all sorts: political, racial, social minorities who can't turn to the political process. It has to be a vision of the Constitution that's about advancing personal freedom. Now, this isn't a theory of constitutional interpretation, but it is a vision, and I think the challenge for this conference and all progressives is to develop this vision for fidelity, and not one that's based on going back to 1787, 1791 or 1868.

(Applause.)

MR. RUBIN: Thank you. Our final speaker, Marty.

MR. MARTY LEDERMAN: Can you hear me? Is it on? Okay. I'd also like to thank Rebecca, Dean Rubin, Jack, for putting this all together, and Lisa, and the ACS folks. It's a wonderful conference and I'm really privileged and honored to be invited to speak. I think Rebecca and Jack asked me to come on, not because I had done any theorizing about originalism in general, but because I happen to be in the midst of a project in which I'm actually engaged in originalist historical research with respect to a very prominent constitutional question of the day, namely, whether the commander in chief has any constitutional authority to violate, to ignore statutory restraints on the conduct of war? And I think it was thought that I could bring to bear to the conference a bit of sort of as applied concrete perspective so we could have at least an example of something to talk about.

I'm a little chastened by Barry's and Erwin's talks because I agree with them. I agree with Barry that when you think about it hard, originalism has never really had a very profound purchase on the results that are obtained either in court, or in the public discourse about great constitutional issues. And I agree with Erwin that it doesn't provide any real constraint on judges, and therefore I agree with what most of us in this

room believe, which is that the general, the basic justification for originalist theories, that the Right has invoked in recent years is subject to a fairly strong critique.

So why am I doing this? I mean, why do we on the Left engaged in any originalist research on originalism ourselves? And we do do it. So that was going to be my theme, and I'm glad Erwin brought up affirmative action in the11th Amendment. Right? Because we're great originalists when originalism is on our side. You can think about any of these areas there's wonderful scholarship and judicial opinions from Justices Brennan and Stevens, from Judge Gibbons on the 11th Amendment, on affirmative action; Eric Schnapper and others have written on the 14th Amendment taking apart the original, you know, making very strong claims that originalism is on our side on these issues. And when it is, we tend to invoke originalism of one variety or another, and pretend like the Right does that we sort of win the battle at that point. Right? If the original vision of the Constitution is on our side, we should prevail. There's a tendency to do that anyway.

There's not a lot of normative 11th Amendment scholarship out there, or certainly in the case law, there's not great deal, and the like. So why engage in this, and what are the dangers? And I'm going to focus on separation of powers generally, and on war powers in particular, and within war powers on two questions that I'll focus on, put most of my focus on one.

What's odd about this administration as you all know it's taken extremely aggressive views of presidential prerogatives, in two respects. And the first is the traditional war powers question that has been prominent since the Korean, and especially the Vietnam War, which is the president's power to initiate hostilities, or put our troops in harm's way without advance authorization from Congress. Now, it's sort of odd that the administration has taken a strong stand on this, and I'll just quote their basic view which is in a memo from John (Yew ?), September 25th, 2001 that – I lost my quote. But anyway, that the president has the absolute authority to take any action preemptively to repel and prevent any threat to American interest from any terrorist group, and to do so without Congressional authorization. But this is an extremely aggressive view of the president's initiating authority. Now, what's odd is that there haven't been any issues in this administration or during the Bush administration about the president's actions unilaterally. He got an authorization to use military force against al Qaeda, and the Taliban; he got overwhelming Congressional authorization to go into Iraq. And so this issue hasn't really arisen yet, although it may in the coming months, if the president decides to take any actions against Iran; it's something to watch.

But more importantly, and what's really a novel in this administration is the view that the president has the absolute authority to ignore statutory constraints that are imposed either before the armed conflict begins, or that are imposed by Congress during the armed conflict that might in any way restrict his discretion and how best to defeat the enemy. And we know that the most obvious examples are the ones that have been in the headlines, the president – the office of legal council asserted the power of the executive branch to torture detainees despite a statute prohibiting torture, has apparently written memoranda saying that restraints in the uniform code of military justice, and the course

of interrogations are also unconstitutional, and has said that the president can ignore the Foreign Intelligence Surveillance Act, FISA, in conducting electronic surveillance of communications between suspected al Qaeda or related, affiliated persons overseas, and U.S. persons here in the United States, can engage in warrantless surveillance without judicial approval.

Now these are very broad claims, and what's odd is that most of the public justification for them has been that this is a new paradigm, right, the famous quote from Judge Gonzales' memorandum to the president about the Geneva Conventions were obsolete. Right? This is a new kind of war. The old constitutional structures and constraints are really anachronistic; they don't fit when we have a terrorist organization, not a nation state attacking us from overseas, secreting itself in civilian populations with the ability to engage in – to impose mass casualties without soldiers being – without troop movements and soldiers in an obvious command structure and the like, that the old constitutional rules about war powers should somehow be put aside, and yet they're not really willing to live only with this – well, I call living constitutionalism, right?

This is a very contingent, and living vision of war powers that the president has to have it. We need a new vision of the president's relationships to Congress in particular, when it comes to fighting modern sorts of wars in a post nuclear age. This has been an argument's been made since the Korean and the Vietnam War throughout the Cold War, but it's really taken on even more sort of – it's become more acute in this war because of the president's assertion that he's able to ignore statutory constraints.

But at the same time they still pledge fidelity to what they say is the constitutional structure. Now why is this? If Barry is right, and the claim of originalism has very little purchase either on courts or on the public, why is it that the Bush administration and its defenders still feel the need not only to invoke a living constitutionalism and a need for the constitution to stretch to cover new forms of war but also to make arguments in particular those of John Yew that this is somehow consistent with original understandings or with the texts of the Constitution and the like.

And I think the reason is – and this will sort of presage what I think is the reason why we should be engaged in originalist research of our own – is that it does have some purchase on someone. I think it has – there is a reason the Right is constantly invoking originalism, and I think one reason is that it appeals to young law students, right? They're creating a cadre of persons for whom Erwin, I think, there is a felt need – and the anxiety goes back to Herb Wexler and long before – for something to ground judicial decision-making and originalism or textualism or original meaning or original expectation, original understanding – we'll start passing those, I think, in the next panel. These are very appealing notions because otherwise it seems that courts – or in this area because most of these decisions are not made by courts but by the executive branch in Congress – that the political branches have to have some grounding or else all is politics, all is power, all is simply policymaking, and that's not a sense of constitutionalism and so why bother with constitutionalism?

So I do think it has some pull on at least new law students and some people within the academy and also in the public debate because otherwise they want to be able to say in particular that President Bush is acting in a long line, in a tradition, right, that this is the proper role for a president because the alternative and the truth is that this is a fairly radical break with our historical traditions. And if that was the way it was being pitched consistently in public, I'm not sure that it would have the same effect and the same support that it might have with the public otherwise. I'm not sure if that's right and I'd love for Barry and others to engage in that, but I think they think that originalism is important. And so I think there are reasons for us to be engaged in the originalist project if – and especially if – we happen to be right about it and originalism supports our views.

Now having said that here are the cautionary principles before giving a couple of examples of why we're right on the major separation of powers question of the day. I think Erwin's right. Like all constitutional law questions, it's equivocal. So even though the originalist account is very heavily against the Bush administration, I think, nothing is certain and there are little nuggets, little germs of support for the president's view. And in particular what was really interesting to me in Erwin's talk was right at the end, Erwin – so what do we replace it with, Erwin? Right? All that is solid melts into air. We need something solid. What is it?

Well, we should be invoking grand constitutional principles. What's the basic objectives – correct me if I have this wrong – that the framers, and it's a fairly originalist notion, what were the framers aiming at? What are the general objectives, and how do we make our current constitutional practice advance those constitutional objectives? Well, if that's the case the objectives of the war powers in the constitution as John McGinnis has written, are basically two-fold and in conflict with one another. It's not simply that we want to be hesitant about going to war and engaging in war for all of the reasons that are obvious, and therefore that we want a check and to want two branches of the government to approve of any serious incursions, any serious military operations. But it's also that we want to provide for the defense of the nation, and it's the conflict between these two principles and we want an energetic war power.

We want – we've all heard that the litany from the federalist papers. We want the commander in chief to be able to act with energy and dispatch in order to better defend the country. And so we have more than one principle, and once we've gone to that level of generality in terms of constitutional fidelity or originalism principles, well, they have a leg to stand on, so do we but at that point we're just debating about what the proper balance is between the defense of the nation and stopping or breaking aggrandizement of threats to liberties because those if those principles are clearly present in the structure of Articles One and Two.

The second reason we should temper our originalism even when it's on our behalf, is just that it's not good constitutional law. I agree with Erwin that good constitutional law should invoke all sorts of modes of interpretation of which originalism should only be one. So it's not the be all and end all. The third is Barry's point which is that maybe there's not much of an audience for this, that at the end of the day if we write

great articles showing that the originalist views is against the Bush administration, the answer is still so what if it's going to keep us safe. It may just not affect very many people's understanding.

The forth – and I think this is very important to point out - is that if we take it to a theological extreme the originalists views that we have about war powers and the separation of powers between Congress and the president undermine much of what we might want to be done in the conduct of foreign affairs and even war powers. And so in virtually every case that I'll talk about or you could come up with where the Bush administration has taken particular views of strong executive power, they are piggybacking on opinions and conduct undertaken by Democratic presidents, in particular the Clinton administration while I was there.

Now this is not to say that the Clinton administration would've said the torture statute defines as unconstitutional. They would've not had said that the president can engage in full-scale war against anyone he wants without Congressional authorization. They would not have said – and this was going to be my first example – as the president said on Tuesday that a new statute requiring that the administrator of FEMA be someone who has knowledge and expertise in actual homeland security and emergency management is an unconstitutional constraint on the president's appointment power. But we did say, we, the Clinton administration, we did say that the president could unilaterally engage in the military conduct in Bosnia and in Kosovo and in Haiti. And we did say that a statutory restriction that the trade representative could not be someone who had represented foreign interest before the United States was unconstitutional because that would have prevented Charlene Barshefsky from being trade representative. And we did say that certain statutes violated the commander in chief power, in particular one that would have prevented the president from allowing any U.S. armed forces to be under the command of UN commanders in peacekeeping operations. The Clinton administration said that violated the commander in chief clause.

So two things: one is we have to understand – and going back even further of course – the assertions of executive power were first announced by Democratic presidents, Truman in particular at the time of Korea, and then again in part by Kennedy and by Johnson. Am I getting close to my time? Okay.

Well, I won't go into the specifics because in part it will just diverge us from these broader and I think important issues that Barry and Erwin have raised into the specifics of why I think we have the better arguments on these war power questions. But I just wanted to say the one real virtue of continuing to do this work is that I think it does take the legs out from under the pillars of the other side's arguments. If you can get rid of their invocation of originalism and fidelity, if you can get rid of their verities and their truths they seem to be felt floundering in a sense – not all of them, certainly not the vice president – but many of the folks who support the president are made very uncomfortable when it's pointed out that in this case it's the originalism that they professed fidelity to does not support the actions of their president. And so for that reason I think it's still

valuable to engage in this project even though I think there are real dangers and cautions that we should have.

MR. RUBIN: Thank you, Marty. Well, it was hard – (applause) – it was hard to stop three such eloquent speakers from completing their remarks. So I'm going to ask each person to make just three minutes worth of responses and then we'll have some time for some questions from what I suspect will not be a shy audience.

MR. MCGINNIS: I want to say actually I'm in agreement with a surprising amount of what my co-panelists have said. I agree, for instance, that many of the Bush administration's assertions about executive power have very little warrant in the original understanding. And incidentally, we're tactically extremely unwise as someone who was in the Office of Legal Counsel, the torture memo was just an unbelievable bureaucratic blunder besides being a bad Constitutional law. But I would say about that very few administrations, it doesn't surprise me, come at a very coherent philosophy, and I tend to agree that methodology is less of a constraint on the executive branch. Some do – Jefferson, I think the Reagan administration. I could cite examples of where I think actually originalism prevented the Reagan administration from doing a variety of things like claiming state disinvestment provisions against South Africa were unconstitutional.

But that doesn't surprise me because that in some sense the federalist papers remind us politics is about will, and the Supreme Court has a different role to play, and the question is to me can there be some relative constraint from the originalism. And there, I think one can have a debate about that. I tend to think, I tend also to agree with Erwin that certainly some of the justices are wrong; wrong, I think, on the 11th Amendment. I think these affirmative actions are complicated, one which I haven't really come to rest on myself. So there certainly can be mistakes. The question is does originalism offer some by forcing people to consider purposes other than their own? Is it a real ballast for neutrality? And I tend to think it is.

Some of the specific points about Erwin discussed, I'm not sure I entirely agree with. For instance, I think it's quite possible that many of the terms he says really don't have any clear meanings or terms of art in the Constitution. As I described, I think there are interpretative rules of the Constitution that help us fix the appropriate level of generality. And when he says that we can't live with the Constitution, it's so obvious we can't live with the Constitution for some provisions – well, of course, we have a Constitutional amendment process, and I don't think it is an accident that we haven't used the Constitutional amendment process as much as we should when we have – when judges act on non-originally.

But I guess I'd just like to end by suggesting that I'd still like to focus on my question which is, well, why do we think these other methods of interpretation are any good? Erwin says well I believe that the goal of separation of power is X. I believe a lot of things, right? And I think everyone believes a lot of things in this room. The question is what's the process by which we have to suggest those beliefs are worthy of being in the Constitution? I think it has to be a pretty extraordinary process in the majority process

we have in this country to get something to be law is pretty extraordinary, to put something in the Constitution so we can strike down majority decisions of our fellow citizens. I think we have to have some justification that stronger than I think most of the proponents of the living Constitution provides.

MR. CHEMERINSKY: Three quick points. First is that the appeal of originalism is deterministic. Marty said this earlier. I very much agree and I don't think it's just among law students. I think all of us in some extent would like to believe that formalism is possible, but I think the challenge is to show that no theory, not originalism or any theory of constitutional tradition can provide determinacy. All inherently require choices to be made and those choices depend on the values of the justices. Second, John says that there are ways of dealing with the problems of originalism. He says if the results aren't acceptable under originalism, we'll amend the Constitution. I think that's too superficial an answer because I tried to list so many areas where we'd have to radically change the law if we're truly originalism.

And then what we'd be saying is the protection of minorities depends upon having to have a supermajority to the amended process to agree and that can't be right. Protection of the rights of racial minorities shouldn't need to depend upon having a supermajority. Protection of women under the constitution shouldn't require a supermajority. Protection of the rights of criminal defendants should not require a supermajority. As I suggested earlier, I think John's theory of originalism or any theory of originalism inherently requires an arbitrary choice of levels of abstraction. Either we follow the specific intent of the framers in which case it's unacceptable or it's an abstract intent in which case there really is no constraint. My third point is I do think that the enterprise has to be to define a constitutional vision.

John says, "Well, how do we know what's the better constitutional vision?" That's what discussion has to be about. That's what constitutional scholarship, that's what ultimately our enterprise should be about, defining what's the appropriate constitutional vision. To be sure we want to look to what the text of the Constitution says; we're all interpreting that text. We want to look to the structure of the Constitution. We want to tell what the goals of the Constitution are. But it seems to me that what we're taking about is what's the best understanding of the Constitution for our society.

There's been reference already to the Bush administration, yet I think we'd be remiss if we didn't talk about how far would the Bush administration, for that matter Congress doing, from any understanding of the Constitution. Last week, the Senate passed a bill previously passed by the House that says that the president of the United States can detain American citizens as enemy combatants without complying with the Forth, Fifth and Sixth Amendment. What constitutional vision is that consistent with?

Last week, Congress passed a bill that said that the writ of habeas corpus is suspended for those in Guantanamo. They're going to literally be held forever without any process. What vision of the constitution is that consistent with? We go on and on with what's being going on in Congress and the presidency over the last several years. I

think our test is to define a progressive constitutional vision that shows what the conservatives in the White House and the court are doing is so wrong.

MR. LEDERMAN: Quick points. First, I guess I want to take issue with Erwin. I think some of you know there's been virtually no one as critical of the Military Commissions Act as I have been, but I'm not sure it's quite as extremist as Erwin describes and we can discuss that. It doesn't say the Forth, Fifth and Sixth Amendments are here by trump and it doesn't allow for no process ay all. It's plenty bad, but it's not quite that bad. (Laughter.)

And secondly, Erwin, and I agree – I mean when I teach my law students I think one thing that I teach them is that there is no determinacy, or I hope they'll learn that by the end. Robert and I teach a legal justice class in which the students have a great deal of anxiety at the beginning as they're going through legal realism and homes and seeing that sort of the formalist model falls away. And then what is one – and that's great and I think we should do that, but does that have any play in the public discussion at all?

I mean no one in the public – I think Barry was saying this, maybe Howard – no one in the public debate is saying, "Oh, the Constitution is completely indeterminate and therefore, we should just be having a normative discussion about what the best visions of constitutional values is." And if we do the Bush administration has a vision. They have a vision of a super executive that would best defend and protect the American public. And so if that vision is in play, regardless of what the originalists meaning is, I think they're on stronger ground than if we resort to some form of originalism.

Very short point in response to John. One point is I don't think the torture memo was a mistake on their part. I think it was very deliberate. It allowed the CIA to engage in these interrogations which is what they wanted. They never wanted it to become public. It accomplished exactly what it was intended to do. And finally John suggests – and I think this is an important point on separation of powers and war powers – John suggests something that he writes about quiet eloquently in the 1997 article in Case Western and in an earlier article on long contemporary problems that perhaps the originalists vision, the true originalism of war powers is that they be a form of living constitutionalism, that there be a give and take, ambition checking ambition, that in fact there will be a contingent in historical and contextual battle between the two political branches and that that is the originalist vision.

And I have several responses to it, I think it's a very provocative sort of notion that gets in, that allows you to be both an originalist and a living constitutionalist at once. And one response is that I don't think that that's how either Congress or the president has ever acted. They don't claim that this is just a give and take and an equilibrium. They claim to be acting according to set rules that the Constitution provides. The Bush administration rules that the president can ignore whatever statutes impinged on his discretion on how best to defeat the enemy, and so even if John was right about that that's not where the debate currently stands.

MR. RUBIN: Okay. We have some time left for questions from the audience. Yes, please.

Q: (Off mike) – this, you know, (inaudible) or whatever, then we still have a question of, well, should we interpret what – we still have the question of what they enact, supermajorities are important, that they enact something or what could they enact? One view is they enacted what they thought they enacted or they enacted this text. And this text as we now interpret it, which I take to be to be something along the living constitution idea, and how we chose between those two and then answer by our attachment to civil majorities that now still have a question about how to interpret it, and we can't, you know, we could say, well, we should go with what they thought they enacted. Well, why? They'll say because that's what, you know, that's – we'd just be adopting originalism rather than arguing for originalism and we still have to have some other reason to choose between the view that we ought to see what they enacted was what they thought it was versus the text as we think it is now.

And if we're going to then turn to other grounds the way maybe we will determine supermajorities for choosing between those two interpretations, then I think we're getting to sort of what Erwin was saying, well, as between thinking we ought to follow what the folks in the 18th century said, or as compared to not think adopting, but we think but the accumulated wisdom of constitutional history over time or constitutional doctrine over time. I'm not sure the stronger case is for that, you know, going with what somebody in the 18th century said.

And let me just say one other comment that then connects to that in sort of thinking about what Robin has said in the last session I am now thinking now fidelity is a terrible metaphor in some ways because it seems to me that it's about – it stacks the deck on your side that is we're faithful to people, not to a thing or to a tradition so easily. So it makes more sense to think of fidelity – I mean, unfaithful maybe to those folks back then who adopted it, but now, if I want to be faithful to our constitutional tradition which is I think what we want to say I'm not sure fidelity is the best way to capture that. But it does seem to me much more powerful as a normative argument that we ought to go with what's enacted as we understand it through the accumulated wisdom of constitutional doctrine rather than what they enacted as determined by how they saw it.

MR. MCGINNIS: Well, the connection between the super majority rules and originalism which you're asking me about is that the argument here is that what makes an entrenchment good and people understand that entrenchments are going to continue, that's one of the things that distinguishes them from ordinary legislation, is what they understood them to be meant. That's why they voted; they voted for these things.

So it's not very different from the arguments for why you should follow statutory arguments, like why we should follow a statute, we should follow what reasonable people understood the statutory terms to mean because the first premise is really that the supermajoritarian process for Constitution-making creates good things, and it's that collective decision that makes it good. They understand that this is going to go through

time and they're making a decision on the basis of the meaning they have. And so that's the connection between the process. It's not that different, as I say, from a statutory process.

Q: It seems to me there is a tension within the defense of originalism that you presented. I don't want to say it's spindled, but it's problematic. It's something that needs attention, sort of (inaudible). On one hand, you say given the circumstances in which (inaudible), and the rules under which they work the supermajority (inaudible) change (inaudible) and the like. There's some kind of a presumption that the work product is really good; it's right. There are pressures for its impartiality, (inaudible), deliberation and so forth. So we have reason, you know, at least some presumptive reason to follow and actually figure out what they said.

Now, (unintelligible) comes along and says, "Well, yes, but they did it a long time ago and they did it within a different world, a world in which political parties want to know, a world in which it was more important to be Virginian and (unintelligible) and I could go on and on. And you saying in return: "No, (unintelligible) I'm still that team of being wise and maybe the decision-making group that they were," and so they cast their directions to us and turned sufficiently open-ended and abstract from the (unintelligible). There is a plasticity here. Now that's the thing, the contention is that if somebody speaks – now, a number of abstraction so hard that people in a vastly different world can maybe make sense in that new world. They won't (unintelligible) sufficient level of concreteness so that we get the benefit of any special wisdom that they had.

I mean, imagine there's a (unintelligible). But why is this person who has never lived or never will live in (unintelligible) and (unintelligible) the way down the Constitution and (unintelligible)? "The world is going to change," he says to himself. "The world is going to change. It's going to be different in ways that I can't fathom, I can't imagine." So my Constitution is one of two sentences. The government shall govern justly. The government shall govern prudently. They'll be able to figure out what justice and (unintelligible) mean in their future world.

On the other hand, someone's (unintelligible) will have been totally wasted. He will have (unintelligible), you know, okay, someone walk the dog (unintelligible) into the ocean. We wouldn't have got anything out of something. There won't be any benefit to us from the fact that he was the (unintelligible) person (unintelligible) because he won't understand anything.

So somehow or other, it seems to me where theory has to negotiate between the claim that there (unintelligible), and said things, you know, therefore that we have reason to follow. And on the other hand, the claim that they work fatally time-bound, right, so time-bound that we have no reason whatsoever to pay attention to anything they said because they spoke in open-ended and abstract terms. You can't have it totally both ways, that's clear. So you must have in mind some formerly realizable way of defining the just right intermediate level of abstraction and try to (unintelligible) and figure out what the just right intermediate level of abstraction is so that we really get the benefit of

their unrepeatable wisdom on the one hand. But on the other hand, we're not bound by wisdom from the middle age. So I think that's something that needs work.

MR. MCGINNIS: Okay, let me – okay. I'm happy to try to begin the work on it here. It certainly won't be a first – last answer, but let me begin by saying that I don't quite agree that I think that this is their situation, it's their – or the situation in time that makes them worthy, it's the situation in the process that makes them worthy of – makes them presumptively beneficent.

I don't – the other thing I think I subtly may not also agree with you, that the evidence is that they have been very general. I don't think I quite said that. The evidence is that they have a lot of roots of democratic change in the Constitution including through the states, broad powers in Congress. And I tend to think as well that the rules of interpretation vis-à-vis Congress, when you struck things down we're pretty limited. I would think that is – never forget it is a Constitution we are construing.

I think, as Marshall talking about the Constitution itself, just the statute rules of construction, the common laws, critical (unintelligible). The Constitution has certain methods of construction and I think with respect to the democratic processes, I don't know, I'm not sure I'm going to endorse, there is a clear mistake here, but it's somewhat deferential in that respect. Nevertheless, there are certainly areas where they first of all question the structures that they understood and then certain predictable problems of majoratarianism that I think they were for on the grounds of not unlike Ulysses and the sirens that we can think that entrenchment agreed by a lot of people, even if it's quite specific could be better than contemporary majorities.

And so that's the response. I think one of the responses is to look at these rules of construction in a world where I think they have given a lot of power to the democratic processes. So one of the things I think that comes out at least in my own sense is I'm sort of skeptical of some of the originalists who think that we should use the Constitution to be striking down a lot of the democratic processes of Congress. That doesn't mean I think there are no such instances, but I think that would be the beginnings of an answer. I think it is a tension, although I think one way out of it is to focus on the avenues of democratic change left open in the constitution.

MR. RUBIN: Okay. Barry?

Q: (Off mike) – which is that there's no original position. The closest we ever came to the original position was in affect when doors were shut and (unintelligible) was playing the crowds and they were really trying to figure something out. (Inaudible.) And ever since then we walked out of doors and it's all advocacy.

I don't, you know, I could call posture, but I don't think we needed highest (unintelligible), this constitutional advocacy about what the document ought to be. But everything that happens is advocacy and it's not just that it's advocacy, but it's sometimes a perverting advocacy that makes originalism impossible. I just don't get it.

If you go (unintelligible) the ratification today instead of just talking about them, what you find is that, in fact, people are taking positions and they were wild positions because half the room is trying to beat the Constitution, so they're saying (unintelligible) terrible things. But how could you proclaim getting it adopted and so they were engaging in extreme (unintelligible) wasn't going to do anything radical.

And I can't believe that anybody really want to adopt the positions that (unintelligible). For example, Brutus. I mean, Brutus said the most – if anybody got judicial review and it had to be a wild notion to (unintelligible) judicial (unintelligible) is going to look like. He just didn't want the Constitution adopted, and so, you know, there is just not this original position that we can go back to. In fact, Peter Smith calls it in a couple of articles that are funds and he shows that the originalists on the court called the anti-federal to (unintelligible) Constitution and ignore the martial court decisions and he says, you know, when they're interpreting the initial Constitution. That's fine because I think it all is about meeting the law together in a way to make sense of it, but I don't see what we can go back to.

Your answer to Frank, I just want to make a point, which is you sort of pull out the process (unintelligible) it's at least worth noting that until we were a century into this thing, nobody was talking about (unintelligible) because we thought there was a Constitution that meant something. We disagreed about what it meant, but we thought it meant something. If we had the Constitution that meant something, that it trumped what was happening. It was the Constitution, and the whole deference argument really takes on the speed of the progressive era, and that's because it made sense for democracy (unintelligible) too. So everybody (unintelligible) judicial review has to have mutually been democracy. But that wasn't a theme that happened in the first 100 years (unintelligible) at all.

MR. MCGINNIS: My respond is to two points about that. First, with respect to – I have (unintelligible) the ratification of (unintelligible), that's absolutely true. Of course, if you look at statutory debates in Congress, people strongly disagree, and there are rules of interpretation. We generally think what the sponsor has to say rather than a parade of horribles. What Napoleon is likely to say, we generally give that a greater way. And that goes back to my – that I think there need to be rules of constitutional construction. I think those would have been the rules, sort of the basic understanding also at the time. But I think more work needs to be done in that area.

The second point with respect to deference, I tend to think some of Marshall's comments, some of the martial court's comments are somewhat deferential. It's a Constitution – we'll never forget it's a constitution we're construing and I'm quite sympathetic to your point. We need to look at how the martial court and the court of the early republic interprets the Constitution. That's a pretty a good indication of constitutional rules of construction rather than the anti-federalists.

Q: I want to take this forward a little bit. Maybe it's because I'm sitting next to Lisa, but I want to talk about the ACS for a minute. So we put together some of what

we've learned already this morning. Originalism often functions as a kind of religion for the people, that it gives us a reason that explains the results. So we can say because the Constitution said so, we feel better in some way.

But Marty shows us that if we sort of – if we peel the onion skin back one layer and we tell Dorothy to go reveal the man behind the curtain, the agenda that is there is this strong executive. And I wonder when we talk and when Barry talks so persuasively about us, that we in this room, I suppose if the ACS was not only about finding our agenda, finding our vision that could compete with the strong executive. And then the language we'll follow, the vocabulary will follow. I wonder what that agenda looks like because we're sort of between a rock and a hard place. Marty is right that those of us who worked in the Clinton administration enabled much of what we just learned today, and so it is hard for us to embrace the strong executive that we see now.

On the other hand, it's hard for us to embrace the court because we don't think the court is likely to change. So do we do something different? Marty said that the war powers circumvents two strains, two principles. One is the energetic war power and the other is the "it takes two" notion, the two branches notion that Erwin talked about. Do we go with that? Do we say that it takes executive? Do we turn our attention at Congress maybe? It's totally open-ended. As much for Marty and for anybody because I think this comment is supposed to invite this question.

MR. LEDERMAN: So where do we go? One point, I think the originals, to understand this, it was Toto that pulled back the curtain, not Dorothy. (Laughter.) I think, but I would have to go back to the (unintelligible). Maybe this –

MR. : That's just a total diversion from the story.

MR. LEDERMAN: That's just a total diversion of the story. And in fact that's an adaptation, right? Does any anyone know the original? But this sort of –

Q: Dorothy (off mike.)

MR. LEDERMAN: Okay. Okay. (Laughter.) This gets to – yes, I mean, I'm engaged in this project which might be a fool's errand of trying to look at the originalist's understanding of the war powers, and I'm not looking at it because I think, Barry, there's an answer at the core, like a true one understanding. It's incredibly multivalent, right? There's what the framers thought in Philadelphia, and they had varying views. What was said in the ratification debate, both honest and tactical. What the delegates might have thought. What the people who elected the delegates might have thought. What the original courts thought. What the original Congresses thought. So – but what we do have on our side, I think, in this particular debate about the president's power to supersede statues is original understanding, original meaning, text, precedent, the history of Congress and the executive branch at least until 1950, and all of that.

I want to say at the end of that we don't necessarily win, right? Okay. We have all those things on our side, but what it means is that they can't invoke those things anymore. So now the real work is – and this is Erwin's point I guess – what is – the Constitution is capacious enough to allow for different normative views of the war powers. What's our normative vision? We have to do the hard work of tearing apart their originalist understanding and their precedent and historical understanding.

Okay, and then we have a blank slate, and how are we going to – what is our vision? And it has to be one consistent with the Constitution, but I actually think it's much more open-ended than we have conceded in the public debate so far. We have tended to adopt their rhetoric, which is when you look at all these formal ways of understanding the Constitution, whether it be historical or case law or original meaning or ratification debates, we win. We get all the check boxes. At the end of the day, it's the point you made on the last panel. The public looks at you and says, "Okay, now what?" And so I think Lisa is right, our work is to come up with our normative vision of a war power's jurisprudence.

MR. CHEMERINSKY: I agree with that, but I would also separate the two steps. One is deciding what do we think is the best vision of the constitution, say, with regard to war powers? Then second how do we sell that to the American people, or we're going to say how do we sell that to the courts as a separate enterprise? In terms of what's the best vision, obviously this panel which is focusing on methodology, doesn't do that. Though I would argue for what I said in one sense that there is a vision of the Constitution that says before anything important is done by government, two branches should be involved, and I think I can base that on text, on structure, on goals, on historical practice, on all of the things that we look to in deciding the meaning of the Constitution.

Then you get to how do you sell that to the American people? I don't think it's as difficult as obviously some of the Democrats in Congress thought so last week because I think that there's also a long tradition of distrust and executive power that goes long before the framing, and the idea that we want to make sure that there is more than one person making important choices. But I think we need to then develop a rhetoric to sell the vision once we have it.

MR. LEDERMAN: Can I just make a 30-second response to that. I'm very sympathetic to that, but it means the Korean War was unconstitutional and it means everyone's understanding, consensus understanding of the framing, which is that the president could without congressional authorization repel imminent attacks – that was the one thing everyone did agree on – would be called into question.

Now, there are responses to that I understand, but it's not – it's just the case that at least since 1950, there has been an awful lot of independent executive action in the context of war that the American public has come to accept as appropriate. And so this is a tall order. A much more modest position would be if the legislative department says that something is verboten, then you can't do it. I mean, I'm willing to go that far, but I think you've got a much tougher claim than you think.

Q: Yeah. No one raised these questions in a neat way, but there hasn't been yet (inaudible) so I want to try to negotiate the waters. Marty suggested – he suggested in your comments that in a way it's a puzzle why you or Bush – John, you or Bush, want to insist (inaudible) is, in fact, in line with originalism, when it so clearly isn't. You said that was a puzzle to me (inaudible) so there's something about certainty in all of that. Of course, the same question has to be put to you.

MR. MCGINNIS: Y-O-U.

Q: You, y-o-u. And that's why aren't you starting a directive if it's a very bad thing for President Bush to have these powers. Why is the Constitution such a compelling form of augmentation? And another way to put it is, if your research produced opposite results to what we've discovered, I assume that people might cope not to switch sides and say, "Oh, well (unintelligible)," more power to them. Okay, so why –

MR. LEDERMAN: Or just drop the project, right? (Laughter.)

Q: That's right. You do not switch sides, you drop the project or redirect the project (unintelligible) vision or whatever. So what's the answer to this? Well, I think there's a value to me at least, we're all lawyers in here. There's something about the power of law itself that I think needs to be explicated. I'm not sure it can be done in a way that will please people's rational impulses. But aside from legalism, there's this value of constitutionalism and here there has to be some affirmative attempt to say why (unintelligible), right? There has to be some answer to the question of why. Why is this so worthy of fidelity?

My own thinking I guess is that – oh, first of all, I think what you're doing is an event with progressive originalism and I do there is quite a bit going on right now and it is a project that has been gathering momentum, gathering steam.

MR. LEDERMAN: Well, I didn't mean to suggest we should stop doing it. We should understand the limits of it's – yeah.

Q: I understand. I understand. There's also the question of why do it at all and I think part of the answer has to be that you're seeking this constitutional answer to this question about whether or not we should do this and partly because in this sense by making an answer constitutional, it has got nothing to do with the courts. Just by putting it in a constitutional manner, what you're trying to do – and I don't mean to be putting thoughts in your head – it's just one way of reading what you're saying in addition to what Erwin was saying about vision and all, is identifying shared ground. Okay?

So if you made this successful constitutional argument whether in court or not what you're saying to another American citizen is this is part of who you are. It has to do with identity; it has to do with American identity. This is part of who we are. So if I'm right on my constitutional claim whether it's done in terms of texts or history or structure,

then you've got to follow me to my conclusion and you've at least got to deal with my conclusion. (Inaudible.) That's one answer.

You suggested another answer and it becomes what I thought was really interesting, and you said it in sort of a way that there's something to do it, and that is, what you're doing is just taking the legs out the other side and so it's an attempt sort of make it an even match and then once the even match has been made you will happily walk away from that battlefield. Just make clear that their wrong in their certainty.

And it doesn't sound very satisfying at first, but on the other hand, I think there's something to it because, first of all, it makes sense for me to think part of why we joined the constitutionalism has to do with identity, but second it's a complex identity. So a lot of the most interesting progressive originalist constitutions and thesis is pulling out the sort of (unintelligible), particularly in the 14th Amendment. (Unintelligible) has his piece on citizenship, public education and all of that. It's loosely originalists, but will be always argued as the losers. But it's still has some, you know, it's obviously history and it's also in one way originalists. But it also (unintelligible) constitutional and where that project is too and that is you're looking to build this point of common agreement between you and your opponent, not so they will then agree with your conclusions. That's not going to happen, but at least there will be admission of complexity in the constitutional agenda (inaudible).

MR. LEDERMAN: I think that's right. Why do I stop? After deconstructing their arguments, why stop before where we would normally pace. But if partisan, a better modesty, then who am I? I can't say it. There are two basic arguments for why presidents shouldn't have this power, and they've been said eloquently (unintelligible) which is that separating powers and checks leads to a – prevents aggrandizement of power threats to liberty.

You make that argument and you show it as the rule has suggested. The other is the one made by Justice Kennedy in his concurrence at Hamdan which is essentially that even from the standpoint of efficiency, of winning wars and keeping us safe the American polity is better off, more efficient, making better judgments if it follows the rules laid down in times of deliberation and calm between the wars rather than if it allows one executive to be making the decisions in the heat of that.

You know, FISA and the torture statute, and (unintelligible) military justice were enacted in times of peace, and the Bush administration's point is it's sort of a walking prerogative point. It's ridiculous for us to be bound by the deck hand of these laws when the people who wrote them could not possibly have contemplated this sort of enemy, this sort of focus or a battlefield carrying these responses. No, maybe we'll be better off winning the war in addition to protecting liberty. And I could say those things, but I would just be quoting people who've said them much better than I. (Laughter.)

And the Bush administration has its normative views in response – and the papers are two hours already and – (laughter).

MR. RUBIN: Thanks. Well, I'm determined by nonverbal signals that the originalist and the (inaudible) is that we go to lunch now, so I want to thank the panel.

(Applause.)

(END)