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FOREWORD

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In the summer of 2001, a group of lawyers, law professors, students, and judges formed the American Constitution Society. The organization's avowed purpose is "to counter the dominant vision of American law today, a narrow conservative vision that lacks appropriate regard for the ways in which the law affects people's lives" and to "restore the fundamental principles of respect for human dignity, protection of individual rights and liberties, genuine equality, and access to justice to their rightful—and traditionally central—place in American law."¹ By spring 2002, the American Constitution Society had formed more than fifty campus chapters, plus lawyer chapters in several cities, and had held hundreds of speaking programs.

Also in the summer of 2001, the Equal Justice Society (EJS), an organization dedicated to "implementing a positive vision of equal justice through the development of progressive legal theory and practice," held an "organizing summit" at the University of California, Berkeley, School of Law (Boalt Hall).² EJS has announced plans to develop "cutting-edge legal theories" and strategies and to disseminate this work to legal practitioners, advocacy groups, and others.

Since its founding in 1982, the Federalist Society has become a fixture in many American law schools, and also has practicing lawyer chapters in several cities. It sponsors numerous symposia and debates and convenes an annual meeting well attended by students, professors, lawyers and judges. "A group of conservatives and libertarians committed to reforming the current legal order," the Federalist Society

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1. American Constitution Society Mission Statement, *available at* <http://www.acslaw.org/> (last visited September 25, 2004).

2. Equal Justice Society listing of Past Events: Reclaiming Progressive Justice: Equal Justice Society Organizational Summit, June, 2001, *available at* <http://www.equaljusticesociety.org/events.html> (last visited, September 25, 2004).

was founded on the proposition that “law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society.”³

While these three organizations obviously disagree on which legal philosophy controls the legal system, they unite around the view that there are distinctive conservative and progressive legal “visions” or “ideolog[ies]” vying for greater influence within American jurisprudence. Nowhere is this depiction of legal reasoning more dominant than in discussions of the U.S. Supreme Court. Here, the weight of academic writing portrays conservatism as currently in the driver’s seat; conservatives see this as but another reflection of the liberal bias within the academy.

When the popular press uses the label “conservative” or “liberal” in regard to judicial decisions, it is expressing a judgment that the result in a case falls at a particular place along a conservative-to-liberal axis. In some areas of law, such as discrimination law, criminal defendants’ rights, privacy, the scope of federal power, and standing, there is a general consensus that Court decisions in recent years have moved in the conservative direction. In other areas, however, the Court eludes any such consensus. For instance, regarding the Constitutional limits on the regulation of speech harmful to minors, conservatives generally prefer greater authority to censor speech than the Court has approved, even though it would deprive adults of some protected speech. Similarly, on the Fifth and Sixth Amendment issues raised by *Miranda*⁴ and its progeny, conservatives favor admissibility of all but involuntary confessions, whereas the Court continues to enforce some prophylactic safeguards.

Even in areas where the consensus suggests a movement toward conservative views, the Court has not moved as far as some conservatives insist it must. The Court’s decision in *Casey*,⁵ in which it affirmed the “core” of *Roe*,⁶ is a leading example of the Court’s failure to adopt the preferred conservative position. More recently, the Court has declined flatly to reject affirmative action in higher education, and in *Lawrence v. Texas*⁷ it reversed course on the constitutionality of anti-sodomy laws, overruling *Bowers v. Hardwick*.⁸ Thus, in three high visibility and important areas of constitutional law, conservatives have been disappointed in what the conservative Court has done.

In yet other areas, Court decisions resist easy classification because the policy options themselves are harder to place on a conservative-to-progressive axis. Illustrative is the area of campaign finance reform, where both liberals and conservatives support each side: Senator McConnell formed a litigation team that included both Floyd Abrams and Ken Starr to challenge the McCain-Feingold-Shays-Meehan legislation,

3. Federalist Society Statement of Purpose, available at <http://www.fed-soc.org/ourpurpose.htm> (last visited September 25, 2004).

4. *Miranda v. Arizona*, 384 U.S. 436 (1966).

5. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

6. *Roe v. Wade*, 410 U.S. 113 (1973).

7. *Lawrence v. Texas*, 539 U.S. 558 (2003).

8. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

while the defense included both Solicitor General Ted Olsen as well as Clinton Administration Solicitor General Seth Waxman.⁹

The effort by the media (and others) to classify Court decisions by how they align with conservative or progressive political stances raises complicated questions in its own right. In light of the apparent consensus of the American Constitution, Equal Justice and Federalist Societies in affirming the existence of conservative and progressive legal visions, the media's effort also raises questions regarding the correlation—or lack thereof—of the terms “progressive” and “conservative” when they are used in the popular media on the one hand, and when they are used by legal advocates and scholars on the other. Are the media and these three organizations talking about the same things? Certainly, many legal theorists and lawyers vigorously resist equating legal visions with case outcomes. For them, the labeling project of the popular media latches onto the consequences of legal reasoning when it is rather the forms and methods of legal reasoning that ought to be central to understanding law. Even if law is not a fully autonomous discipline with its own specialized forms of reasoning, it is at least a quasi-autonomous discipline that rewards study from perspectives that take judicial reasoning seriously. In this view, the correct mode of discourse about legal reasoning evaluates what goes into a legal decision and which arguments are better or worse, not whether results satisfy any particular political theory.

In principle, whether the work of the Court is more accurately described in terms of the internal forms and methods of legal reasoning or in terms of political policy preferences might be resolvable through analysis of the decisions—namely, the decisions that the Court renders. In practice, the evidence is sufficiently ambiguous that supporters of each of these contrasting views can look at the evidence and find support. For example, Mark Tushnet concludes that “one could account for perhaps ninety percent of Chief Justice Rehnquist's bottom-line results by looking, not at anything in the United States Reports, but rather at the platforms of the Republican Party.”¹⁰ Thomas Merrill examines a subset of the same body of evidence, the Chief's decisions on statutory interpretation (where reasoning backwards from results is often suspected), and concludes that “his judicial performance largely conforms to a coherent theory of law and politics. . . . the best predictor of his behavior is not the platform of the Republican Party but an implicit theory of the political system and of the proper role of the judiciary within it.”¹¹

Although constitutional law elicits these differing descriptions most often, similar descriptive contrasts can be drawn in other fields of law. In torts, for instance, positions favoring new causes of action for plaintiffs or new bases of recovery are generally considered progressive while pro-defendant positions are often taken to be conservative. A similar distinction shows up in criminal law, perhaps especially in the

9. See, e.g., Public Citizen, “McConnell v. FEC: Litigation Over the Bipartisan Campaign Reform Act of 2002, A History,” available at <http://www.citizen.org/congress/campaign/legislation/bcralaw/articles.cfm?ID=8521> (last visited September 25, 2004).

10. Mark Tushnet, *A Republican Chief Justice*, 88 MICH. L. REV. 1326, 1328 (1990).

11. Thomas Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621, 621 (1994).

area of defendants' procedural rights. Does a judge respond to a tort or criminal case because of the judge's policy preferences regarding who gains or loses? Alternatively, does a judge first adopt conceptions of tort such as corrective justice or efficiency enhancement or the internalization of the costs of doing business, or of a conception of procedural justice that gives priority to the value of community security over the value of individual liberty or process integrity, and then follow the logic of that prior commitment? Again, empirical work finds correlations between case results and judicial policy preferences and, again, defenders of the quasi-autonomy of law advance conceptions of judicial philosophy which rationalize many of these results as the products of the application of a particular judicial philosophy.

Corporate law can be characterized by a schism between those who believe the corporation is best seen as a voluntary, contract-based arrangement and those who believe it is best seen as a quasi-public entity with both public and private responsibilities. This is another cleavage that maps roughly onto a conservative-to-progressive axis. The contractarian group believes that shareholders should be supreme in the arrangement, and that the state should simply create default rules for the contract. Meanwhile, the progressive corporate law scholars believe that the fixation on contract within corporate law is a throw-back to *Lochner*-era reasoning. Corporate law, to the progressives, should be an instrument for social progress and should be adjusted to make corporations more responsive to the interests of workers, communities, and society at large. What is particularly troubling in this debate is that there is so little discussion between the camps that two leading corporate law scholars recently wrote that there was such unanimity of belief in favor of a shareholder-centered notion of corporate law that we have achieved an "end of history" consensus for the discipline.

In international law, one might predict that something similar could be observed, although the field has produced an insufficient mass of judicial decisions covering the kinds of disputes that lend themselves to placement along a political continuum. Certainly, though, when commenting on politically salient international disputes—the extradition of Augusto Pinochet, the legality of the peace-keeping mission in Bosnia, or the use of military commissions for the trial of captured Taliban and Al Qaeda members—the legal positions adopted by international law scholars seem often to mirror their policy preferences.

What are we to make of this? One possibility is that empirical studies showing correlations between judges' policy preferences and case results are observing a spurious causal relationship. Perhaps a certain justice is by and large following the dictates of a judicial philosophy, and doing so within professional norms of legal reasoning. It then turns out that the reasoned application of consistent methods and principles produces outcomes generally correlated to the political positions of a political party because those political positions were themselves based on political principles similar to principles incorporated into the judicial philosophy. For example, a methodological commitment to originalism in constitutional interpretation may produce an orientation toward questions of federalism more respectful of state autonomy and more vigilant in enforcing boundaries on enumerated federal powers than the post-New Deal Court's orientation toward those questions. Similarly, a political phi-

losophy that took as one of its core principles a vision of federalism comparable to a vision attributed to the Founding Era produces positions on public policy problems that we end up calling conservative. Accordingly, a judge could employ methods of legal reasoning that apply his or her judicial philosophy to legal issues in ways that produced answers consistent with a conservative political plank that has been generated by thinking through the analogous political issue based on core political principles. A correlation between judicial decision and political conservatism would then be observed, but it would not be because the judge was “being political.”

Of course, efforts to salvage the autonomy of law in this way are not without difficulties. There is first the complication that the lessons of history and of original meaning are contestable and often indeterminate. Beyond the possible limitations of any particular legal method or principle, any such approach is also potentially vulnerable to the charge of selective application. In the area of regulatory takings, for example, otherwise originalist and traditionalist judges sometimes put those methods in the back seat and take a brief ride with the Living Constitution. The historical record supports the conclusion that the Just Compensation principle was originally limited to actual appropriations of property, and did not extend to regulations of the use of property. Even Justice Scalia has acknowledged that Justice Holmes introduced the idea of regulatory takings in *Pennsylvania Coal v. Mahon*¹² in order to respond to circumstances unanticipated by the Founders.¹³

Even putting aside issues of selective application, achieving consensus on what a truly progressive or conservative approach is may prove so difficult that it will be impossible to ascertain whether any collection of decisions is explicable as a consistent application of autonomous legal principles or not. The accretion of decisions and competing interpretations of any judicial philosophy may well generate a “multiplication of judicial interpretations . . . so varied as to give the artisan a broad range of discretion,”¹⁴ making any claims of autonomy impossible to test.

Such thoughts as these may lead some to conclude that arguing over whether or not there are distinctive legal methods is ultimately without profit. One might better get on with the business of advocating legal principles on the basis that they are superior to their competitors. If such ideas prevail in both the judicial and political realms so that some descriptive political label can be affixed to decisions following them, perhaps that is both unavoidable and unobjectionable. On this approach, what divides conservatives and progressives is not a dispute over whether law is autonomous or not; rather, the question is whether conservative principles are better than progressive ones, or vice versa, as ways of ordering society. According to this view, we ought to spend our time arguing over the best principles, not over whether decisions following them can be labeled in some way or another.

Where does this leave the agendas of the three legal societies noted above—the American Constitution Society, the Equal Justice Society and the Federalist Society?

12. Pa. Coal v. Mahon, 260 U.S. 393 (1922).

13. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014-15 (1992).

14. BENJAMIN WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 197-99 (1942).

Are there truly “legal visions” that can be characterized as conservative or progressive, as all three of these groups contend? If there are, what is being referred to when the characterization is made—the results of cases or some characteristics internal to the legal reasoning process? Is this way of drawing upon categories of political evaluation better or worse than other ways of appraising legal reasoning? Those who conclude that we might better spend our time debating legal principles themselves, leaving it to others to affix political labels or not, face different issues. For them, the basic question is, what are the best legal principles to govern different areas of the law?

The Fourth Annual Public Law Conference at Duke Law School brought together a distinguished group of scholars, asking them to approach some of these topics from their own preferred perspectives. The result was a stimulating two-day exchange of views across a range of topics and from a variety of perspectives. This volume of *Law and Contemporary Problems* is one of two to contain papers stimulated by the conference. The current volume concentrates on the public law sphere and largely on questions of constitutional meaning. A subsequent volume includes work examining private law and international law issues.

Gerry Spann picks up the challenge of identifying what is distinctive in progressive and conservative visions of the Constitution in the specific context of perspectives on questions of race. He considers differences in social policies based on whether society’s commitment to equality is seen as “substantive” or “rhetorical.”¹⁵ Current policies toward race, he further argues, might be considered to be a sort of compromise between these two opposing visions. His deeper point, however, is that neither the poles nor the compromise positions end up dealing adequately with the problem of racial injustice because both progressives and conservatives are variants of a liberalism that renders adequate solutions unlikely. For one interested in racial justice, Spann concludes, “things look pretty bleak. . . . Because the appeal of liberalism continues to be strong enough to encompass both the progressive and conservative ends of the political spectrum, it appears that racial injustice will persist in the United States regardless of who is in power.”¹⁶

While Spann sees current racial policies in the United States as some evidence of a compromise between progressive and conservative views, Louis Michael Seidman sees the progressive perspective on criminal procedure as being nearly absent from contemporary jurisprudence, and wonders why that is so.¹⁷ While the explanation is complex, Seidman lays at least some of the responsibility at the feet of progressivism itself, claiming that progressivism lacks a single vision in this area and, worse, that some of the seven strands of progressive approaches to criminal procedure that he identifies generate internal contradictions. The disadvantage for progressives in this area, Seidman seems to say, is that conservatives have a coherent approach to questions of criminal procedure while progressives do not.

15. Girardeau A. Spann, *Just Do It*, 67 *LAW & CONTEMP. PROBS.* 11, 12-13 (Summer 2004).

16. *Id.* at 20.

17. Louis Michael Seidman, *Left Out*, 67 *LAW & CONTEMP. PROBS.* 22 (Summer 2004).

Suzanna Sherry does not deny that real distinctions exist between progressive and conservative visions of the Constitution, but she is skeptical of the usefulness of trying to understand our Constitution as embodying either of them. She urges us to put the categories aside, because the effort to identify progressive and conservative constitutionalism fails to appreciate the tensions between fundamental values such as equality and liberty that pervade our Constitution and that require a pragmatic, context-dependent approach rather than one driven by a single-minded constitutional theory.¹⁸ She draws on cases in the free speech and religion areas, where others have had difficulties organizing doctrine along clearly progressive or conservative lines, to illustrate her pragmatic approach.

Sherry's article suggests that a properly applied Constitution ought to yield results that defy easy classification as either progressive or conservative. Like Sherry, Erwin Chemerinsky and Neal Devins are each, in his respective contribution, interested in examining the Court's work product. Chemerinsky ends up weighing in on the Mark Tushnet side of the Tushnet-Merrill debate mentioned earlier:¹⁹ for him, in significant areas of the Court's work, its results are best explained as manifestations of a conservative politics.²⁰ Neal Devins also finds an association between politics and the work product of the Court, but from a different direction. While constitutional legal scholarship has been widely influenced by Alexander Bickel's characterization of the Court as a "countermajoritarian" institution, Devins aligns himself more with an equally influential work—but influential almost exclusively among political scientists until recently—of Robert Dahl. Writing in 1957, Dahl concluded that the Court's constitutional decisions "are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."²¹ Devins then supports his claim with a careful examination of recent decisions striking down federal statutes and their relationship to various possible interpretations of majority opinion.

Robert Tsai finds the free speech area fertile grounds for exploration, and like Sherry sees something other than a struggle between progressive and conservative views at work there.²² Tsai is taken by the extent of agreement among justices usually thought to be on different sides of an ideological divide. He argues that the Court's modern free speech cases can be profitably analyzed in terms of their rhetoric, in which he finds the Justices employing some recurring rhetorical devices in the course of securing their place as final arbiter between other opposing social institutions.

18. Suzanna Sherry, *Warning: Labeling Constitutions May be Hazardous to Your Regime*, 67 LAW & CONTEMP. PROBS. 33, 49 (Summer 2004) ("It falsely implies a full-blown constitutional theory based on sound philosophical analysis that answers all the hard questions in constitutional law. It polarizes the debate and stigmatizes one's opponents. It exacerbates the tendency to use labels instead of grappling with issues, and it lends itself to a lack of nuance.")

19. See *supra* notes 10-11, and accompanying text.

20. Erwin Chemerinsky, *Progressive and Conservative Constitutionalism As the United States Enters the 21st Century*, 67 LAW & CONTEMP. PROBS. 53, 59 (Summer 2004) (commenting on the view of John McGinnis that Chief Justice Rehnquist "has earned very high marks [and] . . . the court has largely regarded the Constitution as law rather than as a mirror of the Justices' own desires," and concluding that this is "nonsense.")

21. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

22. Robert Tsai, *Speech and Strife*, 67 LAW & CONTEMP. PROBS. 83 (Summer 2004).

Dawn Johnsen's contribution extends her prior work on the techniques of constitutional interpretation outside of the judicial branch.²³ Concentrating on the executive branch, Johnsen explores different responses to the question of how this co-equal branch of government, operating under a President who takes an independent oath to uphold the Constitution, ought to understand its own interpretive responsibilities in relation to the interpretations of the Supreme Court. In recent years, the interest of progressive scholars in asserting greater independence of interpretive judgment on behalf of the other branches of government has grown in reaction to the perceived increasing conservatism of a Supreme Court that at the same time has asserted a strong position of judicial supremacy in matters of constitutional meaning. Johnsen reminds us, however, that the contemporary debate about the relationship of the co-equal branches of government in this regard has its roots in the Reagan Administration, and specifically in positions taken by the Justice Department under Attorney General Ed Meese. "The Reagan administration asserted broad and controversial interpretive authority, especially through Attorney General Edwin Meese III. The Department of Justice under Meese's leadership developed comprehensive and detailed constitutional positions at odds with Supreme Court precedent on a broad range of issues, including abortion, congressional power, federalism, and affirmative action."²⁴

Johnsen also reminds us that in addition to staking out a position on the relative independence of the executive branch in matters of constitutional interpretation, the Reagan Administration also pursued a self-conscious strategy of conservative judicial appointments. Ironically, the success of the appointment strategy has brought a Supreme Court whose views are more congenial with those of the Reagan Administration on matters of constitutional meaning but much less so on the issue of interpretive independence. In Johnsen's view, the strong judicial supremacy claims of the Rehnquist Court are too strong. "The Rehnquist Court's new judicial supremacy fails adequately to respect, or even acknowledge, the role of the political branches in the development of constitutional meaning, but the Court seems to be succeeding in its expansion of judicial power."²⁵

Barry Friedman's contribution nicely complements that of Dawn Johnsen. Friedman is interested in engaging the substantive issues posed by the debate over judicial supremacy vs. interpretive independence. At the same time, he documents how the idea of interpretive independence has become more attractive to progressive scholars as the Court itself has become more conservative, as well as how interpretive independence was most vigorously pursued by conservatives when the Court was more liberal. The scholarship on the question of interpretive independence has thus experienced, in Friedman's terms, a cycle of constitutional theory. The existence of such cycles, when those endorsing specific theoretical positions seem to switch from progressive to conservative, and vice versa, as the practical impacts of those theories switch from progressive to conservative, and vice versa, is a major source of the con-

23. Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105 (Summer 2004).

24. *Id.* at 106.

25. *Id.* at 107.

cern expressed earlier that theoretical claims are determined by policy preferences. Looking over the landscape of theory cycles, Friedman asks one of the questions basic to the symposium: Is it “even possible to adopt theoretical views about constitutional meaning and interpretation that will endure over time?”²⁶ Friedman’s analysis suggests that constitutional theorists, even those rightly thought to be exemplars of the craft, may be insufficiently attentive in their theorizing both to the difficulty of tracing the consequences of theoretical positions, thus calling for empirical humility in theorizing, and to the need to test their theories in historical and political contexts different from our own, thus calling for historical humility.²⁷ In the end, Friedman reaches a conclusion similar, although not identical, to Sherry’s: namely that “the process of political change and the problem of cycling theory might suggest that we narrow and contextualize our solutions, pay careful attention to the precise immediate problem, and eschew quick calls for fundamental structural change.”²⁸

Garrett Epps, like Friedman, also addresses a question that was basic to the symposium. Conservative constitutional theorists have a general answer to an inquiry into what distinguishes conservative constitutionalism from conservative political preferences. Their claim is that conservative constitutionalism adheres to a defensible interpretive methodology grounded in originalism. Whether particular constitutional rulings of which conservatives approve can be squared with originalism is a point that can be debated,²⁹ but at least originalism provides a methodological base upon which they are prepared to stand. In contrast, progressives are often accused of having no methodological commitments at all, but only a commitment to preserve a group of favorite rulings of which they approve, but for which they lack a sufficient theoretical defense. Epps’ contribution urges a greater appreciation of the sea change in constitutional meaning represented by the Fourteenth Amendment as a foundation for progressive constitutionalism.³⁰ He argues that the Fourteenth Amendment was itself rooted, in ways many and complex, in the historic struggle over slavery and the Slave Power that dominated antebellum politics in the United States; it is not simply a Reconstruction Amendment. The Fourteenth Amendment needs to be understood, he argues, not through the lens of the *Slaughterhouse Cases*,³¹ which marginalized its significance, but as an embodiment of the defeat of the Slave Power and as a means of securing the permanence of that victory. Although he does not suggest this in so many terms, an implication of Epps’ contribution is that progressives may wish to explore the implications of 14th Amendment originalism.

As I hope this brief Foreword illustrates, the articles found in this volume both reflect upon and contribute to the debate over competing progressive and conservative

26. Barry Friedman, *The Cycles of Constitutional Theory*, 67 LAW & CONTEMP. PROBS. 149, 149 (Summer 2004).

27. *Id.* at 168-74.

28. *Id.* at 171.

29. See, e.g., William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217 (2002).

30. Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment*, 67 LAW & CONTEMP. PROBS. 175 (Summer 2004).

31. 83 U.S. (16 Wall.) 36 (1872).

visions of the Constitution. Individually, they are much more nuanced than any such summary as this can reveal, and so I urge you to examine the articles themselves, and then to bring your own reflections to bear on the issues examined.