

PANEL I: THE ENTERPRISE OF JUDGING

THE DIVERSITY OF THE FEDERALIST SOCIETY

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When I was teaching summer school in 1982 at the University of Texas, Lino Graglia, an economist from UCLA named Wes Leiber, and I were wondering one day whether it would be possible to assemble a group of law professors and students who were not adherents to the dominant ideological environment in which we were being asked to work. It turned out that at the same time, Lee Liberman, Steve Calabresi, and some other law students at The University of Chicago, Yale, and Harvard were considering the same idea, and executed it. So it happens that we gather here as members of the Federalist Society, as people who are interested in the Federalist Society, and as people who do not like the Federalist Society, to discuss topics of importance to public policy.

The Federalist Society is not a particularly cohesive group. Perhaps this is because the main characteristic shared by its members is the existence of a common adversary; namely, the unleavened left-wingery that permeates the curriculum and appointments process at most American law schools. The Federalist Society bills itself as an association of libertarians and conservatives, and it is therefore not exactly a dating service: It is more like a collection of odd couples, because libertarians and conservatives disagree—strongly, if not violently—on many matters.¹ Legalizing drugs,² pornography,³ flag burning,⁴ property and

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1. See generally STEPHEN L. NEWMAN, *LIBERALISM AT WIT'S END: THE LIBERTARIAN REVOLT AGAINST THE MODERN STATE* 32-33 (1984) (characterizing the debate between conservatives and libertarians as a "blood feud"); GEORGE F. WILL, *STATECRAFT AS SOULCRAFT* (1983) (describing the different underlying philosophies of conservatism and libertarianism); Richard A. Posner, *Bork and Beethoven*, 42 *STAN. L. REV.* 1365, 1376 (1990) (comparing the originalist approach of some conservatives to the classical liberal approach followed by other conservatives).

2. See Mark A. R. Kleiman & Aaron J. Saiger, *Drug Legalization: The Importance of Asking the Right Question*, 18 *HOFSTRA L. REV.* 527, 532 (1990).

3. See Richard Delgado & Jean Stefancic, *Pornography and Harm to Women: "No Empirical Evidence?"*, 53 *OHIO ST. L.J.* 1037, 1045 (1992).

4. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 127 (1990).

contract rights,⁵ and gays in the military⁶ are examples of matters on which libertarians and conservatives often differ. My point here is that there is much diversity in our group. We are not, by any means, of one mind. That is part of the reason why, over the years, the Federalist Society has provided a catalyst in our law schools for the discussion of important matters affecting the law.

I accept the role of moderator for this panel discussion with a great deal of pleasure. I was a student here at Harvard in the 1960s during literally revolutionary times. I look around the room and see friends who were in this same room during meetings that did not proceed with nearly so much civility as I expect ours will. This place has always been one where ideas are alive, real, and worth fighting about. So I find myself grateful to be here, and eager to be a participant in the symposium.

5. See L. Gordon Crovitz, *Property and Liberty: Clarence Thomas and the Coming Conservative-Libertarian Split on the Supreme Court*, 22 *PRESIDENTIAL STUD. Q.* 711-19 (1992).

6. See James D. Woods, *The Right Side of the Closet*, *WASH. POST*, Oct. 4, 1992, at X1.