ON FINDING (AND LOSING) OUR ORIGINS

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I

Suppose I asked a hundred people to write an article describing what happened yesterday in, say, France. We could even agree more specifically on the question, like what happened in the City Council of Paris; or, what did the French government do with respect to the Middle East? I doubt there would be much disagreement if we limited ourselves to a factual account of what occurred. But if I asked the same people to *interpret* what happened, if I asked them to explain events so that I could understand why those particular things happened, a range of arguments and ideas would emerge. And we could talk about it for weeks or months or forever and never achieve consensus.

Nor would it be different if we ran the same experiment with respect to what happened yesterday in California or New York City. Just read the op-ed pages in different newspapers. The editorialists are all being honest in explaining things as they see them; there is simply a lot of disagreement about the "true" explanation. Though many premises are shared, people have different views about what is more or less important, about how to interpret why people did things, and about what the influence was of this or that occurrence in any particular context. Yet no one ever suggests that we cannot talk about or analyze current events, whether in France or right here at home. We accept that explaining human behavior is complex. It turns on how we see things, and we may see things, even the same things, very differently.

History is like this. I speak as an amateur historian, of course: an autodidact, albeit one who has had assistance from some very fine historians. But my own sense after having spent about a decade rummaging around the Founding era is that history is just a kind of comparative study and that we can do it about as well and with about

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as much certainty as we do any kind of comparative study. One tries to immerse oneself in the culture of an earlier era in much the same way one tries to immerse oneself in any culture. We try to learn as many facts as we can, but more than that, we try to get a feel for the culture. The task is collective, and we learn from what others have discovered as well as from our own research. Slowly, we come to better understand the people in a particular place at a particular time. (I think this is why historians, unlike scholars in most fields, continue to get better with age.)

Obviously, there are limitations on how well I can get to know the past. I may not be able to obtain all the information I need, and I can't meet and talk to someone from the Founding era in the same way that I can travel to France and talk to French people. (I can, however, read their private diaries and letters, which few of my French friends are likely to share with me.) All things considered, in any even, we can do pretty well—especially when dealing with a period like the Founding, which is not too distant and which has left us more material than any one person could seriously hope to absorb in a lifetime.

The Founding will, to some extent, always remain foreign. We are not "of" the culture and can never be more than observers. But we can do about as well in grasping the Founding as any of our contemporary comparativists or anthropologists do with their respective cultures. There will always be room to disagree, and there will always be room for new interpretations to emerge, or for old ones to come back into vogue. But that simply is not an indictment of any consequence. No more here, at least, than in any other discipline that purports to be descriptive and interpretive rather than purely theoretical.

So when it comes to the question implicit in the title of this panel, "originalism and truth," my answer is that we can find "truth" in the context of the Founding—if by that we mean accuracy, as I take the organizers of the panel to have intended—in roughly the same manner and to roughly the same extent as we can find truth in any context that requires judgment and interpretation. What that manner and extent are I leave readers to decide for themselves. I insist only that historical inquiry is not exceptional in this regard. It does not follow that there are no problems with originalism as an approach to constitutional interpretation, but its problems do not, in any important sense, turn on an inability to discern or understand what the Founding was all about.

To put the same point another way: it is ultimately irrelevant whether there is an objective truth about what happened at the

Founding (or at any other time, for that matter, including yesterday). Even if such a truth exists, we are inevitably and unavoidably trapped by our own subjectivity in trying to apprehend it. Discussion will call for judgment and interpretation and so always be subject to revision and never a matter of settled, irrefutable fact. But that is true of practically everything that counts or is worth doing in life. Certainly it is true of every method of legal interpretation, whether we are talking about textualism or pragmatism or moral philosophy or any other approach one might advance.

II

So what is wrong with originalism as a historical method of legal interpretation? I want to sketch two problems in this brief comment. The first relates directly to our topic in that it turns on difficulties in interpreting history. The second is less methodological and more normative.

A

Originalism rests on a conventional theory of positive law:[1] something becomes "law" through a process of enactment, and the law "is" what those who enacted it meant it to be. Laws are commands, issued by some body that has been delegated authority to issue those commands.[2] Pure textualism is not a viable strategy under this conception because the language used in an enacted law is merely the means by which its underlying command is conveyed. The language may be the best evidence of that command, but where it is unclear—either because inherently so or because the passage of time has made it so—we must look elsewhere to determine what the law "is," which is to say, what the lawmaker meant to command or sought to accomplish.

This model of positivism has obvious and well-known problems, most of which I do not want to talk about here. Among the difficulties I am not interested in are things like whether the command theory makes sense or whether we can talk about the intent of a group. As with the general question of historical research, these are not difficulties unique to originalism, and they would exist in pretty much

1. *See* William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1260 (1986).

2. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832) (associating the concept of law with the commands of a sovereign lawgiver).

the same form had the Constitution been ratified yesterday instead of in 1788. There is, however, one methodological problem inherent in originalism that does grow directly from the fact of historical distance and that seems to me intractable. This is the problem of translation.

I said above that with time and hard work we could do a reasonably good job understanding what the Founders saw as their problems and what they came up with by way of solutions to those problems. But originalism asks for something different: it asks us to understand how the Founding generation would have solved *our* problems. And that, I think, is impossible: not because we can never translate what someone said or did at one time and under one set of circumstances to another time and different circumstances, but because the translation problems in this context grow quickly to epic, self-defeating proportions.

To begin with, one cannot accurately understand the rules of the Constitution without also understanding the conditions and assumptions on which those rules were based. This is a wholly conventional idea, the justification (among other things) for the common interpretive strategy from changed circumstances. To the extent that a law commanding someone to "do X" or "not do Y" rests on circumstances or conditions that make the doing or not doing of X or Y problematic, when these circumstances or conditions change, so too must the command. Not all changes in circumstance matter, of course—only those affecting the premises that actually led lawmakers to adopt a particular rule. This is why, for example, it matters so much to originalists engaged in the Second Amendment debate whether the Framers had an individual right in mind or were thinking exclusively about the viability of state militias.[3]

Take the following trivial example by way of illustration: suppose I have to choose a color. I think the color green is very pretty, at least I think so when it is on a blue background. So if someone asked me to choose a color and the background were blue, I would choose green. But what if the background were red? Under those circumstances, I might not have chosen green at all. The point is not just that I might have chosen a different color. The point is that once the background changes from blue to red, the problem itself is different. What color to choose when the background is red is, literally, a different question.

3. *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 639-40 (1989) (presenting scholars' statements regarding whether the Second Amendment provides individual rights or simply the collective right to have a militia).

So, the Founders' choice of green on a blue background is just unhelpful if the background has become red. And unless I know that the Founding generation thought the same color should go on a red as on a blue background, I have invented a new rule if I say the answer is green.

Let me give a less trivial illustration: do federal courts have common law making powers? We know that the Founding generation said no to criminal common law (in *United States v. Hudson and Goodwin*),[4] but yes to civil common law (in *Swift v. Tyson*).[5] When the Court overruled *Swift* in *Erie Railroad Co. v. Tompkins*,[6] it did so based partly on a historical argument that *Swift* had the Founding wrong. Federal courts should never have been able to make common law, the Court said, because nothing in the Constitution granted them power to do so, and federalism therefore forbade it.[7] We now know that the Court in *Erie* was wrong in this respect and that *Swift* and *Hudson & Goodwin* were both consistent with the original understanding.[8]

The common law occupied a peculiar station in the eighteenth century. Today, we think of the courts' common law authority as a power: the power of judges to make law, which can exist in any field or domain, and for us presents mainly a question of separation of powers. The eighteenth-century view was different. Then, the common law was seen as a distinct *field* of law, one that covered most of the ordinary affairs of life in a world where legislation was still somewhat exceptional.[9] The scope of this field was defined by a set of principles, found in judicial opinions, but originally derived from "maxims and customs . . . of higher antiquity than memory or history can reach . . . ."[10] The field of the common law existed independently of and alongside assorted other fields, each defined by its own distinct

4. 11 U.S. (7 Cranch) 32, 34 (1812).

5. 41 U.S. (16 Peters) 1, 18-19 (1842), *overruled by* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

6. 304 U.S. at 77-80.

7. *Id.* at 72-73 ("[R]ecent research" by "a competent scholar," the Court said, "established that the construction given to [§ 34 of the Judiciary Act] by the Court was erroneous . . . ." (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51-52, 81-88, 108 (1923))).

8. *See generally* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984).

9. *See* Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 281-83 (1992).

10. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 67 (Univ. of Chicago Press 1979) (1765).

set of principles, such as the law of nations, the law of equity, and the law merchant, and admiralty—and, within each separate jurisdiction, by statutory law.

Two implications followed. First, a political society could choose to "receive" the common law's body of principles for itself, but doing so required a positive political act in its constitution or by way of legislation.[11] Second, once a society had adopted the common law, its judges were authorized to interpret that law in all the cases to which it applied, employing the uniquely legal form of "artificial reasoning" by which judges molded the principles of the common law to fit the exigencies of the day. Reception further authorized the society's legislature to modify or replace common law rules by statute. Unless and until the legislature acted, however, it was the judges' special task to determine how the common law resolved particular cases. In so doing, moreover, the judges were participating in a collective project of applying a general body of legal principles that was shared everywhere the common law system had been received.[12]

Given this understanding, it is not surprising that the possibility of federal common law crimes might have been controversial.[13] Common law offenses could be committed against the United States only if the federal government had received the common law. Yet if it had, it followed that suits based on common law would present federal questions that could be litigated in federal court as cases

11. Thus, upon declaring their independence, twelve of the original thirteen colonies immediately adopted "receiving statutes" expressly incorporating the common law as state law. *See* ELIZABETH G. BROWN, BRITISH STATUTES IN AMERICAN LAW: 1776-1836, at 25-26 (1964); Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 798-805 (1951).

12. This rather complex idea—complex partly because it is so foreign to modern conceptions of law—has nowhere been better explained than by Joseph Beale in his treatise on conflict of laws. Speaking of the relationship between the common law as a received system of law and the positive law of a state, Beale states:

> But though [the common law] . . . is received in several states, it is necessarily distinct from the law of each of these states, since such laws are not the same; and in each state therefore the local law may, and practically must, vary to some extent from the accepted general system. The common law is received in Massachusetts as the basis of its law; but the positive law of Massachusetts, by mistake or design, is gradually differentiated from it: "So shakes the needle and so stands the pole," as stands the general system of the common law to the unwritten law of a particular state. The common law is one law; the law of Massachusetts, even her unwritten law, is another. To confuse the two is easy, since one is based upon the other, and this accounts for the fact that the difference is often not realized.

1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 4.5, at 34-35 (1935).

13. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1407-09 (2001) (discussing the controversy over the Sedition Act).

"arising under . . . the Laws of the United States."[14] Moreover, since reception of the common law necessarily included the power to change it by legislation, it also would have followed that Congress could repeal or modify any rules within its domain—even in areas beyond Article I's enumeration of legislative powers. Small wonder, then, that Jefferson branded Federalist efforts to enforce common law crimes an "audacious, barefaced and sweeping pretension."[15] Federalists disagreed, of course, which is why they initiated common law prosecutions and also why they felt comfortable modifying the common law of sedition in the Sedition Act.[16] The Supreme Court eventually embraced the Republican position in *Hudson and Goodwin* in 1812, responding to the Republicans' political ascendancy after 1800.[17]

This same conception of the common law explains as well why no one was similarly upset in 1842, when the Supreme Court held in *Swift* that federal judges were not bound by state court decisions in civil actions based on the common law and brought in federal court via diversity jurisdiction.[18] Certainly the absence of protest over *Swift* was not due to waning interest in states' rights—not in 1842, with the Jacksonians in command and the slavery problem brewing. But the question in *Swift* was different, because no one was claiming that common law was federal law.[19] Federal jurisdiction was based on diversity, and Justice Story was simply saying that federal judges were as capable as state judges of deciding what the common law was in a particular case: as capable, in other words, of participating in the collective project of interpreting a system that had legal force because it had been adopted by the states, but that still consisted of general

14. U.S. CONST. art. III, § 2, cl. 1.

15. Letter from Thomas Jefferson to Edmund Randolph (Aug. 18, 1799), *in* 7 THE WRITINGS OF THOMAS JEFFERSON 383, 384 (Paul Leicester Ford ed., G.P. Putnam's Sons 1896). In addition to Jefferson's letter to Randolph, quoted in the text above, see Madison's lengthy and scholarly (though no less impassioned) repudiation of the Federalists' argument in his Report of 1800 defending the Virginia Resolves. *See* James Madison, Report on the Alien and Sedition Acts (Jan. 7, 1800), *in* JAMES MADISON: WRITINGS 608, 632-44 (Jack N. Rakove, ed., 1999).

16. *See* Hugh Stevens, *Responsibility in the Media*, 9 U. FLA. J.L. & PUB. POL'Y 177, 182-83 (1998) (discussing the Federalists justification for passing the Sedition Act and the Jeffersonian response).

17. United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32, 32-33 (1812) (discussing public opinion on the question of whether federal courts can exercise a common law jurisdiction in federal criminal cases).

18. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18-19 (1842), *overruled by* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

19. *See id.* at 12-14.

principles.[20]

Where a state had modified or revised these general principles—as by "local statutes or local usages of a fixed and permanent operation"[21]—federal judges were, of course, bound by the state's particular declarations. But where the general common law system was still in place, its principles furnished the governing law, and a court called upon to apply those principles had to discover for itself how best to do so. The decisions of other courts—state courts, English courts, even other federal courts—were "at most, only evidence of what the laws are, and are not of themselves laws."[22] Such decisions were, in other words, data for the judge to use in determining the correct result in the particular case under the general principles of the common law.[23]

Swift became problematic as this pre-modern conception of common law was displaced by the Austinian model of positivism that became dominant after 1860.[24] Austin's view was that all law "properly so called" consisted of prescriptions clothed with legal authority by a sovereign empowered to do so.[25] The common law, which Austin called "judicial legislation," was merely that part of a state's law that judges were permitted to make.[26]

By the late-nineteenth century, this understanding had begun to generate serious pressure to abandon the *Swift* doctrine. For if there were no general law, but only the law of some state, then federal judges had no business ignoring the authoritative voice of state courts as to the meaning of state law, and they had no power to make federal law without authority from Congress or in areas outside the scope of federal legislative jurisdiction. The rise of positivism, in other words, recreated, in the diversity context, all of Jefferson's fears about the

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20. *See id.* at 17-19.

21. *Id.* at 18-19.

22. *Id.* at 18.

23. This is confirmed by certain aspects of the *Swift* regime that were inconsistent with the fears expressed by Jefferson in 1799 and that would otherwise have been quite anomalous, such as the fact that federal common law decisions did not afford plaintiffs a basis for federal question jurisdiction and did not preempt inconsistent state law. Common law decisions of federal judges in diversity cases were not "federal law" at all: they were merely federal judges' determinations of the proper interpretation of the general common law.

24. *See* 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 204 (Robert Campbell ed., 4th ed. 1873) (1863); Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1789-95 (1997).

25. AUSTIN, *supra* note 2, at 2-3.

26. AUSTIN, *supra* note 28, at 204.

implications of allowing federal courts to make their own common law decisions.[27] The demise of *Swift* was retarded for a time by the force of *stare decisis*, but the Court finally renounced its general common lawmaking powers in 1938, in *Erie Railroad Co. v. Tompkins*.[28]

The decision in *Erie* turned on a misunderstanding of this history, which was not properly recovered until decades later. But what if that had not been the case? How should a historically sophisticated originalist have decided? Few originalists today, I suspect, are prepared to overrule *Erie* and restore *Swift*. But why not? What should an originalist do when crucial premises on which a rule formerly rested have ceased to exist?

Many answers come to mind, but none that are consistent with Originalism, because the one thing we cannot do is to follow the Founding generation on a question it never faced or even imagined. Should we try to guess what they would have done? When it comes to *Erie*, for example, one could argue that, if the Founding generation had understood the common law in modern terms, their beliefs about limited federal power would have led them to reach the same result as the Court did in 1938.

But is that right? It seems pretty clear that this would have been Jefferson's and Madison's position, at least in 1799—though guessing what even these Founding Fathers might have said in 1787 is more difficult, particularly Madison, who was quite down on the states when the Constitution was written. Guessing what Hamilton or Washington or James Wilson or Gouverneur Morris might have thought is more difficult still, particularly since they acted throughout the 1790s as if the federal government had received the common law. The truth is that the Founding generation was divided on the question

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27. As Justice Field explained in 1893, protesting continued repetition of the idea of "general law" to justify ignoring state common law decisions:

> [T]here stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

Baltimore & Ohio R.R. v. Baugh, 149 U.S. 368, 401 (1893) (Fields, J., dissenting). *See also* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532-36 (1928) (Holmes, J., dissenting); Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370-72 (1910) (Holmes, J., dissenting).

28. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79-80 (1938).

it did have to face (what to do about the common law as they understood it), and we simply have no idea how they might have fallen out on a question like ours (what to do about the common law as we understand it). As is so often the case, the only way to make a counterfactual question seem easy is not to look at the history too closely.

And I have not even posed a difficult problem. Making these sorts of guesses becomes much harder once we start asking what the Founding generation might have thought about today's versions of making war or making treaties or federalism or separation of powers or the United Nations or government aid to religion or pretty much any issue we find difficult ourselves. As a historian friend of mine likes to say, if we resurrected James Madison from the grave, the only thing we know for sure is that he would be confused.

Our inability to know what the Founding generation would have done with today's problems does not result from failure of imagination. Their world was different from ours. It was different socially, different philosophically, even different physically. To move eighteenth-century thinking into the present is not impossible, but neither is it an act of recovery in any meaningful sense: it is an act of creation. The Founding generation's line of reasoning ends at a point well short of our destination, a point that still leaves room for any number of different directions and solutions. We can choose, but the choice is ours, not theirs. We are no longer asking what the Founding generation did. We are asking what they would have done if they were us—or, rather, we are asking what we would have done if we were them and were thinking about our problems. And isn't that really just another way of saying that we are asking what we would do if we were us?

B

This suggests a second, more normative problem with Originalism, which is that it does not fit how we think law does or should work. Suppose a law is enacted, and the very next day a first case arises. The case might be easy; there are, after all, problems that contemporaries will perceive as clearly covered by the text. But lawmakers are not infallible, and we inevitably discover gaps, conflicts, and ambiguities. Suppose our first case raises one of these. The court needs a theory of interpretation to resolve it, of course, but for present purposes I don't really care what theory the court uses. Whatever it is, the court employs it to resolve the ambiguity, settle the

conflict or close the gap.

In so doing, the court has changed the law. It is now the law as it seemed to exist at the moment of enactment plus the new clarity added when an ambiguity was discovered and resolved. But laws are complex things, and in closing this gap or resolving this ambiguity, the court will almost certainly have created some new gap or some new conflict or ambiguity. So on day two, another case arises, perhaps because yet another gap or ambiguity has been discovered, or perhaps because of a problem generated by the solution reached on the first day. Either way, the court addresses that problem too, and in so doing resolves the new problem while creating still more new problems, and in the meantime, the outside world that the law was designed to address may change, and this too creates conflicts or gaps or ambiguities for the court to resolve. And so it goes, on and on, an unfolding process of continually making and adapting the law in practice.

Our best understanding of law is that an interpreter should take these changes into account as they unfold. This is not just the conventional story of precedent—it is also the most sensible account we have of legal interpretation. For laws generally, and constitutions particularly, give rise to complex, interdependent responses. As decisions are made, actors throughout the system adapt and change with them. One should not ignore this. It makes no sense to address a new problem by resort to an original blueprint after the design has been modified many times. One should not ignore the original blueprint either. One would presumably start with it, so as to understand basic principles, and then trace the course of problems that arose and solutions that were adopted—trying to understand how the system has been modified and what it has grown into. At the end of this process, one would understand the system as it now exists and be in the best position to think sensibly about how to solve the problem at hand.

This, it seems to me, is how we should use history in constitutional interpretation. We cannot understand how the Founders would have understood *our* problems. But we can understand how they understood *their* problems. And we can understand how they solved those problems, and how their solutions created still more problems for the next generation, and how that next generation addressed its problems, and so on—right on down to the present.

History performs a framing function. Our Constitution "is" what those who enacted it and those who came after them made of it. It is

what the generations of Americans who have lived under the Constitution have bequeathed to us, and we need history to understand how it actually works and what it has become. History will not solve our problems, but it will help us to understand what they are.

POSTSCRIPT

The text above is a slightly elaborated version of my oral presentation at the conference. While it scarcely reflects anything radical (or even original!), it does take strong exception to the idea that we can or should be trying today to implement an eighteenth-century constitution as it was originally understood. In truth, I do not believe that anyone who is actually familiar with the eighteenth century would say otherwise. Originalism is a political slogan that stands for strong disagreement with a particular subset of modern decisions, not an unqualified commitment to wholesale restoration of the Founders' Constitution.

I doubt, for example, that the same people who want to undo the New Deal are also prepared to give the middle third of the country back to France, though from an originalist perspective the Louisiana Purchase stands on no firmer footing than the NLRB. Likewise, I imagine that the people who insist that Congress has no business enacting conditional spending programs probably are not likewise itching to tell President Bush that he must bring the troops in Afghanistan home right now, that all our executive agreements are void, and that the President must consult with the Senate before beginning talks with foreign leaders. We could, moreover, easily generate a very long list of similar examples, things so extravagantly implausible in the modern world that strict originalist talk begins to look silly.

These arguments are, I think, clear enough from the discussion above. What was striking, and somewhat dismaying, however, was that when I tried to make this point during the question-and-answer period of our panel, I was jeered. Nor was this the first time something like that has happened to me at a Federalist Society event, and I have seen it done to others, too. I confess that, when the laughter began, I grew angry, and I regret making my point by saying that anyone who held strict originalist views was either ignorant or an idiot. That was a product of frustration at being invited to speak to an audience that apparently had no interest in listening.

I was a second-year law student at the University of Chicago when

the Federalist Society was founded. While I did not agree with its founders on most issues, I thought they had a point that something like the Federalist Society was needed because liberals had grown smug and stopped listening to arguments from those who disagreed with them. And in its early years, what gave the Society's events energy and legitimacy was its genuine commitment to honest discussion. The first conferences worked because of the Society's willingness, indeed eagerness, to create an environment where liberals and conservatives actually listened to one another. Liberal colleagues would sometimes joke that they had been invited to serve as meat for the audience to chew on, but we went because, in truth, it seemed like a place where ideas were taken seriously. No one expected to change anyone's mind (including their own), but one could still learn from people with different views.

Twenty years on top changes things, I suppose, and somewhere along the way the Federalist Society lost its original sensibility and became what it started out criticizing. The smugness and failure to listen are coming from the other side of the aisle now, and the rest of us, it seems, really are there just to serve as lunch meat. What a pity.

DEBATE:

EXCLUSIONARY RULES

PANELISTS:

GUIDO CALABRESI
YALE KAMISAR