INTRODUCTORY REMARKS

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I am delighted to welcome all of you to the Fourteenth Annual National Student Symposium of the Federalist Society. On behalf of Gary Lawson and the entire Northwestern chapter of the Federalist Society, let me say that is a great honor to have so many distinguished guest speakers and students from other law schools here for this weekend's conference. The topic for the conference is "Originalism, Democracy, and the Constitution." Our goal is to explore many of the core issues of constitutional theory and interpretation. We hope in doing this to contribute to the great debate over the proper role of judges in invalidating the actions of the majoritarian branches of government in our system of constitutional democracy.

We decided to revisit the originalism debate at this year's conference for essentially four reasons. First, this year marks the tenth year anniversary of the swearing in of our trustee, Edwin Meese III, to be the seventy-fifth Attorney General of the United States. During his time in office Mr. Meese became one of the most important and influential attorneys general in American history, both because of his role in guiding the historic presidency of Ronald Reagan and because of his role in reforming and transforming the American legal system. One of Mr. Meese's first acts when he took office ten years ago was to publicize the originalism debate that had previously gone on relatively unnoticed within the legal academy. It does seem fitting for us to revisit that debate ten years later to weigh and evaluate the many arguments that have been made since.

Second, this year also marks the fifth anniversary of the publication of Judge Robert Bork's national best seller, *The Tempting of America.*[1] Judge Bork also is a Federalist Society trustee, and his book surely is one of the most controversial best sellers in American legal history. Given the evident gap between the popular and the academic reactions to the book,[2] it seems appropriate to re-

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

2. *Compare, e.g.*, David Streitfeld, *Book Report*, WASH. POST, Feb. 11, 1990, at X15 (stating that once Bork's book hit the upper reaches of the best seller list, the public's response to its fifteen-city promotional tour was "phenomenal") *with* Bruce Ackerman, *Robert Bork's*

visit the issues it raised and to discuss the merits of the arguments made in many of its reviews.

Third, originalism seemed an especially appropriate topic this year to all of us at Northwestern because of the recent publication of two books on the originalism debate by our colleagues Michael Perry and Stephen Presser. Michael Perry's new book, *The Constitution and the Courts*,[3] inspired and challenged all of us with its thoughtful analysis of, and response to, the many arguments made in the originalism debate. We are deeply indebted to Professor Perry for his help in organizing this Symposium and we wish to note that a number of our panel topics are deliberately modeled on the organization of and chapter headings of his recent book. Professor Stephen Presser's new book, *Recapturing the Constitution*,[4] makes a powerful originalist case against much of the modern work product of the U.S. Supreme Court. Whereas Professor Perry thinks the Court's recent decisions can be defended on originalist grounds, Professor Presser finds them deficient. Professors Perry's and Presser's differing originalist arguments should prove highly enlightening as we examine the debate on this theory of constitutional interpretation.

Fourth, and finally, holding a conference on originalism seemed vital to all of us here at Northwestern because we are proud to be the home of the original originalist, Raoul Berger, of the Northwestern class of 1935. Professor Berger's critiques of judicial activism in government budget issuery and in countless law review articles over the years[5] helped to give rise to the public originalism debate and it thus seemed fitting that the conference on originalism should be held at his alma mater.

The seven Panels that follow all seek to address some of the most common criticisms that are made of originalism. They proceed in general from the abstract and philosophical to the more particular and concrete. The Symposium begins with two Panels

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Grand Inquisition, 99 YALE L.J. 1419, 1420 (1990) (book review) (denouncing *The Tempting of America* as "a Red-baiting political tract").

3. *See* MICHAEL J. PERRY, THE CONSTITUTION AND THE COURTS: LAW OR POLITICS? (1994).

4. *See* STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED (1994).

5. Professor Berger's more recent works on this subject include Raoul Berger, *A Lawyer Lectures A Judge*, 18 HARV. J.L. & PUB. POL'Y 851 (1995); Raoul Berger, *Activist Censures of Robert Bork*, 85 NW. U. L. REV. 993 (1991); Raoul Berger, *Activist Indifference to Facts*, 61 TENN. L. REV. 9 (1993); Raoul Berger, *Constitutional Interpretation and Activist Fantasies*, 82 KY. L.J. 1 (1994).

that address the underlying questions of the desirability and legitimacy of constitutional government.

The first Panel takes up the question debated long ago by Thomas Jefferson and James Madison of whether and why one generation ought to be able to bind its successors. In other words, why is it ever legitimate for the dead to rule the living? Originalism, like all other constitutionalist theories, assumes that the dead ought in some circumstances to be able to bind the living. The first Panel explores whether this assumption is correct, and if it is, why the dead should be empowered in this way.

The second Panel considers the normative case for and against constitutional government. Why is it that we think a polity ought to have a constitution? Do the reasons that lead us to embrace constitutionalism generally also lead us to prefer written over unwritten, custom-based constitutions? If they do, when and to what degree ought we to embrace originalism in constitutional interpretation? This second Panel sheds light on the normative case for constitutionalism and for at least some measure of originalism in constitutional interpretation.

The third Panel addresses the question what precisely originalism is. As Professor Perry has observed, many different religions now march under the originalist banner. We thus think it essential to define originalism before we can proceed to analyze its merits and feasibility. This discussion includes both spirited defenses and vigorous criticisms of originalism.

Panels four and five address the problem of two kinds of indeterminacy, normative and historical, both of which have been said to make originalism impossible in practice. Here our intellectual debt to Michael Perry in structuring this conference is particularly strong. Both of these Panels consider the implications of normative and historical indeterminacy in judicial decisionmaking. They also help to shed light on the important question raised by Professor Perry whether there is any relationship between originalism and more theoretical notions of judicial restraint.

Panel six takes up the vital question of the original meaning of the unusually open-ended language of the Fourteenth Amendment. Originalism would be far less useful as an approach to constitutional decisionmaking if it could not plausibly explain the

vitally important text of Section 1 of this provision.[6] This Panel demonstrates that the question of the Fourteenth Amendment's original meaning is not as difficult to solve as many have hitherto believed.

Finally, the participants in Panel seven address the viability of some of the leading alternatives to originalism in constitutional decisionmaking. Some of these alternatives, such as reliance on precedent and on common law constitutionalism, have gained support in recent years among current Justices on the Supreme Court. Panel seven debates the merits and demerits of these alternative theories in a thorough and thoughtful fashion, and serves as a useful conclusion to our two days of deliberation on the great originalism debate.

6. *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").