PANEL III: WHAT IS ORIGINALISM?

INTRODUCTION: A VIEW FOR THE LEGISLATIVE BRANCH

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Thank you all for joining us for the third Panel. I am David McIntosh, the National Co-Chairman of the Federalist Society, and I am delighted to be here as the Moderator for this group of distinguished speakers. I do not claim to have a great deal of expertise in this area—in the sense of having taught a course in it—but my background has given me some insights into how originalism has manifested itself in the executive and legislative branches.

Before we begin, I think we should pause for a moment and recognize the contribution made to this debate by two people who have been highly involved in the Federalist Society. Originalism and the question what standard to use in interpreting constitutional and statutory text were not subjects of discussion very often when I was in law school in the early 1980s. But while I was working for Attorney General Edwin Meese at the Justice Department a few years later, Mr. Meese engaged in a vibrant public debate with Justice Brennan which the Federalist Society subsequently published as *The Great Debate: Interpreting Our Written Constitution.*[1] That document set out many of the fault lines in the arguments on whether originalism should be used by judges as a means and a standard for interpreting constitutional text. It also considered the role of originalism in determining the constitutional duties of officers in the executive branch. Judge Bork, I think, made one of the most important contributions to the debate over the Constitution through the very forceful arguments in his book *The Tempting of America: The Political Seduction of the Law.*[2] He accurately pointed out that judicial decisions often have much more to do with politics than with an understanding

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1. *See* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION (Federalist Soc'y 1986).

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

of the purpose and function of constitutional and statutory provisions.

This last point brings me to an area in which I have had some recent experience: Congress, probably the most political branch of our government. As a new member, I thought I would share a couple of insights concerning how originalism is applied in that body. First, I have to tell you that there has been a refreshing new development in the aftermath of the November 1994 elections. I recently realized that there are now fifteen Federalist Society members in the House and Senate. Before the elections, I think there were three or four Federalists at most. This number is potentially growing even further. The Federalists in the House have formed a caucus called "The New Federalist," which is aimed in part at reducing the number of federal agencies in the government and restoring the balance of power between the federal government and the States.

The influence of the Federalist Society is being felt among the congressional staff as well. Every day, as I travel to and from my committee meetings and the House floor, I seem to run into someone I originally met at a Federalist Society conference. It is refreshing to see people committed to principled interpretations of the law.

But I must confess that Federalists have a great deal of work to do in the area of constitutionalism in the legislative branch. The typical method of constitutional interpretation in the House is most closely analogous to a parliamentary system, in which there is no written constitution to guide decisions. For the most part, members of Congress do not think about the written text of the Constitution when they make a policy decision. For example, they do not ask themselves whether a power they are exercising is one of those enumerated in Article I.[3] Nor do they ask, "Are we violating a provision of the Bill of Rights? What does this legislation do to the structure of our government?" The answers to these questions are more or less assumed in the oral traditions of the body. The typical interpretation of the scope of Congressional power has moved far from the idea of limited enumerated powers to an assumption that Congress can legislate in any area it chooses. And most decisions—even in the new Republican Congress—are made within the framework of the status quo.

3. *See* U.S. CONST. art I, § 8 (listing Congress's powers).

To bring this debate into the Congress, let me urge the organizers of next year's conference, or perhaps some future conference, to consider discussing the implications of constitutional principles for the legislative branch. An increasing number of the people elected to Congress are dedicated to principled decisionmaking in our political process. The insight that a conference could bring to this subject would be enormously helpful to us.

Finally, let me just say that I think there will be a very lively and insightful discussion as we attempt to define originalism precisely. For example, what role should it play in the various branches of our government? What principles should we adopt in our effort to be true to the original understanding of the Constitution or a statutory text? Professor Larry Alexander of the University of San Diego School of Law will lead off the panel, followed by Professor Paul Campos of the University of Colorado School of Law, Professor Richard Kay of the University of Connecticut School of Law, and Professor Frederick Schauer of Harvard University's Kennedy School of Government. So let me now turn it over to Professor Kay to kick off this third Panel and the debate.