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The Federalist Society 2016 National Lawyers Convention Showcase Panel II: Rules Versus Standards in Constitutional and Statutory Interpretation

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**THE FEDERALIST SOCIETY
2016 NATIONAL LAWYERS CONVENTION**

**SHOWCASE PANEL II:
RULES VERSUS STANDARDS IN CONSTITUTIONAL
AND STATUTORY INTERPRETATION**

PANELISTS

PROF. AKHIL REED AMAR
HON. FRANK EASTERBROOK
PROF. JOHN C. HARRISON
PROF. VICTORIA NOURSE
HON. WILLIAM FRANCIS KUNTZ II, *MODERATOR*

ABSTRACT

Justice Scalia believed that the rule of law required a law of rules rather than of balancing tests. He favored rules (like the requirement the President be at least thirty-five years old) over standards (a requirement that the president be “a mature individual”) because they lend themselves more to principled judicial enforcement. As a result, Justice Scalia revolutionized the caselaw he inherited from the Burger Court by eliminating as many balancing tests as possible and replacing them with rules. An example is his favoring of a rule of viewpoint neutrality in freedom of expression cases over separate treatment of various categories of speech. He believed that rules over standards promote the rule of law because they guarantee that judges will decide like cases alike rather than deciding each case on its facts using a totality of the circumstances test. Justice Scalia was so committed to rules over standards that he refused to enforce the non-delegation doctrine because to do so he would have had to employ a balancing test standard, however, in his last year on the bench, there were signs that Justice Scalia was moving away from this position. Justice Scalia also favored rules over standards because they limit lower federal and state court discretion in applying Supreme Court precedents as compared to balancing tests. The reemergence of rules over standards in Supreme Court opinions is another of Justice Scalia’s legacies.

JUDGE KUNTZ: Good morning ladies and gentlemen. My name is William Kuntz and I am the United States District Court Judge from the Eastern District of New York who has the honor and the privilege of moderating our panel of distinguished experts as they explore a central issue in modern constitutional and statutory interpretation, the tension between rules versus standards under our Constitution and in our statutes. Our first speaker is the Honorable Frank Easterbrook; he is a Judge of the United States Court of Appeals for the Seventh Circuit. He is a senior lecturer at the law school of the University of Chicago. He is one of the most well-known, respected, and admired jurists in our country—and he is now being introduced by the polar opposite jurist, Bill Kuntz from Brooklyn.

[Laughter.]

JUDGE KUNTZ: He will be followed by Professor John C. Harrison, former law clerk to Judge Robert Bork of the United States Court of Appeals for the District of Columbia Circuit. The professor now serves as a James Madison Distinguished Professor of Law and Joseph C. Carter, Jr. Research Professor of Law at the University of Virginia Law School. He will be followed by Professor Akhil Reed Amar, the Sterling Professor of Law and Political Science at Yale University, where he teaches Constitutional Law at both Yale College and at the Yale Law School. In 2008, he received the DeVane Medal, Yale's highest award for teaching excellence. Professor Amar will be followed by Professor Victoria Nourse. She is Professor of Law at the Georgetown University Law Center, where she is Director of the Georgetown Law Center for Congressional Studies. She clerked for Judge Edward Weinfeld, distinguished judge, as you all know, of the Southern District of New York, also known as the “mother court” to those of us in the Eastern District. She has served as Chief Counsel for the Vice President of the United States. We will begin by hearing from the Judge, followed by Professor Harrison, by Professor Amar, by Professor Nourse, and we will then have questions among the panelists.

JUDGE EASTERBROOK: Thank you for that gracious introduction. I don't have to say either the “H” word or the “Y” word at any time during my talk. Justice Scalia famously plugged for rules and opposed standards. He sometimes filed short concurring opinions objecting to multi-factor approaches, and when he had the assignment for the majority, he tended to announce approaches with as much rule-like capacity as his colleagues would allow. He wrote an article explaining this preference with the telling title, *The Rule of Law as a Law of Rules*.

He saw rules as vital to promoting the treatment of like cases alike. With multi-factor standards, nothing is dispositive and disparate treatment is assured. I won't catalogue the other reasons he gave but will highlight a few major considerations, but in my way rather than his. Some people well represented in the academy, the bar, and the press, tell us that Justice Scalia's preference for rules stemmed from his politics or his religion. That's not tenable. Take the First Amendment's Establishment Clause. Justice Scalia favored the neutrality rule: a law is valid if it treats religion and secular activities and speakers the same way. Justice Ginsburg and some others support a different rule: government never can support religious organizations and speakers, no matter how it treats secular and

irreligious activities. A prohibitory rule and a neutral rule, but both rules. In the middle, Justice O'Connor favored balancing—a non-rule—as does Justice Breyer. Again, we have support for standards from people with very different approaches to law and political questions, and this runs through our jurisprudence. It's not sound to say that conservatives favor rules while liberals favor standards. The disagreement, when it comes in particular cases, rests on something else. Why did Justice Scalia favor rules? I'll give you two answers.

First, that he did not favor rules but that the text he was interpreting did. So, when the text had a rule, he deployed it. For example, the Seventh Amendment says that the right of jury trial shall be preserved—that creates a rule. The Sixth Amendment says that defendants are entitled to confront and cross-examine their accusers—another rule—to be enforced as a rule rather than watered down through interest-balancing. The First Amendment says, no restrictions on the freedom of speech, which covers political campaigns and that can't be diluted by contentions that a given regulation is beneficial. The Constitution takes out of our hands what is wise. Justice Scalia treated speech the same categorical way as Alexander Meiklejohn and John Hart Ely, no conservatives are they. But the Fourth Amendment says that searches and seizures must be reasonable; that's a standard, which Justice Scalia tried to implement as a standard. It can't have been a surprise that he found thermal imaging of houses and GPS locators on cars to be problematic under a reasonable standard. Put a word such as reasonable in the Constitution and you get common law decision making. Justice Scalia tried to get out of the Constitution what is there in its text, no more but no less, that usually meant rules but not always.

Now I said that he had a second reason to prefer rules, and it stemmed from the nature of the judicial process. The Constitution doesn't have a judicial review clause. The role of judges in evaluating the constitutionality of other actors' choices depends on the constitutional structure. The Constitution beats ordinary law in a hierarchy, but this creates a bad incentive for judges—what you can think of as the dark side of judicial tenure, just like the dark side of the force. The dark side in either case is self-indulgence. Tenure is designed to free judges from politics, the better to enforce commands laid down in prior years but no longer liked so well among the people, the press, and the legislature. Judges don't answer to the electorate so they can and should follow the original decision until it is repealed or amended. But tenure can free judges from law, freedom to follow their own druthers, that's the dark side and we see all too much of it on the bench. When John Marshall articulated the rationale for judicial review in *Marbury v. Madison*, the great Chief Justice stressed that the Constitution beats ordinary law only when the Constitution is itself a source of law.

Rules that satisfy the *Marbury* standard suffice, other things don't. So, in *McCulloch v. Maryland*, which raised the question whether Congress has authority to create a national bank, Chief Justice Marshall wrote that there's no rule about banks in the Constitution. There are vague grants of power but they have to be fleshed out through the political process because anything else makes judges the effective legislators. We didn't rise up against a tenured King of England to hand debatable choices to a tenured judiciary. The political branches are on short leashes with no term longer than a senator's six years and the president of course is under a term limit. Unless there is a real decision in the

Constitution, Judges have to let the electorate prevail. But justice is conserved thirty years, as Justice Scalia did, or even longer. To keep to the rationale of *Marbury*, the Court has to look for rules rather than moral or political principles. Well, what does that have to do with something like the Establishment Clause, which is written as if it were a rule but lacks much content?

One possibility for Justice Scalia would have been to say that the Establishment Clause means exactly what it says: the Congress can neither establish a national church nor interfere with the churches established by the states. You may not know that when the United States was created, more than half the states had established churches. But long before Justice Scalia arrived on the Court, other justices had said that the First Amendment imposes limits on the states and that's incompatible with the original meaning. So, there are two other possibilities: ignore the original meaning and just make things up as you go along—that's what the balancers do—or adopt a second best rule. Justice Scalia chose the second best approach as the one that entails a more modest judicial role. That leaves a choice of rules—the “neutrality” approach to establishment provides more space for legislation than does the “wall of separation” approach. Naturally, Justice Scalia chose neutrality, not because it is more “in” the Constitution than any other approach, but because the rationale of *Marbury* and *McCulloch* is to make judicial review dependent on leaving policy choices to legislators. The wall of separation approach removes judicial discretion at the cost of removing legislative discretion. The neutrality approach limits judicial discretion while preserving substantial room for political choice.

Now let me turn from the Constitution to statutes. Justice Scalia was known as a textualist for both the Constitution and statutory interpretation. But the second constitutional consideration that I've mentioned—the need to find a doctrine that both decides the case and justifies giving the judiciary the final decision—doesn't apply to statutory interpretation. Judges have the final say in each case of course, but the legislature has the final say about what statutes there are. So, for statutes, only the first of my considerations—the need to implement the text as written—plays an important role. For Justice Scalia, this foreclosed the use of legislative history to turn rules into standards—after all, Congress enacts and the President signs only the statutory text. But the need to implement the text as written does not regularly favor rules over standards, for text come in many forms, some are rule-like and must be enforced as rules, others are standards, and some of them even delegate power elsewhere. Think for a moment about the delegation to an agency. Justice Scalia was happy to defer to an agency's decision under *Chevron*, provided the agency didn't contradict the statute—that would exceed the delegation. Otherwise *Chevron* is consistent with his jurisprudence because often when the statute does not create its own rule, then somebody else has to do so and better that the someone be an agency whose leaders can be evicted in the next election rather than judges with life tenure. The democratic approach preserves agency discretion in statutory interpretation because the judicial role is supposed to be modest. Sometimes though, the delegation is to a court. The antitrust laws, which a panel discussed yesterday, don't decide any concrete question but also don't authorize an agency to decide, that leaves judges. Justice Scalia was perfectly happy to engage in common law antitrust decision making. Consider ERISA, the Federal Pension statute, which preempts most state law related to pensions and leaves

in its place—nothing at all. Pension funds have to be held in trust, and trustees are fiduciaries, but what does that mean? Can the employer design pension or welfare plans that favor their own interests over those of workers? Yes, they can, the Court has held unanimously because in the end plans are contracts. Do promises of health care benefits last for the lifetime of required workers? The Court has said, yes and no, again unanimously, depending on what the *documents* say, understood in light of common law principles. No thumb on the scale for either workers or management, for either the left or the right side of political life. And where do the ordinary contract principles come from? Well, by and large, they come from state law, by and large they are standards, but that again respects the justices' understanding of the Court's limited role. It's not to make up a new world, a brave new world, but to see what can be done with the tools on hand. One issue of rules versus standards in statutory interpretation sometimes divided the justices. A few of them occasionally contended that statutory ambiguity should be handled with a method that Aristotle called "imaginative reconstruction." Justice Stevens was especially fond of this method, which entailed guessing how the sitting Congress would resolve the dispute and then attributing that conclusion to the enacting Congress no matter how old the statute. Now, always writing for a majority in one of these disputes, Justice Scalia replied that the exercise is illegitimate because it exalts something that has not been enacted—that is, current legislative beliefs—over an enacted text, and he sometimes added that the method is even worse than legislative history because it relies on nothing that anyone has written down and adopted. A few years back the justices decided a wonderful case showing how inaccurate such predictions are. Now, maybe we can talk about that dispute later. For now, I just want to wrap up by saying that a textualist such as Justice Scalia prefers neither rules nor standards in statutory interpretation, but tries to implement the enacted text at its own level of generality. But when the judge has discretion, rules are preferable because they treat equal cases equally and curtail the discretion of people you can't turn out of office. That's a worthy approach for any judge. Thank you.

[Applause.]

PROFESSOR HARRISON: Thank you. I'm going to be using some of Justice Scalia's thinking about the constitutional structure to criticize what he famously said about rules and standards. In *James B. Beam Distilling Company v. Georgia*, Justice Scalia talking about the judicial role said, judges make law, but they make it "*as judges make it*, which is to say, as though they were finding it—discerning what the law *is*, rather than decreeing what it is today *changed to* or what it will *tomorrow* be." That I think is a fundamental principle and it has important implications for Justice Scalia's thinking about rules and standards, which as I say, I will partially criticize. In his great article, *The Rule of Law as a Law of Rules*, he famously argued in favor of rules on policy grounds. He said that when judges have discretion to formulate policy, as Judge Easterbrook was just talking about, they should use that discretion in a rule-like fashion because rules have many virtues. That raises the question, when are exercises of judicial discretion permissible, given all the considerations that Judge Easterbrook just talked about? One answer that you might get from the kind of vulgar legal realist that every law student is for a little while at least, is, sometimes the law isn't clear and when the law isn't clear judges should do the

right thing. That's like saying that sometimes judges take bribes and when they do that, they should take them from the more admirable parties.

A better argument is that sometimes judges interpret practices, because sometimes the law is inherently unwritten, as with common law. There are powerful theories according to which the interpretation of a practice is necessarily a normative process, because the interpreter must decide what the practice is for and therefore make normative and policy judgments. That may be true, but it's not relevant here because Justice Scalia said explicitly addressed his argument about rules and standards to the interpretation of written law. Inherently unwritten law thus is not on the table. It's also possible that sometimes the written law of the Constitution or a statute refers to some moral truths, some moral reality, in which case judges would have to make moral judgments, but by hypothesis those would be moral judgments about questions of fact and not independent policy judgments by the judges, so we can put that aside too. There is considerable debate these days among originalists about the process called construction and whether the linguistic content of written rules is inadequate to supply abstract principles that can then be applied to particular cases. Some say that the linguistic content of written law like the Constitution often is inadequate in that fashion, and that that inadequacy calls for what's called "construction." Construction, the argument goes, is inherently a normative process requiring the exercise of discretion and policy choices. Others deny that, saying that the linguistic resources of interpretation are adequate to produce abstract principles that can then be applied to concrete cases. I'm not going to try to adjudicate that dispute. My impression is that Justice Scalia didn't believe in construction, but thought that linguistic resources were adequate. I'll assume he was right and so put construction aside as a possible context in which judges might legitimately exercise policy discretion.

Whether or not one believes that construction is unavoidable, abstract principles found in texts have to be applied to concrete cases. When a court has to do that, it may ask, should the abstract principle be applied using an "all things considered" test, if the abstract principle seems to call for one, or should a court formulate a doctrine, that is to say, a generalization? Borrowing from Judge Easterbrook, I use a famous example from the nineteenth century, the original package doctrine. The Constitution says that states may not tax imports. But at what point does an object cease to be an import and become just a piece of property subject to the taxing power of the state? That is a problem of vagueness. It could be approached by asking in every case, under all the facts of this case, is this thing still an import? The Marshall Court created the original package doctrine, made things simple, and said, as long as it's still in the original package, it's an import. After that, it is intermingled with the general property of the state and subject to the taxing power of the state. That is a generalization. It takes an inherently abstract textual concept and makes it more concrete by ignoring certain facts. That's how doctrine works. Using generalizations in judicial decision making calls for the application of policy discretion. In deciding whether to use a generalization, a court has to decide what kind of errors to make and therefore must weigh the cost of different kinds of errors. If a court decides to use a generalization, it must then pick a generalization—that too will require policy discretion. So, in the question of whether to use a generalization, a rule, we have found, I think, an area in which courts legitimately may exercise policy discretion. It's important to see that

when a court decides to use a generalization, a rule-like implementation of an abstract concept, in a particular case, it is so far deciding only the particular case. It's the rules of *stare decisis* or precedent that turn those decisions in particular cases into what we think of as judge made law. Subsequent courts, horizontally or vertically, may be required by the rules of precedent to accept the reasoning of the prior case. If a subsequent court accepts the reasoning of the prior case, it too will use the generalization, and the generalization will become law or doctrine. It's important to see that simply using a generalization in a particular case doesn't make doctrine. Generalizations in particular cases plus rules of precedent make doctrine.

What kind of considerations are legitimate when a court decides whether to use a rule, a generalization, and throw out some facts in a particular case? I will suggest that some considerations are legitimate and some are not for reasons having to do with fundamental features of the way courts operate. Probably the most important reason to use a generalization is to decide the case that is before the court correctly. Justice Scalia said that one of the great things about a rule-like approach, that doesn't take an all things considered approach and throws out some facts, is that when courts take all things considered approaches and don't throw out some facts, they are more likely simply to decide on the basis of their own views about what the rule should be rather than what it is. A court's views about what the rule should be are not the law and so a generalization that disciplines the court in the particular case before it can legitimately help keep the courts from deciding on the basis of their policy views. Using a rule thus can help the courts properly perform their function of deciding the cases before them according to the law, not their policy views. Generalizations also make deciding cases quicker and easier. That too is a legitimate consideration in deciding a particular case because there is always a next case waiting to be decided. The sooner this case can be decided, the better. Those are legitimate considerations, I think, because they apply to the resolution of the particular case before the court.

Justice Scalia also said that the advantage of rules is that they create clarity going forward for future parties. That is a virtue of rules and a good reason for a legislature to use rules. But courts aren't legislatures. The parties not before the courts are not legitimate objects for the courts concern precisely because they are not before the courts. To ask about the ex-ante effect of some legal norm on non-parties in the future is precisely to perform the legislative function. Notice that everything I said before, about how courts can make policy decisions as to whether to use generalizations, concerns the application of abstract principles to the particular case before a court and so is a legitimate side effect of the exercise of the judicial power, which is the power to resolve concrete disputes. To look forward to non-parties, by contrast, is to do what legislatures distinctively do and what courts do not do, and is inconsistent with the allocation of powers in the Constitution. That kind of consideration is illegitimate for a court in deciding whether to use a rule rather than a standard. The principles on which I rely, that so-called judicial lawmaking must be an outgrowth of the adjudicatory function, is precisely what Justice Scalia said in the case about the Sentencing Commission, *Mistretta v. United States*. He said that the problem with the Sentencing Commission was that it didn't do anything but make law. It therefore wasn't doing what an executive agency does when it legitimately adopts a regulation.

According to Justice Scalia, delegation of legislative power is a figure of speech. In strict legal terms, when an executive agency adopts a regulation, is it performing the executive function of carrying out the law. Its so-called legislation is permissible only because it is an exercise of genuine executive power. The effect of legislation, he thought, had to be accomplished through the reality of execution. The problem with the Sentencing Commission, he thought, was that it was not, in effect, legislating by executing, it was just legislating. In one of his many famous phrases, it was solely “a sort of junior-varsity Congress.” The fundamental principle was that the executive can do something that is like law making only when it is really executing. My principle is that the courts can do something that is like law making, that is metaphorically legislation, only when they are really adjudicating. To be really adjudicating, they must be deciding about the particular parties before them on the basis, as Justice Scalia said in *James B. Beam*, of the law as it now exists and not as it may be in the future. Both of those metaphors—executive law making and judicial law making—must be cashed out in terms of the actual allocation of power. In that allocation of power, executive agencies carry out the law and the courts adjudicate, applying existing principles to concrete cases. The constraint that courts legitimately “make law” only on the basis of considerations relevant to particular cases limits the grounds on which they may legitimately choose rules over standards, and rules out some of the considerations that Justice Scalia recommended.

If the answer to what I’ve just said is, but everyone knows that courts make law, well, as Robert Bork said, “What we all know is wrong.”

[Applause.]

PROFESSOR AMAR: Good morning. It’s always a pleasure to be with you at the Federalist Society; thanks so much for many years of friendship. So, what’s the relationship between the syntactical form in which a legal proposition appears in the Constitution and how judges should implement or interpret that proposition in cases? Let me use some examples from Justice Scalia’s oeuvre.

We heard earlier that he very famously said in *Morrison v. Olson* that “this wolf comes as a wolf.” He would have liked to hear that. Just as rose is a rose is a rose and wolf is a wolf is a wolf, he thought a rule was a rule was a rule. So, if the textual form of a proposition in the Constitution is rule-like, he wanted judges to respect that in their implementation. Thus, in a famous dissent of his, in the 1990 case of *Maryland v. Craig*, he analyzes the Confrontation Clause. This was a case in which there was an allegation of sexual abuse and the victim was allowed, under a statute, to testify via a one-way closed circuit television. So, there wasn’t face-to-face confrontation between the defendant and the victim. The Court majority said that’s okay; there are some good reasons for this. Justice Scalia would have none of it: “Seldom has this Court failed so conspicuously to sustain a *categorical* guarantee of the Constitution. The Sixth Amendment provides, with *unmistakable clarity*, that”—here you hear the voice of a rule-focused textualist—“in *all* criminal prosecutions the accused *shall* enjoy the right to be confronted with the witnesses against him.” And then he says: “That text means a defendant’s right to face his or her accusers,” and that’s precisely what Maryland was *not* offering. Here’s the last paragraph of this classic dissent: “The Court today has applied ‘interest-balancing’ analysis where

the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit—that would be, rule-like—“constitutional guarantees, and then to adjust their meaning to comport with our findings. The Court has convincingly proved”—and here he’s mocking Justice O’Connor writing for the Court majority—“that the Maryland procedure serves a valid interest, and gives the defendant virtually everything the Confrontation Clause guarantees (everything, that is, except confrontation). I am persuaded, therefore, that the Maryland procedure is *virtually* constitutional. Since it is not, however, *actually* constitutional, I dissent.”

Okay, so, I’m glad you know what would Scalia do, and what Scalia did, and I’m glad you’re hearing his words, his voice, his vision. He says: Enforce a textual rule as a rule. On his view, Justice O’Connor erred, applying the rule as a standard, as just a mushy balancing test. Recall that the *Craig* case involved face-to-face confrontation. Now let’s move to another quadrant of Confrontation Clause law. Here’s what Justice Scalia said in the *Crawford* line of cases. He noted that the Court’s previous doctrine treated hearsay as the subject of the Confrontation Clause, and allowed some sorts of hearsay, so long as the hearsay was really reliable. Here, too, Court caselaw used a balancing test. But then a revolution in Confrontation Clause jurisprudence occurs, led by Justices Thomas and Scalia. In a case called *Crawford v. Washington*, Justice Scalia, writing for the Court in 2004, recast the inquiry and offered a more rule-like account of the Confrontation Clause. Here is one way in which a rule-like account often operates: It shrinks the domain of the proposition in order to make it more amenable to a crisp clear rule. The Confrontation Clause says you have a right to confront witnesses against you. But what is a witness, who is a witness? If you think that a witness is any statement that is introduced for the truth of the proposition asserted, well, you’re not going to be able to say that’s categorically prohibited because there are all sorts of situations in which hearsay is going to be properly admissible. But suppose you have a narrower view. Suppose I say to Victoria, “Oh gee, I saw Frank running down the street the other day.” Suppose when I say this to her that I have no idea that a crime is even being committed at that time. And suppose that, later on, Victoria testifies under oath in court: “Well, Akhil said he saw Frank running down the street that day.” Am I a witness in that scenario? Am *I* the witness when *she* takes the stand and testifies? Well, if you have a hearsay understanding of the thing—my statement is an utterance that’s introduced for the truth of the matter asserted—then I’m the witness. But if you have a narrower view—a witness is someone who in effect offers a testimonial-like statement to the government itself, knowing that he’s offering it—well, then I am not the witness; Victoria is. She’s the one offering the statement to the government itself. On this narrower view of what counts as a witness, you can actually have a more rule-like and crisper and absolute understanding of the Confrontation Clause. And that’s just what Justice Scalia offers in *Crawford*. I myself prefer Justice Thomas’s rendition of it to Justice Scalia’s, but what they are both trying to do is make the Confrontation Clause implementation more accurately reflect its linguistic structure, which is rule-like and not interest-balancing in its syntax. My claim is, sometimes you accomplish this rule-like application by restricting the scope of application.

So, a rule is a rule, but shouldn’t interpreters also take seriously the principle underlying the rule, and maybe apply that broader and softer principle in other situations,

although, perhaps less categorically? I'll return to that question shortly. Also, if a rule is a rule, why isn't a standard a standard? At his best, Justice Scalia said, yes, a standard is a standard. But at his worst, Scalia sometimes said a standard is a rule. His love of rules overcame his close attention to text. So, let's take the Fourth Amendment, which prohibits unreasonable searches and seizures. A 1991 case called *California v. Acevedo* involves some very technical issues about cars and compartments in cars and packages in cars, and the doctrine is completely confused. Welcome to the Fourth Amendment. Here's what Justice Scalia says in his concurrence, "The Fourth Amendment does not, by its terms, require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are 'unreasonable.'" He doesn't love that, you see, because he likes rules and he's now admitting it's a standard. So, maybe, he thinks to himself, we can actually read the standard as if it's a rule. He says, "Although the Fourth Amendment does not explicitly impose the requirement of a warrant, it is, of course, textually possible to consider that implicit within it is a warrant requirement." So, he's open to the idea that maybe implicitly there is a rule. But the problem is that you can't make sense of that doctrinally. If you actually required a warrant for each and every search and seizure, it just wouldn't work, and he catalogs nearly twenty exceptions to the so-called warrant requirement. So, you just can't operationalize a warrant requirement as a rule and so, he says, "In my view, the path out of this confusion should be sought by returning to the first principle, that 'reasonableness' is the requirement of the Fourth Amendment."

That's great—all the greater because he cites some good scholarship on that point. (You know what I mean.)

[Laughter.]

But he doesn't love it because although he is a textualist, and the text here is a standard—and a standard is a standard—on the other hand, he's a rule person. He doesn't love standards. But he does love texts and when the text states a standard, he is torn. So, later on I think he actually undercuts what he said in *California v. Acevedo*. In a case about the DNA testing of mere arrestees, *Maryland v. King*, which Justice Alito said might be the most important criminal procedure case of the last generation, here's what Justice Scalia says in dissent: "The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception; it lies at the very heart of the Fourth Amendment." Well, that sounds great. The only problem is, the Fourth Amendment doesn't say so and no Framers ever said so! Note how Scalia is smuggling in all sorts of distinctions of his own making, like the distinction between evidence for criminal prosecutions and various other things that the government might search for or seize. But the text of the Fourth Amendment doesn't distinguish between criminal searches and civil searches; the Amendment's text speaks globally of all searches and seizures. And it states a standard not a rule: all searches and seizures must be reasonable, but there is no clear and categorical textual rule that some subset of searches must always have a warrant. So, *Maryland v. King* was very different from *Maryland v. Craig*, and in *King*, Justice Scalia, with due respect, erred and betrayed his own commitments to textualism and originalism. A rule is a rule, but a standard is a standard.

So, rules are rules, and Justice O'Connor, unfortunately, doesn't quite get that; she

thinks rules are mushy interest-balancing. Standards are standards, that's what Justice Scalia gets in *California v. Acevedo* and forgets later on in *Maryland v. King*. But now let's think about the idea that rules are rules, but we often have to supplement them by a more flexible standard or read them at a higher level of generality because they're nested within a larger constitutional system that has to make sense. Justice Scalia sometimes mocked that thought but actually sometimes implemented that idea. This is what he said about the First Amendment in *A Matter of Interpretation*, his classic book on the nature of interpretation:

Take, for example, the provision of the First Amendment that forbids abridgement of "the freedom of speech, or of the press." That phrase does not list the full range of communicative expression. Handwritten letters, for example, are neither speech nor press. Yet surely, there is no doubt they cannot be censored. In this constitutional context, speech and press, the two most common forms of communication, stand as a sort of synecdoche for the whole. This is not strict construction, but it is reasonable construction.

Okay. So, as regards handwritten letters, he says, well, they're not speech or press but we should read the First Amendment as if it's about some higher level idea, freedom of expression. Now, I'm with him on this. Indeed, without knowing about that paragraph (because it hadn't been published yet; it had just been spoken at a lecture), I used the exact same example in a piece in the *Harvard Law Review*. I'm with him on that but there is a tension between that approach, which I think is sensible and structural, and the more narrow, literalistic idea that a rule is a rule is a rule. Speech by its nature is inherently limited by the power of the range of my voice. I can't speak across the city or this country but I could send a letter across this city or this country, a handwritten letter. So, actually freedom of speech (read very strictly and literally) is in its nature rather limited; you could make some distinctions between that and a handwritten letter. Perhaps you could say, oh well, a handwritten letter is like a printing press—you're pressing ink on paper. But you could also say it's different, because at the time of the Constitution, very few people had actual printing presses and the freedom of the press was actually about not licensing the few printing presses that existed, and that's very different than all letters. And so, if you wanted to, you could say, a handwritten letter isn't freedom of the press; it's different than a printing press; and it isn't freedom of speech because it's not limited geographically, locationally, the way the oral word is. But Justice Scalia did not say this, and I think he was wise to sweep private letters into the First Amendment, in part because there's a larger constitutional context in which free expression, especially political expression, would need to be part of our system, even if we didn't have the words of the First Amendment. So says Meiklejohn, so says Bork, so says Charles Black.

So, I leave you now with three examples of Justice Scalia in action, Justice Scalia at his best. Rules are rules; standards are standards; and sometimes, for good structural reasons, we enforce the rule in all its absoluteness, but we also supplement it by a broader principle (which might be a standard) that makes good structural sense. The Constitution permits more rights but not less, than the text specifies. So says the Ninth Amendment. Unfortunately, this is an idea that Justice Scalia didn't always take seriously, but at his best he did, as with his very interesting example of handwritten letters. Thank you very

much.

[Applause.]

PROFESSOR NOURSE: Well, I want to thank Dean Reuter and the Federalist Society for having me here yet again. I confess, I feel like I'm a bit of a walking oxymoron. My talk today will be in a little bit of a different register than the erudite talks by my fellow panelists. I am a walking oxymoron in part because I am the only feminist on the planet whose first article was on *The Federalist Papers* and who agrees entirely with Justice Scalia about the importance of the structure of the Constitution. I get into debates with my friend Randy Barnett about that all the time over at Georgetown, but I was delighted to see the opening here today. I'm also a bit of an oxymoron because I'm one of five percent of law professors not only at the "H" school or the "Y" school, the "V" school, the "C" school, the "G" school and the top twenty percent of law schools in America, who have any experience in a legislature, namely the Congress, not to mention the White House. Finally, being a liberal, I will argue oxymoronically for rules.

So, a bit of a road map. I want to say that Justice Scalia did an extraordinary thing for the legal academy. When he gave these lectures, *A Matter of Interpretation*, which if you haven't read it, then read it, reread it, and reread it again—I give it to all of my students. If he can, in fact, do what he said he would do, to change the legal curriculum of America's law schools, it would be tremendous, with all due respect to Langdell and Harvard. He was very generous at Georgetown with his time and he would pronounce that, in fact, law schools needed to stop teaching about the common law and teach about statutes, about texts. This is a very important lesson and it is an important lesson because we do not, even at my own law school, teach about texts in the first semester or at many law schools and I think that is a shame. It's an anachronism. I'm deeply indebted to Justice Scalia for having said that because statutory interpretation has been the great subject of my scholarship for the last decade. So, first I'm going to admit my priors, about my agreements and disagreements with Justice Scalia on this topic. I will, second, defend a set of rules that are supported in the Constitution by rule, that I had hoped to convince him were worthy of his attention, and then I want to note something about how I felt as I was teaching on the day of his death.

So, first, as an intellectual matter I have to admit my priors. Judge Easterbrook's colleague on the Seventh Circuit, Judge Posner in print and Judge Ripple recently at a conference at Loyola have said some very nice things about a book I wrote, which has an unfortunate title because it is in response to Justice Scalia's enormously powerful book, *Reading Law*. My book has the unfortunate title of, *Misreading Law*, although I managed to have the Harvard University Press publish it, but it would not have existed without Justice Scalia. I will tell you, however, that it is equally tough on purposivists, which is the ugliest word I have ever heard. I believe the Hart and Sacks school—which in a tome of one thousand pages had five on the Congress, five, we do have a republic you know—left us with imaginary construction, as Judge Easterbrook has told you. I am certainly not and nor was the Judge I clerked for, a man named Weinfeld, an imaginary reconstructionist. So, I am hard on both existing schools of thought. Like Groucho Marx, I have no friends. But for this audience, I want to try to defend some rules I think are

underappreciated in the Constitution and have had something to do with my view of how best to look at the difficult cases, the very hard cases: when the statute is vague, when there is no text, nor is there even a principle, or when, in fact, there are two plain meanings, an extensivist meaning which would be more of a standard, which is to say, all senses of, let's say, the term "labor" in the famous *Holy Trinity* case, or the prototypical meaning of manual labor.

Most linguists will tell you that you can find a plain meaning that is both a prototype as well as an extension of the term, which leaves you in many cases—certainly the cases that are achieved in appellate courts and in the Supreme Court—with vagueness. At that point, you must go somewhere. Well, where do you go? Well, in the book, I defend looking at legislative evidence, which will horrify you all. I call it evidence, not history, because if you do history you're never going to find it, trust me. There's nothing I ever worked on when I was in the Senate that was ever reported accurately by the press. But then again, as I heard, unfortunately, and I'll mention this later, CNN reported last night, we are in a post-truth age. I'll get back to that. In any event, I want to talk about a different set of rules, the rules that actually govern Congress. Yes, they have rules, who knew! It's actually in Article One, Section Five of the Constitution. I once was at a conference—I'm sorry I'm picking on Harvard, Judge—where I asked people, "What is the most important rule in the Republic?" And I said, I'll give you the number, because we all love numbers, right? 10b-5? 10-k? I said, "it's 22," and there was a large silence. This was a conference on legal education and everyone was looking at me very perplexed, and then someone at the back of the room raised their hand and said, interpleader, and I said, "Do you think the Republic would end if we got rid of interpleader?"

[Laughter.]

And I said, no, I was actually thinking a rule of the Senate, Rule 22. Rule 22 is the Cloture Rule. It is the only way to stop debate after Aaron Burr got rid of the motion for a previous question. Yes, sorry, he was treasonous in many ways. It's the only way you can stop debate in the Senate. Now, what does that mean? It means we have a 60-vote system, we've always had a 60-vote system. It means that we have a super majoritarian system, that it is built into the Constitution, and maybe for good reasons as my friend John McGinnis says. But it isn't interpleader.

Now, lest we give up all hope of a representative republic, we must learn something about how that republic works on both ends of Pennsylvania Avenue, as well as inside the Supreme Court. The day after the election, I received several calls from people from both sides of the aisle about "cloture" and "reconciliation" and other terms that generally do not grace any law school classroom in America. I think this is sad. Why? Because that knowledge is sold every day in this town by lobbyists, and this is the kind of thing that anyone who has voted for civics or general education should be resoundingly for, these are rules and these rules do matter. They cannot simply be evaded, except in the Senate by unanimous consent. Now, I believe that these rules have a basis in the Constitution. Article One, Section Five provides that each house—not both houses, each house—may create the rules of its own proceedings and then report these in a journal. Now, the Founders believed that this was a very important provision of the Constitution. Imagine if the President of the United States, whether the president-elect or the current president, had the

power to change the rules of the Senate. Imagine any reform you like—a wall, amnesty, DACA, DAPA, healthcare, not healthcare, repeal. If the president can change the rules, it makes it very easy for him to get his program. The Founders understood that, that's why they gave it to Congress themselves and they divided it up, to support the Bicameralism Clause, Article One, Section Seven, which Justice Scalia deservedly loved.

So, these rules are important, they are important to teach because we are at a time when these rules will become important. They're also important to understanding how to read statutes when there is vagueness. Now, I understand that Justice Scalia and I would disagree about what I call legislative evidence. He infamously called it garbage, and I must say that I find that a bit excessive. I agree that there is no such thing as legislative intent and that that is a very bad idea. Max Radin had a very silly, skeptical argument, which in my book I refute. But I do believe that the materials that Congress creates—committee reports, conference reports—at least people should understand their differences. For example, conference reports are texts, they're not some imagined belief. They're like a 10-k, they're like any document that could be admitted into evidence, and in 1842 the Supreme Court agreed that they could be admitted into evidence, for whatever they are worth and sometimes they're worth nothing, according to the rules. Why? Well, let's imagine that you wanted to cite some legislative evidence that the opponents of the bill propounded or a committee report that was passed after the president signed the bill—and yes, that can happen. This is bad legislative evidence, and it's bad legislative evidence because no one within the body would consider it good legislative evidence, bipartisan evidence, evidence that the rules of the body delegate to those inside and give it the meaning of the full Congress. Just as every corporation has delegation rules, it's no different from them. So, the problem I find, the deepest one, is about what I call the super majoritarian difficulty in statutory interpretation, which is to say, that if you cite those things that are contrary to the rules, those who opposed a bill, it's as if you're citing a dissent as a majority. Judge Mikva famously said that his views of the RICO statute, when he opposed it, then became its meaning in the Supreme Court. Justice Scalia and I would agree that is terrible, that is awful.

On the other hand, I do believe that it is important when we are in an age where it is easy to believe that, as my friend from the University of Virginia said, law students are too easily wed to the notion of a false realism, the kind of Radin-esque silly realism, that it is all politics. It seems very important to me at this point in time to preserve what I went to that Harvard conference so many years ago to do and I was somewhat lambasted for, but I believe, very strongly, and why I keep coming back to the Federalist Society, in a very conservative distinction between law and politics. I believe it because I have lived it on both sides of Pennsylvania Avenue and as a clerk for a very distinguished judge, as an appellate advocate for George H.W. Bush, and I can tell you that this is exactly the kind of thing that is so important today if we are in an age of fake news and post-truth. The courts are the last repository of reason, we believe in evidence, and we may be tested in the future. Thank you very much. I appreciate your time.

[Applause.]

JUDGE KUNTZ: Well, last time I had someone make this much fun of Harvard I

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was sitting with my friend, Second Circuit Judge Denny Chin, and he was laughing at the fact that there were two Harvard men who were fumbling the oath of office as President Obama was about to be sworn in. I pointed out to my good friend Denny, however, that there were two Harvard men who were standing there.

[Laughter.]

A number of reversals followed and I learned my lesson. All right. We're now going to have our distinguished panelists fire questions at one another. Have at it.

JUDGE EASTERBROOK: Well, I'd like to say a few words in response to Professor Nourse's talk about Congress from the inside. First, I want to defend Justice Scalia against the implicit charge that he really wanted to ignore the legislative process. He's actually on record as saying that, if you have real process that leaves evidence behind, if, for example, there is a motion to amend the law and the motion fails, you don't want to then interpret the law as if the motion had succeeded. The legislative process can leave behind things that matter. I may need to sharpen a little what I said about legislative history. What Justice Scalia believed and said is that legislative history doesn't count as law, and that's for the reasons of provenance. What counts as law in our system is something that both houses of Congress pass and the President signs or something that President doesn't sign and two thirds of each house of Congress votes for. But since nobody votes for the legislative history and the President doesn't sign it, it doesn't count as law. But it may count as evidence, in the sense that, we understand words generally, the way the community of listeners understands them. It's not what's in the heads of the speaker that counts, law is addressed to an outside audience. So, it's how the listeners understand particular language and it's entirely conceivable that what's in a legislative report might tell you something about how people used words at the time, and the older the legislation and the more the language is changed in between, the more important that use might be. But it's not as if it's, for Justice Scalia, it's not that it's being used as law but it may have some use for our understanding of the language. What particularly concerned me about her talk—I basically agree with everything about her talk until the end—which suggests that those who are well versed in the legislative process know some secret sauce that's relevant to interpretation. Justice Scalia was not of that mind nor am I precisely because law is addressed to society at large. It's signed by someone outside Congress, the addressees are outside Congress. For a law to be successful in communicating an idea, that idea has to be understandable to you and interpretable by people who have never been inside Congress. The law has value to the extent it has signs and symbols ascertainable by the outsiders. So, I'm entirely in favor of the project of those with inside knowledge explaining how Congress works, but it's a really bad idea when the judiciary interprets laws by making assumptions about Congress that are factually untrue. It's also very important, it was terribly important to Justice Scalia, that law be interpretable by people outside the body with no knowledge of secret sauce.

JUDGE KUNTZ: Professor Nourse?

PROFESSOR NOURSE: I'm not much of a cook, but I don't think this should be

secret sauce. If I had my way with a lot of other folks who teach basic civics, I think it's important for judges as well as lawyers to understand the basics of our Constitution. I don't think that legislative evidence in many cases yields good results. I do think that it's irrational not to look at evidence in context, if you know that the context exists—and many political scientists agree with me. I understand judges are afraid of this, law professors are afraid of this. I mean, my colleagues don't teach this. I think it largely is because of my own experience that I have a very different take. When you ask me to look at the legislative evidence, I'll tell you what's a bunch of bunk. And if I can do it, it seems to me, everyone can do it. If you don't teach it, you're going to get folks who disagree with Justice Scalia but who get the evidence wrong. This is my attack on the purposivists who end up looking at very bad legislative evidence.

Now, I don't think it's law either. I do think however, the question is, whether you're going to use canons of interpretation or legislative evidence. I believe Justice Scalia would prefer canons, which interestingly enough, as Judge Posner has said, is more like a standard than a rule because there is no key to which canons shall apply. So, my argument is for legislative evidence in the particular case because in fact, it's likely to be the best, as Judge Easterbrook indicated, sense of semantic meaning. Justice Scalia would look at legislative drafting. But if you're going to look at legislative drafting, you must know what you're looking at, because there are arguments in the Supreme Court of the United States where fine advocates confuse simple things like a conference report and a committee report—one comes at the end of the procedure and one comes at the beginning. That's all I'm asking for from law schools, a very basic, rudimentary knowledge, not inside, not Abbe Gluck's let me interview 5000 people, just that there is a basic set of procedures.

JUDGE KUNTZ: Professor Harrison, do you have a comment on this?

PROFESSOR HARRISON: Well, not exactly this but related to what Professor Nourse said.

One of the great questions associated with Rule 22 of the Senate is whether in the exercise of its rulemaking power, either house of Congress can bind itself. That is to say, are the entrenching rules in the Senate, which purport, like Article Five of the Constitution, to impose limitations on further changes, themselves valid? The observation I want to make is that that question is connected to our topic of rules and standards because the idea of a rule is intimately connected with the idea of legal formality. Rules are formal in the sense that they are not transparent to their purposes. In order to determine whether any text is transparent to its purpose, of course, as Professor Amar was saying, you have to attend to its language and try to find out how much information the language is going to give you. I will propose a hypothesis related to Rule 22 and ask whether anyone thinks I'm over-reading the Constitution. The hypothesis is that neither house of Congress may bind itself, and that entrenching rules are ineffective and can be dispensed with at any time by either house of Congress, but not for reasons having to do with the general principle that legislative bodies can't bind themselves. Instead, that conclusion rests on the narrow textual point that the relevant provisions of the Constitution, both Article One, Section Seven with respect to legislative power and the rulemaking powers of the two houses,

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speak in an eternal present. They say Congress and the two houses *shall* have certain powers. If that does speak in an eternal present, it means that at every moment, Congress has the legislative power and the houses have the power to make rules and can't bind themselves through prior legislation or rules. That would mean that the Senate right now is not bound by prior attempts by the Senate to entrench its rules. I actually think that's correct, but I have some doubts about it, in part because it seems to be putting a great deal of pressure on a particular verbal formulation. Deciding whether some provision is a rule or not similarly often requires putting a lot of pressure on a particular verbal formulation.

JUDGE KUNTZ: Professor Amar, your reaction.

PROFESSOR AMAR: So, it's great that, in the context of a general discussion of rules and standards, we're talking about Rule 22, which I agree is hugely significant. I agree with what Professor Harrison said. He gave you a textual reason. I am in print in multiple places committed to the same conclusion, but I also try to embed his textual observation in a larger set of structural and historical arguments. These arguments appear—and this is very bad form, I admit—in the new book that I'm plugging.

[Laughter.]

JUDGE KUNTZ: There will be, by the way, a book signing at the end of this.

[Laughter.]

PROFESSOR AMAR: Thank you, Judge. The new book has three essays, on this topic. One is titled, *How to End the Filibuster Forever*; the second one is titled, *Filibuster Reform Made Simple*; and a third is titled, *The Nuclear Option Genie is out of the Bottle*. These are a series of essays advocating the so-called nuclear option, which the Republicans were for when they were in charge, and then the Democrats were for when they were in charge—and we will see now what happens going forward. It is among the most significant constitutional issues of the next administration, and I think the Constitution speaks to it not just textually but structurally and historically. So, it's a reminder, again, that even though we can look at the Constitution sentence by sentence and we can see whether the syntactical form of a given provision is a rule or a standard, often these provisions and sentences are embedded in larger structures of meaning.

JUDGE KUNTZ: Judge Easterbrook do you want to go nuclear or...?

[Laughter.]

JUDGE EASTERBROOK: I'd like to. I don't want to say a word about Rule 22, but I want to bring the problem back to what Justice Scalia said, because Rule 22 says whatever it says but here's something that's in the public laws. There's a statute called the McCarran-Ferguson Act, which regulates insurance, and it is a reverse-preemption statute. It says that state law prevails over inconsistent federal law, unless the federal law expressly says that it applies to insurance. Justice Scalia once wrote an opinion saying, he thought that will always be unconstitutional, not because Congress couldn't defer to the states but

because it appeared that the enacting Congress was attempting to tell the future Congress what language it must use in legislating. He spoke only for himself and that raised a lot of eyebrows because the alternative way to understand that clause in the McCarran-Ferguson Act is as a dictionary—that is, it’s a rule of interpretation that says, here is how we’re going to read language and there are a whole bunch of things. The Dictionary Act, 1 U.S.C. § 1, for example, says that the singular includes the plural, right, and I don’t think Justice Scalia has ever said that that was unconstitutional because it was tying the hands of future Congress which could always legislate. So, I don’t want to say anything about Rule 22, because I’m always afraid of what will land in litigation, but to somebody who’s worried about what is the structure of a rule, saying Congress can’t use a rule to tie its own hands is one thing, but saying you can’t specify the meaning of words would be something completely different. Justice Scalia was known to be fond of dictionaries, which as far as I know are not enacted by Congress and signed by the president. You always need some objective reference for the meaning of words, which I trust is possible without transgressing constitutional limits.

PROFESSOR NOURSE: I don’t want to comment on Rule 22 either to tell you the truth, we will see what happens to it, and I refer you to Professor Amar’s writing. As far as I’m concerned, I don’t think that I agree with Judge Easterbrook on this. I mean, I do believe that the meanings of words are things that in the Dictionary Act, for example, that can be defined by Congress. That is not the idea of what a rule is simply by defining a word. It seems to me that Congress can do that but that Congress often, as Aaron Bruhl has written, creates its own rules within a statute for how it’s going to proceed. So, I do think actually Congress can bind itself with respect to interpretation because the interpretation is, in fact, enacted into law under Article One, Section Seven. But as far as rules are concerned in terms of binding, you know, the Senate, just to give you one point of reference, in fact, they do try to bind themselves because you need two thirds votes; you need 67 votes to change the rules in theory. So, in theory they attempt to bind themselves and attempt to entrench these rules, even if there remains some question, as Professor Harrison noted, about whether that is constitutional.

PROFESSOR AMAR: On the Dictionary Act and related issues, I commend to you an outstanding article by a good friend of the Federalist Society, Nick Quinn Rosenkranz, a professor at Georgetown, in the *Harvard Law Review*. Nick asked the questions, “If Congress can pass laws like the Dictionary Act, can they pass laws about judicial interpretation and tell judges, for example, how generally to construe or not construe various things?” And if so, what limits might there be on that, on Congress’s capacity to bind itself or even to change default rules about what a subsequent Congress might need to do—about what magic words might a subsequent Congress need to utter—in order to repeal an existing statute and change the judicial rules about repeals by implication and whether they are favored or disfavored? There’s also an article by Paul Kahn, this one in the *Yale Law Journal* (and recall I just put in a plug for *Harvard Law Review*).

[Laughter.]

Kahn’s article is *Gramm-Rudman and the Capacity of Congress to Control the*

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Future. Those are both interesting pieces on this topic.

JUDGE EASTERBROOK: I think it's terribly important to point out at this moment that the article, *The Rule of Law as a Law of Rules*, appears in the *University of Chicago Law Review*.

[Laughter.]

JUDGE KUNTZ: I take it the gentleman from Virginia wishes to weigh in.

PROFESSOR HARRISON: Rather than citing something in the *Virginia Law Review*, I will say first that maybe the most important statute that has one of these magic words entrenching provisions is the War Powers Resolution, which says that the use of military force can be authorized only by subsequent statutes that explicitly refer to the War Powers Resolution. The Office of Legal Counsel that Justice Scalia once headed has rejected that view on the ground that Congress cannot limit itself in the future. I have grave doubts about the authority of the Dictionary Act. I think what Congress can do or can try to do, and has been trying to do with the way it deals with the War Powers Resolution in authorizations of military force that explicitly refer to the War Powers Resolution, is to create conventions both of language and of legislative process. The conventions would then provide interpretive structures within which later Congresses can act. I think Congress can try to do that, it may succeed in doing that, but I don't think that Congress can do that simply by saying so as in the Dictionary Act. Congress may in fact be able to change the way in which words are used. If it succeeds in doing that then, yes, what it said in the Dictionary Act will be authoritative, but only because it works through the process of actually changing linguistic usage in particular contexts.

[Brief question and answer portion of the panel omitted.]