Back to the Future

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Annual Meeting

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Thank you, Stephen, for that kind introduction.

I'm honored to be here, and grateful to Lisa Brown, her remarkable team, Paul Smith, Peter Rubin and the Board, and everyone else involved with ACS for the tremendous work that you have done to build this very important organization. Why are this organization, and this annual meeting, so important?

Because as you may have noticed, we already find ourselves deep in the silly season of American politics, one year before next summer's presidential conventions. For the next year, the media's attention will focus minute to minute on issues of personality, not substance. We will be sentenced to a 24/7 barrage about four-point plans, verbal gaffes, the price of candidates' haircuts, the width of their ankles, and debates featuring people behind podiums who claim not to believe in evolution.

As you've surely noticed, some of that silliness has already afflicted our public law.

In the last few months we've heard from White House officials that unlike the rest of us, they don't have to answer congressional subpoenas or serve prison time before they can have their criminal sentences commuted.

We have heard from our Supreme Court that a local school board's efforts at conscious racial integration are constitutionally equivalent to efforts at conscious racial segregation.

We've heard from our President that he is categorically banning torture, even as last week, he issued an executive order that Ronald Reagan's former Marine Corps Commandant and former White House lawyer told us in yesterday's *Washington Post* "has compromised our national honor and … may well promote the commission of war crimes by Americans and place at risk the welfare of captured American military forces for generations to come."[1]

And last month, we even heard from our Vice-President that he is not part of the executive branch! If you've read the remarkable series in the Washington Post about this Vice President[2] or Charlie Savage's excellent new book, *Takeover*,[3] you have to wonder whether that's because he thinks he's *above* the executive branch. And if Arthur Schlesinger were alive today, he would probably entitle the revised edition of his famous book *The Imperial* Vice-*Presidency*.

So one critically important role for an American Constitution Society is to ensure that constitutional arguments are not so malleable. When Article II, section 1 of the

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[1] P.X. Kelley and Robert F. Turner, War Crimes and the White House, *The Dishonor in a Tortured New 'Interpretation' of the Geneva Conventions*, Washington Post, July 26, 2007; A21.

[2] Barton Gellman and Jo Becker, *Angler: The Cheney Vice-Presidency*, Washington Post, June 24-27, 2007.

[3] Charlie Savage, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2007).

Constitution says "The *executive* power shall be vested in a President of the United States of America [who] together with the Vice President" shall be elected for four years, that phrase should tell us something about the branch in which the Vice-President is located. When the Fifth Amendment tells us that "No person shall be deprived of life, liberty, or property, without due process of law," that protection should apply even to persons who are alleged to be enemy combatants.

Ensuring that our view of the Constitution does not shift with the election returns means having a constitutional vision we can live with regardless of who wins next November. As someone who has twice worked in the executive branch—once for Republicans and once for Democrats[4]-- that means, for example, not responding to exorbitant claims of executive power with proposals that would unduly weaken the power of future presidents.

In pushing back against imperial claims of presidential power, we should be asserting a vision of a strong presidency *within* a strong constitutional system of checks and balances, a vision that promotes constitutional dialogue, not confrontational deadlock, among the political branches. So when Congress answers the President's excessive claims as Commander-in-Chief, it should do so by invoking its own appropriation powers to promote interbranch dialogue about a realistic political strategy for getting our troops out of Iraq, not just by debating gimmicky statutory deadlines that will prove unrealistic and unenforceable on the ground.

The theme of this conference is "Toward a Just Future." Let me suggest that the best way for us to move toward that justice is to go "back to the future:" to reassert the constancy of our Constitution by reversing the stunning inversion since 9/11 of both the constitutional vision and the foreign policy vision that guided out our thinking in the late 20th century. In just six short years we have seen a reversal of four key constitutional premises upon which our national security policy has traditionally been conducted.[5]

First, as we all know, to justify just about every tactic it has used in the War on Terror-- whether warrantless NSA surveillance, cruel treatment or indefinite detention of detainees, or assertions of executive privilege-- the current Administration has asserted a stunning theory of unfettered executive power, based on overbroad interpretations of the Article II Commander in Chief Clause and dicta from the Supreme Court's decision in *United States v. Curtiss-Wright Export Corp.*, which we used to call when I was in the Office of Legal Counsel of the Department of Justice (OLC), the "Curtiss Wright so I'm right cite."[6] Under *Curtiss-Wright*, the President's Article II powers are paramount, Congress exercises minimal oversight over executive activity, government secrecy prevails, and the Solicitor General urges the courts to defer totally to the President.

Our best response to this anticonstitutional vision is go back to the future, and to follow the path taken by the Supreme Court majority most recently in last year's *Hamdan v. Rumsfeld* decision.[7] In that case, all of Justices who addressed the merits rejected the *Curtiss-Wright* framework as the starting point for analysis, and instead went back to the

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[4] I worked as an Attorney-Adviser in the Office of Legal Counsel at the Justice Department from 1983-85 and as Assistant Secretary of State for Democracy, Human Rights and Labor from 1998-2001.

[5] See generally Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350 (2006), from which some of what follows is drawn.

[6] 299 U.S. 304, 320 (1936) (calling the President "the sole organ" of our nation in foreign affairs).

[7] *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

accepted framework of shared institutional powers set forth in Justice Jackson's famous concurrence in the *Steel Seizure* case, *Youngstown Sheet & Tube Co. v. Sawyer*.[8]

Second, the Bush Administration has invoked the War on Terror to create law-free zones, like Guantánamo, law-free courts (military commissions), law-free persons (enemy combatants), and law-free practices (extraordinary rendition to black sites), all of which it has claimed are exempt from judicial review. In so doing, the administration has opposed judicial efforts to incorporate international and foreign law –particularly the Torture and Geneva Conventions--into domestic legal review to insulate itself from charges that it is violating universal human rights norms.

But again, in *Hamdan*, the Court went back to the future. The Supreme Court rejected the Government's claim that that Hamdan was a person outside the law, held in an extralegal zone (Guantanamo), who could be subjected to the jurisdiction of a non-court. And the Court treated as binding a universal treaty obligation-- Common Article 3 of the Geneva Conventions.

Shortly after *Hamdan,* I testified before the Senate Judiciary Committee. One of the Senators said to me, "Professor, the terrorists have not signed Common Article 3!" I answered, "Senator, *whales also have not signed the Whaling Convention, either."* This is not about contract. *Common Article 3 is not about them and who they are. It is about us and who we are.* It's about how we're obliged to treat them, however they behave. As a matter of universal principle, we are obliged to give all detainees basic humane treatment, however despicable they may be. And unlike the Administration's claim that it can pick and choose where and to whom the law should apply, we should promote instead the Constitution's vision that wherever U.S. officials govern under our public law, that public law constrains them.

Third, we have heard repeatedly from the administration that the executive can infringe upon our civil liberties without clear legislative statements, relying on broadly worded laws such as the Authorization for Use of Military Force Resolution of September 2001. But again in *Hamdan*, the Court rejected that claim, demanding a clear congressional statement before the Commander-in-Chief could try a suspected alien terrorist before a military commission in a manner inconsistent with the Uniform Code of Military Justice. As Justice Breyer said, in his concurrence for four Justices, "[t]he Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check'" in the AUMF.[9]

Fourth and finally, as David Cole has noted, the Bush Administration has dramatically widened the gap between the treatment of citizens and aliens, particularly alleged enemy aliens.[10] In *Hamdan*, the Court acknowledged not only that enemy aliens have rights, but also that the Government cannot discriminate against aliens by asserting an alleged dichotomy between law and war. The Court acknowledged that once war begins, law does not end. Rather, the Court went back to the future, saying that the traditional law of war applies, and it required consistent application of the *law of war* to

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[8] 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). In *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981), a majority of the Court adopted Justice Jackson's tripartite framework.

[9] *Hamdan*, *106 S.Ct.* at 2799 (Breyer, J., concurring) (citing *Hamdi v. Rumsfeld*, 542 U. S. 507, 536 (2004) (plurality opinion)).

[10] David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (2003).

Hamdan's case. As Justice Kennedy succinctly put it, "If the military commission at issue is illegal under the law of war, then an offender cannot be tried 'by the law of war' before that commission."[11]

If this has been the Bush Administration's four-part constitutional vision—*Curtiss-Wright*, human rights double standards, infringing civil liberties without clear legislative statements, and treating enemy aliens as outside the law of war—then our response should be to urge return to the original constitutional framework based on *Steel Seizure's* vision of Shared Foreign Affairs Power, Human Rights Universalism, the clear legislative statement principle, and the notion that under the law of war, even enemy aliens have rights.

In the months ahead, you can expect to see the clash between these two constitutional visions in an array of settings. This battle will be fought out not just in the courts, but also before Congress, the Executive Branch and the media. We won't have to look far to see the next judicial battleground where these competing frameworks will collide—*Boumediene v. Bush* and *Al Odah v. U.S*, two D.C. Circuit cases on which the Supreme Court initially denied expedited review, but has now decided to hear on the merits this fall,[12] and *Al-Marri v. Wright*, which was recently decided against the Government in a Fourth Circuit panel decision written by Judge Diana Gribbon Motz.[13] As far as the litigation goes the lines are pretty clearly drawn at the Supreme Court, where the Bush Administration has lost three out of the four major terrorism cases that have been litigated there: *Hamdi, Rasul* and *Hamdan.*[14] The key vote remains Justice Kennedy and the two major questions are: first, will Justice Kennedy join Justice Stevens' arguments applying *Rasul* to *Boumediene?* And second, on the habeas-stripping issue will Justice Kennedy follow the Fourth Circuit panel's reasoning in *Al-Marri?*

But to me, the real question is not what will happen on the merits, but whether we ever get there. As someone who has spent his share of time litigating Guantanamo cases against the U.S. government, I would urge you to remember that the Government holds the detainees, and thus has numerous ways to influence the outcome of the case outside the courts. I would expect the Government to try to moot either *Boumediene* or *Al Odah* before judgment, or perhaps to announce preemptively in advance of argument a plan to close Guantanamo in an attempt to moot a negative ruling. So don't be surprised if in the months ahead, the Administration starts to depopulate Guantanamo, first retail, then wholesale by charging some detainees criminally in civilian courts, holding others as material witnesses, or finding other countries who will accept them for criminal trial. The Administration could enlist its congressional allies to move proactively for Guantanamo legislation, like the 2006 Military Commissions Act, that would put Congress's imprimatur on the closing of Guantanamo in exchange for greater flexibility in how the Administration closes it.

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[11] *Hamdan*, 126 S. Ct. at 2802 (Kennedy, J., concurring).
[12] *Boumediene v. Bush* (06-1195); *Al Odah v. U.S.* (06-1196) (S. Ct. 2007).
[13] *Al Marri v. Wright* (4th Cir. June 11, 2007), available at http://pacer.ca4.uscourts.gov/opinion.pdf/067427.P.pdf.
[14] *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush,* 542 U.S. 466 (2004). A fourth post-9/11 case, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), did not rule on the merits of a detainee's habeas petition but merely specified the jurisdiction in which the habeas petition could be heard.

All along, the real question we should be asking is why was Guantanamo ever opened as a detention facility in the first place after the Haitian/Cuban refugee debacles of the 1990s? Why were hundreds of people brought there from the far side of the world without an "exit strategy," another example of the broader planning failure that characterizes the entire conduct of the "war on terror."

During this transition period we should be especially wary of accepting lowered legal standards as the price of political compromise. In particular, we should avoid wrongheaded ideas that measure justice for terrorist suspects by a watered-down standard of "at least it's better than Guantánamo," rather than the due process required by American constitutional law and international law. Take for example a recent proposal by Professors Jack Goldsmith and Neal Katyal in the *New York Times* urging the creation of a secret terrorism court.[15] While each of these lawyers has done very admirable things in recent times, make no mistake: their joint proposal is an incredibly bad idea, which offers a proposal dramatically at odds with our nation's values and history. The authors correctly spot failures in the government's current system for detaining terrorists without charge. But rather than limit executive excesses, their proposal would permanently enshrine them by assuming that indefinite detention without trial, abusive interrogation, and other unacceptable practices have now become necessary features of a post-9/11 world. To this day, the U.S. government still has not proven that ordinary civilian courts or courts-martial cannot handle important terrorist suspects --whether the Oklahoma City bombers or the several dozen terrorist suspects successfully prosecuted before and after September 11, including Richard Reid, Zacarias Moussaoui, and Jose Padilla. Let's not forget that our goal in the next period should be to end the Guantánamo debacle, not to set its worst features in concrete with misguided proposals like a Terrorism Court.

So if the first role of an American Constitution Society is to ensure that constitutional arguments are not infinitely malleable, its second, equally important role, should be to ensure that constitutional arguments are not so rigid that they prevent our Constitution from adapting to changing times and a globalizing world. In the two latest Supreme Court confirmation hearings, the nominees were openly dismissive of arguments based on international and foreign law. But as Justice Blackmun said some years ago, Aif the substance of the Eighth Amendment is to turn on >evolving standards of decency= of the civilized world, [as the Court has held since at least 1958] there can be no justification for limiting judicial inquiry to the opinions of the United States.@[16] In this day and age, we would never consider deciding what is "unusual" for global capital markets by looking only at American stock exchanges, and we would never suggest that what is "unusual" for cyberspace can be determined by looking only at websites in Silicon Valley. So when the Eighth Amendment expressly bars "cruel and unusual" punishments, and some states in the U.S. were the only jurisdictions left in the world who persisted in executing children or persons with mental retardation, there was nothing

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[15] Jack Goldsmith and Neal Katyal, "The Terrorists' Court." New York Times, (July 11, 2007).

[16] Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39, 48 (1994). In *Trop v. Dulles,* 356 U.S. 86 (1958), the Court specifically held that the Eighth Amendment of the United States constitution contained an Aevolving standard of decency that marked the progress of a maturing society,@ which it suggested measured not just according to American experience, but by reference to foreign and international experience as well.

wrong with looking at those practices in light of global practices and calling them "cruel and unusual," and hence unconstitutional under the Eighth Amendment.[17]

In the same way as we should promote a progressive, evolving vision of what constitutes "cruel and unusual" punishment, we should promote a progressive, evolving vision that maintains fidelity to core constitutional values in three other areas as well, all of which were at issue in the last Supreme Court term: family values, racial equality, and access to the courts.

Consider first what constitutes a compelling state interest in the family after the Supreme Court's recent decision in *Gonzales v. Carhart,* where a deeply divided Court upheld Congress's ban on one method of partial birth abortion.[18] The Court found that the State had legitimate interests not just in the protecting the life of the fetus and the health of the mother, but also a legitimate "moral" interest in regulating postviability abortions, as well as an interest in protecting the integrity and reputation of the medical profession from performing a procedure that appears similar to infanticide.

By so saying, the Court seemed to create a new, seemingly unadministrable test for evaluating abortion procedures based on comparative morality. This new test led it to blur the line between previability and postviability abortions and to approve for the first time an abortion prohibition with no health exception, Justice Kennedy's majority opinion emphasized abortion's "ethical and moral concerns" and said that the law protected women who might otherwise have an abortion by the prohibited method from "regret," "grief" and "sorrow," without evaluating the regret, grief or sorrow they might experience if overriding their choice led to the delivery of an unwanted fetus.[19]

Finally, by rejecting a facial challenge to the statutory ban, the Court required advocates to shift to piecemeal as-applied challenges to abortion laws. This creates a huge chilling effect for families, expectant mothers, and their doctors, for the simple reason that abortion litigation almost always lasts longer than pregnancy. Under *Carhart*'s reasoning, in the future, a pregnant mother can challenge the legal ban only if she can show "that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used:" meaning families may have to choose whether a pregnant mother should bring an unwanted pregnancy to term, or litigate and hope that she can get a preliminary injunction simply to protect her own health and life. Simply put, a majority of the Supreme Court of the United States has now said that the Congress of the United States can make itself an integral part of a woman's decision whether to bear or beget a child, and that the only way a family can vindicate its own autonomy is to get yet another governmental actor, the federal courts, involved. On its face, that holding undermines *Planned Parenthood v. Casey*, challenges rights of women and doctors recognized since *Roe v. Wade*, and calls into question zones of family privacy recognized since *Griswold v. Connecticut*.

Moreover, *Carhart* is a telltale product of what my colleagues Robert Post and Reva Siegel have felicitously called "*Roe* Rage," a social movement that, far from being required by the 21st Century Constitution, actually opposes basic principles of privacy,

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[17] *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding "cruel and unusual" the execution of persons with mental retardation); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding "cruel and unusual" the execution of minors).

[18] 127 S. Ct. 1610 (2007).

[19] Id. at 1634.

individual autonomy and secularism that lie at the heart of our modern constitutional order.[20]

I can make the same point with respect to racial equality and the Supreme Court' recent decision in the Louisville and Seattle school cases.[21] As Walter Dellinger has pointed out, the Chief Justice's rhetorical finale in those cases--"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race"[22]--condones a form of judicial social engineering dictated from Washington that ignores the principle of local control of schools, sets aside the judgment of elected officials, and "equates the well-intentioned and inclusive programs supported by both white and black people in Louisville and Seattle with the whole grotesquerie of racially oppressive practices" that led to the enactment of the Fourteenth Amendment.[23] The decision misunderstands the difference between a "color-blind Constitution," which Justice Thomas called for in his dissent, and a vision of achieving racial equality by overcoming the effects of past discrimination, which Justice Breyer called for in his dissent. And the Court's decision cannot be reconciled with any meaningful notion of originalism. As my colleague Akhil Amar has pointed out, how can it be that a number of avowedly originalist justices "have consistently voted against affirmative action, but have never explained how their votes can be squared with historical evidence that the Reconstruction Congress itself actively engaged in affirmative action"?[24]

A third area where we see the need to update constitutional doctrine to preserve constitutional values is access to the courts. In a term that my colleague Judith Resnik has called "the year they closed the courts,"[25] the most contested case was one in which access to the courts was upheld over the objection of the Chief Justice: *Massachusetts v. EPA*, which raised a challenge to the EPA's unwillingness to engage the issue of global climate change.[26] In dissent, the Chief Justice seemed to echo Alex Bickel's arguments in *The Least Dangerous Branch* and *The Supreme Court and the Idea of Progress* arguing for the application of passive virtues in judicial decisionmaking. Giving Massachusetts or any of the other plaintiffs standing to challenge the federal action at issue here "has caused us to transgress the proper — and properly limited — role of the courts in a democratic society," because "the redress of grievances of the sort at issue here is the function of Congress and the chief executive, not the federal courts."[27] But as we all know, in *Democracy and Distrust*, John Hart Ely revamped Bickel's legal process vision for the modern day, arguing that courts need not simply act as umpires, but have an important role to play in forcing the political branches to clear channels for political change and to force the political branches to do their jobs when they refuse to play their

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[20] Robert Post & Reva Siegel, *Roe* Rage, Democratic Constitution and Backlash (2007), available at http://www.law.yale.edu/documents/pdf/Faculty/PostSiegelRoeRageDemocraticConstitutionalismandBacklash.pdf.

[21] *Parents Involved In Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738 (2007).

[22] Id. at 2768.

[23] Walter Dellinger, *A Supreme Court Conversation*, Slate.com, June 22, 2007, available at http://www.slate.com/id/2168856/.

[24] Akhil Reed Amar, *Rethinking Originalism*, Slate.com, Sept. 21, 2005, available at http://www.slate.com/id/2126680/.

[25] Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. Times, July 1, 2007.

[26] 127 S. Ct. 1438 (2007).

[27] Id. at 1464 (Roberts, C.J., dissenting).

assigned legal roles. In *Massachusetts v. EPA*, the agency had deliberately declined to regulate greenhouse gases. Recognizing that Massachusetts had suffered a concrete and particularized injury sufficient to confer standing upon it captures Ely's core insight that a 21st century constitution must protect an inclusive political process, in which states and NGOs can use the courts to force the federal government to act consistently with its legal mandates.

To make this point clearer, consider the standing controversy in *Massachusetts v. EPA* alongside the Sixth Circuit's recent ruling in NSA surveillance case, in which the Sixth Circuit recently vacated the order of Judge Anna Diggs Taylor in *ACLU v. NSA*, and ordered that the case be dismissed because, the panel majority reasoned, the plaintiffs lacked standing to sue.[28] The case raises the question whether the government can secretly injure many people, without ever acknowledging which specific people it is injuring, then deny judicial remedies to everyone on the ground that no one has standing to challenge the governmental action. To bring it closer to home, suppose that, unbeknownst to you, all the while I have been speaking, I have been secretly and illegally surveilling and datamining the Blackberry messages you all have been sending—and I notice there have been quite a few! Many of you have been injured, but no single one of you can prove your injury in time to get me into court. I may be acting illegally toward all of you, and indeed, all of you may feel a chilling effect the next time you get ready to send a Blackberry message, but under the dissent's reasoning in *Massachusetts v. EPA* and the Sixth Circuit majority's reasoning in the NSA surveillance case, no one here would have standing to sue me. But how does my resulting freedom from accountability to any of you in any way promote the rule of law or core constitutional values?

And while I'm discussing the role of the courts, let me finally mention the relationship among U.S. courts and international and foreign tribunals, an issue which has twice been to the Supreme Court with regard to the Mexican nationals on death row who have been denied their Vienna Convention in the *Medellin* litigation, which was before the Court two years ago and is back before the Court next term.[29] These cases make clear that our courts should not withdraw from action in this field, but rather, craft a set of judicial canons to govern the relationship between domestic and international jurisprudence (e.g. U.S. S.Ct. and the ICJ in the death penalty area; U.S. courts and WTO and NAFTA panels, U.S. courts and international commercial arbitrations, etc.).

Crafting judicial doctrines for managing relations among courts is not a new activity for U.S. courts. In the early days of the Republic, U.S. courts regularly applied international and foreign law and paid "decent respect to the opinions of mankind," as the Declaration of Independence urged, by framing doctrines of comity to foreign courts. There are obvious analogies to Hart & Wechsler's *The Federal Courts and the Federal System* and the canons of abstention, avoidance, ripeness and the like that were specified there to govern the inter-judicial relations between state and federal courts. In the 21st century, we will need a similar set of judicial canons to govern the relationship between the Federal Courts and the Global Adjudication System. Maybe the best canon is the one

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[28] *ACLU v. NSA* (6th Cir. July 6, 2007), available at http://www.ca6.uscourts.gov/opinions.pdf/07a0253p-06.pdf.

[29] *Medellin v. Dretke*, 125 S. Ct. 2088 (2005); *Medellin v. Texas*, No. 06-984 (to be argued October 10, 2007).

put forth by Justice Blackmun in the *Aerospatiale* case in 1987.[30] He said, when construing laws, U.S. courts must look beyond national interest to the "mutual interests of all nations in a smoothly functioning international legal regime,"[31] to "consider if there is a course that furthers, rather than impedes, the development of an ordered international system."[32]

Here too, the issue of foreign and international law comes in. Justice Scalia likes to ask, "What about Zimbabwe?" If our Supreme Court is looking to foreign law, will it have to apply the law of Zimbabwe as part of our law? The short answer is "No more than the courts of the early U.S. Republic felt obliged to apply the law of the Barbary Pirates as American law." The Framers' originalist vision of paying decent respect to the opinions of mankind means supporting the selective incorporation of the best practices of international and foreign law into domestic legal review. Our federal courts should no more be slaves to the worst foreign practices than they were obliged to be slaves to bad state practices during the 1950s. The role of selective incorporation of foreign and international law into U.S. jurisprudence is not to surrender U.S. sovereignty, but rather, to check the creation of a constitutional jurisprudence of rights that is visibly below global human rights standards and that will bring us into inevitable conflict with our allies.

In sum, what I am arguing for is a twin role for the American Constitution Society: on the one hand, to preserve the intellectual and historical integrity of the Constitution, so that its meaning does not simply switch depending upon which party controls the White House. On the other hand, this Society should promote a progressive vision of the Constitution that keeps it true to its core values, while adapting those values to make them relevant to 21st century circumstances.

In the next few years, I would argue, there will be a third function for the American Constitution Society as well: promoting a progressive vision of our public law will inevitably mean supporting steps to repair America's damaged human rights reputation. Again, repairing that reputation will require us to go back to the future.

At the dawn of the 21st century, a viable global human rights strategy for the United States seemed to be emerging, which combined four factors:

1. *Diplomacy backed by force* in service of human rights;
2. A recognition that a major source of our *"soft power"* is our perceived adherence to human rights principle;
3. *A Simple Approach to Human Rights Enforcement* based on telling the truth, and taking a consistent approach to the past (promoting accountability), present (stopping ongoing abuses), and future (preventing future abuses through coalition-building and democracy-building); and
4. *Using Cooperation Among Global Democracies to Solve Global Problems:*

Tragically, the last six years have deeply disrupted that strategy. As evidenced by Afghanistan and Iraq, we have shifted from a strategy of diplomacy backed by force to

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30.*Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 560 (1987) (Blackmun, J., concurring in part and dissenting in part).

31. *Id.* at 555.

32. *Id.* at 567.

force backed by diplomacy, seeking to build democracy from the top down rather than from the bottom up. The United States has deployed hard power at the expense of its commitment to human rights principle as a source of soft power, and now finds itself in a position of military overstretch. We now fail to tell the full truth about our human rights conduct, or that of our allies in the War on Terror. Through a series of self-inflicted wounds--such as our counterproductive policies on Guantanamo, torture, denial of habeas corpus for suspected terrorist detainees, military commissions, the International Criminal Court, and the U.N. Human Rights Council— the Administration has succeeded in shifting the world's focus from the grotesque human rights abuses of the terrorists to America's own human rights misconduct, leaving other, equally pressing issues elsewhere ignored or unaddressed. In short, six long years of defining our human rights policy almost entirely through the lens of the War on Terror have clouded our human rights reputation, given cover to abuses committed by our allies in that "war," blunted our ability to criticize and deter gross violators elsewhere in the world, and gravely diminished America's standing as the world's human rights leader.

We have proven particularly ineffective in curbing ongoing abuse in four situations: (1) in the face of genocide in Darfur; (2) as committed by our major allies in the War on Terror, such as Saudi Arabia and Pakistan; (3) in the so-called "Axis of Evil" countries—North Korea, Iran, and Iraq—as well as in Afghanistan, notwithstanding our military intervention there; and (4) in such traditional geopolitical rivals as China, Russia, and Cuba. The challenge for the next Administration, whatever its party may be, will be to reverse these self-inflicted wounds and to return to a consistent set of human rights policies that are true to our enduring principles.

The Pew Global Attitudes Project recently found, after interviewing 110,000 people in 50 countries, that the United States' image has plummeted abroad since September 11, due in good part to a decline in America's perceived commitment to human rights and the rule of law. If we are serious about restoring our human rights bona fides, there at least four steps we need to take right away: take immediate steps to put America's own human rights house in order, renew our support of multilateral human rights efforts, act to end the ongoing genocide in Darfur, and urge our government to restore its own reputation for truthtelling about human rights.

Putting the U.S. human rights house in order would entail not just closing Guantanamo as soon as possible, but also: revising the flawed 2006 Military Commissions Act to ensure availability of the writ of habeas corpus to alleged terrorist detainees; unambiguously banning the use of torture and cruel treatment by U.S. personnel and contractors anywhere in the world—with an enumerated list of forbidden practices (such as waterboarding) that can be monitored by admission of the International Committee of the Red Cross into U.S.-operated or controlled detention facilities; and ending the practice of "extraordinary rendition" and closing the CIA's notorious black sites.

Concrete steps to restore our human rights multilateralism would include: sending a Special Envoy to the new U.N. Human Rights Council; shifting formally to a policy of constructive engagement with the International Criminal Court (to match what has already become our de facto policy); reinitiating a human rights diplomatic process with regard to Iraq following the recommendations of the Iraq Study Group Report; joining

new multilateral human rights treaties, such as Convention on Protection of All Persons from Enforced Disappearance and the Convention on the Rights of Persons with Disabilities (both of which the United States recently backed away from); supporting the Community of Democracies and using that ad hoc multilateral body to support democratic transitions in particular countries, such as Cuba; and promoting "Private-Public" partnerships between governments and multinational corporations to ensure the growth of internet freedom and human rights in China (especially as the 2008 Olympics approach) as well as greater access to essential medicines and the end of "blood resources" (especially oil and diamonds) in Africa.

A third necessary and belated step would be to take firm and immediate action to end the genocide in Darfur. While proposals for intervention vary, indispensable to all are "the 4 Ps": first, initiating a Peace Process; second, calling for immediate deployment of Peacekeepers into Darfur—with a deadline for Khartoum's acceptance of such a force, to help achieve an enforceable ceasefire that could lead to a sustainable political settlement; third, Protecting People, both the mass of trans-border refugees and the internally displaced; and fourth, Punishing Perpetrators, by promoting four kinds of accountability: (1) new targeted sanctions (such as travel bans and assets freezes) upon individuals named in the U.N. Commission of Inquiry Report on Darfur and upon Sudanese companies owned by ruling party officials doing business abroad; (2) sanctions targeted at revenue flows from the "blood oil" sector; (3) capital market sanctions imposed upon foreign firms who deal with Khartoum; and (4) mechanisms for sharing information with the International Criminal Court to accelerate indictments against responsible Khartoum officials.

Fourth and finally, the State Department's Annual Country Reports on Human Rights Practices have increasingly begun to shade or underreport the truth about human rights violations by our allies, especially those such as Egypt and Pakistan, who support us in the War on Terror. Nor has the State Department done enough to ensure that these Country Reports are made widely available in the very countries whose human rights conduct is being described.

This may seem like a long "To Do List." But America's human rights reputation defines who we are as a nation and a people. What the last six years have taught is that restoring that human rights reputation is simply too important a task to be left to politicians. Restoring our human rights reputation should be a core challenge for all thinking lawyers, educators, and law students, who are the ultimate guardians of the rule of law.

What I am urging, in closing, is that we go back to the future, both in restoring our constitutional principles and in restoring our human rights principles. The future of a progressive public law lies in reviving principles honored in the past, and dishonored since 9/11.

There is much we do not know about what lies ahead, but we do already know a few things. Terrorism will continue to plague the next Administration, as it has this one. The common feature of most of the emerging problems in a globalizing century—terrorism, trafficking, WMD, avian flu, the environment, AIDS, cloning, global warming—will require global solutions. Ours will remain an exceptional country, with unique capacity to fill global vacuums, to shape global regimes, and to generate those global solutions.

We must return to a foreign policy strategy that is based not on unilateralism and power politics, and freedom from fear, but on time-honored principles of democracy, human rights, and the rule of law: promoting democracy from the bottom up, then using international law and diplomacy to mobilize global cooperation among global democracies to solve global problems.

To enable that global rule of law strategy, we need to return to a domestic constitutional vision based on *Youngstown*, not *Curtiss-Wright*, a theory not of the imperial president, but of constitutional powers shared among the executive, congress and the courts, and overseen by a transnational process in which the global media, NGO networks, and ordinary citizens all play important roles.

In short, we can move toward a just future, but to do so we have to go back to the future, by renovating old constitutional and human rights frameworks for the modern day.

If the American Constitution Society exists for a reason, it cannot be to support political attacks, or to manipulate constitutional arguments to serve particular politicians, but rather, to maintain the integrity of constitutional argument against political manipulation and to promote a progressive vision of our public law that enables our Constitution to adapt to a rapidly changing world.

Robert Post and Reva Siegel have recently written that progressives need more than a theory of constitutional conflict avoidance.[33] They need a theory that protects constitutional ideas and ideals. Their observation reminds me of the unforgettable moment in Joe Klein's *Primary Colors,* where the longtime political operative reminds the once-progressive presidential candidate of something he said when they were young and idealistic: "Our job is to end [the old style of politics]. Our job is to make it clean. Because if it's clean, we win—because our ideas are better."[34]

Our job—all of us here—is to make sure that our constitutional ideas are better. Because making our constitutional ideas better, and ensuring that they truly protect our constitutional ideals, is the fundamental and indispensable role of the American Constitution Society. And if our Constitution wins, we win, no matter what the results may be on election day.

Thank you.

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[33] Post & Siegel, *supra* note 20.

[34] Anonymous [Joe Klein,] PRIMARY COLORS: A NOVEL OF POLITICS (1996).