School: University of Baltimore.

Transcript: The Fate of Scholarship in American Laws Video.

Second Keynote.

Date: 08/13/2016.

Captioner: Carrie.

"This text is being provided in a rough draft format. Communication access Realtime Translation (CART) is provided in order to facilitate communication accessibility and may not be a totally verbatim record of the proceedings."

>> So if I could ask everyone to take their seats we'll get started in a minute. Okay, I think we should get started in the interest of not getting too far behind our schedule, and I'm hoping that some folks will trickle in as we go along. So hello everyone. Hello again. Welcome. Thank you very much for coming. As most of you know, I'm CJ Peters. I'm a member of the faculty here at the University of Baltimore School of Law and I'm also the Associate Dean of Faculty Scholarship here. And I have the pleasure and honor this evening of introducing our keynote speaker, Professor Jack Balkan who is a Knight Professor of Constitutional Law and the First Amendment at Yale Law School. Professor Balkan is one of those people of whom it can be asked with much humility and bewilderment, when does this guy sleep? [Laughter] in addition to his teaching duties at Yale he is the Founder and Director of Yale's Information Society Project as well as the Director of the Knight Law and Media Program and the Abram's Institute for Free Expression. Many in this room may know him best as the creator and editor of the very popular law blog about Balkanization which has already come up several times in the proceedings today. Or

for his frequency commentary on legal issues for publications including the New York Times, the America Prospect, the Atlantic On-line, the Washington Monthly, the New Republic Slate and yes, the New England Journal of Medicine. Law students in the room may recognize Professor Balkan as one of the authors of the leading Constitutional law casebooks, Processes of Constitutional Decision Making. People who own kindles may recognize Professor Balkan as editor or author of by my count, ten other books for academic and other audiences, including, I'm not going to list all of them here, "Living Originalism", "What Roe v Wade Should Have Said", "Cultural Software, a Theory of Ideology", and I didn't know this until I looked up his bio for this intro, an English translation of the Chinese classical book, "I Ching." I did not know that. Professor Balkan also happens to have written more than 100 journal articles in fields of Constitutional theory, international law, freedom of speech, reproductive rights, jurisprudence and the theory of ideology. Professor Balkan received his PhD in philosophy from Cambridge University and his AB and JD degrees from Harvard. Served as clerk for Judge Carolyn D King of the United States Court of Appeals for the Fifth Circuit and practiced as an attorney at Cravath, Swaine, and Moore in New York City before joining the legal academy. He's been a member of the law faculties at the University of Texas and the University of Missouri-Kansas City and a visiting professor at Harvard, New York University, Tel Aviv University and the University of London. Highly intriguing and very timely topic on which Professor Balkan will speak to us this evening is American legal scholarship and American politics. So please join me in welcoming, Professor Jack Balkan.

[Applause]

>> Technology, what can I say. Hey guys, how are you today?

>> Good.

>> Good. I'm going to get this thing to work if I can. So I hope everything has been going very well for you. You had enough coffee? [Laughter] did you have pastries? Did you have everything that you need? Okay fine. Because I'm going to talk for a while. And the way I tend to talk is I just tend to riff and at some point CJ will tell me to stop and at that point we'll have some questions. So he said what are you going to talk about? And I said I'm going to talk about American politics and legal scholarship and said, oh good. They have nothing to do with each other. I however, by politics I don't mean politics, I mean politics in the sort of grand sense, I want to talk about American political development. I don't want to specifically talk about liberal and conservative. Eric Posner did a nice little piece that on a SSRN in which he proved the obvious and he pointed out that American law professors by and large donate to Democratic candidates. And from that he inferred that they would, he tested whether they wrote liberal leading scholarship, it turns out they do. And that's the paper so I'm not going to talk about that. That's really interesting stuff but I'm interested in how the state gets built out over time. The larger question of the relationship between the legal scholarship that law professors write and how the American state changes. And you really can't talk about that without talking about things like demographic changes, social changes, technological changes, the stuff that I care about a lot. So here's the big thesis, I'm going to tell you what it is at the very beginning of the talk. Here's the big thesis. If you want to understand why American legal scholarship looks the way it does, if you want to understand how it changes over time and if you want a

head start in figuring out where it's going, you have to pay attention to very fundamental forces in American political life. And these include, among other things, the growth and the direction of the American state. Why is that? It's because at the end of the day lawyers and law professors are sort of, they're always writing about what the state does and what it's planning to do and when the state grows or changes, it affects the agenda of what lawyers and therefore law professors write about. That is to say lawyers and law professors are sort of the scriveners of the American state. So if you really want to understand what's driving legal scholarship and why it changes, pay attention to the American state. Okay. I thought the best way to sort of give you a sense of the kind of things I'm talking about is, I'll just use my career as a legal scholar as a way of showing you at different points what happens and how these reflect different changes in American state. So I started teaching at the age of 28 which now is relatively young to start teaching, but in those days you could start teaching at that age. I knew absolutely nothing, which was true in the 1980s, but is no longer true. And when I started teaching in 1984 I was associated with two different legal movements. One was critical legal studies and the other was law and literature or law and the humanities. I taught torts, private law subject and that's because a lot of CLS stuff and other things really focused on private law. Private law was the high intellectual stuff of those dies. Critical legal studies, unfortunately or not dies out. It's dead as a doornail by about 1995 or so, so I moved on. I moved more into Constitutional theory and the First Amendment and in 1997 I started teaching telecommunications law and internet law. And I started a center on law technology. In 2003 I started a legal blog called Balkanization which is still around today. In 2006 I became

an originalist. Now, I should tell you that that is a lot of work. Becoming an originalist is a lot of work. There's a lot of paper work you have to fill out. There are a lot of forms you have to sign. [Laughter] But anyway, I did it. In 2009 I helped start a clinic on media law, all right. So this is the critical point. And then in 2000 -- what is this? This is 2016, after this conference is over I'm going back to New Haven, my center is doing a conference on algorithms and artificial intelligence. Now, I no longer teach internet law, I teach artificial intelligence and robotics because internet law is so 2005. Okay. [Laughter] Here's the thing I want you to get out of this, I have basically been changing through this whole period, right. I've been doing different things and moving and there's a weird way in which all of the changes that occurred over 30 years, I have been swept up in. Either I've watched them happen or they've washed over me and I've been swept up in them. So one way you can think of me is the Forrest Gump of American legal scholarship. [Laughter] And that's a good way of trying to understand how these changes affect all of you and how they affect the progress of American legal scholarship. So each of these things I mentioned, moving out of private law into public law. Starting out in certain movements, no longer being in movements. Becoming an originalist, starting a clinic, doing internet law, technology, all of these things reflect what they call the fundamentals behind the legal scholarship. So what do we call the fundamentals? I'm going to identify about six basic fundamentals. They're sort of deep drivers of what people think they should write about. First of all, we might call the material conditions of legal scholarship. By material conditions I mean, real simple stuff. Who does it? Who writes legal scholarship? Where they write it. Who pays for it? What resources you need to

do it? Right. How much it costs to do it? Right. What's cheaper or easier to do? Basically those are the kind of fundamental features of the writing of legal scholarship. Secondly, a really important event that occurs between 1975 and 1995 which I will call the interdisciplinary explosion. Third, changes in Constitutional regimes. This is a political science idea, but basically it goes like this, American political development moves in regime changes. That is, in one or two generations, after one or two generations you move to a new Constitutional regime. Essentially I was born in 1956 which is right in the middle of The New Deal Civil Rights regime which runs roughly from about the mid '30s to about 1980. In most of my adult life I and you have been living in the conservative/Regan regime. Which basically runs from about 1980 to the present. And one of the interesting things I'm going to talk about at the very end of this talk is that we may well be on the threshold of the end of that regime and the beginning of a new regime which helps you to explain why our politics is looney tunes. Right. A feature of regime change is looney tune regime politics. So it's possible that's happening and that will also have an important effect on what's going on. The third thing that's related to the Regan regime change in which you've all lived is the rise of what is, fancy term, $3 word, neoliberalism. And in politics and legal scholarship -- how many of you have heard of the term, neoliberalism before? Oh very good. Oh you're very well-educated, what can I say. We'll talk about that in a little bit. Anyway, it's the rise of neoliberalism as a way of talking about politics and law, and that affects not only private law, but also public law as well. State building, all I mean by state building is, over time the state builds out new capacities, new programs. So if you think about the American state in say, 1789, basically there's the post office

and the customs house. That's about it. George Washington has no staff. There's like nothing in terms of the state. And what happens over the 19th century is the building out-of-state capacities, the creation of the Justice Department, after the Civil War. You don't have a Justice Department until after the Civil War. The Attorney General is basically sitting in an office by himself with a clerk. That's it. That's the Attorney General's office. Justice Department is created and then you get the ICC, you get the Federal Reserve in the 20th century and then you get the explosion of the building out of state capacities in the 20th century. So that's what we mean by state building, is that what the state does, what it thinks it's supposed to do, what its responsibilities are. All of that changes over time and state building is a really important driver of legal scholarship. And then finally, technological change, which I could talk about, you know, forever because I think it's just so cool. But it means two different things. First of all, how legal scholarship gets written. How do you actually write it? What technologies do you write it in? What are the conditions of producing it? And then secondly, the subject matter. That is to what extent you write about technology or things that are changed by technology. So those are the fundamentals. Now let's go through them in a little bit more detail.

So first of all, let's talk about the material conditions of scholarship. And here's the big idea I want you to think about, think about somebody entering law school teaching in 1980. You would not have to have written anything to get a job. That's really important. You probably would have done some legal practice. You might have clerked for a judge. And the question would be whether you were sound not whether or not you had written anything. There are no fellowship programs,

almost nobody has a PhD. Basically you've just practiced before you go into teaching. Most law schools hire from their regional either from the -- in other words if you're in Slippery Rock law school, most of the faculty either graduated from Slippery Rock or from the general region in which Slippery Rock sits, right, because it's a slippery rock. So that changes and it changes at different times for different law schools over the course of the period beginning after World War II and up to the present. In other words, what happens is you move from that model in which most of the folks are local lawyers or locally educated lawyers to a model in which more and more of the faculty members are coming from a relatively small number of elite institutions. That's a change in the hierarchy and structure of the law schools. But the most important fundamental condition which we've touched on in some of the panels but I'll just make it clear, is that the law schools, law teachers, teach in institutions in which most of their students are not going to be them. That is, Anita Allen made this point during a previous panel. If you teach in an economics school, all of your students are going to be academic economists. If you teach in a political science department, all of your students are going to be political scientists. If you teach in a law school, all of your students are going to be lawyers. They're not going to be law professors. Even at Yale, which produces per capita the most, right, maybe only 10% of the class, to 15% of the class will actually end up someday at the academy. The vast majority of these people are going to be lawyers. That is what we might call the professionalism idea, okay. The second thing is, the question that you're always asking is a prescriptive question which is, how would you interpret the law differently? What would you do differently? How would you change the statute? What is the correct change in

doctrine? We call this prescriptivism. So we have two ideas. Professionalism and prescriptivism. Prescriptivism is not the same thing as being normative, it's much more precise. To be normative is to say I like it, I don't like it. Right. It's just, it's unjust. Prescriptivism is a claim, what are you going to do about it? What change in the law are you going to recommend? What doctrinal interpretation are you going to claim? What's the best interpretation of the statute? What kind of reform program do you have in mind? That's what I mean by prescriptivism. The thing to understand is because law professors teach in professional schools to law students and they teach legal subjects, their way of thinking about the world is shaped by professionalism and prescriptivism. Professionalism in terms of what they're doing, what they're conveying, and prescriptivism in terms of what is an interesting question for them. All right. And that is not true of any other discipline in the university. Right. It's not even true at medical schools. Medical schools don't have prescriptivism in the same way that law schools do. These two ideas exert a constant gravitational pull on legal scholarship. And no matter what else happens in the legal academy, these things are there forever. They will never change. They really shape everything you do. And they're so much in the background that you don't notice it. But you do notice it when you bring somebody in from a different discipline and they present a paper and then you just look at them like they don't even know how to ask a question. They don't even know what an interesting question is. What is this craziness that you're giving me with this stupid paper? Okay, so what are we going to do about this? What change are we going to do? And they look at you like, that's not how we ask a question in political science. We don't do that kind of stuff. Right. And that's the, that's sort of

like the air we breathe, it's the water the fish swims in, it's just so obvious to you. I want to point this out in terms of the controversy that begins with Harry Edwards in '92 when he starts to talk about the growth in the junction between legal scholarship and profession. In some ways you have to understand that that is orthogonal to these features because even when law professors are writing these wacko law review articles they are still immersed in prescriptivism. That is, they still get that. So you write about fur coats for 70 pages in then in the last 5 pages you say, therefore we should change the following laws and the following writings. And that's what school teaches. So still at the end of the day it's very prescriptive and it's still professional because it's set to professional norms. So that's what's so crazy or looney tunes about American legal scholarship, but that's characteristic about it. So you have to change what we might call a separation of function, in other words, who are you writing for? Who is your audience? Who are you trying to impress? Who are you trying to get tenure from? Who are you trying to advise? To the question of professionalism and prescriptivism, which are basically about agendas. That is what is an interesting question. What do you think you want to write about? Why would you care about this topic as opposed to other topics? So even as you get an increasing differentiation of functions between law professors and the bar and bench, that's clear, everybody sees it. It's been here for 20 or more years. What you don't get rid of is you don't get rid of these basic thoughts of prescriptivism and professionalism. They're still with you. And so you get the bizarre situation of people writing 85 pages on Atari and at the end they describe how the federal rule should change. [Laughter] Right. That's it. Now there's another irony that I'll get to in a second, but actually I should talk about it now

because I've mentioned Harry Edwards. So one of the interesting ironies about the Harry Edwards debate is that this really occurs in 1992 and it occurs in the middle of interdisciplinary. So now let's talk about interdisciplinary and professionalism. Here's the big idea, do you guys all remember about Muhammad Ali and his rope-a-dope strategy? Anybody know about that? Okay, so later on in Ali's career when he wasn't quite as fast as he was before he developed a strategy where he would get his muscles extremely strong. He would get really strong and then he would get in the ring with somebody and then he would just have them punch at him for round after round and then they'd just exhaust themselves and then he would knock them out. It's the rope-a-dope strategy because he would basically just stand against the ropes. A way to understand this for interdisciplinary and law is, it's rope-a-dope. Everybody is afraid that law is going to be colonized by another discipline. Some people fear it will be economics. Some people fear it will be psychology, those people are crazy. Some people fear that it's going to be history. But here's the funny thing, law is like Ali, it lays against the ropes and says, come on in and try and colonize me and try and take me over if you dare, suck up. And what happens is no matter how many times different disciplines come in and try and colonize law, law always ends up basically colonizing them. It turns the questions and interesting ideas of the discipline and turns them into a legal flavor. That is, it imposes professionalism and prescriptivism on these disciplines. And that is -- and a classic example is law of economics and history. Economics is a social science. It has a set of questions it asks, but law and economics and very different than economics. Law and economics talks in a way that lawyers talk about topics. It raises the kind of questions lawyers think are important and it answers

them in ways that lawyers care about. It turns the discourse of economics into a policy discourse for lawyers. Same thing with history. Professional historians have a set of academic standards that they use and employ when they are basically trying to tell what's good work or not. Lawyers make complete hash of this. If you ever want to see a historian tear their heart out, have them come to a conference in which American lawyers are using history in order to assert authority, which is really why lawyers use history anyway, they want authority. And so historians and they will try to behave themselves, they'll grit their teeth for the first 15 minutes and then eventually you'll hear this long slow grown coming from them as they watch what lawyers have done to their beloved discipline. This is the most important lesson you have to understand about interdisciplinary. Lawyers always seem like they're going to be colonized, but they actually colonize the colonizers. Okay. Why is this important? Because when you hear people complain about the fact that legal scholarship has lost its connection to law, has lost its connection to the profession, has lost its connection to what lawyers care about and what lawyers do, what you are listening to is the techniques and the cultural features that produce this gravitational pull. That is, the gravitational force is always there. At certain moments in history, actually all of the time, people are constantly reminding people in the legal academy of their professional and their prescriptive orientation. And these complaints, these conferences even, are ways in which this gravitational force exerts itself. So the great, so that was the first idea. The first idea was to think about the conditions under which scholarship was written. Here's the second idea, the great interdisciplinary explosion. So when I started teaching in 1984, it was about halfway through this amazing transformation in legal scholarship, I'll

call it the interdisciplinary explosion. How many of you have heard of the Cambrian explosion? Anybody heard of the Cambrian explosion? The Cambrian explosion is this period about 542 million years ago in which you get a shift from one celled organisms to multicellular organisms. Right. And all of these different kinds of biological organisms are created. By the way, do we have any multicellular organisms in the audience today? [Laughter] We have a few one celled organisms, I can see them in the back. [Laughter] It's a really nice life being a one celled organism. All right. But in any case the same thing happens in law. Somehow for reasons which I'll get to in a second, between about 1975 and 1995 there's an explosion of interdisciplinary work in law. Suddenly there are multiple approaches that enter law schools and what happens is, for any of you who have ever studied the America thought you've probably heard the schools of thought. Right? Ever heard of that expression in law? This all begins in '75. All these new schools blossom. You get critical legal studies. You get law and economics. You get feminism, race theory, queer theory, which really is the '90s. Civic Republicanism, public choice theory, practical reason, law and humanities, law and literature, law and history had already existed, but the law and history really takes off in the '70s. It was a smaller field. And all of this, all of this explosion takes place roughly in a 20-year period and it's mostly over by 1995. The law reviews in this period start to look different. I recently taught a course, a seminar on critical legal theory in which I went back and I exposed students to law review articles written in critical review studies between about 1980 and 1992. The students, you know, their jaws dropped. They look at these articles, they're bizarre. They have weird stuff in the footnotes. They have poetry in them. They have all sorts of crazy stuff and

what they're thinking is how did the law review editors let these guys get away with this stuff? Right. The articles look different, the form is different, they use different techniques and so what you see something is happening during this period. Then, and people are experimenting with all sorts of new literary forms. And so some of you know that Derrick Bell's work during this period. Bell is experimenting. Patricia Williams is experimenting. Kim Crenshaw is experimenting. There's a whole debate in law schools over whether narrative even belongs in legal argument. Dan and Sherry have a whole article trying to understand why people are doing this and then there's a whole practice about that. But basically it's a highly experimental period in legal scholarship. This all kind of dies down around 1995 or so and you get very few new schools of legal thought. You have gay rights and queer theory, but they're already existing at this point. The most important, in fact, movement in legal scholarship is not actually an academic movement at all, it's a political movement. It's the conservative movement. The conservative movement and its related Federal institutions like the Federal Society become extremely important in the late '90s and early 2000s and that influences scholarship as well. And that is tied to neoliberalism, which we'll get to in a second. The thing to remember is that most of the schools that you think about when you think of different approaches, they're all from this '75 to '95 period. After that everything basically calms down. And then legal scholarship becomes boring again. So why does the explosion happen? Well, there's been, you know, a lot of people have theories about it, I'm just going to go very quickly over it. Some of these things you've already heard so I'll just go over it lightly. First, demographic changes. This is a period in which more women and minorities enter American law

schools. As they enter they have different things they're interested in, they have different agendas for scholarship. They have different materials they want to talk about, different histories they want to discuss and this opens up American legal scholarship and makes it different. You also have people coming in, men and women alike, who have had training in other disciplines. Some of them have PhDs. You start to get PhDs during this period. Some of them that don't have PhDs when they're coming in, they have training. They bring that in as well and they enter into the legal academy and at the time the legal academy is the best job you can possibly get. It's such a better than a job you can get in another discipline so they enter. Sociological changes, really important. And this goes back to the Harry Edwards point, American law schools start to become more and more like academic departments in the universities. They weren't like that before. They start to resemble academic departments during this period. And as they do the standards change. So for example, you have to actually write something to get a job. You have to write something to get tenure. And it used to be the case that the standard number of articles that you wrote after tenure in American law school was zero. Zero. And now it becomes a positive number. Right. People actually keep writing after tenure. So something interesting is happening and what's happening is it's becoming more like the rest of the academy. As it becomes more like the rest of the academy you get academic norms and academic questions and academic standards and this is part of what produces the differentiation of function between the law professor and the bench and bar that everybody's talking about. The great irony of this, I was just talking to Garrett Epps about this over the break. The great irony is that Harry Edwards is complaining about this in 1992 and he says, why don't you guys write

about stuff we're interested in? And everybody said the same thing since. The irony is, before this period nobody wrote, right. But the amount of writing is small, relatively small people are doing the writing and the irony is that the very moment when people were actually starting to write, they're writing things that Harry Edwards doesn't care about anymore. But that's not because they were writing a lot before and now they changed, it's that they were not writing at all. And so you have to understand the explosion in the relationship to this ongoing debate which existed really since the '80s and '90s over the relationship between bench and bar on one hand and the academy on the hand. Oh, the other thing I said is you get more hierarchical systems of hiring. The law schools become more stratified. The hierarchies become more rigid. The hiring practices change. And everybody points to you U.S. News & World Report as basically egging this on. It's true, it was, but this was going on even before U.S. News & World Report as to the hiring processes of law schools. And every law school that I've been at or been associated with and all of my friends at different law schools tell me that at some point in the history of that law school there were a bunch of really bitter fights among the older and newer scholars over the direction of the law school and its relationship to academicization. And all their fights were all the same. And it's interesting and it happens at different times at different law schools. And in fact I asked about, you know, various, some of these elite law schools, if they have these fights too. They had these fights in the '50s and '60s. And other law schools had them in the '60s and '70s. We had fights at UMKC in the '80s and at Texas in the '80s. So it just happens at different times and different places, but this is all happening and it happens to do with the rigidification and hiring in these law schools.

Technology. Technological changes, really, really big point, but simply think about this. In 1980 there ain't no personal computers. You have Apple II and a TRS80. The IBM is introduced in 1980 but it doesn't have a hard drive. In 1984 when I started teaching, I had an IBM PC and I buy a hard drive and through amazing surgery I insert the hard drive into the IBM PC. And now am I king of the world because I can save lots of documents. And then I buy a printer and I can print them. Right. And then I buy a laser printer. So if you think about it, if you were writing law school scholarship before, there was a limit. Now you can actually produce. You just don't have the technology to do it. Suddenly in the '80s it becomes possible to write more stuff and to do multiple drafts and print it and this encourages interdisciplinary. You see why? Because you can write more. You can write longer articles. You can include more stuff in your articles. The footnotes can be wild and crazy. All of this happens at the same time. Another thing is the cost of travel goes down. When the cost of travel goes down it changes who your reference group is. If your reference group, if you don't travel much your reference is everybody in your law school. They teach lots of different subjects, but they're all lawyers. So those are the people you talk to and talk to them about what matters. When the price of travel goes down your reference group is the person using the same discipline as you or as the same subject matter as you. It allows all of these people to find each other and talk to each other. It allows conservatives to talk to each other. It allows all the people with race theory to talk to each other because they can meet in person and they can talk to each other. And this changes interdisciplinary and it changes the legal scholarship. These are technological features. Next, what else brings all of this? Well a really important thing happens in American history

during this period. Do you know what happens? The end of The New Deal Civil Rights regime and the beginning of the Regan/conservative regime. It's the beginning of what we would now call neoliberalism in American politics and also world politics represented by Regan and the modern Republican Party and in Great Britain by Margaret Thatcher and the modern Tori party. Internationally it's represented by the development of the so-called Rush consensus and the policies of the World Bank and world relationship to emerging democracies around the world. The great irony of this period is this. If you were thinking about legal scholarship in the '80s and you were a lefty, all right, let's assume you were like a lefty, you looked at your merely liberal colleague and you despise them. [Laughter] They were the dirt under your feet. They didn't get it. They are talking about Brown versus Board of Education and I believe in equality for women and all of that and you just spit at them and say you guys just don't get it. You are basically a slightly nicer version of oppression. All right. So that's the critical movement in this period. And so you had these fights between legal liberals and lefties. And what is so wild about this period is, it is so deeply missing the point because what's about to happen during this period is an enormous tsunami is wash both of these people away. The tsunami is basically the neoliberal state. Right. The rise of modern conservatism. And in this everybody on the left is swept away. It doesn't matter whether you were having a squabble about X or Y or Z. You guys are just on the outs. And in hind sight these fights look bizarre to us. Why were these people fighting about this? Didn't they realize there was somebody else who really disagreed with them who basically was about to sweep them away. Think about this on the right now. Same thing is now happening on the right. What happened on the left is now happening

on the right and you're getting this same kind of struggle on the right with American politics. And we'll get to that later. I don't want to give too many spoilers. As a result of this great tsunami and change, the CLS is swept away. In the '90s, by the time Duncan Keany writes his big book in '97, nobody cares anymore. Legal feminism and critical race theory survive. They survive for a complicated set of reasons. They survive first of all because the demographic changes in law schools are prominent and so you now have people who say, I don't care what you think, I have an agenda, I have things that I think matter to me, I'm going to continue writing about them. This was different for the CLS people who were basically writing. The second thing that is really important, if you think about what neoliberalism does to liberals and leftism, it takes class off the table as something that people care about when you talk about it. That is to say these critical movements in this time are talking about race, gender, sexual orientation and class but the effect of neoliberal politics is to make somebody who talks lot about class inequality, these people, why are you talking about that? We don't have classes and inequality. We have markets, we have freedom. So what happens is that people on the left start to organize around the last thing they can talk about which is identity. Equality via the identity. And this becomes the central focus of left thought in the neoliberal period. So one thing you want to think about is the relationship with class. Is class coming back? Is it coming back into legal scholarship? If so, what is this relationship to American politics? Okay. It's no surprise, by the way, the most successful social movement on the left during this period is the gay rights movement. Right. It's the one that is, that works best in this particular kind of political climate. Law and economics becomes the main discourse. Very

good. That's fine. And that brings me to the whole idea of what neoliberal scholarship is about. Here's the big idea. Neoliberalism has both the ideological component and a practical component. The ideological component you're all familiar with, it's basically market oriented. It's the idea of decentralized determination of social life, market models for social life. Markets are a way to solve social problems. The practical component is quite different because what's interesting about neoliberal politics is that it doesn't dismantle the state. You don't go up against the state. Instead what you do is your harness the power of the state that's been built in the 20th century to serve particular market forces. To serve capitalism and market-based ways of thinking. For example, you make the government more market-like by privatizing it. International institutions like the world bank basically use these institutions after World War II, they use loans in order to get countries in different parts of the world to institute austerity measures or measures that are sort of market-based in order to basically shape the way in which their economic policies were. Al Gore has this initiative called reinventing government, right. Sounds great. But what it really was basically making government work more like markets. So the rationality is the market and the model of how you do everything. You use a market to govern with. You market a structure your life. You use a market to organize society. This is the big neoliberal idea. Social life and public policy are reconceptualized in market terms with used in market metaphors, in fact, even personal life and personal values are reconceptualized using market metaphors. If you don't believe me compare two different people entering the university. One person enters the university in 1960 and one person enters the university in 2015. The person from 1960, you ask them why do you want to go to

a university. And they say I want to enlighten. I want to grow personally. I want to develop my faculties. I want to become the person I planned to be. Right. The person in 2015 says, why do you go to the university? I want to build my brand. [Laughter] I want to keep my options open. I want to amass human capital. Right. Does this all sound familiar to you? Well of course. It's because this language is neoliberal language. It is the language that uses the metaphor of the market and things associated with the market. Human capital, options, right, branding, as a way of describing your life. Right. What it means for you to go through life is to build your brand, keep your options open and amass human capital. Everybody is an entrepreneur. The whole idea of what life is, is entrepreneurship. The whole idea of what it means to move through your life is understood in logic metaphors. This is what neoliberal thought is. And also neoliberal thought is based on the idea of what is called TINA, there is no alternative. Very famous phrase of Margaret Thatcher. The only way to organize society is according to this model of thinking. If you try it any other way you're going to get disaster. After all, look what happened during the 1970s. Look at stagflation. Look at these crazy reviews. There is no alternative. So this is dominant ideology of this particular period. What is legal scholarship look like during the period of neoliberalism? Well, okay, so I'll tell you what I think. One it's incredibly boring. It's the end of the interdisciplinary explosion. Interdisciplinary is still there but what happens is you get increasing silo effects. That is everybody goes off in their own place and does their interdisciplinary work. You don't get cross disciplinary as much anymore. People become more interested in antiquarianism on the left, legal history on the left becomes antiquarian and it's not particularly heavily theoretical. The

dominant interdisciplinary move is basically rational choice theory in law and economics which works because that's neoliberal thinking. Right. You get explosion of empirical social scientist, but what you don't get is any significant debate over the 8 prominent foundations of law and economics, which you by the way had in the period between about 1975 and 1985. But those of you who don't know that t there actually was a period in which law professors and legal philosophers and political theorists were actually actively debating the normal foundations of law and economics. After the period is over and it's the neoliberal period, we don't even debate these questions anymore, we just do the cost benefit analysis. We just do law and economics. Because that's the common realm. It's the common language you speak if you want to do policy. And anyone who want to do policy has to know how to talk in this way and reason in this way. So history on the left becomes anti-originalism. There's what form of history you actually get in the neoliberal period is originalism. Originalism is the form of history which is the dominant historical discourse during the period of neoliberalism and it starts out being a political project to the Regan justice Department, but then it becomes a serious intellectual project which is promoted in the counter establish and think tanks and eventually in America law schools. An enormous amount of intellectual work is done in trying to develop a coherent and effective theory of originalism. In that process is splinters into multiple different versions and sets. This is where I come in. I am the defender of a particular version of originalism, which is called living originalism or framework originalism. And in this, just as different parts of Protestantism, originalism has different parts. Just as Protestant sects hated each other and not each other during the 1700s and 1800s, so too the different kinds of

originalists all hate each other and point fingers at each other and say, you just don't know how to Regan right. And all of this is going on. Anyway, I could do a whole lecture on that. State building. Key idea. Legal scholarship really takes off World War II. World War II also happens to be a period of enormous state building in American life. If you were a highfalutin legal scholar in the period after World War II you would become an expert in labor law, you would become an expert in antitrust law. You would become an expert in securities law. Why? Because these are the ways in which the state is being built out and for this you need legal expertise and you need to think about policy and vocations of the way this thing is being built out. What are the major state building exercises in our era? There are two of them. One is the creation of the apparatus for dealing with national security following 9/11. And the other is what I call the national surveillance state. It's the creation of a very extensive system for collecting data, analyzing it and using it to solve government's problems. And as a result, if you actually look at the way American legal scholarship has changed you get lots and lots more articles about these questions. They follow, they simply exercises the American state building. So if you want to know where our legal scholarship is going, just look at how the state is being built out. If you follow it you'll know where legal scholarship is going. But of course the interesting thing about American law professors is they are lazy. Industrious but lazy. It's very difficult for them to relearn. They learned a certain set of rules, it's very hard for them to simply learn another set of rules and so they tend to gravitate back toward things they already know about. So there are really, really interesting questions that we could talk to you about and think about this period, but I've read paper after paper after paper about those

views and the presidency. Because it's pretty easy to do. Right. And if you think the way technology shapes the materials that are available, all the originals are on line now, it's very easy to do. It's a very easy little. Where if we actually want to think about the presidency and the change to the presidency, it takes a lot more work and you're going to have a few people actually doing it. Another example, a major feature of state building during our period is the growth of what I want to call the trade regulatory authority. So you have these big agreements. You have NAFTA during the Clinton administration. You have the TPP with the Obama administration and these things are really interesting because what they do they change, they collapse the relationship between trade countries and economic relationships went in the countries. That is economic regulations within a country are now seen as an extension between the countries, intellectual property, for example. They also now involve a really interesting idea fast track which essentially is you are negotiations by executive branch officials and industry folks in secret and then they produce something which is then presented to Congress in an up and down way. So routing around the traditional treaty power of the Senate and use -- its Congressional executive agreement, but it's allowing you to ground Congress because basically you just do it up or down. And that's the way PPP is done. The reason has the do with the way the party system changed in the period from 1980 to the present. You couldn't possibly have a trade regime like the one we have in polarized parties if you didn't use fast track, right. This is really important. It affects lots of things. But very few people are arguing about it. Why? Because it takes an enormous amount of bill up to basically learn about the trade system and how it works and how it affects democratic life. Law and technology.

It affects, as I said before, rights to ownership, how much scholarship you write, the way you produce it. But it also affects other things like blogs. The thing to understand about blogs is they have a very interesting feature. You might think blogs make legal scholarship more interdisciplinary. They make legal scholarship further away. No blogs make legal scholarship more legal, more doctrinal. Why is that? Curious thing about the digital public sphere. The digital public sphere undermines professional authority. Take Web MD. So the digital public sphere means anybody can find any information they want about anything themselves, they don't have to go through professionals. This is a problem for every form of professional theory. Journalism is the first to go, right. Journalism takes it in the neck in the '90s and now we're watching it. Medicine is taking it in the neck now. Law is taking it in the neck. If you're a law professor and you want to assert your professional authority how do you prove to people you know what you're talking about if you spend your time on the web talking about I don't know, whatever. Who cares? Right. You have no authority to talk about that. What do law professors talk about? Doctrine. Right. Law professors, people pay attention when they talk about what law professors are supposed to know, what law professors are supposed to know is doctrine. How to doctrinal moots and how to interpret statutes and make arguments. It is no accident that Marty Lederman basically discovers him on an organization. Why? Because Marty Lederman's authority comes from being a fabulous lawyer. Fabulous doctrinal lawyer. And that's why he succeeds on the internet because that's where he maximizes his authority in the digital public life. And if you think about Derrick that I was talking about before, what does Derrick do? He explains what the Supreme Court is doing to lay persons, drawing upon his authority as an expert

in legal doctrine and Constitutional law. Right. And so one of the ironic effects of the blog is that it actually makes lawyers more lawyer-like. It makes law professors more law professor-like. And if you're a judge and you want to know, if you want to help on something, don't go to law reviews, that's differentiation of function. That's not going away. Go to the blogs because there people basically establish their authority by being lawyer-like and solve the problems for you. Last thing I want to say and then we'll take some questions. One of the things that really drives American legal scholarship is state building and one of the things that drives state building is these change in Constitutional regimes. I also mentioned that the regime that I was born in, the Civil Rights regime, that around 1980 and is replaced by the conservative regime, the Regan regime. Of course now the dominant discourse is neoliberalism and I said, we may be at the end of that regime. And I think that's exactly what's happening. I can't predict exactly when it's going to occur, right. Prediction is always difficult, especially of the future, but all of the signs seem to be there. Generally speaking, a Constitutional regime has a dominant party which basically drives it through most of its period. During the Civil Rights regime the Democratic Party was the dominant party. During the Regan regime the Republican Party was the dominant party. You may have noticed in the newspapers that the Republican Party is in the middle of a Civil War. You may have noticed that parts of the Republican Party, not all, but parts of it have seemed to be whack doodle and gotten extremely radical and crazy and they seem to be knifing each other instead of knifing the Democrats, which is what they should be doing. This is a sign that we are nearing the end of a dominant party and its control over the Constitutional regime. This is a sign that we are about to move into a new era.

Which party is the dominant party of this era, I don't know. It looks like it will be the Democratic Party, but remember, if you think about the period between 1828 and 1860, the Jacksonians are fighting the Whigs, the new party is neither the Republican Party, which is formed in 1854. So you guys are living through a period in which for a 160 years we have not seen a major party crash and burn. Well last time that happened was the Whig Party in the 1840s and '50s. It might happen now. The current Republican Party might crash and burn and split into multiple factions and out of that might come a new party, a new party which might affect the dominant party if they can create a coalition. So who knows what's going to happen, I just want to say it looks like we're at the end of an era here. The end of such an era is characterized both by changes in state, which lawyers are always interested in and law professors, but it's also interested in changes in doctrine. For my entire professional life I've been in a Federal judiciary which was basically an institution. The Democratic Party, which I'm a liberal party was between 1969 and 1992. Think about that again. Not a single one between that time period. The Republican Party becomes more conservative over the years, so that's why the lawyers start to look liberal because the party itself is becoming more conservative. And so as a result what you get is a very long period in which the doctrine, the structure of American doctrine has become more conservative, as was it means to be conservative is different. We seem to be at an inflection point. It just so happens that the 2016 election is occurring at the same time as Justice Scalia's death. They obviously didn't have to happen at the same time, they just did. And so that just heightens the degree of uncertainty about what's going to happen. And everybody in Washington knows it. Everybody in Washington understands it's a pivotal moment

and inflection point, which might lead to any number of different possibilities, but whichever possibility actually emerges in the next four or five years, that is going to shape state building. It's also going to shape the composition of the Federal courts and Supreme Court. It's going to shape the kind of cases that come before the Federal courts and therefore the kinds of interesting problems that law professors will write about. And so this is in fact an incredibly exciting time to be a law professor because everything is about to change and we just don't know how. Thank you all very much.

[Applause]

>> Professor Balkan has just done what I would have thought was impossible, which is making a relatively dry conference in legal scholarship look like it is part and parcel of glacial trends sweeping the American political system. So I'm very impressed. So we have quite a bit of time, 20 to 25 minutes for Q and A.

>> Everyone, could you please state your name and your favorite citation from the blue book.

[Laughter]

>> Or just your name. So who would like start us off? Greg Doland, what a surprise. Here to either explain why the Republican Party is not splintering or something else. Greg.

>> No, something else. So here's my question, I will be fly in the ointment. So I think, I think for the history and sort of the splitting history, our history, into different Constitutional periods of new deal periods, so a vice period and then ultimately the liberal period, but I guess I wonder if it's true from '80s on we've all changed the way we talk, we've all changed the way we think and therefore the

way we write, I wonder then why is it despite the law moving rightwards, why is it that at least on some of the more hot button issues, at least the elite academy has absolutely failed to see the way the Supreme Court is going to move? I'm thinking of at least two cases in particular Rumsfeld versus Forum where sort of the almost every institution thought it was a slam dunk and it lost 8 to 0. And then Sebelius, NFIB versus Sebelius. When it was filed people thought it was insane. But basically they lost 5 to 4 on the commerce closing arguments.

>> Yes.

>> So why is that that on one hand we seem to be all moving in one direction, but on the other hand, apparently either not enough or there's this huge split between academy and judiciary.

>> Great question. It helps for me to situate this as institutional logic. Okay. Here's the thing you want to think about, when you get changes in social life, they don't happen everyone at once in the same place at the same time. What you get is people retreating in particular institutions. So if you look at the American legal academy in the period of about say '45 to '65 you would have had a mixture of different folks with different beliefs. You wouldn't have conservatives in a modern sense, but you would have people that were conservative and you would have more liberal people. And what happens during the period that we're talking about, the period that we lived through, is that the anatomy in general, but also the legal academy has become more coherently liberal at the very moment when American politics is moving to the right. Right. So it becomes like an institutional island and in the context of that development the conservative movement, looking at what had happened, right, they also saw the Ford Foundation, right, and the other foundations

become liberal foundations. They created a counter establishment because they knew that the establishment was closed to them, right. The establishment of the big foundations, the academy and these research institution workings, right, think about that. So what they did from the period '80 forward is they created a series of counter institutions where they could talk about these ideas. That's why you get heritage developing the way it does, why you get AEI developing the way it does and why you get the Federal Society, in fact, developing the way it does. It does that because it sees that as this period is happening they can't crack these institutions so they have to create their own institutions. What happens, interestingly though, as you move forward is, the ultraconservative movement begin now to enter the legal academy. As they enter the academy they bring a new set of ideas into the academy reshaping legal scholarship. Right. And at the same time you, remember in this earlier period you have left wing liberal public interest law firms, right. The same folks who think about the creation of a counter establishment also know they need the get themselves some right wing public interest firms. So that's IJ, right, and a bunch of other public interest firms on the right. They begin to shape litigation that's going to be brought into the courts so that they can build a conservative conception of the Constitution. So the interesting thing about this period is that you have institutional separation, the creation of a counter establishment and the creation of polarized versions of public interest law. And that in turn sets up exactly what you're talking about. A role in which you have two different Constitutions. You have a Constitution that's understood by liberals and a Constitution that's understood by conservatives. And this Constitution is being adjudicated by a court which flips back and forth in terms of its ideological views. But the by the period

you're talking about, 2010 to 2016, it's largely a conservative court. It's really a court that has a conservative majority. And what would you expect then? You would expect that liberals would see these ideas that are being, that are bubbling out as insane or off the wall and conservatives would say, what's off the wall about it? It makes perfect sense to us. And the court is now adjudicating these and because it's a conservative court, it says these things make perfect sense to us. We don't understand why you think it's crazy. It's another way of understanding what you're describing.

>> My colleagues are making me get my exercise this evening, probably a good idea. Ken.

>> Kenneth Lassen and I'm a law professor here at UB. You mentioned that there was a time before which, at which law professors stopped writing once they achieved tenure, and then afterwards various forces, you suggested as to why they resumed.

>> They changed their behavior.

>> Okay. They changed their behavior. What about the role of money in the form of summer stipends that served as, in my opinion as a big incentive to continue writing after tenure?

>> I agree with you. And this also has to do with incentives, but you might think about this, if you're a law school dean, why would you give out summer stipends to encourage people to write? In other words, why not use the summer stipends to get them to do something else? The interesting idea is that somehow law school deans, that's what they think, how you gain prestige in this increasingly hierarchical strata of law schools, is by having faculty produce scholarship. So what you do is use the levers of power basically pushing faculty to become more academic. So

these are very good points.

>> Hi. I'm Geoffrey Sawyer. I teach history in the College of Arts and Sciences here. You've given a lot to think about, but one thing that's very puzzling to me about your narrative is the power of this idea of the market because to me it seems like even though it's, you know, it's like the holy grail thing that everybody uses to justify everything, but nobody I don't think really believes in it especially free markets. Do you know executive --

>> Do I know anybody who believes in free markets? Yes, I do.

[Laughter]

>> Don't most people want to monopolize their operation as much as they can? I mean do you know of any businessmen who would rather be in a competitive environment than in a monopolistic environment?

>> Yes. I think you're right. But if you ask me, do I know anyone whose ideology is free markets? Yes, I know lots of people like that.

>> Really. Not just as a cover for another kind of --

>> No. No. I am not a person who thinks or believes that people operate in that way. I mean people will usually tell you what they actually believe, if you ask them. And sometimes you'll think, well what they believe is stupid or you can't believe they actually believe it, but they do.

>> Hi, Jack. Max Sterns from Maryland.

>> Max. How are you doing my friend?

>> I'm well. And I would ask how you're doing, but I can see you're doing well. So I want to talk a little bit about rope-a-dope and law and economics.

>> And you are very well apt to talk about this because in fact you represent

a particular incursion, you might say, in politics.

>> In a sense, that's right. I'm probably far less qualified to talk about boxing, but my question is really this, one could look at law and economics itself as having under gone -- I don't really usually need amplification. But one could look at law and economics itself as having -- I don't know, it's not working for me. As having a series of generations and when I myself began law school I was there in the mid '80s at the University of Virginia when it was just discovering law and economics and entered the legal academy in the early '90s when it was really regarded largely as a positive enterprise. It was designed to explain, not to advocate the general conventional wisdom if anybody ever tells you economics dictates a policy they're failing to understand what economics actually is capable of accomplishing.

>> And this is a period in time.

>> Absolutely. Absolutely. And the intrusion simply being, economics provides choice and the normative choice among those options and the trade-offs likes outside of any economic board. I'll just tell you, for having done this for 24 years, I continue to tell that to my students. Now something momentous happened today that you may or may not know, George Mason has changed its name to the Antonin Scalia School of Law.

>> Wow! I love it!

>> I don't love it. Having spent 1995 to 2005 there I don't love it. And one of the reasons I don't love it has nothing to do with my opinion of Justice Scalia, it has to do with Justice Scalia's opinion of economics which had once been the foundation of this law school.

>> Right. He was not a big fan.

>> He was not a fan of economics, he was an ideological conservative. The issue for me is the school that I kind of brought this on the mission took on a conservative ideological to the ideological core. They now made it into something. It was empathetical to that mission.

>> Right.

>> So my question for you, a pressing question for you to ask, do you think it's no longer possible to have a pure methodological core? And the politics you're talking about in which it's not so much a law and conference and politics, but inevitably any policy discipline has the eventually yield to some ideological sake? I just wonder.

>> The short answer is, if you're talking about American law schools, I'm afraid the answer would be yes. But there's a different point. That's because what are lawyers anyway? This is professional prescriptivism. Right. It's the very feature, you're a lawyer and an advocate and you make arguments. You're prescriptive, what are you going to do what is the policy choice, which will inevitability push you in this direction because the law between law and politics is always so fluid. What you're worried about is what inevitability happened. But I've got good news for you. Even those tendencies are always going to be present in American law school it doesn't mean that an intellectual like yourself who wants to spent a life in the law, you know, in law, and wants to do good work has to be swept away by these discourses. That is one of the great things about the American law school is the eclecticism which allows people to basically refuse the majority and say no. I want to do good work. I want to do methodology and you do it. The problem is when your colleagues are likely to be swept up in these forces. Right.

So it's really a problem, it's an issue of your vocation as the world is changing around you. So that's the good news I have for you.

>> Hello. Is it working? Okay. My name is Theseus. I had a question.

>> Is your name Theseus?

>> Yea.

>> That is a fabulous first name.

>> Thanks. So I know you mentioned you could do an entire lecture on this, but if you could briefly summarize living originalism and how that would differ from an outcome of a case would be different with typical originalism that we hear about?

>> Great. Okay I'll do it. I hope I don't use up too much time. This is a real simple version. Let's take Obergefell v. Hodges for the same-sex marriage case. So originalism goes through multiple versions. The earliest version of originalism which really starts in 1980 is original intention originalism. That is a correct way to interpret the Constitution is by is by asking who the people who drafted the text who have intended it to be applied. How did they intend it to be interpreted? Okay. Obergefell v. Hodges, easy case. Nobody addressed the 14th Amendment and imagines that it's going to prohibit same-sex marriages. No problem. Easy case. Now if you construe their intentions in a more abstract way then you can get to the point where yes, they did intend equality for all, and so therefore, they're right. But the burden of this particular version of originalism in the '80s is to adopt a very narrow and concrete version of intentions so that specific expected applications are in control. With me? As a result of a series philosophical objections conservatives then moved to original understanding of originalism which is based not on the intentions of the drafters, who after all, didn't make the law,

but the standings of the ratifiers, in other words, those who have the power to make the Constitutional law. Then here too you get the same result, that is what they would have understood the consequences of creating the text to be would be of course is that same-sex marriage is not part of the 14th Amendment. Same problem of levels of generality, you still have that. But there's objections to that. And so by about 1985 or 1986 then Judge Scalia, after whom this law school is now named, has a very famous address before the Federal Society and in it he says, from now on never say original intention, never say original understanding, just say original meaning. And we originalists are now devoted to that original public meaning. That is, what was the meaning of the words used, the text at the time, in the English spoken before basically an audience of people living at that time. What would an ordinary person speaking English have understood the meaning of the words of the text to be. So that is Scalia's formulation and that becomes the dominant way in which originalists talk about originalism from '85 on. You still have people doing their own version, but basically that's dominant. And then comes a really interesting set of really elaborate philosophical work trying to figure out how to make sense of this. It turns out that there is a problem in this model and the model goes like this, when you say meaning, do you mean the meaning of the words or do you mean how people expected the words would be applied? If you mean how people expected the words to be applied, then it's just the same thing as the old version. Its original intention and original understanding. But if you just mean the meaning of the words, the meaning of the words, equal protection under the law is the same meaning as in 1868. The words haven't changed their meaning. There are a few cases where they have, but this isn't one of them. And then the question is, the question before a judge is, the original

meaning of the text that I'm supposed to apply you protection of the law, so okay. Is this equal protection of the laws? The result then is that you could be an original meaning originalist and believe that in 2013, 2015, it is not equal protection of the law by denying same-sex couples the right to marriage. As a result what you get is a form of originalism in which the meaning the original meaning stays constant but the applications change over time based on how people are in different generations would apply them. As a result again, it's what we might call the living originalism. And this idea is not just mine, it's an idea that's been put forward by a whole bunch of different people. Libertarian Constitutionalists adopt a version of what you might call this, and others as well, but mine is called living originalists. Did you have a follow up you wanted to ask?

>> Brief follow up.

>> That just sounded very similar to, almost like an originalist textualist sort of description.

>> It is.

>> Okay.

>> It's originalist and textualist. Yes.

>> Okay.

>> Very good.

>> So there's sort of one --

>> And you are?

>> I'm Patrick Williams. I'm a Supreme Court Fellow just here as me. I'm required to say that. [Laughter] So there's one accolade that after the generation of legal scholarship that we didn't talk about today which is generated by

practitioners and generalists and I'm curious how those types of articles, which seem to me have remained very doctrinal, fit into your broader narrative today.

>> They fit in in the following way. Let's tackle law reviews. So law reviews are so different than the publishing practices of almost any other discipline. If you were into political science or philosophy or economics you would find that they really are a very departmentalized. There's very limited entry into them. It's very difficult. It lot of it has to do with who you know and its peer reviewed and all of that. But in law in very much open. So one of the great things, I think one of the great things about American legal scholarship is that it's always possible, to perpetuate a form of legal scholarship even if it is no longer the dominant form of legal scholarship. Right. So that's the reason why you see this continuing over time. Right. You still have practitioners writing for law reviews and judges writing for law reviews and that produces a particular kind of scholarship that doesn't, and this is essentially the same incentives, right, of the scholarship that people actually tenure or have to get their notes, right. And as a result, because it's created under different incentive structures it can be a different kind of scholarship and it can still be published in American law reviews.

>> I'm going to ask what I think is the final question. Your story I think, as I understood it is a story about how American politics has shaped, maybe driven, maybe used instrumentally in American legal scholarship. Is there a cause and effect relationship, quick can there be, has there ever been a cause and effect relationship running in the other direction?

>> All of the time.

>> Or it is possible for legal scholarship, other scholarship in general, rather

than just influencing the terms of debate and what form of originalism we like to actually influence ideas that as they're implemented in the American political system?

>> Yes, it happens all of the time. You have to get different accounts. So one is that you have a continuous movement back and forth between the academy and government. Not just one direction. But the more interesting example that was given this morning when we were talking about Catherine MacKinnon. That's an example of the relationship between social mobilizations and legal scholarship. So there's, if you go back, actually really far back you'll find there's always a relationship between legal and political intellectuals and social mobilizations when you have constant conversation between the two. You don't have legal scholars in the same way at the beginning of the 20th century, that's really post-World War II, but even if you go to the women's suffrage movement you can see these debates among intellectuals and women's suffrage, and it's affected the way that they actually do it. And it's back and forth. The same thing happens with respect to social mobilizations from the '50s up to present day. Both in the left and the right. But legal intellectuals have constant conversations with people in social mobilizations and each influences the other.

>> So please join me again in a warm round of applause for our keynote speaker, Jack Balkan. [Applause] So those of you who have RSVP'd for the dinner, that is on the 7th floor starting in about a half an hour. And for everyone, we reconvene here tomorrow morning at 8:00 in this room for panel 3 which is, emerging forms of legal scholarship. Thank you all for coming.

[Event concluded]

"This text is being provided in a rough draft format. Communication access Realtime Translation (CART) is provided in order to facilitate communication accessibility and may not be a totally verbatim record of the proceedings."