

Harvard Law Today



3 *Fried on executives' compensation: Are they worth it?*

On Constitution Day

Feldman and Souter discuss models of judicial decision-making



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To view the conversation go to: www.law.harvard.edu/news/spotlight/constitutional-law/23_constitution.html

On his 70th birthday—and the anniversary celebration of the Constitution's signing—retired Supreme Court Associate Justice David Souter '66 shared some perspectives on the Constitution and his plans for retirement.

Souter offered his reflections in a discussion with HLS Professor Noah Feldman, who once served as his law clerk, at an Emerson Hall event.

In response to criticisms of the Constitution—which were advanced by a panel of scholars just prior to his appearance (see story p. 7)—Souter emphasized that the Constitution was intended by the framers to be a document of “internal conflict.” He highlighted the fact that many of the

barriers to efficient governmental action were deliberately placed in the Constitution to prevent the excessive concentration of power at the highest levels: “It is well,” he said, “for ourselves to not let ourselves go too far.”

Because of the document's inherent competition between values, the Court's doctrines cannot always be perfectly coherent, he said.

When asked about the value of originalism, Souter said the problem with originalism is that it's “unlikely to provide you with very specific answers to the kinds of questions that you are likely to ask.” Interpreting and understanding a certain text as it relates to the application of the law often requires a reliance on outside references.

One characteristic of a >>8

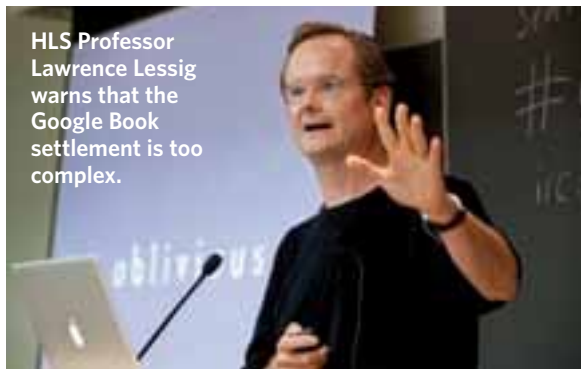
Digital library or digital bookstore?

Scholars look at fallout of Google Book settlement at HLS

WHAT WILL libraries in 2075 look like? Can copyright law be re-engineered? Should we trust Google to make decisions in the public interest? Those were some of the questions discussed at “Alternative Approaches to Open Digital Libraries in the Shadow of the Google Book Search Settlement,” a conference which took place at Harvard Law School on July 31.

Participants in the conference, which was sponsored by

HLS Professor Lawrence Lessig warns that the Google Book settlement is too complex.



MARTHA STEWART

Harvard University's Berkman Center for Internet & Society, focused extensively on the ramifications of the 2008 settlement reached by Google, the Authors Guild and the Association of American

Publishers about copyright infringement caused by Google's book search function.

The massive settlement devises avenues for Google to pay royalties to authors through the >>7

Introducing ... *Dean* Minow!

“[Martha] is someone who has won the admiration, both intellectual and personal, of a remarkable array of colleagues and students and alumni. People spoke to me of her energy, her drive, her intellectual range and curiosity, her appreciation for different points of view, her caring and patience and worth, but also of her toughness and high standards and inner steel; her passion for the law and for its ability to change people's lives for the better; and, of her uncommon ability to bring people together for common goals,” said Harvard University President Drew Faust, officially introducing Martha Minow to the Harvard Law School community as the new dean.

Minow welcomes incoming class see story on page 6.

Minow with Faust at HLS reception on Sept. 2



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BRIEFS

The low-down on downloading

Academic work by HLS faculty is downloaded more frequently from the Social Science Research Network's online database than the work of any other law faculty, according to the law blog "Brian Leiter's Law School Reports." Scholarship by **Lucian Bebchuk LL.M. '80 S.J.D. '84** was downloaded more (23,416 times) than the work of any other law author. **Cass Sunstein '78** and **Vivek Wadhwa**, a senior research associate at the HLS Labor and Worklife Program, were ranked fourth and seventh, respectively, with 12,413 and 9,050 downloads. **Allen Ferrell '95** came in 14th with 6,572 downloads.

Scott and Coates testify before Senate



In July, following the Treasury Department's unveiling of the administration's regulatory overhaul plan, **Professor Hal Scott** testified before the Senate Banking Committee on the improvement of regulation in the insurance sector. **Scott** called for reforming regulation of the insurance industry through optional federal charters, as opposed to the current system of state charters. On July 29, **Professor John C. Coates** testified before the Senate Banking Committee's Subcommittee on Securities, Insurance and Investment at a hearing titled "Protecting Shareholders and Enhancing Public Confidence by Improving Corporate Governance," offering recommendations for corporate governance reform.



Supreme clerks

Of the 38 clerks to U.S. Supreme Court justices for the 2009-2010 term, nine are Harvard Law School graduates:

| | | |
|----------------------------------|---|--------------------------|
| Adam Jed '08 | → | Justice Stevens |
| Steven Lehotsky '02 | → | Justice Scalia '60 |
| Daniel Epps '08 | → | Justice Kennedy '61 |
| Elizabeth (Petrela) Papez '99 | → | Justice Thomas |
| Elizabeth (Barchas) Prelogar '08 | → | Justice Ginsburg '56-'58 |
| John Rappaport '06 | → | Justice Ginsburg '56-'58 |
| Andrew Crespo '08 | → | Justice Breyer '64 |
| Christopher Fonzone '07 | → | Justice Breyer '64 |
| Eloise Pasachoff '04 | → | Justice Sotomayor |

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Professors submit open letter to SEC



In August, a group of Harvard Law School and Harvard Business School professors submitted a letter to the U.S. Securities and Exchange Commission arguing for changes in an SEC policy proposal. **HLS Professors Robert Clark '72, John C. Coates, Reinier Kraakman, Mark Roe '75 and Guhan Subramanian '98**, along with five Harvard Business School professors, signed the letter, which recommended an increase in the percentage of shareholders required to nominate a corporate director, from 1 percent to 5-10 percent. The group also suggested an "opt-out" clause, allowing companies to bypass the threshold rule if a majority of shareholders agree.

Minow named to Legal Services Board



President Barack Obama '91 nominated **HLS Dean Martha Minow** to the board of the Legal Services Corp., a bipartisan, government-sponsored organization that is the single largest provider of civil legal aid for low-income Americans. **John Levi '72 LL.M. '73**, a partner in the Chicago office of Sidley Austin, and **Gloria Valencia-Weber '86**, a professor at the University of New Mexico School of Law, were also nominated. **David Hall LL.M. '85 S.J.D. '88** and **Thomas Meites '69** currently serve on the board.

HLS financial columnists



Professors Lucian Bebchuk LL.M. '80 S.J.D. '84, director of the Program on Corporate Governance, and **Professor Hal Scott**, director of the Program on International Financial Systems, have begun writing monthly financial commentaries for online publications. **Bebchuk** is a columnist for Project Syndicate, an international association of 425 newspapers in 150 countries. His commentaries, titled "The Rules of the Game," focus on finance and corporate governance. **Scott** is a columnist for Financial News online, a source of news, analysis and commentary for the investment banking, asset management and securities industry.

Million-dollar miss



Self-described as "the guy who lost \$475,000 in three minutes," **Ken Basin '08** was a contestant on the ABC network program "Who Wants to Be a Millionaire?" in August. **Basin** lost almost a half million dollars in prize winnings when he incorrectly answered the million-dollar question: "LBJ installed four buttons for drinks in the Oval Office, labeled 'coffee,' 'tea,' 'Coke,' and what?" (**Basin** chose "Yoo-hoo"; the correct answer was "Fresca.") On his blog, **Basin**, an associate at Greenberg Glusker in Los Angeles, took the long view: "In real life, most people have to risk bankruptcy to take their shot at a million dollars, and all I had to do was make a calculated wager with found money."

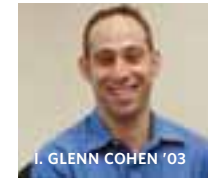
Cohen and Roin named co-directors of Petrie-Flom Center

ASSISTANT PROFESSORS of Law I. Glenn Cohen '03 and Benjamin Roin '05 are the new co-directors of the Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics at HLS.

Cohen and Roin both joined the Petrie-Flom Center as inaugural academic fellows in 2006. They were appointed assistant professors in 2008.

Cohen is currently working on projects relating to reproductive technology and medical tourism. His past work has included projects on end-of-life decision-making, FDA regulation, research ethics and commodification.

A 2003 graduate of HLS, Cohen received the Sears prize for the highest 1L grades and was an editor of the Harvard Law Review. Before joining the HLS faculty, he clerked for Chief Judge Michael Boudin '64, United States Court of Appeals for the 1st Circuit. He also served as an appellate attorney for the United States Department of Justice, Civil Division, Appellate Staff, where he acted as lead counsel in more than 12 Circuit Court cases and represented the United States in the U.S. Supreme Court, in conjunction with the solicitor general's office.



Roin, the Hieken Assistant Professor of Patent Law, works on issues involving pharmaceutical innovation, FDA regulations and the patent system. His previous scholarship includes work on why the patent system fails to achieve one of its functions—the disclosure of patented ideas to others. Roin has multiple research interests, including patent law, trade secrecy, copyright law, trademark law, health law, food and drug law, and property law.

Roin graduated from HLS in 2005, after also earning the Sears prize and serving as an editor of the Harvard Law Review. After HLS, he clerked for Judge Michael McConnell on the United States Court of Appeals for the 10th Circuit.

The center was founded thanks to a generous gift from Joseph H. Flom '48 and the Petrie Foundation in order to respond to the need for leading legal scholarship in the fields of health care, biotechnology and bioethics. Professor Einer Elhauge '86, who has served as faculty director since the center's founding in 2005, will remain associated with the research program as its founding director. *

FACULTY Q&A

Having a “say on pay”

Jesse Fried '92, a leading expert in executive compensation, corporate governance, bankruptcy and venture capital, joined the HLS faculty in the fall from the University of California at Berkeley.

In your 2004 book, “Pay without Performance,” with Lucian Bebchuk, you described problems that have since become widely recognized in the wake of the financial crisis. What caused these problems?

We identify a number of ways in which pay arrangements in public companies have not served shareholders' interests. Many executives are overpaid, and compensated in ways that fail to give them incentives to create shareholder value. Indeed, pay arrangements frequently reward managers for decisions that destroy firm value. One of the main problems we highlight is executives' ability to profit from short-term results, even when those results are later reversed.

The root of these problems, we argue, is that directors have been more attuned to the interests of the CEO than the interests of shareholders, especially when it comes to things like the CEO's own pay. This is not surprising. CEOs have played a much more important role than shareholders in selecting directors. If directors wish to be renominated to

the board, or invited to serve on other boards, there may be a cost to haggling with the CEO over his pay. At the same time, directors reap little benefit from reining in the CEO's pay or ensuring it creates proper incentives—directors pay the CEO with shareholders' money, not their own. A simple cost/benefit calculation naturally leads directors to refrain from bargaining aggressively over CEO pay.

The recent financial crisis highlighted what can go wrong when pay arrangements are not properly structured. There is now mounting evidence that badly designed bonuses played a major role in bringing down many large financial institutions. Even Wall Street executives have admitted that there were serious flaws in their pay arrangements, and have begun taking steps to fix them. Unfortunately, this recognition is coming a little too late for many of these firms and the taxpayers who were called upon to bail them out.



How can executive compensation arrangements be improved?

First, equity arrangements should focus executives' attention on the long term. Currently, executives are free to cash out their equity once it vests, typically one to three years after the grant date. Instead, firms should require executives to hold most of each equity grant for a fixed number of years after vesting. This would better tie executive's equity payoffs to long-term shareholder value.

Some compensation reformers have advocated executives holding their equity until retirement. I think this would be a mistake. Such arrangements would perversely give the most effective executives an incentive to retire prematurely. In addition, the ability to cash out all of one's equity upon retirement would give executives on the verge of retiring an incentive to focus on the short-term rather than long-term. Both of these problems would be avoided if equity must be held for a fixed number of years after vesting, rather than until retirement.

Second, compensation should be structured to reduce executives' ability to use inside information to time equity transactions as well as to manipulate the stock price around these transactions. Consider stock sales. Executives routinely use inside information to time large sales of stock, and often manipulate the stock price shortly before the sale. In a paper published last year, I urged firms to use “hands-off” arrangements under which each equity grant must be cashed out gradually on a series of dates specified when the grant is made.

Hands-off equity would leave the executive no discretion over when her equity is cashed out. It would not just reduce executives' ability to use inside information to boost their sale profits, but eliminate it altogether. I also showed that the gradual unwinding under a hands-off arrangement would ensure that executives have little incentive to manipulate the price around each disposition of their stock.

In June, the Obama administration unveiled a plan to help rein in executive compensation. How do you assess its likely effectiveness?

The administration's June statement did not really offer a comprehensive “plan” for dealing with executive pay. Rather, it indicated Obama's intent to propose or support legislation in two specific areas: (1) making compensation

committees more “independent,” in part by ensuring that they hired their own compensation consultants and (2) giving public shareholders a nonbinding “say-on-pay” vote.

I am skeptical that legislation targeted at compensation committees will do much to improve executive pay arrangements. The thinking is that compensation consultants have an incentive to recommend pay arrangements favorable to the CEO because the consultants are often selected by management or with their input. Having the compensation committee itself select and hire pay advisers, it is argued, will give directors access to better information and thereby lead to more shareholder-serving pay arrangements.

But requiring compensation committees to use their own consultants does not alter directors' continuing incentive to favor the CEO on pay issues. Suppose the consultants hired by the compensation committee propose a shareholder-serving pay arrangement, but the CEO rejects it. The compensation committee will simply go back to the consultants and tell them to come up with “Plan B”—an arrangement more palatable to the CEO. The consultants will promptly comply. Otherwise, they won't be rehired by the committee next year. Most consultants will simply start with Plan B. As long as directors fail to bargain aggressively with CEOs over pay, legislation requiring directors to hire pay consultants directly is likely to have little effect on the pay arrangements emerging out of this process.

I am more hopeful about the second area of legislation, “say-on-pay.” One important constraint on executive pay is directors' fear of negative publicity and shareholder outrage. Say-on-pay shines a spotlight on a board's compensation decisions, and provides shareholders with an efficient mechanism for indicating their approval or disapproval of these decisions. Because disapproval is embarrassing to directors, enactment of say-on-pay should make directors push harder for pay arrangements that better serve shareholders' interests. Indeed, say-on-pay in the UK has led to more communication between boards and shareholders over pay arrangements, and an improved link between pay and corporate performance. I expect it to yield similar results here. *

☛ To read the full interview, go to: http://www.law.harvard.edu/news/spotlight/business-law/02_fried.html

PHIL FARNSWORTH

Yoon Suk Choo

WHEN Yoon Suk Choo '11 was in middle school, his father brought home a documentary about North Korean children orphaned by parents who starved to death or were forced by poverty to abandon them. In the video, the children fed themselves by picking seeds from the ground. "This was my first contact with these North Korean refugees," Choo says. "Ever since, I have maintained an interest in them. At law school, I finally had a chance to get involved last summer."

Yoon Suk Choo interned with the Citizens' Alliance for North Korean Human Rights, in Seoul, South Korea.



Citizens' Alliance for North Korean Human Rights, an NGO that helps bring North Korean escapees to South Korea. Among its many projects, NKHR is trying to establish that the U.N. Convention Relating to the Status of Refugees protects these escapees from being turned back by China to North Korea, where they face imprisonment and worse. The legal hurdle is whether their hardship is economic or political in nature; if it's economic, the convention does not apply. Choo's research supports the case that their plight is political: "North Korea classifies all its citizens into three classes—loyal, wavering, hostile—and 51 subcategories. If your ancestor fought with the national founder Kim II Sung in the war

of independence, then you are at the top," Choo explains. "People suffering the brunt of the hardship are, of course, those in the low class."

Choo first became interested in international law after reading about Woodrow Wilson's vision of law replacing realpolitik as a way of resolving international conflicts. But he also feels a spiritual pull: "I feel that human rights work is a very worthwhile place to be because this is where people are caring for each other. People who work in human rights are not out to achieve their own purposes. They are trying to help other people. I could feel this strongly over the summer."

Dominique Winters

THE CLIENT was on trial for double homicide. Dominique Winters '10 wrote a winning pretrial motion that excluded a witness's hearsay testimony. On the day the verdicts came down, Winters held it together until the jury foreperson uttered: "Not guilty." "I was crying at the end of that trial because I was nervous he would be found guilty," says Winters, who steadfastly believed in her client's innocence. "The murders happened over a decade ago. He had gone and lived his life, and then they hit him with this."

Dominique Winters spent the summer with the Public Defender Service for the District of Columbia.



Winters spent this summer with the Public Defender Service for the District of Columbia, assisting her supervising attorney in six murder cases by writing motions and participating in investigations. "The best part of it was meeting our clients, so we have a face to the story," she says. It was important to her that she find the humanity in each person she was helping to defend.

Winters watched her supervisor juggle four murder trials in the course of a summer. "She had a pretty heavy calendar. It gave me a good opportunity to get a realistic idea about the work I'd have to do as a public defender," she says.

Ever since she was a high school freshman participating in mock

trials, Winters has been clear that she wants a career in criminal justice defending the poor. Growing up in Columbus, Ga., she saw how poverty could lead people to choose a criminal path, and she says that justice cannot be done unless the zeal of the defender matches that of the prosecutor. "You realize if you aren't a zealous advocate on behalf of the person who is guilty, then how will the innocent be protected?" she says. "By protecting the guilty, you are protecting the next innocent person."

Winters aspires to work for the Public Defender Service after she graduates.



STUDENT S

Lawyers in
at home and
Students reflect on
and cha

SPOTLIGHT

in summer,
and abroad
summers of growth
challenge

Anne Siders

WHEN I was little, I wanted to be Indiana Jones,” confides Anne Siders ’10. It’s no wonder, then, that she counts as a highlight of her summer internship the chance to tour a Navy submarine and a destroyer.

Siders used her opportunity as a Heyman Fellow summer intern to explore a career with the federal government by working with the U.S. Navy Judge Advocate General’s Corps in San Diego. She researched and wrote on the right to jury trials for civilians who commit offenses on naval bases, and on premeditation and the application of the death

penalty in murder cases. Her memos provide reference and background for time-strapped JAG officers. “They’re busy handling their cases, and they’re only stationed there for two years; they don’t have the time to do this kind of general information research,” Siders says.

Working with JAG prosecutors helped Siders round out the exposure to criminal law that she gained as a volunteer with Harvard Defenders, and introduced her to operational law, family law and environmental law. She also learned about Navy culture and about leadership as exemplified by JAG officers: “I was impressed with how hard they worked to advance other people’s careers. They did everything they could to help

the people they were responsible for.”

Siders’ Navy experience blends with her prior summer internship in London with the nonprofit Landmine Action, where she worked on a project to increase nations’ compliance with international conventional weapons treaties. Though a pre-med as a Harvard undergraduate, Siders opted for law school with an eye toward a career in international law. “I came to law school because I wanted to do something that makes a difference,” she says. She has been offered a commission with the JAG Corps when she graduates. If she goes that route, her dream is to advise Navy officers on international humanitarian law and the laws of war.



As a Heyman Fellow summer intern, Anne Siders worked with the U.S. Navy Judge Advocate General’s Corps in San Diego.

Brad Adams

BRAD Adams ’11 came to HLS a bit skeptical about whether he wanted to be a lawyer. He’d spent the previous three years managing relief programs in African refugee camps. That work, he says, “wasn’t about taking someone to court. It was about creating conditions to advance human rights. After his 1L year, he still wasn’t sure that “the route of individual adjudication” was the right one for him.

This past summer, he was a Sonnenschein Scholar and a Chayes Fellow at Reprieve, a legal services organization in London, where he did research and drafted motions for attorneys

defending Guantánamo detainees against the U.S. government. In the case of a detainee accused of associating with an alleged terrorist organization, he was asked to research the charges and look into the group. His supervisor told him, “We’re not sure it exists.”

Adams studied trial documents of past prosecutions of members of the organization and found no real proof of the group’s existence—just official suspicions. He also examined the government’s allegations against Reprieve’s client and found they were based entirely on one questionable interrogation of one person by a state known for using torture. Looking at these facts, he concluded, “They just don’t add up.” The case is now awaiting

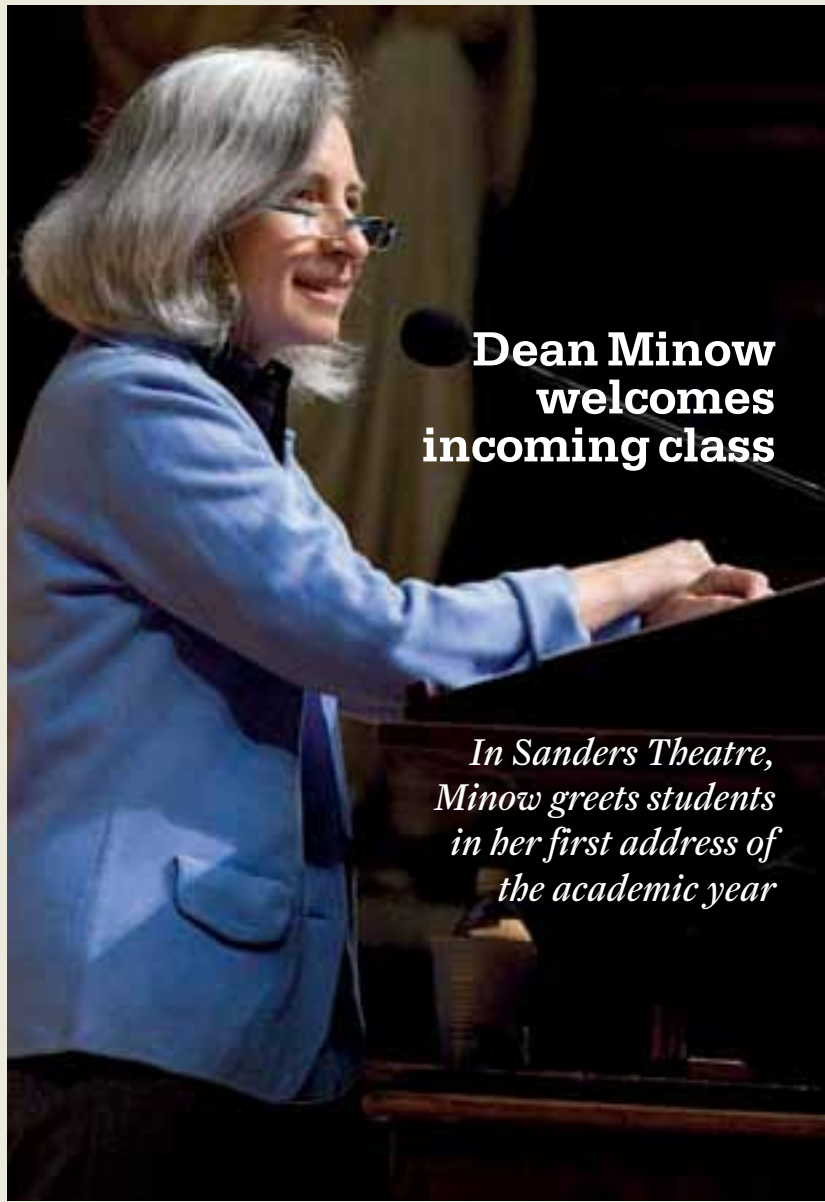
another hearing.

“Factual research is where the breakthroughs happen,” Adams says, noting that of 500 people released from Guantánamo, 470 were freed through negotiation and political maneuvering, supported by painstaking research.

Working with the Reprieve lawyers, he saw that law and policy can advance each other, and he now thinks of “individual adjudication” as a useful piece in a lawyer’s tool chest. “That tool is powerful,” he says, “but it’s not all-powerful; it doesn’t exist alone.” He is looking forward to studying criminal procedure at HLS.

Adams plans to continue working with Reprieve during the school year. *

Chayes Fellow and Sonnenschein Scholar Brad Adams worked at Reprieve in London.



Dean Minow welcomes incoming class

In Sanders Theatre, Minow greets students in her first address of the academic year



MARTHA STEWART

WE SEARCHED THE world for you.”

That was the message delivered by Harvard Law School Dean Martha Minow to this year’s class of incoming law students at a welcome reception at Harvard’s Sanders Theatre on Aug. 31.

“You are here, each of you, for a good reason. You’re here because you’re talented, you’re passionate and maybe a little driven. You are the strength, the center of the Harvard Law School. It is a privilege, truly, of everyone on the faculty to get to teach you and to know you,” she said. “We picked you because you have the gifts to pursue your dreams and because your dreams can change the world.”

In her first address of the academic year, the dean welcomed the more than 700 students who make up this year’s group of LL.M., J.D. and transfer students. Calling this year’s group “extraordinary,” she offered examples of the talents and accomplishments they bring.

Among the members of this year’s class are 165 LL.M. candidates from 65 countries, 56 of whom already have advanced degrees; 559 J.D. candidates from 21 countries and 159 undergraduate students; and 39 transfer students from 24 schools. They include international judges, a member of the U.S. national gymnastics team, a veteran awarded the Purple Heart and the founder of a foreclosure prevention company.

Minow told the incoming class that this is a “vital time to enter law,” with at least five major shifts going on in the world and producing technological, social, economic and political change. These shifts—in information technology, biology, globalization, resource scarcity, and mass population growth—generate fundamental questions whose answers will alter the shape of the human experience. “Lawyers’ tools are words, concepts and institutions. We have building blocks to help frame the debates and generate alternative solutions,” she said. *

Kagan offers insights on solicitor general job

HLS Professors Fried and Manning join former dean in panel discussion

JUST TWO DAYS after making her debut before the Supreme Court on Sept. 9, Solicitor General and former Dean Elena Kagan ’86 returned to HLS to give students an insider’s account of her new role.

Students spilled into the hallway in Pound Hall to hear Kagan and her fellow panelists, HLS Professors Charles Fried (solicitor general from 1985 to 1989) and John Manning ’85 (assistant solicitor general from 1991 to 1994). Dean Martha Minow moderated.

The panel focused on the solicitor general’s unique role as a “backstop for the rule of law,” as Manning described the job. In that role, the office has immense authority, and as a result must be a dispassionate defender of long-term interests

of the United States, the panelists agreed.

“A [high] level of professionalism, integrity and the lack of politicization have been a historic hallmark of the office,” Kagan noted.

As the government’s top litigator, the SG supervises all aspects of government litigation and appeals, and makes recommendations to the Court about which petitions for certiorari should be granted.

The Court agrees with those recommendations in the vast majority of cases, Kagan said.

Along with the 22 lawyers in the SG’s office, Kagan relies upon a “literal army of lawyers” across the federal government for legal analysis and memos recommending courses of

action. Based on all of that work, only those matters that present an important legal issue that has been sufficiently “ventilated” in the lower courts are recommended for certiorari.

Manning, who served during the transition between Presidents Bush and Clinton, described the lack of political bias in the office. Only two of the 22 attorneys on staff are political appointees, he said. Because most everyone in the office is a career attorney, there is very little turnover. “There is

an ethos of professionalism and neutrality and dispassionate lawyering that is exceptional and, I think, unique in the government and in the world of policymaking,” Manning said.

Said Fried: “It is the model of what lawyers working together should be.”

But, the SG is an advocate with a client and a specific job to do in defending statutes before the Court, Manning added. Thus, the solicitor general is not completely insulated from politics, to the

extent that the legal positions on high-level issues may change when there is a change in the administration. Because the solicitor general ultimately works for the president, however, those policy changes are appropriate, Manning said.

Each SG typically argues at least one case per sitting of the Court, making her the Court’s most frequent litigant.

“The SG has an absolute obligation to be honest to the Court,” said Kagan. “The SG is a real repeat player. I can’t do anything ... that will make me lose my credibility.”

Kagan summed up her new job by describing the delicate balancing act of being honest with the Court while still trying to win: “The SG has many masters. The trick of the job is figuring out how to accommodate the interests of the different players.” *



ELENA KAGAN '86

A standing-room-only crowd gathered in Pound Hall on Sept. 11 for a panel discussion on the role of the Solicitor General.



PHIL FARNSWORTH

Google Book settlement

continued from page 1

creation of a central book rights registry, enabling Google to index the books and display snippets in search results, as well as up to 20 percent of each book in preview mode. Google will also be able to display ads on these pages and make available for sale digital versions of each book. Copyright holders will receive 63 percent of all advertising and e-commerce revenues associated with their works.

Harvard Law School Professor Lawrence Lessig warned that the settlement, which goes before a New York District Court judge in October, is too complex and does not allow for enough open access to the material in the Google Books database.

Citing the maze of permissions and licensing needed today to make documentary films, Lessig said the Google settlement “moves us down a path where books become documentary films, when the ecology of access we have to books in the future is like the ecology of access we have to documentary films today.”

“It’s a digital bookstore with the freedoms of a library of documentaries, which, in my view, is no freedom at all,” added Lessig. The issue, however, is not Google, which is acting as a profit-making company should, he said. It’s up to academics, politicians, researchers and consumers to resolve the questions raised by the new “information ecology,” rather than leave it to Google, he argued.

Lessig made the case for a new

kind of copyright system that would deal with the new challenges posed by digital technology. He argued that a registration system, instead of antiquated laws from the print world, could clarify which materials need copyright protection and which should be in the public domain.

But he criticized the Google settlement’s registration system because it “documentarifies” so-called orphan works—books and materials for which no author can be located. “It imposes such enormous transaction costs on getting access to orphan works, it guarantees that they remain orphans,” he said.

Despite what Lessig called the “insanely” difficult questions raised by the emerging digital “information ecosystem,” participants were upbeat about moving forward. As Harvard Law School Professor John Palfrey ’01 succinctly put it: “It’s not game over.”

“Those of us who are queasy about or skeptical about the settlement have a particular challenge on our shoulders: What do we think would be better?” Palfrey asked a packed Pound Hall classroom.

Admittedly, Palfrey said, he and other scholars are five years late to the game. Although there have been efforts by universities and public libraries to create open digital libraries, including Open Knowledge Commons, Google has become the chief player in this space. *



John Palfrey, HLS professor and vice dean, library and information resources, discusses the Google Book settlement during the July workshop.

MARTHA STEWART

Challenging the Constitution

Panelists debate the merits and shortcomings of the historic document



Alex Keyssar and Charles Fried during a panel discussion on Sept. 17

THE RESILIENCE OF the U.S. Constitution, the nation’s founding document, was put to the test Sept. 17 by a number of scholars who challenged its legacy and effectiveness.

In honor of Constitution Day, the annual celebration that commemorates the signing of the historic document on Sept. 17, 1787, a group of Harvard constitutional experts met in Emerson Hall to explore why the landmark text should be both celebrated and criticized.

Though the criticisms were in greater supply, there were also compliments for the text from the five-member panel.

Charles Fried, Beneficial Professor of Law, said the document’s brevity is one of its most impressive features.

Its small size is to be admired, said Fried, who noted that educated and literate statesmen “schooled in the sense of style” were responsible for its crisp language. “It’s [this] very concision that is its great rhetorical sense.”

With fewer than 5,000 words used to define the country’s system of laws, division of power into three separate branches, and citizens’ rights, it is one of the world’s shortest constitutions.

But Fried also noted that structural issues, like the separation of powers and the bicameral nature of the legislature, make it “very difficult for the government ... to actually do anything.”

Many lauded the goals spelled out in the work’s preamble. The concepts of justice, liberty and domestic tranquillity are “political ideals that are worthy of continued adherence,” said Mark Tushnet, William Nelson Cromwell Professor of Law.

But the fact that the document condoned slavery and created a nation of slave owners was a critical flaw, agreed the panelists.

“Framers had to do so if they wanted the participation and agreement of the Southern states,” said Michael Klarman, Kirkland & Ellis Professor of Law. “Still, it’s hard to celebrate a document that protected slavery for 20 years.”

Another failing, many noted, is the Constitution’s creation of the electoral college—the system that allows popularly elected electors from each

state to in turn officially vote for the president of the United States.

The section of the document that deals with elections and voting rights was “very badly crafted,”

said Alex Keyssar, Matthew W. Stirling Jr. Professor of History and Social Policy at Harvard’s John F. Kennedy School of Government.

“[It] does not provide for a popular election for president,” said Keyssar. “That has created problems and still continues to do so. ... Both Richard Nixon and Bill Clinton got the keys to the Oval Office by getting 43 percent of the [popular] vote. This is nowhere near majority approval.”

Tushnet called the Constitution’s Article V, which is an amendment clause, its most “anti-democratic feature,” noting that the article makes it “functionally impossible to amend the Constitution with regard to anything of significance.” *

Colleen Walsh (original story appeared in the Harvard Gazette)

“[I]T’S HARD TO celebrate a document that protected slavery for 20 years.”
HLS Professor Michael Klarman

FROM THE LIBRARY

War crimes trial collection is now online

A behind-the-scenes look at the Tokyo Trial

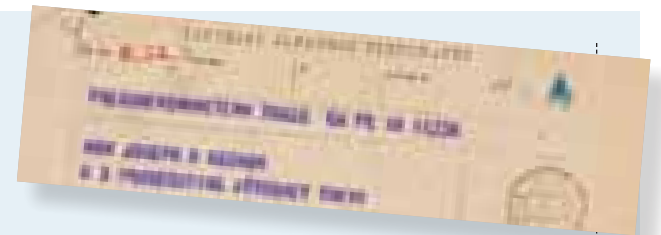
At the end of World War II, thousands of individuals were tried for war crimes in courtrooms around the world. The Japanese War Crimes Trial—known as the Tokyo Trial—is considered, with Nuremberg, to be one of the most important trials of the 20th century.

The Joseph Berry Keenan Digital Collection of manuscripts and photographs from the Tokyo Trial is now available for the first time online at the Harvard Law School Library Web site. The collection, which exists only at Harvard, was gathered by Joseph B. Keenan '13 during his tenure as chief counsel in the International Prosecution Section for the Allies for the Tokyo Trial.

"The collection provides a terrific insight above and beyond what you'd find in the official transcripts, a behind-the-scenes take on the trials, based on [Keenan's] position as the chief prosecutor," said Edwin Moloy, curator of modern manuscripts and archives for the library.

The materials, which consist primarily of Keenan's correspondence during his tenure as prosecutor, also include black-and-white photographs he collected, spanning the years 1945 to 1947.

➔ <http://www.law.harvard.edu/library/special/exhibits/digital/jbkcollection.html>



↑ TELEGRAPH FROM George L. Berry to Prosecuting Attorney Joseph B. Keenan '13

← JOSEPH KEENAN in conversation with Gen. Douglas MacArthur, supreme commander for the Allied Powers

↗ AERIAL VIEW OF a decimated Hiroshima taken by the U.S. Army Signal Corps in December 1945

↓ A SNAPSHOT OF a Japanese child on a village street



HLS SPECIAL COLLECTIONS

Souter and Feldman

continued from page 1

legitimate constitutional interpretation is that a court must "look to sources of meaning and to guides of how to make practical sense of what the Constitution says that have more authority merely than the preference of the judge who is talking," Souter said.

Describing himself as a judicial pragmatist, Souter emphasized the importance of making decisions based on the facts in a case, rather than creating new laws that embody

larger principles through opinions.

"Your first job is to decide the case, not to embody principles," he said. "You may well not be able to decide the case without accepting some legal principles, but make sure you are being honest in your assessment and your respect for the facts first."

Feldman challenged this apparent minimalist approach to judicial decision-making, asking Souter if in his view, his decisions had been "moving towards a direction" instead of merely interpreting facts. Souter

agreed with Feldman's assessment and said, ultimately, "When one gets to the fork in the road, one has to go one way or the other."

In his retirement, Souter said, he is working part time for the U.S. Court of Appeals for the 1st Circuit Court in Boston. He is also lending his support to a New Hampshire citizens committee that is exploring a curriculum for civic education in public schools. And, since being a Supreme Court justice left little time for extracurricular reading, he plans to enjoy his "very good, unread library." *

Adapted from reports by Colleen Walsh, the Harvard Gazette, and Matt Hutchins, the Harvard Law Record, with additional reporting by Emily Dupraz



Souter and Feldman on Constitution Day