



TAKING BACK THE CONSTITUTION

**The Launch of the Constitutional
Accountability Center
June 3, 2008**

The Constitutional Accountability Center

Welcome to the launch of the Constitutional Accountability Center, (CAC), a new think tank, law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC will work in our courts, through our government, and with legal scholars to preserve the rights and freedoms of all Americans and to protect our judiciary from politics and special interests.

CAC grows out of the success of Community Rights Counsel (CRC), a public interest law firm that for 10 years won by focusing on what the Constitution actually says. Concentrating on environmental law, CRC aggressively employed arguments about the Constitution's text and history in its winning advocacy before the Supreme Court, its path-breaking work in judicial selection, and its successful campaign against corporate-funded judicial junkets.

CAC will build on CRC's record of success and apply its text and history approach across all of constitutional law. We have assembled a top-flight team of attorneys, consultants, and advisors, and are launching a new website, www.theusconstitution.org, and a new blog, www.textandhistory.org. We have already raised nearly \$2 million in start-up funding.

Our launch panel – featuring preeminent experts from the world of politics, journalism, and academia – will discuss how arguments rooted in Constitutional text and history can help progressives win on the campaign trail, in Congress and in the courts. Our launch will show how we intend to improve the way progressives fight conservatives over the direction of the Supreme Court, think and talk about the Constitution, and strategize to win legal victories. We have powerful ideas, superb people, and tremendous energy. You'll be hearing much more from us.

Doug Kendall

The Need for the Constitutional Accountability Center

For the last 35 years, conservatives have worked to lay claim to the Constitution's text and history, just as they have sought to control politically resonant terms such as freedom, liberty, and national security. They have maneuvered progressives into relinquishing this ground.

This is most apparent in the different ways conservatives and progressives talk about the Constitution and the Supreme Court. Conservatives talk mainly about judicial method, insisting that judges are "bound" by the original meaning of the Constitution. That argument pervades their approach, in Supreme Court opinions, law journals and on talk radio. Progressives have allowed themselves to be relegated to talking mainly about judicial results, and warning that the confirmation of conservative judges could turn back the clock on issues such as civil rights, reproductive choice, and environmental protection.

Both sides are playing to their perceived strengths. Americans want judges who will protect individual rights and liberties and ensure broad access to "justice for all." By and large, they like progressive judicial rulings. But conservatives have dealt themselves the trump card, because Americans more strongly reject the idea that judges can rule based on their own policy preferences. They want accountability, which is why the conservative claims that judges must follow the original meaning of the Constitution have resonated so strongly.

But progressives don't need to choose between the results they want and the method Americans demand. That's because conservatives have it wrong. The best recent scholarship demonstrates that the Constitution is, in its most vital respects, a progressive document. By relying on this scholarship, and deriving arguments and narratives rooted in Constitutional text and history, progressives can give Americans precisely what they are looking for: judicial methods that track the Constitution's text and history and result in progressive outcomes.

This is not happening because conservatives have maneuvered progressives into fighting the wrong fight. Galvanized in the 1980s by the reactionary legal ideas promoted by Edwin Meese and Robert Bork under the label of "originalism," progressives have devoted enormous time, resources, and energy over the last several decades to discrediting originalism as a method for deciding cases. This effort has produced notable victories: Bork was defeated, subsequent nominees such as John Roberts and Samuel Alito have refused to embrace originalism as their judicial method, and Justice Antonin Scalia has altered his description of originalism significantly in response to progressive critiques.

But this fight has driven a wedge between progressives and the Constitution, as liberal scholars and activists have become adept at arguing that the Constitution's text answers almost no questions and that reliance on text and history would produce awful results. The truth is, text and history do point to clear answers in some important areas, and, more often than not, these answers favor progressives. Progressives are losing cases they should win if the Supreme Court is serious about considering arguments based in text and history. By continuing to distance themselves from the Constitution, progressives are ceding to conservatives the high ground of fidelity to constitutional text and history. We think it is time for progressives to start taking back the Constitution.

The Constitutional Accountability Center will do just that:

- As a **think tank**, CAC will develop arguments and narratives rooted in text and history and the communications framework for a stronger progressive message on the courts and the law.
- As a **public interest law firm**, CAC will translate arguments and narratives based on text and history into briefs that help win cases.
- As an **action center**, CAC will relentlessly seek to unite progressives around shared narratives, rooted in text and history, about our Constitution and the role of the courts.

From “Taking Back the Constitution,” by Doug Kendall and Jim Ryan, *The New Republic*, August 6, 2007

What if progressives stopped accusing Scalia and his ilk of intellectual simplicity and instead accused them of being unfaithful to the Constitution? Suppose that they pointed out where neither text nor history supports the results conservatives say they support? Suppose they even charged that conservatives ignore the Constitution when it gets in their way? ...

There’s a nascent movement among progressives to embrace the Constitution rather than run from it. The central theorist of this school--what you might call progressive originalism--is Yale law professor Akhil Reed Amar.

Over the years, conservatives have convinced many liberals--not to mention the public--that the Constitution is a document largely geared towards protecting private property and wealth. Amar demolishes this notion. He explains that our Constitution started out both democratic and inclusive for its time and has remained viable because of constitutional amendments that improved the document

Amar’s most powerful argument is that the post-Civil War amendments fundamentally altered our founding document in ways that have yet to be recognized by the Supreme Court. What may have begun as a document focused on protecting liberty was transformed into a document just as concerned with equality. A federal government that began with powers that were “few and defined” was awarded vast new powers to protect due process and equal protection. Conservatives may not like this, of course, but they should not be able to wish away these changes.

This approach may not sound terribly revolutionary. But once liberals understand that the Constitution is a progressive document, it will transform the way in which they argue.

From “Constitutional Cravings,” Jennifer Bradley and Doug Kendall, *The New Republic Online*, December 24, 2007

Is the Constitution a partisan, Republican document? GOP candidates sure seem to think so--they have been relentless in asserting that they would “follow the Constitution” in pursuing goals from overturning *Roe v. Wade* (Mitt Romney) to restoring the gold standard (Ron Paul). And for decades, conservative judges such as Robert Bork and Antonin Scalia have been backing these claims up, advocating for a version of constitutional “originalism” that lines up quite nicely with the Republican platform. This rhetorical onslaught seems even to have convinced Democrats, who have been skittish and uneasy about embracing the Constitution.

But the Republican hammerlock on the document was weakened in three minutes in Iowa on December 13, three minutes that could change constitutional debate in America. Spurred by the tremendous unpopularity and dubious legality of the Bush Administration’s efforts to enhance its own power at the expense of both Congress and individual rights, the Democratic presidential candidates made an explicit promise to America: In their first year in office, they will give the United States its Constitution back.

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Many Republicans still refuse to fully recognize the sweeping changes to our founding document ratified after the Civil War. ... And it’s not just the Civil War Amendments that Republicans get wrong. It is remarkable how many of their claims about the Constitution have withered once constitutional historians have had a chance to subject them to close scrutiny.

.... Democratic candidates have a golden opportunity not just to criticize Bush for his extravagant views of executive power, but also to completely reclaim the high ground of fidelity to the nation’s founding document. Having hit their rhetorical stride in three minutes in Iowa, the Democrats need to take the Constitution and run with it.

What is Constitutional Accountability?

All of our public officials, particularly every federal and state judge in America, take an oath of office pledging to uphold the U.S. Constitution. CAC's mission is to hold public servants accountable to their oath. CAC believes that text and history are the foundational considerations in judging accountability to the Constitution.

Constitutional Text

The text of the Constitution must be the primary source of judicial guidance in deciding constitutional cases: that is what the judicial oath requires. An approach to constitutional interpretation that starts with a very careful parsing of the words of the Constitution is sometimes called "textualism." It is an approach best exemplified by great Supreme Court opinions written by justices such as John Marshall, the first John Marshall Harlan, and Hugo Black.

The idea that constitutional interpretation should start with the text of the Constitution is so obvious as to seem banal. There is almost universal agreement that constitutional interpretation should "start with the text." But in the deeply politicized debate over constitutional interpretation and the direction of the Supreme Court, this is often where agreement ends. Many progressive scholars and judges move almost immediately from the recognition of the primacy of text to an assertion that "the text answers very few questions." At the other extreme, Justice Antonin Scalia has claimed that judging is "easy as pie" because the text almost always yields a definitively right answer. CAC believes the truth lies between these two positions. Many constitutional controversies can and should end with a careful review of the words of the Constitution. In every case, we think wisdom can be found in a careful review of the Constitution's text.

But honest textualism is not "easy as pie" because of the nature of our founding document. Words and phrases like checks and balances, separation of powers, and federalism never appear in the Constitution's text, yet every grade school child in America learns that

these are bedrock principles enshrined in our Constitution. A modern reader of the Constitution will find it jarring to stumble upon the words "three-fifths of all other Persons" still prominently placed in Article 1, Section II of the Constitution. The reader must continue until very near the end of the document to amendments that excise this shameful language from our nation's charter. Honest textualism requires a careful consideration of the words, patterns, and structure of the entire document, including the amendments.

Honest textualism thus differs sharply from what some politicians like to call "strict construction." The Constitution was written to endure for the ages. A number of the most important provisions in the Constitution are purposely written in general terms: e.g., due process of law, unreasonable searches and seizures, cruel and unusual punishments. To be faithful to the text, judges must be faithful to the principles captured by these general phrases and do their best to apply them to present circumstances. Chief Justice Marshall put it best in insisting that "[w]e must never forget that it is a Constitution we are expounding."

Textualism also should be distinguished from originalism, at least as that term is sometimes employed by conservatives. One version of originalism insists that the intent or expectations of the individuals who drafted and ratified the document control the outcome of cases. This elevates expectations over text. For textualists, what matters most is what the actual text means, not how one group of people expected the language to be applied at a particular time. These expectations might shed light on what the text means, as explained below, but they alone cannot be controlling.

Constitutional History

While history cannot trump text, historical sources such as the Federalist Papers can provide critical clues about what specific words meant to the framers and ratifying generation. As importantly, the best interpretations of the Constitution's general terms and embedded

principles are informed by a careful consideration of historical events that led to the creation of the Constitution and made necessary changes to the document.

For example, it is hard to appreciate the Constitution's radical-for-its-time idea of popular sovereignty – a government of, by, and for the people – without examining the Revolution and the Declaration of Independence, which tell us what the 1776 patriots were fighting for. It is impossible to fully understand major changes to our Constitution ratified after the Civil War without studying that War and the Gettysburg Address, which describes the more perfect union and the rebirth of freedom the 13th, 14th, and 15th Amendments promised for our nation.

CAC believes that our nation's constitutional history is, in its most vital respects, a progressive story. The Constitution was written by revolutionaries and amended by those who prevailed in the most tumultuous social upheavals in our nation's history – the Reconstruction Republicans after the Civil War, the Progressives and the Suffragettes in the early 20th Century, the Civil Rights and student movements in the 1950s and 1960s. The historical origin of our Constitutional text tells us a great deal about the timeless principles that our Constitution enshrines.

We call this careful review of history for evidence of original meaning and insight about constitutional concepts “principled originalism.” Combined, honest textualism and principled originalism – text and history – constitute CAC's method and form the essential foundation for assessing constitutional accountability.

**From “Constitutionally Incorrect,” Doug Kendall,
The New Republic Online, March 26, 2008**

Bringing our nation's Second Founding - as the Reconstruction amendments are appropriately called - back into our constitutional conversation should be a central focus of Barack Obama's if he becomes president. The framers who wrote slavery out of the Constitution, instead of writing it in, and who crafted many of our Constitution's most inspiring and underappreciated words, have been buried for far too long.

This is not an academic exercise. Much of the rancor over the Supreme Court centers around the meaning and import of these amendments. Conservative “originalists” such as Clarence Thomas and Antonin Scalia treat these Amendments as if they merely tinkered around the constitutional edges, with the document remaining mainly about property rights, states' rights, and limiting the power of the federal government. To give just one example, in a critical 2000 case called *United States v. Morrison*, the Court's conservatives cited favorably both the Civil Rights Cases and *Cruikshank* in limiting the federal Violence Against Women Act.

President Obama's nominees to the Supreme Court will have to fight Scalia and Thomas on these issues. It would help these justices immeasurably if a groundwork of public understanding was laid for this battle. The 150th anniversary of the 13th Amendment will take place in 2015, near the end of what would be a second Obama term in office, followed in quick succession by similar events marking the passage of the 14th and 15th. These events provide a perfect opportunity for a President Obama to lead a celebration of our Constitution's Second Founding.

The Growing Obsolescence of Conservative Originalism

Justice Scalia may not have gotten the memo, but conservative originalism is dying. While progressive scholars and activists have fought for decades for the honor of doing away with conservative originalism, the job is being done mainly by conservative politicians. George W. Bush nominated two Justices – John Roberts and Samuel Alito – who refused to embrace originalism and, since joining the Court, have eschewed originalism for a more result-oriented conservative path. John McCain, the presumptive Republican nominee, recently sealed the deal, substituting Justices Roberts and Alito for Justices Thomas and Scalia as the model conservative justices.

This shift away from originalism by conservatives can be traced to an evolution in how conservative originalists describe their method. In a short period of time, from 1985 to 1989, conservative originalism burst on to the scene, drew savage criticism, and rapidly evolved from a jurisprudence of original intent to original understanding, and finally, though fitfully, to a jurisprudence of original meaning. Through this evolution, originalism has become far more intellectually coherent – just about everyone now recognizes that the “original meaning” of the Constitution’s text is important – but far *less* reliable in securing conservative results.

To be sure, Justice Scalia has supported reactionary legal rulings in many areas of the law, but usually he does this by betraying or contorting, rather than following, a jurisprudence of original meaning. In a number of areas where original meaning is clear, and Justice Scalia has allowed himself to be bound by this meaning, he has reached surprisingly progressive results, perhaps most significantly in a stinging rebuke to the Bush Administration for its “war on terror” detention of U.S. citizens in the 2004 case *Hamdi v. Rumsfeld*. For an administration that values loyalty over all else, this may have been a big part of the reason Justice Scalia was never seriously considered by President Bush for promotion to Chief Justice. Thus, while Justice Scalia has retained the mantle of the chief spokesperson of the legal right, conservative

politicians have moved on to a newer breed of conservative judges.

An even more interesting shift is occurring in the legal academy. Conservative originalists have generally focused on advancing particular arguments about discrete constitutional topics such as gun rights, executive power, and Congressional authority. While they have enjoyed some success in advancing a conservative position in these areas, no conservative scholar has produced a comprehensive account of the Constitution’s original meaning. Progressive scholars, meanwhile, have effectively answered most of the conservatives’ specific claims about the Constitution, developed arguments and narratives of their own rooted in original meaning, and, through the work of Yale’s Akhil Amar, produced the only comprehensive account of the document’s original meaning. Amar’s book, *AMERICA’S CONSTITUTION: A BIOGRAPHY*, has been called the “best book on the Constitution since the Federalist Papers,” and reveals the Constitution as a remarkably progressive document.

This progressive scholarship provides the essential foundation for the work of the Constitutional Accountability Center. From the dying embers of conservative originalism, CAC’s text and history approach is being launched.

From, “Cruel and Unusual Originalism,” Doug Kendall, *Huffington Post*, April 30, 2008

Could Alabama bring back the whipping post or brand the skin of a thief with a scarlet T, and not run afoul of the Eighth Amendment’s prohibition against cruel and unusual punishment? Such a proposition may seem outlandish, but it is what opinions signed last week by Justices Antonin Scalia and Clarence Thomas in *Baze v. Rees* would seem to sanction.

These opinions haven’t gotten much attention, but they illustrate everything that is wrong about originalism as it is practiced by Justices Scalia and Thomas. Too often, these justices manipulate text, speculate wildly about the intentions of the Framers, and end up far from the letter and spirit of the Constitution. Recognizing the weakness of the conservative arguments about what the Constitution says and compels would help progressives immeasurably in responding to the rise of the conservative legal movement.

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Frustratingly, no other justice in *Baze* responded in any detail to the sloppy account of text and history offered by Scalia and Thomas. One can understand the desire of the other justices not to get dragged down into debates about long settled points of law, but this has an important downside: it leaves the reader with the distinct impression that Scalia and Thomas are correct about the Constitution’s text. This feeds into the right’s claim that the Supreme Court is being activist in even considering whether the death penalty and its application can be cruel and unusual punishment.

Progressives opposed to the vision of the Constitution being advanced by Justices Scalia and Thomas under the label of originalism need to take the arguments like those made in *Baze* far more seriously, not because they are right about text and history, but precisely because so often they are so wrong. This yields a corresponding question: if Scalia and Thomas so frequently have to push the envelope on text and history to reach conservative results, why aren’t progressives using these sources more to support the results they seek in the courts?

From “Originalist Sins: The Faux Originalism of Clarence Thomas,” Doug Kendall & Jim Ryan, *Slate*, August 1, 2007

It may be too much to expect any individual justice to be perfectly consistent from year to year and across a diverse array of cases. But here we have two public-school cases [*Morse v. Frederick*, and *Parents Involved v. Seattle School District #1*], both involving the rights of students, and both decided within days of each other, with Justice Thomas writing concurring opinions in each case, concurrences that no other justices joined. Don’t you think that someone, somewhere, might have asked Thomas: “Um, so you ask what the Framers would have thought about speech in school but not what they would have thought about voluntary integration. Why not?”

Here’s our guess: The question is not asked because it does not yield an answer Justice Thomas would like. There is no way to make an argument, at least with a straight face, that the 14th Amendment was originally understood to prohibit voluntary school integration. No way. Indeed, given how flimsy the evidence is for Justice Thomas’ other argument—that students have no free-speech rights in school—it’s clear that he is not shy about stitching together a historical tale from very slim pieces of material. The fact that he doesn’t even try to make the historical case in the voluntary integration decision speaks volumes.

What it says is that Justice Thomas is not particularly principled. To be clear, this is not a criticism of Thomas as a person. We’re not saying that he’s mean or doesn’t like dogs or small children. We’re criticizing his work, much in the same way Scalia recently criticized Chief Justice John Roberts for his “faux” judicial restraint. Our criticism is similar: Justice Thomas is not sticking with his professed commitment to originalism, and is certainly not living up to his newfound reputation as the high priest of principled originalism.

His recent opinions instead suggest that Thomas will use originalism where it provides support for a politically conservative result, even if that support is weak, as it is in the student-speech case. But where history provides no support, he’s likely to ignore it altogether. If his cheerleaders believe otherwise, they should try to reconcile his opinions in the two school cases on originalist grounds.

Constitutional Accountability Center Issues

Constitutional Accountability Center will take on issues either because we believe the Supreme Court has misread an important part of the Constitution or because special interests are trying to move the law in a direction that does not square with text and history. As we launch, we are building campaigns in the following issue areas:

The Constitution and Environmental Law: Corporations and special interests have spent millions attacking environmental safeguards using interpretations of the Constitution that are untethered from text and history. CAC will defend the constitutionality of environmental laws against these attacks.

Redefining Federalism: We the people ratified the Constitution in 1789 to form a stronger national government and amended it to further shift power away from the states. Yet the Supreme Court has sharply cut back on federal protections for women, workers, disabled people, and the environment in an effort to protect the states. CAC advances a vision of federalism that keeps states as strong laboratories of democracy while preserving the federal power to address problems states cannot fully handle alone.

Human and Civil Rights and the Constitution: The Reconstruction Amendments were intended give our nation a new birth of freedom. Read properly, these amendments provide a solid foundation for courts and the federal government to protect human and civil rights. CAC works to raise public consciousness about the importance of the Reconstruction Amendments and convince politicians and judges about the mandate these amendments create for the advancement of civil and human rights.

Citizenship, Immigration and the Constitution: The 14th Amendment's Citizenship Clause is important and underappreciated. The clause grants full United States citizenship to anyone born on American soil (except children of foreign diplomats) or naturalized by the federal government. With text and history on our side, CAC

defends the rights of new Americans and immigrants in Congress, courts, and the media.

Corporations and the Constitution: Our Constitution never uses the term "corporations," referring instead to rights and immunities for "persons," "the people," and "citizens." Yet in recent years, the Supreme Court has in several areas given corporations *more* protection than individuals. CAC shows through text and history how the Constitution demands more protection for people than corporations.

Access to Courts, Juries, and the Ballot Box: Voting rights and jury trials are at the core of our Constitution's ideal of a government of "we the people." But these constitutional ideals are all too often unrealized in practice: many Americans have difficulty casting their vote, the modern Supreme Court appears to disdain jury trials, and the Court has of late denied a hearing in federal court to people with valid claims. CAC uses text and history to protect voting rights, trial by jury, and access to federal courts.

Judicial Accountability: Their oath of office makes judges accountable to the Constitution, not a party platform or ideological agenda. CAC carries on the work of its predecessor, Community Rights Counsel, promoting judicial accountability by reviewing the records of federal judicial nominees and by working to prevent corporations from lobbying judges at judicial junkets.

From “The Legislature Thereof,” Doug Kendall, *Slate*, September 13, 2007

Republican presidential candidates are crossing the country promising voters that they'll pick judges who will be “strict constructionists” of the U.S. Constitution. Meanwhile, Republican activists in California are trying to flout the Constitution in order to change the rules for the 2008 election. Last week, their bid to change the state's method for meting out its electoral votes was endorsed by the state GOP and cleared by the California secretary of state, moving it closer to a place on the June 2008 ballot.

It's easy to see the allure for Republicans of this voter referendum, which has a predictably misleading name, the Presidential Election Reform Act. The initiative aims to replace the state's current “winner-take-all” allocation of its trove of 55 Electoral College votes. Instead of going to a single candidate, the state's electoral votes would be divvied up among multiple ones, based on the popular vote outcomes in California's 53 congressional districts. As several commentators have pointed out, including Jamin Raskin in *Slate*, this is all about political gamesmanship. Bush won 22 of California's congressional districts in 2004, and assuming that voting trend holds, the proposed referendum would shift approximately 20 electoral votes into the Republican column. That's enough to determine the outcome of a close election.

But there's a big problem with this referendum that has so far gone unnoticed: It's patently unconstitutional. The U.S. Constitution prohibits a ballot measure that would trump a state legislature's chosen method of appointing electors. In Article II, Section 1, the Constitution declares that electors shall be appointed by states “in such manner as the Legislature thereof may direct.” That's *legislature*. California's could scrap its current winner-take-all approach and adopt a district-by-district system for allocating electors (as only Maine and Nebraska currently do). But the voters—whom the initiative supporters have turned to because they don't have the support of the Democratic controlled legislature—cannot do this on their own.

From “The Supreme Court Intensity Gap,” Doug Kendall, *Huffington Post*, February, 2, 2008

When's the last time you heard one of the Democratic candidates talk about who they would nominate to the Supreme Court? Have they said anything at all interesting about the topic? Not that I've heard. Republicans just seem to care more about the future of the Supreme Court than Democrats.

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So why don't progressives seem to care? The answer, I think, is that conservatives have a clear vision of where they want the Court to go and progressives don't. More precisely, conservatives have a forward looking vision for the Court – they want the Court to make dramatic jurisprudential shifts that favor Republican “values” voters and corporate interests. Progressives remain fixated in the Warren/Brennan past, united mainly around the goal of preserving as much of the status quo as possible.

It's hard to energize Americans around the status quo, which is why the Democratic candidates talk about the forward-looking parts of their agenda on energy security, foreign policy, and health care.

This silence has its consequences, as illustrated in the safe Supreme Court picks by President Bill Clinton. Breyer and Ginsburg are fine Supreme Court justices and capable defenders of the status quo, but neither are what Cass Sunstein has called “visionaries” – justices that have “a large-scale understanding of where the nation should be heading” and are “entirely willing to press a controversial theory about, say, liberty or equality or the president's power as commander-in-chief, even if that theory offends many Americans.” Progressives have had such visionaries in the recent past, notably in justices such as Hugo Black and Thurgood Marshall, but right now they have no counterweight to conservatives such as Scalia and Thomas.

Progressives have been cowed by the label “liberal judicial activism” and now seem to think that it is too much to ask for a president to nominate a Marshall or a Black. But ... recent scholarship demonstrates that constitutional text and history support and, in some areas, compel a progressive shift in constitutional law. It's difficult to argue that fidelity to the Constitution is activism, even if it departs from the status quo.

The CAC Team

Constitutional Accountability Center is building a top flight team of professionals to accomplish our ambitious goals.

STAFF AND CONSULTANTS

Doug Kendall: Doug is the Constitutional Accountability Center's founder and President. He previously was founder and executive director of Community Rights Counsel (CRC), CAC's predecessor organization. As CRC's Executive Director, Doug represented local government clients in state and federal appellate courts around the country and before the U.S. Supreme Court. Doug is co-author of three CRC books dealing with Constitutional issues and lead author of numerous CRC reports and studies. His academic writings have appeared in journals including the *Virginia Law Review*, the *Harvard Environmental Law Review*, and the *Georgetown Journal of Legal Ethics*. His commentary has run in *The New Republic*, *Slate* and dozens of major papers including *The Washington Post*, *USA Today*, and *The Los Angeles Times*. Doug received his undergraduate and law degrees from the University of Virginia.

Elizabeth B. Wydra: Elizabeth is Constitutional Accountability Center's Chief Counsel. She joined CAC from private practice at Quinn Emanuel Urquhart Oliver & Hedges in San Francisco, where she was an attorney working with former Stanford Law School Dean Kathleen Sullivan in the firm's Supreme Court/appellate practice. Previously, Elizabeth was a supervising attorney and teaching fellow at the Georgetown University Law Center appellate litigation clinic, a law clerk for Judge James R. Browning of the U.S. Court of Appeals for the 9th Circuit and a lawyer at Shaw Pittman, a law firm in Washington DC. She is a frequent contributor to the American Bar Association's Preview of United States Supreme Court Cases and she has served as a legal expert for ABC News. Elizabeth is a graduate of Yale Law School.

Sean Siperstein: As New Media Director, Sean's responsibilities include updating and designing CAC's website and weblog, providing research support to CAC staff, preparing promotional and fundraising materials, and attracting and tracking media coverage. Prior to joining CAC, he was a member of the external relations staff at the Alliance for Excellent Education. Sean has also done research, communications and online strategy work as a student activist and on behalf of the League of United Latin American Citizens and the Democratic Congressional Campaign Committee, developing the initial template and outreach strategy for the latter's Stakeholder blog. He received his A.B. in Early U.S. History from Brown University.

Rachel Sauter: As Research and Web Director, Rachel is responsible for CAC's website, assisting CAC staff with research projects, tracking media coverage and managing the daily operations of the office. Rachel previously worked at the Sierra Club's National Campaigns office, where she researched and generated outreach materials on environmental quality issues. She received her undergraduate degree from the New School's Eugene Lang College in New York City, and studied at Columbia University's Biosphere 2 Center in Oracle, Arizona.

Jim Ryan: Jim was a founding board member of CRC and serves as a paid consultant on CAC's legal team. Jim is Academic Associate Dean and Distinguished Professor at the University of Virginia School of Law, where he teaches constitutional law, land use law, law and education, and local government law, among other topics. Jim is a co-author of REDEFINING FEDERALISM and, as a founding member of CRC's Board of Directors, Jim has contributed to a number of other CRC books, reports, and opinion pieces. Jim left CRC's board in order to work for CRC in an expanded role as a consultant to our *Judging the Environment* and *Redefining Federalism* projects. Jim's legal writings have appeared in major law journals including the *Yale*, *University of Michigan*, *Virginia*, and *New York University* law reviews. His opinion pieces have run in papers including *The Washington Post* and *The Los Angeles Times*. After graduating law school, Jim clerked for the Honorable J. Clifford Wallace, Chief Judge, United States Court of Appeals for the 9th Circuit, and then for the Honorable William H.

Rehnquist, Chief Justice of the United States. Jim received his undergraduate degree from Yale University and his law degree from the University of Virginia, where he served on the managing board of the *Virginia Law Review*.

Sean Donahue: Sean joined CAC in May 2008 as a paid consultant on CAC's legal team. He is a partner in Donahue & Goldberg, focusing on appellate litigation, including environmental cases in federal and state appellate courts. He has participated in several significant cases in the U.S. Supreme Court, most recently successfully briefing and arguing *Environmental Defense v. Duke Energy Corp.* for the petitioners. He has also represented leading public interest environmental organizations, trade organizations, local governments and private entities. Sean clerked on the U.S. Court of appeals for the D.C. Circuit for then-Judge Ruth Bader Ginsburg, and on the U.S. Supreme Court for Justice John Paul Stevens. He practiced with Jenner & Block and in the Department of Justice's Environmental and Natural Resources Division, Appellate Section. Sean graduated from the University of Chicago Law School.

David Goldberg: David joined CAC in May 2008 as a paid consultant on CAC's legal team. He is a partner at Donahue & Goldberg, working primarily on constitutional and public law litigation in the U.S. Supreme Court and in federal and state appellate courts. In the last eight years, David has been involved in more than 30 cases in the U.S. Supreme Court, representing a diverse array of clients, including state and local governments, labor unions, civil rights, public health and environmental organizations, community groups, and members of the U.S. Senate. David spent five years on the staff of the NAACP Legal Defense Fund, Inc., where he litigated cases based in constitutional and statutory anti-discrimination law at both the trial and appellate level. He also worked in the White House as special Counsel in the Office of Presidential Personnel. David clerked for Ruth Bader Ginsburg, then of the U.S. Court of Appeals for the D.C. Circuit, and for Supreme Court Justice David H. Souter. He graduated from Harvard Law School, where he was Articles Co-Chair of the Law Review.

BOARD OF DIRECTORS

Eldon ("Took") H. Crowell: Took is a founding partner of Crowell & Moring, a Washington DC-based law firm employing more than 400 attorneys in five offices. An authority on Government Contract and International Laws, he has written and lectured extensively on these subjects, and has represented foreign and domestic corporations in a wide range of problems, both in litigation and counseling, in the United States. He was a Visiting Lecturer at the University of Virginia School of Law and at The George Washington University National Law Center. Took graduated from Princeton University, cum laude, and the University of Virginia School of Law, where he was on the Editorial Board of the *Virginia Law Review*. A Fellow of the American Bar Foundation, he is a member of the American, Federal, and District of Columbia bar associations. He has served as a Public Member of the Administrative Conference of the United States, and is a Fellow of the National Contract Management Association, as well as the recipient of their 1992 Roback Award. He is the President of the Board of Directors of the National Association of Public Interest Law Fellowships for Equal Justice.

Veronica Eady Famira: Veronica is a senior staff attorney at New York Lawyers for the Public Interest and an adjunct professor at Fordham University Law School. Prior to that, Veronica was general counsel at West Harlem Environmental Action, and an environmental lawyer and professor at Tufts University in the Department of Urban and Environmental Policy and Planning. She also served as Director of the Environmental Justice and Brownfields Programs for the Massachusetts Executive Office of Environmental Affairs. She is the former chair of EPA's National Environmental Justice Advisory Council and sits on the Board of Directors for Earth Island Institute.

Douglas T. Kendall: Doug is the Constitutional Accountability Center's founder and President.

David Stern: David is the Executive Director of Equal Justice Works, a national coalition of public interest organizations that helps promote

law careers in social justice. David was hired in 1992 to start the organization's fellowship program, and since then he has seen the number of lawyers the program sponsors to work at nonprofits jump from seven to over 1,100. In 1997, David raised \$3 million for the program, an amount that was then matched by philanthropist George Soros. He graduated from the Georgetown University Law Center in 1985 and clerked for two federal judges in Baltimore. He then worked for a small public interest law firm that represented whistleblowers in government and private industry, as well as individuals discriminated against on the basis of their sex, race, disability, sexual orientation, or age.

BOARD OF ADVISORS

Akhil Reed Amar: Akhil is the Southmayd Professor of Law and Political Science at Yale University, where he teaches constitutional law at both Yale College and Yale Law School. He received his B.A. *summa cum laude*, in 1980 from Yale College, and his J.D. in 1984 from Yale Law School, where he served as an editor of *The Yale Law Journal*. After clerking for Judge Stephen Breyer, U.S. Court of Appeals, 1st Circuit, Professor Amar joined the Yale faculty in 1985. Along with Dean Paul Brest and Professors Sanford Levinson, Jack Balkin, and Reva Siegel, Professor Amar is the co-editor of a leading constitutional law casebook, *Processes of Constitutional Decisionmaking*. He is also the author of several books, including *The Constitution and Criminal Procedure: First Principles* (Yale Univ. Press, 1997), *The Bill of Rights: Creation and Reconstruction* (Yale Univ. Press, 1998), and most recently, *America's Constitution: A Biography* (Random House, 2005).

Ron Klain: Ron is Executive Vice President and General Counsel of an investment firm, Revolution LLC, launched by AOL co-founder Steve Case, and an informal adviser to Senator Evan Bayh. He graduated from Georgetown University *summa cum laude* in 1983, and *magna cum laude* from Harvard Law School in 1987, where he won the Sears Prize in 1984-85, and was an Editor of the *Harvard Law Review*. Earlier in his career, he clerked for Supreme Court Justice Byron White during the Court's 1987 and 1988 Terms. Ron has served as Legislative

Director for Rep. Ed Markey, Chief Counsel to the U.S. Senate Committee on the Judiciary, and Staff Director of the Senate Democratic Leadership Committee. Ron joined the Clinton-Gore campaign in 1992. He oversaw Clinton's judicial nominations, and was General Counsel to Al Gore's recount committee in the 2000 election aftermath. In the White House, he was Associate Counsel to the President, directing judicial selection efforts, and led the team that won confirmation of Supreme Court Associate Justice Ruth Bader Ginsburg. Ron left the judicial selection role in 1994 to become Chief of Staff and Counselor to Attorney General Janet Reno. In 1995, he became Assistant to the President, and Chief of Staff and Counselor to Al Gore. During the 2004 Presidential campaign, Ron worked as an advisor to Wesley Clark and later, John Kerry. In 1994, *Time* named Ron one of the "50 most promising leaders in America" under the age of 40.

Walter Dellinger: Walter is currently the Douglas B. Maggs Professor of Law at Duke University and head of the appellate practice at O'Melveny & Myers in Washington, D.C. He also leads Harvard Law School's Supreme Court and Appellate Litigation Clinic. He served as the acting United States Solicitor General for the 1996-1997 Term of the Supreme Court. Prior to his appointment as acting Solicitor General, Walter was an Assistant Attorney General and head of the Office of Legal Counsel under President Bill Clinton. Dellinger is a graduate of the University of North Carolina at Chapel Hill and Yale Law School. On March 18, 2008, he represented the District of Columbia in the United States Supreme Court in *District of Columbia v. Heller*.

Jack M. Balkin: Jack is Knight Professor of Constitutional Law and the First Amendment at Yale Law School. Jack received his Ph.D. in philosophy from Cambridge University, and his A.B. and J.D. degrees from Harvard University. He served as a clerk for Judge Carolyn Dineen King of the United States Court of Appeals for the Fifth Circuit. He is a member of the American Academy of Arts and Sciences. Jack writes political and legal commentary at the weblog *Balkinization*. He is the founder and director of the Information Society Project at Yale Law School, an interdisciplinary center that studies law and the new information technologies.

From “Big Business’s Big Term: Victories for the Chamber of Commerce at the Supreme Court”, Doug Kendall, *Slate*, March 5, 2008

With the Supreme Court term moving past the halfway mark, corporate America’s long-term investments in the federal judiciary are yielding impressive returns. The U.S. Chamber of Commerce’s Robin Conrad gushed about a “hat trick” of Supreme Court victories one day in February, telling the *Legal Times*, “I don’t think I’ve ever experienced a day at the Supreme Court like that.”

Thirty-seven years ago, future Justice Lewis Powell, then a lawyer in private practice, penned a now-famous memorandum alerting the Chamber of Commerce to a “neglected opportunity in the courts.” Powell explained that “the judiciary may be the most important instrument for social, economic and political change,” and he urged the chamber and its corporate benefactors to invest heavily in this “vast area of opportunity.” In the wake of Powell’s memo, the business community seeded a vast body of scholarship and created a nationwide network of pro-business legal organizations. This investment has quietly borne fruit for decades—and, this term in particular, landed corporate America the wins that thrilled Conrad, and more besides.

It’s not just particular cases that the chamber is winning, but also foundational issues that set the course of the law. . . . [For example, t]he Chamber of Commerce . . . appears to have won the day in disputes over the role of the jury in deciding contract and liability disputes that might be costly for businesses.

The court’s disdain for jury trials was especially evident at oral argument in *Riegel*, the case about manufacturer liability for medical devices. Justice Scalia responded to *Riegel*’s argument about the importance of preserving the judgment of the state jury

by declaring “extraordinary” the very notion that a “single jury” could find a company liable for a defective product when the “scientists at the FDA have said [the product] is OK.” This is a remarkable statement for a justice who professes to be bound by the Constitution’s original meaning. Many things are obscure about the framing era, but this we know for certain: The framers of our Constitution loved juries. In siding with the chamber and viewing the jury more as a threat to the modern economy and less as a bulwark of our system of justice, the court is departing sharply from what our framers would have wanted.

There will surely be other cases this term that the Chamber of Commerce loses. The game is not rigged. Rather, by investing heavily in legal strategy and working patiently in case after case, the chamber has won victories that have gradually shifted the ground rules in its favor. For that, the Chamber can thank Justice Powell’s advice and deep corporate pockets. For ordinary Americans and the victims of corporate misconduct, there is much less to celebrate.

Find out more about CAC’s work at:

www.theusconstitution.org

www.textandhistory.org (our blog on the Constitution’s text and history)

www.warminglaw.org (our widely-acclaimed blog on litigation and other developments related to global warming.)

Community Rights Counsel Accomplishments

CAC's History: CAC is a new organization that will build on the decade-long record of accomplishments of Community Rights Counsel.

Supreme Court Litigation:

- CRC was formed in 1998 to combat an increasingly successful effort by corporate special-interests to establish the Takings Clause as a barrier to environmental protections. CRC fought this Takings Project by explaining why constitutional text and history compelled a narrow reading of this provision.
- By helping secure Supreme Court victories in cases including *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Association* (2002), *Brown v. Legal Foundation of Washington* (2003); and *Lingle v. Chevron* (2005), CRC stopped the Takings Project in its tracks and demonstrated that CAC's text and history method can produce progressive victories, even with a conservative Supreme Court.
- CRC subsequently used the same method and produced similar results in other areas of constitutional law including the reach of the federal Commerce Clause (*Raich v. Gonzales* (2005), *Rapanos v. United States* (2006)) and standing (*Massachusetts v. EPA* (2007)).
- CRC filed 16 Supreme Court amicus briefs and more than 30 briefs in lower courts. CRC became the voice of the state and local government community in environmental cases, representing every major association of state and local government officials before the U.S. Supreme Court.
- CRC's briefs have been cited by Supreme Court Justices in two recent opinions and acclaimed by advocates and editorial writers. Former Solicitor General Walter Dellinger said before arguing the *Brown* case, **"If I could tell the Supreme Court only one thing, I would tell them to read CRC's brief."**

Junkets for Judges:

- In 1998 CRC discovered that the same corporations and special interests that were supporting a radical interpretation of the

Takings Clause were also bankrolling expense paid junkets where federal judges were wined, dined, and told how and why they should strike down environmental safeguards.

- CRC's investigative research, which included producing a database of more than 10,000 judicial trips, has been featured in hundreds of newspaper stories, dozens of editorials in national papers, segments on ABC News' 20/20, Nightline, and World News Tonight, and more than ten broadcasts of National Public Radio.
- CRC's work on the junkets issue has produced changes in the rules governing trips for every federal judge in America. In September 2006, the Judicial Conference required junket providers to post information about their funders, their speakers, and their programs on the internet; judges who go on junkets must disclose detailed information about the trip within 30 days. The American Bar Association has adopted similar disclosure rules in its model ethics code for state judges.
- A pending Senate bill that would raise federal judges' pay includes a complete ban on junkets.

Judicial Nominations:

- In 2001, CRC released "Hostile Environment; How Activist Federal Judges Threaten Our Air, Water, and Land," a report that explained how certain federal judges were being activist in ignoring text and history and striking down environmental safeguards. This report galvanized the environmental community around the environmental stakes in judicial confirmation fights.
- With Earthjustice, CRC formed and directed the Judging the Environment Project. CRC produced detailed reports on the environmental records of nominees to the Supreme Court and the courts of appeal, organized a coalition of more than 200 other environmental groups, and made environmental issues a front-line issue in many confirmation battles. In 2007, the confirmation of William Myers, a long-time lobbyist for the oil and gas industry, was stopped because of Myers' hostility to environmental safeguards and his support for anti-environmental judicial activism.