

# THE CONTRIBUTIONS OF WILLIAM FUNK TO AMERICAN CONSTITUTIONAL LAW SCHOLARSHIP

by  
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*This Essay discusses the contributions of Professor William Funk to American constitutional law scholarship on the occasion of a festschrift held in his honor at Lewis & Clark Law School on April 5, 2019. Reviewing Professor Funk’s varied scholarship reveals his careful, attentive, and even-handed approach. The Essay concludes by comparing Professor Funk’s style of constitutional law scholarship to the approach to substantive due process embraced by Justice David Souter in his classic concurring opinion in Washington v. Glucksberg. Just like Justice Souter’s analysis in Glucksberg, Professor Funk’s scholarship seeks justification for rules in the results they generate, rejects arid all-or-nothing approaches to constitutional principle, and, even while acknowledging the imperative of legal evolution, recognizes that the surest foundations of such evolution lay in what had come before. This comparison reveals the great value of Professor Funk’s contributions to the American constitutional project of creating a system that fairly balances the imperatives of order and liberty.*

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Over the course of his academic career, Professor Funk has written extensively on environmental, administrative, and constitutional law.<sup>1</sup> Indeed, his administrative law scholarship—not just in the form of standard law review articles,<sup>2</sup> but also

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\* Professor of Law, Brooklyn Law School. This Essay is based on remarks delivered at the Festschrift marking Professor Funk’s scholarship. Thanks to Lewis & Clark Law School for inviting my participation in that event. Thanks as well to Jedediah Tiftt for his fine research assistance.

<sup>1</sup> See *Law Faculty: William Funk*, LEWIS & CLARK L. SCH., <https://law.lclark.edu/live/profiles/276-william-funk> (last visited Oct. 11, 2019) (providing a list of scholarship spanning these areas).

<sup>2</sup> For a very brief sample of Professor Funk’s administrative law scholarship published in law

in casebooks<sup>3</sup> and practitioner sourcebooks<sup>4</sup>—has marked him as an exceptionally influential participant in the ongoing debate about the American administrative state. The fact that Professor Funk’s work has a substantive focus on environmental law only increases his influence over administrative law, given the well-known, if nevertheless contested “argument that environmental law is properly understood and treated as a subspecies of administrative law.”<sup>5</sup>

But Professor Funk’s constitutional law scholarship deserves its due. Over the course of his career, Professor Funk has written prolifically and broadly about constitutional law issues that go beyond issues implicating the constitutional status of the administrative state. Among other topics, his scholarship has considered the Due Process and Fourth Amendment implications of targeted drone strikes against American citizens abroad;<sup>6</sup> limits on domestic surveillance undertaken for foreign intelligence-gathering purposes;<sup>7</sup> the Takings Clause, both generally<sup>8</sup> and in its relationship to so-called regulatory exactions;<sup>9</sup> standing to sue;<sup>10</sup> the First Amendment;<sup>11</sup> and the Commerce Clause, both in its affirmative<sup>12</sup> and dormant<sup>13</sup> dimensions. Moreover, by writing casebooks,<sup>14</sup> Professor Funk has made his mark across

reviews, see, for example, William Funk, *Slip Slidin’ Away: The Erosion of APA Adjudication*, 122 PENN ST. L. REV. 141 (2017); William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171 (2009); William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321 (2001).

<sup>3</sup> See WILLIAM FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE: A CONTEMPORARY APPROACH (6th ed. 2018).

<sup>4</sup> See, e.g., WILLIAM FUNK & JEFFREY S. LUBBERS, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK (5th ed. 2016).

<sup>5</sup> Michael Burger, *Environmental Law/Environmental Literature*, 40 ECOLOGY L.Q. 1, 9 (2013). *But see id.* at 9 n.27 (citing differing views on this question).

<sup>6</sup> William Funk, *Deadly Drones, Due Process, and the Fourth Amendment*, 22 WM. & MARY BILL RTS. J. 311 (2013).

<sup>7</sup> William Funk, *Electronic Surveillance of Terrorism in the United States*, 80 MISS. L.J. 1491 (2011) [hereinafter Funk, *Electronic Surveillance*].

<sup>8</sup> William Funk, *Revolution or Restatement? Awaiting Answers to Lucas’ Unanswered Questions*, 23 ENVTL. L. 891 (1993).

<sup>9</sup> William Funk, *Reading Dolan v. Tigar*, 25 ENVTL. L. 127 (1995) [hereinafter Funk, *Reading Dolan*].

<sup>10</sup> William Funk, *Standing Without Injury?*, TRIAL, Mar. 2012, at 54.

<sup>11</sup> William Funk, *Intimidation and the Internet*, 110 PENN ST. L. REV. 579 (2006) [hereinafter Funk, *Intimidation*].

<sup>12</sup> William Funk, *The Lopez Report*, ADMIN. & REG. L. NEWS, Summer 1998, at 1.

<sup>13</sup> William Funk, *Constitutional Implications of Regional CO<sub>2</sub> Cap-and-Trade Programs: The Northeast Regional Greenhouse Gas Initiative as a Case in Point*, 27 UCLA J. ENVTL. L. & POL’Y 353 (2009).

<sup>14</sup> See WILLIAM FUNK, INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS (2014); WILLIAM FUNK, INTRODUCTION TO AMERICAN CONSTITUTIONAL STRUCTURE (2008).

every constitutional law topic that is typically covered in standard first-year constitutional law classes.

Professor Funk's writings have not merely been numerous and broad; they have been careful, and, to reclaim a term that has perhaps been corroded, his scholarship has been fair and balanced. Indeed, one could justifiably conclude that Professor Funk's constitutional law scholarship reflects an administrative lawyer's concern for detail, rationality, and procedural care. Parts I through III of this Essay will each examine a particular piece of his writing and explain how it features those characteristics. Part IV will identify common threads in Professor Funk's scholarship. Part V will conclude by considering the usefulness and importance of Professor Funk's work in the long-term project of American scholarly thinking about our Constitution and constitutionalism more generally.

## I. DOMESTIC ELECTRONIC SURVEILLANCE

In 2011, Professor Funk wrote an article considering the constitutional issues lurking in domestic electronic surveillance performed for counter-terrorism purposes.<sup>15</sup> Beyond providing a nuanced history of the legal regime governing such surveillance,<sup>16</sup> that article's analysis steers a careful line between the government's legitimate need for covert investigatory tools and the potential for government abuse of the counter-terrorism justification to skirt traditional Fourth Amendment warrant requirements.<sup>17</sup> As Professor Funk notes, the problem is a difficult one, given the increasingly blurred line separating domestic law enforcement, which is unquestionably subject to Fourth Amendment requirements, from what amounts to wartime surveillance of a foreign enemy, where the Fourth Amendment's applicability and meaning are much more contested.<sup>18</sup> His analysis also notes the practical reality that intelligence-gathering abroad may be more difficult than analogous conduct

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<sup>15</sup> Funk, *Electronic Surveillance*, *supra* note 7.

<sup>16</sup> *Id.* at 1492–501.

<sup>17</sup> *Id.* at 1503 (“The issue here is less whether FISA as amended is constitutional according to established constitutional doctrine massaged in the inimitable American way, but rather the questions it raises about the nature of the struggle against international terrorism and the appropriate means to combat that terrorism consistent with retaining the individual freedoms citizens of developed nations have come to expect.”).

<sup>18</sup> *Id.* at 1500–01 (“So long as foreign intelligence surveillance was aimed at pure foreign intelligence, traditional counter-intelligence, or even international terrorism accomplished abroad against non-United States targets, drawing the intelligence/law enforcement line was generally not problematical, because criminal prosecution was rarely the sought-for goal. However, the shift of international terrorism from non-United States targets abroad to domestic targets and United States targets abroad changed the nature of the problem. Now, criminal prosecution, or at least incarceration or incapacitation, was likely to be the primary goal, although the gathering of intelligence regarding the terrorists' contacts, plans, and infrastructure was also extremely important.” (footnote omitted)).

carried out domestically.<sup>19</sup> Given that difference, Professor Funk suggests—quite appropriately—that the government should be given more leeway when it acts to gather information abroad, even if that information-gathering implicates U.S. citizens.<sup>20</sup>

This emphasis on practicality is also evident in Professor Funk's acknowledgement of the political realities underlying government action in this area. Thus, he observes that the political decision to take a war footing when confronting al-Qaeda triggers a different set of defaults when considering the information-gathering issue.<sup>21</sup> Similarly, Professor Funk cautions readers that courts will likely not overturn a bipartisan decision reflecting a balancing of intelligence-gathering and civil liberties concerns, especially when, as with the Patriot Act, the governing law includes a sunset provision that, in his words, "required it to be reconsidered in the future, under calmer conditions."<sup>22</sup> In those words one can almost hear Justice Jackson cautioning as he did in *Korematsu v. United States* that courts cannot be expected to prevent infringement on civil liberties when, in times of emergency, the people entrust their leaders with the urgent task of national defense.<sup>23</sup>

Thus, Professor Funk's article reflects the granular distinctions between different situations triggering government surveillance, concedes the difficulty of the issue and the unhelpfulness of all-or-nothing rules, and recognizes the importance of practical realities in finding a resolution. Finally, and perhaps most importantly, his analysis cautions that courts cannot be expected to stand in the way of national

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<sup>19</sup> *Id.* at 1505 ("Given the reduced capability of the government to obtain information abroad short of surveillance, compared to the capabilities to obtain information through less intrusive techniques in the United States, more flexibility regarding surveillance regarding such information might be justified.")

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 1504 ("Second, the acceptance of the 'war on terror' as more than a mere sobriquet, but as a legal concept in the United States, further supports approval of 'war-time' measures. Unlike the 'war on drugs' or the 'war on crime,' the war on terror, or at least the use of force pursuant to the Authorization for the Use of Military Force (AUMF), has been accorded the status of 'war' for many legal purposes. . . . Thus, limits on surveillance that might be appropriate if the purpose were ordinary law enforcement may not be appropriate if the prosecution is to occur in military tribunals under the laws of war." (footnote omitted)).

<sup>22</sup> *Id.* at 1503.

<sup>23</sup> *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting) ("Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.")

security measures taken with broad public support. There is much wisdom—practical and otherwise—in his consideration of this issue.

## II. REGULATORY EXACTIONS

Turn now to a completely different constitutional law topic where Professor Funk's analysis again reflects the features noted in Part I. In 1995, Professor Funk wrote an article considering the meaning and likely impact of *Dolan v. City of Tigard*.<sup>24</sup> *Dolan* dealt with the requirements the government must satisfy before imposing land-use exactions that would otherwise constitute takings as the price of obtaining a development permit.<sup>25</sup> *Dolan* followed *Nollan v. California Coastal Commission*, in which the Supreme Court held that, as a general matter, such exactions triggered Takings Clause scrutiny.<sup>26</sup> As Professor Funk notes, *Nollan* “left murky” the degree of relationship the government had to demonstrate between the deleterious public effects posed by the requested development and the conditions the government insisted on as a condition of allowing that development.<sup>27</sup> In *Dolan*, the Court elaborated on that relationship.

In his article, Professor Funk presents two ways of “reading *Dolan*.”<sup>28</sup> He presents the narrative offered by the landowner, in which “she is the victim of government extortion” and then the narrative offered by the city, in which the proposed development would exacerbate traffic and water runoff problems that were directly addressed by the required exactions.<sup>29</sup>

Many law review articles might be content with presenting these competing narratives, perhaps commenting on how their differences reveal the fundamentally indeterminate nature of law. They perhaps come down on one side or the other, depending on where the author's sympathies lie.<sup>30</sup> But Professor Funk does more than that—much more. Indeed, the competing narratives constitute only the beginning of an analysis that is not only careful and balanced, but rich in detail and nuance.

He begins his consideration of the issue by noting and carefully considering two factors that figured in the majority's analysis. First, he acknowledges the Court's observation that the challenged exaction demanded in response to Ms. Dolan's re-

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<sup>24</sup> *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

<sup>25</sup> *Id.* at 377.

<sup>26</sup> *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987).

<sup>27</sup> Funk, *Reading Dolan*, *supra* note 9, at 128.

<sup>28</sup> *Id.* at 127.

<sup>29</sup> *Id.* at 127.

<sup>30</sup> For a general discussion of law as narrative, see Anne E. Ralph, *Narrative-Erasing Procedure*, 18 NEV. L.J. 573, 575 (2018) (considering the power of narrative in litigation).

quest for a zoning variance was imposed in the context of an adjudicatory proceeding rather than as a generally applicable legislative determination.<sup>31</sup> But he notes the oddity that the adjudication involved the application of the city's master plan—a legislative determination that normally elicits deferential scrutiny rather than the heightened review implicated by the Court's ultimate requirement that the exactions exhibit a "rough proportionality" to the problems the development threatened to cause.<sup>32</sup> He also notes the general rule that in such adjudications the movant—that is, the person requesting the variance—bears the burden of proof.<sup>33</sup>

From this granular analysis, implicating the boring topic of land-use decision procedures rather than grand ideas of a rebirth of *Lochner v. New York*<sup>34</sup> under the aegis of the Takings Clause,<sup>35</sup> Professor Funk perceives that Ms. Dolan's story ultimately reduces to one of fair process: in this case, the application of a pre-existing master plan to Ms. Dolan's parcel before Ms. Dolan had a chance to present the particular facts of her case. He concludes this part of the article:

Therefore, the first factor distinguishing *Dolan* from ordinary cases is the existence of a master plan calling for specific pre-determined conditions applicable to particular properties without relation to what might be proposed for those properties, which conditions any significant development would trigger. This is a substantial limitation on the scope of *Dolan*.<sup>36</sup>

Second, Professor Funk notes the Court's concern—which occupied much of the Court's attention—with the fact that the exaction required Ms. Dolan to give up title to the land the city wanted for its greenway and bike path. But again, rather than simply exclaiming over that factor, Professor Funk calmly notes that this issue was decided in *Nollan*, the previous exactions case.<sup>37</sup>

All told, this careful analysis suggests that *Dolan* may mean less than appears at first glance.<sup>38</sup> But, more importantly, his analysis reaches that conclusion through a

<sup>31</sup> Funk, *Reading Dolan*, *supra* note 9, at 133.

<sup>32</sup> *Id.* at 130 (citing *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994)).

<sup>33</sup> *Id.* at 133.

<sup>34</sup> *Lochner v. New York*, 198 U.S. 45, 59 (1905) (using liberty of contract reasoning to strike down a New York law limiting work hours).

<sup>35</sup> Funk, *Reading Dolan*, *supra* note 9, at 131 (observing that Justice Stevens's dissent in *Dolan* explicitly invoked *Lochner*).

<sup>36</sup> *Id.* at 134.

<sup>37</sup> *Id.* ("The only distinction between Tigard's condition and the paradigm takings case is that the transfer is not required; it is optional with the land owner. Mrs. Dolan could avoid the transfer merely by not engaging in the new development. This same issue had been raised and settled in *Nollan* . . . . *Dolan*, like *Nollan* before it, was different from ordinary land use cases because the government's conditional requirement of deeding the property to the government, with its potential for out-and-out extortion, triggers the need for stricter scrutiny.")

<sup>38</sup> *Id.* at 141 ("The thrust of my analysis has been to minimize the effect of *Dolan*. This is not just wishful thinking; it is the clear tenor of the decision itself."). *But see infra* note 80 and

careful unpacking of what was going on in the case. It is easy to be hyperbolic about a case that appears to hamstring government power to engage in basic land use planning. But Professor Funk's careful analysis explains *Dolan* as embracing propositions that are reasonable and well-established and that limit any city planner's need to panic about its holding, even if "*Dolan* no doubt says something fundamental about master plans that involve planned dedications of property as a condition of development."<sup>39</sup>

But Professor Funk is not done. Instead, after his measured analysis he challenges the majority's sloppy, offhand reference to the unconstitutional conditions doctrine.<sup>40</sup> In response to the Court's (unwise) doctrinal move, he proposes a much simpler approach—one that asks simply whether the exaction would itself be unconstitutional, regardless of any benefit the landowner would reap from obtaining the requested development permit, which was dangled as the compensation for the alleged unconstitutional condition. Such an approach, he argues, would avoid the morass of the unconstitutional conditions doctrine, at least in situations like those in *Dolan*. Indeed, he argues, it was essentially what the Court did in *Dolan* (and *Nollan*) when it considered whether the condition featured an "essential nexus" to the public harm the development threatened to cause.<sup>41</sup>

Here again, Professor Funk's good sense is evident.<sup>42</sup> Indeed, one can contrast

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accompanying text.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 135–37.

<sup>41</sup> *Id.* at 136–37 ("Although the Court did not analyze it in this way in either *Nollan* or *Dolan*, the nexus tests arguably focus on the regulation itself. Thus, in *Nollan* the Court assumed for purposes of argument and in *Dolan* the Court flatly stated that the denial of the permit would not constitute a taking, because the denial would substantially advance a legitimate state interest and it would not deny the owners all economic use of the property. If the conditions involved in those cases satisfied the nexus tests, they also would likewise not constitute takings, because the conditions themselves would substantially advance a legitimate state interest and not deny the owners all economic use of the property. In other words, the conditions would themselves satisfy the constitutional requirements to avoid being a taking without just compensation. In both cases, the Court held that the requisite nexus had not been established to avoid the Takings Clause, or as stated in my framework, the conditions themselves failed to satisfy the constitutional requirements necessary to avoid the Takings Clause." (footnote omitted)).

<sup>42</sup> Indeed, one can perceive a distant echo of this same sort of analysis in one aspect of Professor Funk's administrative law scholarship, in which he calls for a clean, straightforward approach to the otherwise deeply murky question of when an administrative rule is a legislative one (that is thus subject to notice-and-comment requirements) and when it is an interpretive rule or statement of policy (that is exempt from those requirements). Rather than engaging in the intricate and often scholastic hair-splitting that some approaches to this question have entailed, Professor Funk has offered an elegantly simple approach: "any rule not issued after notice and comment is an interpretive rule or statement of policy, unless it qualifies as a rule exempt from notice and comment on some other basis." William Funk, *When is a "Rule" a Regulation? Marking a Clear Line Between Nonlegislative and Legislative Rules*, 54 ADMIN. L. REV. 659, 663 (2002). Just

*Dolan*'s unnecessary citation to a vague and troublesome doctrine with Professor Funk's analysis of that case. As I have suggested, Professor Funk's analysis is the very opposite of such sloppiness; it is precise, spare, and grounded in factual context.

Unsurprisingly, Professor Funk's approach ultimately found good company, albeit in a different context. A decade after his article, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, a unanimous Supreme Court upheld a law conditioning federal education grants on colleges providing military recruiters equal access to on-campus job interviewing resources.<sup>43</sup> In reaching that decision, the Court simply bypassed the law's spending condition—and thus the unconstitutional conditions question. Instead, the Court upheld the law simply because that condition could have been directly imposed on schools without violating the Constitution.<sup>44</sup>

But Professor Funk is still not done. Speculating about the impact of *Dolan*'s "rough proportionality" requirement, Professor Funk returns to his earlier distinction between adjudicative decisions responsive to the particular facts of the particular proposed development, and, on the other hand, blunt applications of a master plan that do not take those particular facts into account.<sup>45</sup> Professor Funk suggests that decisions of the former sort may well satisfy the Court's requirements—and, just as importantly, provide firm grounding for what is otherwise the mushy "intermediate scrutiny" review he sees in *Dolan*'s "rough proportionality" requirement—in a way that the analogous intermediate scrutiny test in sex discrimination cases is satisfied (and more firmly grounded) when the Court determines that a gender line is being drawn not as an unthinking repetition of old sex stereotypes, but instead as a considered attempt to counter those stereotypes.<sup>46</sup> It is an ingenious parallel, and it shows Professor Funk's ability not just to get into the procedural or factual weeds of the case but also to draw broad-stroke lessons when they are supported by the analysis.

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as Professor Funk's proposal about rulemaking cuts through the difficulty of determining the essence of a legislative, as opposed to a non-legislative, rule, so too his suggestion about dealing with allegedly unconstitutional exactions cuts through the murk of the unconstitutional conditions doctrine.

<sup>43</sup> *Rumsfeld v. Forum Acad. Institutional Rights, Inc.*, 547 U.S. 47 (2006).

<sup>44</sup> *Id.* at 59–60 ("This case does not require us to determine when a condition placed on university funding goes beyond the 'reasonable' choice offered in [an earlier case] and becomes an unconstitutional condition. It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly. . . . Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds." (citation omitted)).

<sup>45</sup> Funk, *Reading Dolan*, *supra* note 9, at 138–39.

<sup>46</sup> *Id.* at 138.



## III. INCITEMENT SPEECH

One final piece of scholarship reflects the type of constitutional law work Professor Funk has done throughout his career. In 2006 Professor Funk wrote an article discussing the First Amendment implications of online intimidation.<sup>47</sup> That piece focuses on the then-recent Nuremberg Files case, *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*.<sup>48</sup> *Planned Parenthood* involved anti-abortion activists who created a website that both provided identifying information about abortion providers and strongly suggested that such persons would be appropriate targets for violence. A sharply divided Ninth Circuit en banc panel held that the public disclosure was not protected speech because it constituted a true threat.<sup>49</sup>

Characteristically, while Professor Funk agrees with the majority result that the activists' speech was not protected, he does so for a more nuanced reason than the Ninth Circuit majority. That majority concluded that the website constituted a true threat. To those judges, it did not matter that the source of the threat may not have been the organizers of the website but others who might be encouraged to engage in the violent conduct to which the website alluded with approval.<sup>50</sup>

Professor Funk does not accept the argument that the website constituted a true threat under existing Supreme Court doctrine.<sup>51</sup> Instead he argues that the website should be unprotected based on what he calls "a generic balancing approach that takes account of the value of the particular speech without regard to its subject matter . . . or viewpoint."<sup>52</sup> For Professor Funk, the components of that balancing in *Planned Parenthood* are (1) the significance of the fear the speech generates<sup>53</sup> and (2) the special conditions of speech on the internet: the permanence and universal avail-

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<sup>47</sup> Funk, *Intimidation*, *supra* note 11.

<sup>48</sup> *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002).

<sup>49</sup> *Id.* at 1088. Five judges on the 11-judge en banc panel dissented. *Id.* at 1062.

<sup>50</sup> *Id.* at 1076 ("The dissents would change the test, either to require that the speaker actually intend to carry out the threat or be in control of those who will, or to make it inapplicable when the speech is public rather than private. However, for years our test has focused on what a reasonable speaker would foresee the listener's reaction to be under the circumstances, and that is where we believe it should remain.").

<sup>51</sup> Funk, *Intimidation*, *supra* note 11, at 588–89.

<sup>52</sup> *Id.* at 597.

<sup>53</sup> *Id.* at 590 ("Whether any particular state of fear is enough to outweigh First Amendment values is not the issue at this point. For now it is sufficient merely to establish that the psychological reality of sensed fear is harmful enough to individuals that the state has a legitimate, even important, maybe compelling, interest in taking action to prevent persons from causing fear in others.").

ability of internet speech, the ease with which such speech is made, the lack of gatekeepers, and its anonymity.<sup>54</sup>

For Professor Funk, these factors justify the result the Ninth Circuit reached.<sup>55</sup> He argues that this result should flow not from “shoehorn[ing]” the Nuremberg Files site into a pre-existing speech category, such as true threats, but instead by performing the requisite weighing without any prior act of categorization.<sup>56</sup> To be sure, he concedes that the inputs into his proposed balancing have also played roles in that categorization process.<sup>57</sup> Nevertheless, he eschews such categorization as itself a necessary part of First Amendment analysis.<sup>58</sup>

Of course, as anyone with knowledge of First Amendment doctrine knows, Professor Funk’s call for such free-form balancing has been rejected by the current Court. Instead, beginning in 2010, the Court has reaffirmed the traditional categories of unprotected speech.<sup>59</sup> Indeed, it has gone farther, describing those categories not as the result of any court-performed balancing, but instead as recognition of

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<sup>54</sup> *Id.* at 591–92. To be sure, Professor Funk published this article in 2006, before the rise of Facebook and other social media sites that feature at least the realistic potential of content moderation by third parties such as operators of such sites. See Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018) (discussing content regulatory options available to operators of social media sites such as Facebook); Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353 (2018) (same).

<sup>55</sup> Funk, *Intimidation*, *supra* note 11, at 597 (“The conclusion of this alternative analysis is that the speech involved in *Planned Parenthood* that targeted particular individuals by identifying them with names, addresses, and other particular details in order to induce fear in these persons for their physical safety, under circumstances in which the identified persons would reasonably become afraid, is not protected speech under the First Amendment.”).

<sup>56</sup> *Id.* (“This paper has attempted to provide an alternative analysis to a particular case involving intimidation through the Internet. Rather than attempt to shoehorn the facts into or distinguish the case from existing categories of unprotected speech, the analysis here has used a generic balancing approach that takes account of the value of the particular speech without regard to its subject matter (abortion) or viewpoint (against). While this analysis has relied, to some degree, on the balances made in defining certain categories of unprotected (or semi-protected) speech, it has done so on the basis that these categories are implicitly derived from this generic balancing, rather than to show that the speech involved in the Nuremberg Files is like or not like the speech in particular categories.”).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See *United States v. Alvarez*, 567 U.S. 709, 717 (2012); *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 792 (2011); *United States v. Stevens*, 559 U.S. 460, 470 (2010) (characterizing as “startling and dangerous” the idea that unprotected categories of speech could be discovered by an *ad hoc* balancing process as opposed to an inquiry into the categories of speech that were historically unprotected).

historically unprotected categories.<sup>60</sup> While it has left open the possibility that additional categories will be “discovered,”<sup>61</sup> the Court’s tone seems to be skeptical of any such possibility.

In my view, this approach is deeply unfortunate<sup>62</sup>—not to mention historically inaccurate.<sup>63</sup> The creation of such rigid categories leads to attempts like those of the Ninth Circuit majority in *Planned Parenthood* to “shoehorn” particularly troubling speech into such pre-existing categories rather than to candidly examine the factors that should be relevant to whether the value of particular speech outweighs its potential for harm. To be sure, such balancing carries its own risks—in particular, it runs the risk of failing to protect speech exactly when moral or other panics trigger the loudest calls for suppressing allegedly dangerous speech.<sup>64</sup> But if the history of constitutional doctrine has taught us anything, it should be that rigid categories, whatever their benefits, inevitably start to fray at the edges when the Court confronts difficult cases.<sup>65</sup> Given that speech suffuses everything that humans do—that is, given that speech occurs essentially every time humans act<sup>66</sup>—the perils of such doctrinal fraying, and ultimately, doctrinal dishonesty—seem particularly problematic in the First Amendment context.

And so they are with *Planned Parenthood*. As Professor Funk notes, the majority, in its categorization of the speech in question as a true threat, fails to engage the

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<sup>60</sup> Funk, *Intimidation*, *supra* note 11, at 597.

<sup>61</sup> See *Stevens*, 559 U.S. at 472 (“Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. . . . We need not foreclose the future recognition of such additional categories to reject the Government’s highly manipulable balancing test as a means of identifying them.”).

<sup>62</sup> See William D. Araiza, *Citizens United, Stevens, and Humanitarian Law Project: First Amendment Rules and Standards in Three Acts*, 40 STETSON L. REV. 821, 837 (2011) (concluding that the case for rigid First Amendment rules is ultimately “disappointing”).

<sup>63</sup> See Genevieve Lakier, *The Invention of Unprotected Speech*, 128 HARV. L. REV. 2166 (2015) (offering a different explanation of the origin of the unprotected speech categories).

<sup>64</sup> See generally Araiza, *supra* note 62 (offering this rationale as the strongest support for a rigid approach to free speech issues).

<sup>65</sup> This dynamic is most obviously, although certainly not exclusively, reflected in the Court’s application of tiered scrutiny in equal protection and other contexts. See generally R. George Wright, *What if All the Levels of Constitutional Scrutiny Were Completely Abandoned?*, 45 U. MEMPHIS L. REV. 165 (2014) (examining the manipulability of tiered scrutiny); see also Araiza, *supra* note 62, at 830–33 (comparing the Court’s seemingly deferential approach to stringent First Amendment scrutiny in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), to its similarly deferential approach to strict scrutiny in the equal protection context in *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

<sup>66</sup> See *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2380 (2018) (Breyer, J., dissenting) (“[M]uch, perhaps most, human behavior takes place through speech . . .”).

dissent's point that true threats are normally uttered by the speaker.<sup>67</sup> That is not what was going on in *Planned Parenthood*, which featured speech that created a real risk that *others* were going to engage in the threatening conduct. Professor Funk's more "generic balancing"<sup>68</sup> accounts for this distinction, without thereby rendering the speech automatically protected despite the harm it might (indirectly) cause. The majority's approach—both in *Planned Parenthood* and the Supreme Court cases rejecting such explicit balancing—cannot do so.

But to be clear, Professor Funk's approach is not lawless—it is not simply balancing for its own sake. Rather, Professor Funk grounds his call for balancing in *Planned Parenthood* based on the tradition of balancing that he sees as underlying the Court's existing free speech jurisprudence.<sup>69</sup> To be sure, the current Court doesn't view the current set of unprotected speech categories as arising out of such a balancing exercise; for the Court, the current set of categories is historically based.<sup>70</sup> But there is reason to doubt the empirical correctness of that conclusion<sup>71</sup>—and certainly its foundation in logic.<sup>72</sup>

#### IV. COMMON THREADS

The scholarship discussed above spans a variety of doctrinal and subject-matter areas. Indeed, Professor Funk's casebooks cover the entire field of doctrines and topics normally covered in a first-year constitutional law course. But his scholarship features common themes that render it enormously valuable for the study of American constitutional law and its forward progress.

First, Professor Funk's work is careful. He is meticulous in setting forth the relevant doctrinal structure he's discussing. For example, his article on domestic surveillance carefully traces the sequence of changes to the legal regime governing intelligence gathering, from *Olmstead v. United States*'s blanket rejection of any Fourth

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<sup>67</sup> Funk, *Intimidation*, *supra* note 11, at 588 ("Judge Kozinski's argument [in his dissenting opinion]—that in order for something to be a threat the speaker must be suggesting some control over the action threatened—was left unanswered by the majority.").

<sup>68</sup> *Id.* at 588–89.

<sup>69</sup> *See id.* at 597 (observing that his proposed balancing approach "has relied, to some degree, on the balances made in defining certain categories of unprotected (or semi-protected) speech").

<sup>70</sup> *See id.*

<sup>71</sup> *See generally* Lakier, *supra* note 63.

<sup>72</sup> *See* Funk, *Intimidation*, *supra* note 11, at 590 (arguing that "the psychological reality of sensed fear is harmful enough to individuals that the state has a legitimate, even important, maybe compelling, interest in taking action to prevent persons from causing fear in others" even if the threats that cause such fear do not fall under the formal First Amendment category of "true threats").

Amendment right to be free of electronic surveillance<sup>73</sup> to cases<sup>74</sup> evaluating the constitutionality of the Patriot Act's expansion of authority for foreign intelligence surveillance.<sup>75</sup> The path is a tricky one, combining as it does constitutional and statutory provisions and featuring judicial analyses that focus on the adequacy of differing sets of safeguards as surveillance legislation was modified over time.<sup>76</sup> But the nuance and granularity Professor Funk's analysis features is necessary given the difficult balancing required in order fairly to mediate between legitimate foreign intelligence activity and Fourth Amendment rights.

Professor Funk's analytical care is also evident in his analysis of *Dolan*.<sup>77</sup> Rather than simply reacting to the result or to the justices' ideological line-up and expressing concern for legitimate local land-use planning, Professor Funk meticulously peels away the layers of the case to conclude that it might not mean as much as some had feared. For example, he notes that one of the majority's main concerns seemed to lie in the fact that the city had attempted to impose the regulatory exaction without any consideration of the particular impact Ms. Dolan's proposed development would have on the city's legitimate interests.<sup>78</sup> Additionally, Professor Funk observes that *Dolan*'s main contribution to land-use law—the “rough proportionality” requirement to measure the relationship between the exaction and the public problem the proposed development threatened to cause—was, according to the Court, already the law in a majority of states.<sup>79</sup> It is for reasons like these that Professor Funk was able to suggest, at least based on a reading of *Dolan* itself,<sup>80</sup> that “a proper

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<sup>73</sup> *Olmstead v. United States*, 277 U.S. 438, 465 (1928) (“The language of the [Fourth] Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office.”).

<sup>74</sup> See *In re Sealed Case*, 310 F.3d 717, 719–20 (FISA Ct. Rev. 2002).

<sup>75</sup> See Funk, *Electronic Surveillance*, *supra* note 7, at 1492–502.

<sup>76</sup> See *id.* at 1501–02 (discussing *In re Sealed Case*, 310 F.3d at 717, which upheld the facial constitutionality of the Patriot Act's changed requirements for intelligence-motivated surveillance based on the new safeguards the Patriot Act had provided for such surveillance requests).

<sup>77</sup> Funk, *Reading Dolan*, *supra* note 9.

<sup>78</sup> *Id.* at 134.

<sup>79</sup> *Id.* at 140.

<sup>80</sup> *Id.* at 139. To be sure, Professor Funk cautions that *Dolan*'s place in a series of Takings Clause cases the Court had decided in the years immediately preceding *Dolan* raised the specter that *Dolan* could become simply another part of the Rehnquist Court's new focus on protecting property rights at the expense of public land-use planning objectives. *Id.* at 142 (“The second important element of *Dolan* can be illustrated by a list: *Dolan*, *Lucas*, *Nollan*, and *First English Evangelical*; property owners have won the last four decisions by the Supreme Court involving alleged regulatory takings of real property. Those who argue that these cases individually do not have great impact nevertheless must have the sense that they are whistling past the graveyard.” (footnotes omitted)).

interpretation of *Dolan*'s rough proportionality test should not cause major problems for local government."<sup>81</sup>

Second, and relatedly, Professor Funk's scholarship respects facts. Professor Funk's article on *Dolan* acknowledges the fact that much—although concededly not all—of *Dolan*'s analysis could have been found in its predecessor case, *Nollan v. California Coastal Commission*.<sup>82</sup> This fact necessarily mitigates *Dolan*'s impact, even if *Dolan*'s reinforcement of *Nollan*'s reasoning surely places that earlier case on a more secure doctrinal foundation. A similar emphasis on facts—though with a different impact on legal doctrine—emerges in Professor Funk's article on the Nuremberg Files case.<sup>83</sup> Professor Funk's article acknowledges the fact, elided by the majority in that case, that the threat at issue emanated not from the persons who posted the doctors' names and identifying information and encouraged violent action against them, but rather from those who acted on that encouragement and thus actually posed the "true threat."<sup>84</sup> But for Professor Funk, that fact is met by the fact that such indirect threats end up causing the same type of harm that true threat doctrine is designed to address.<sup>85</sup> To be sure, such indirect threats do not constitute a "true threat" as the doctrine understands that term. But for Professor Funk, the fact that they cause the same harm justifies holding that latter type of speech—the type that was at issue in the Nuremberg Files case—similarly unprotected.<sup>86</sup>

This focus on facts complements Professor Funk's focus on the details of doctrine. Both of these features of Professor Funk's scholarship reflect a detail-oriented, incremental understanding of law—one that would not be out of place in a common law opinion. Of course, they appear in constitutional law scholarship. Nevertheless, as Part V explains, that fact does not diminish the importance of this attention to detail.

Finally, Professor Funk's scholarship is balanced. Professor Funk explicitly embraces a balancing methodology in his *Planned Parenthood* true threats article,<sup>87</sup> but

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<sup>81</sup> *Id.* at 139.

<sup>82</sup> *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); see Funk, *Reading Dolan*, *supra* note 9, at 134.

<sup>83</sup> *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc); see Funk, *Intimidation*, *supra* note 11.

<sup>84</sup> Funk, *Intimidation*, *supra* note 11, at 589 ("The doctrine that the speaker need not *actually* intend to do the harm simply does not address the situation where the speaker does not even lead the listener to believe that the speaker intends to do harm—the situation present in the Nuremberg Files, where there was no suggestion (or understanding by readers) that the authors of the site themselves or anyone subject to their control intended to do physical violence to the persons named on the site. 'True threat' doctrine simply does not address this type of speech.")

<sup>85</sup> *See id.*

<sup>86</sup> *Id.* at 597; see *supra* note 56.

<sup>87</sup> Funk, *Intimidation*, *supra* note 11, at 597; see *supra* note 56.

an analogous approach informs his other scholarship as well.<sup>88</sup> But this is not balance for the simple sake of balancing—or, even worse, balancing as an easy way out of doing the hard work of legal analysis. Rather, Professor Funk's work is balanced because, as with his foreign surveillance piece, it recognizes that profound national values often stand on opposing sides of constitutional claims. When that occurs, accommodation of each competing value almost necessarily requires balancing, whatever one may call that process.

The balancing that emerges in Professor Funk's scholarship also implicates the fact-sensitivity noted above. Simply put, balancing is not a task that is accomplished in the abstract. Balancing competing interests requires an appreciation for the facts underlying those interests, unless the resulting accommodation is simply done as a categorical matter—or, even worse, if the judge pretends that the result of the balancing was foreordained by history, as the Court has done when it has maintained that the list of unprotected speech categories in *Chaplinsky v. New Hampshire* represent simply historically unprotected speech rather than the result of self-conscious judicial balancing.<sup>89</sup>

Balancing as well as fact and doctrine-sensitivity are the hallmarks of Professor Funk's scholarship. As Part V below explains, they reflect an apt and, one might hope, an enduring approach to constitutional law, and not just constitutional law scholarship.

## V. PROFESSOR FUNK'S CONTRIBUTIONS TO CONSTITUTIONAL LAW

This Essay closes by considering a passage from a Supreme Court opinion that I believe well characterizes Professor Funk's constitutional law scholarship. The excerpt discusses substantive due process, a topic that this Essay has not addressed but is apt nevertheless.

In *Washington v. Glucksberg*, Justice Souter, concurring in the majority's result rejecting a due process challenge to a state ban on assisted suicide, wrote the following:

Just as results in substantive due process cases are tied to the selections of statements of the competing interests, the acceptability of the results is a function of the good reasons for the selections made. It is here that the value of common-law method becomes apparent, for the usual thinking of the common law is suspicious of the all-or-nothing analysis that tends to produce legal

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<sup>88</sup> See, e.g., Funk, *Electronic Surveillance*, *supra* note 7, at 1505 (balancing Fourth Amendment interests with the increased difficulty of government information gathering in foreign surveillance operations as part of an analysis of what sorts of burdens government should face when seeking foreign intelligence information).

<sup>89</sup> See *supra* note 59; see also Lakier, *supra* note 63, at 2176.

petrification instead of an evolving boundary between the domains of old principles. Common-law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and new counterexamples. . . . “The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take its place in relation to what went before and further [cut] a channel for what is to come.”<sup>90</sup>

Justice Souter is describing the methodology embraced by the younger Justice Harlan in his influential dissent in *Poe v. Ullman*,<sup>91</sup> but it could be language describing Professor Funk’s scholarship.

This passage fits because, as Justice Souter writes, the acceptability of the results reached in a given case is inevitably a function of the reasons for the choices made. Professor Funk’s scholarship is all about the practical reasons justifying one choice over another. This approach is exemplified by his explanation of why government may need more leeway to avoid otherwise applicable Fourth Amendment requirements when gathering intelligence abroad.<sup>92</sup>

The passage also serves as a fitting description of Professor Funk’s approach because it acknowledges the common-law suspicion of what Justice Souter calls “all-or-nothing” analysis and lauds the common law’s respect for detail. As this Essay has explained, Professor Funk’s scholarship respects both doctrinal detail and facts. The work it has reviewed also reveals a suspicion of grand ideological theorizing of the sort that characterized the *Lochner*-era jurisprudence that Justice Souter was trying to avoid in sketching out his own theory of substantive due process review. For example, Professor Funk’s discussion of *Dolan* succeeds in limiting the scope of the Court’s holding by its careful attention to the factual and doctrinal detail that appeared to drive, and thus cabin, that decision.<sup>93</sup>

Finally, as with Justice Souter’s approach to substantive due process, this Essay illustrates Professor Funk’s practice of grounding his analysis in what came before. His defense of the balancing he calls for in the Nuremberg Files case is a clear example of creating new doctrine that flows within the previously cut channel of weighing the costs and benefits of speech.<sup>94</sup> Indeed, Professor Funk’s application of that balancing, by turning on the similar harms caused by traditional “true threats” and the threats indirectly encouraged by the sponsors of the Nuremberg Files site, similarly flows within a pre-cut channel.<sup>95</sup> Nevertheless, just as with Justice Souter’s

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<sup>90</sup> *Washington v. Glucksberg*, 521 U.S. 702, 770 (1997) (Souter, J., concurring in the judgment) (quoting *Poe v. Ullman*, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting)).

<sup>91</sup> *Poe*, 367 U.S. at 522 (Harlan, J., dissenting).

<sup>92</sup> See Funk, *Electronic Surveillance*, *supra* note 7, at 1505.

<sup>93</sup> See *supra* notes 34–41 and accompanying text.

<sup>94</sup> See Funk, *Intimidation*, *supra* note 11, at 597; see *supra* note 56.

<sup>95</sup> See text accompanying *supra* note 86.



approach to due process, Professor Funk's reasoning also cuts a new channel, given the particular analysis demanded by the facts of that particular case, including the characteristics of the new medium of the internet.<sup>96</sup>

To quote yet another substantive due process opinion, "[t]his is surely the preferred approach."<sup>97</sup> Today, the Court struggles to find the balance between more granular, less categorical approaches to constitutional law and the rigid, acontextual approach that in the equal protection context cannot distinguish a welcome mat from a "No Trespassing" sign,<sup>98</sup> and that in the First Amendment context is similarly unable to distinguish unchecked corporate electoral funding from *Mr. Smith Goes to Washington*.<sup>99</sup> Scholastic (in the medieval sense) distinctions compete against those that are firmly based in common sense and good policy, although nevertheless grounded in law—just as Justice Souter's approach in *Glucksberg* recognizes the judicial imperative of weighing governmental justifications against liberty infringements, but does so against the backdrop of the long tradition of substantive due process review and the legal principles governing that review.<sup>100</sup>

Professor Funk's approach to constitutional law reflects similar imperatives.<sup>101</sup> As such, it reminds us that we need not be slaves to the formulaic, abstract, deductive approach to constitutional law that purports to be policy-neutral but that really just hides its policy analysis under a veneer of cold logic. As Justice Souter's approach in *Glucksberg* and Professor Funk's scholarship both show us, rejecting the absolutism of, respectively, *Lochner* and the Court's categories-based approach to protected speech does not equate to rejecting law.<sup>102</sup> For that reminder we should be grateful.

To be sure, one should not overstate the congruence between Justice Souter's

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<sup>96</sup> *See id.*

<sup>97</sup> *Moore v. City of E. Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting).

<sup>98</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting).

<sup>99</sup> *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371 (2010). *Compare id.* at 394 (Stevens, J., dissenting) (criticizing the majority's reliance on the "glittering generality" that the First Amendment bars regulatory distinctions based on a speaker's identity), *with Adarand*, 515 U.S. at 245 (Stevens, J., dissenting) (faulting the majority for adopting a rigid colorblindness rule in a race-based affirmative action case rather than drawing distinctions between different types of race-based laws depending on the motivation behind the challenged law).

<sup>100</sup> *Washington v. Glucksberg*, 521 U.S. 702, 764 (1997) (Souter, J., concurring in the judgment) (explaining this approach).

<sup>101</sup> *E.g.*, Funk, *Intimidation*, *supra* note 11 (providing one example of how Professor Funk's analysis reflects longstanding legal imperatives while still giving due weight to contemporary policy balancing).

<sup>102</sup> *See Glucksberg*, 521 U.S. at 764 (Souter, J., concurring in the judgment) ("The second of [Justice Harlan's *Poe*] dissent's lessons is a reminder that the business of [substantive due process] review is not the identification of extratextual absolutes but scrutiny of a legislative resolution (perhaps unconscious) of clashing principles, each quite possibly worthy in and of itself, but each to be weighed within the history of our values as a people.").

analysis and the themes that surface in Professor Funk's scholarship. Ironically, forcing a parallel between the two would reflect the same artificial and categorical analysis that Professor Funk's scholarship avoids. But the approach that Justice Souter identified—careful, incremental analysis grounded in factual distinctions between situations—is unmistakably present in Professor Funk's scholarship. This may be the influence of Professor Funk's time working in the federal bureaucracy, where the goal is empirically-based problem solving rather than theorizing, or it simply may be that Professor Funk was naturally drawn to this approach. Or it may be something else—for example, this sort of attention to detail is what naturally happens when one studies regulatory law, as Professor Funk has to great effect.

Whatever the motivation, the result shines through in his work. And we—as scholars, as lawyers and judges, and as Americans trying to muddle our way through a system of ordered liberty that by definition demands a careful balance of both order and liberty—are the better for it.