Kellye Testy:

Well, good afternoon, everyone. I'm Kellye Testy, the Dean of the law school. It's great to welcome you here to our program, Bridging Town and Gown: Where Academics Meet the Real World. I'm really pleased that you joined us today and I want to thank all of you from the faculty and staff and also from the community for being here. I was really happy to see that the law school has established the tradition of doing this program. I understand this is the second year that it's been done. When I'm out and about, I do often hear that the public would very much like to know more about what the law faculty is working on and the research. So I'm hopeful that as this tradition continues, we can find ways to get more of the public in the room when we have you here to share your work.

I want you to know too that I do believe it's very important for us to be engaged in the world with our research. We all love ideas, of course. What drew us to being faculty members is our love for scholarship, our love for ideas, but one of the things that I have been so impressed with on this faculty is that it's not just about ideas.

Though I think being about ideas is very important, but it's also about the impact and the reach those ideas have. It's about the difference they make, and that is scholarship at its finest form. When you really see the difference it makes in the world. The way it changes law, the way it works for justice, the way it makes a difference in a person's life, and for most every doctrine that's out there in law, it started as an idea, as an article, as a theory.

So I think it is wonderful today to be able to celebrate that very important part of our faculty's work. Indeed, I think that today, as we welcome Professor Sean O'Connor and Professor Kathryn Watts as our speakers, they're just two absolutely fabulous examples of the point that I make a lot, that scholarship and teaching and service, those are the parts of a faculty member's job, and they go together very, very well.

It's very tempting sometimes to act as if scholarship and teaching are somehow inconsistent, or that one might take away from time for institutional dedication. I believe just the opposite. That they reinforce one another and that the faculty member's role in an institution is at its finest when those three things are integrated and working together.

Now let me, before I introduce our speakers, thank the planning committee for this event. The planning committee included Associate Dean Steve Calandrillo, Cathy Klein, who directs our conferences and CLE programs, Bernadette O'Grady in the Dean's office, Sheryl Niberg in the library, our Associate Dean, Penny Hazelton, and in fact, I think most of the law librarians and staff helped with this program, and also of course, our advancement staff.

So I would ask you to join me in giving a round of applause and thanks to the planning committee for the event.
Then the way that we'll proceed today is Professor Watts will speak first and share some remarks around 15, 20 minutes or so, and then take some questions. Then Professor O'Connor will use the same format thereafter. Speak for 15 or 20 minutes and also take some questions on the topic that he addresses, and then I want to remind you all that we, at the conclusion of the program, also have a reception planned in our beautiful law library where you'll also be able to peruse the other faculty scholarship that the faculty has been working on for the last couple of years.

So let me introduce both Professor Watts and Professor O'Connor, again by thanking them for stepping up today to do this, and also for just all the ways that you serve the law school and bring about the educational and academic excellence that we're so known for.

Professor Watts joined us in 2007, and she had clerked for Justice Stevens for the US Supreme Court prior to that. Many of us are kind of holding our breath, wondering who's going to take that distinguished seat. Maybe Professor Watts. I'd vote for that.

Professor Watts teaches administrative law, constitutional law and also, the seminars on the Supreme Court and Supreme Court decision-making.

Our second presenter is Professor Sean O'Connor, who joined us in 2003. He is the Founding Director of the Entrepreneurial Law Clinic, which is a thriving clinic here at UW Law. He also led the formation of our law technology and arts group and continues to be one of the leaders of that terrific law and technology group within the school of law.

Professor Watts will go first, as I noted, and will discuss bridging the courts, law and politics, followed by Professor O'Connor discussing bridging law and business.

So with that, Professor Watts, it's all yours.

[applause]

Kathryn Watts:

Thanks so much for coming today. I'm pleased to be here and to have the chance to talk with you. As many of you in the room know who are my colleagues, and as Dean Testy said in her introduction, my teaching here at the UW focuses on three main areas: constitutional law, administrative law and Supreme Court decision-making. So what I wanted to do today, hence the title of my talk, which is Bridging the Courts, Law and Politics, is talk a little bit about how both my research, my scholarship and my teaching look at the crossroads of politics, law and the courts.

My classes that I teach raise many, many opportunities for students to raise a lot of questions about whether certain doctrines are about law or about politics. I was thinking as I was preparing this talk about a subject that might constitutional law students just covered this week, for example. We were looking at the commerce class, and we studied a case, a 2005 case, Gonzales vs. Raich. It's the medical marijuana case many of you have probably read or heard about. In the case, Justice Kennedy and Justice Scalia joined part of a
six Justice majority that upholds a fairly broad reading of federal power, federal power to regulate controlled substances.

My students, when we took this case, always say, "Why? Why did Justices Kennedy and Scalia support a broad reading of federal power when just a few years earlier, in Lopez and Morrison, Lopez, being a case involved in regulation of guns in schools, and Morrison being a case involving regulation of violence against women, why did Justices Kennedy and Scalia support a broad reading of federal power in the marijuana case, but not in Lopez and Morrison, the cases involving guns in your school and violence against women?" Because of politics? That's just the answer to that? Or did they have some legal principled reason for why they reached different conclusions in the different cases? That's one example where it services.

In my administrative law class, those sorts of same questions surface all the time. For example, when we talk about global warming, we talk about why was it in 2003, that the EPA denied a petition asking it to regulate certain emissions from motor vehicles that lead to global warming. We talk about whether it was for legal reasons. That was one of the reasons the EPA gave. Was that they thought they didn't have the statutory authority to regulate under the Clean Air Act? Or was it for political reasons or policy-driven reasons, or for scientific or technical reasons due to the lack of scientific certainty surrounding global warming? Or was it some combination of those factors?

Students are always very interested in trying to understand, is it law or is it politics? The same thing in my Supreme Court decision-making seminar. I'm really looking forward this fall to being able to talk with students about the upcoming confirmation proceedings that Dean Testy just alluded to, to be able to talk with them about some of the issues that I know we'll see surface this summer.

Questions like whether it's appropriate for senators to be asking nominees about their views on topics like abortion. Whether a justice's or a nominee's personal background and life story should or should not matter, as it seemed to have in the Sotomayor confirmation proceedings that we all saw unfold last summer.

So all of these sorts of questions that students are exploring in my class that help sort of highlight the intersection of law and politics and of the courts, all these sorts of questions I think are framed to some extent by a principle that students start out with, or an assumption that students start out with. Like they all seem to start out thinking about these questions by framing politics as a dirty word. They all seem to assume that politics is a corrupting or a tainting influence, and that it doesn't have any place in the legal world, or in the legal context.

So they seem to be following - I'll borrow from Christopher Edley now, who's a dean at Berkley who's written a book where he, relatively, in a nice succinct way, summarizes some of the negative attributes of politics and some of the positive attributes of politics. Many of my students and probably many of you in the room, if I had to guess, I think start out from the
standpoint of saying politics are viewed as negative in the legal context, and so you think of it as being associated maybe with willfulness, or perhaps subjectivity, or a tyranny of the majority, or the fact that it's non-scientific, not technical, not legal, perhaps. Not fair, not reasoned, perhaps.

These are all some of the negative attributes that I think many, as I said, in this room perhaps associate with politics, and many of my classes do. So in my own scholarship though, I question a bit whether we should be starting from that beginning assumption point of viewing politics as a bad word.

Some of the positive attributes that we could associate with politics have to do with democracy. That it helps further democratic principles, it's responsive, it helps further public participation and public dialogue, and it helps further accountability monitoring. These are some of the positive aspects that come along with politics.

So in my scholarship, one of the things that I aim to do is to try to question this notion that I think many have that politics just simply shouldn't play any role in the law and to think about situations where politics shouldn't necessarily be a dirty word in the legal context.

So what I thought I'd do today is focus on one concrete example of where I've sketched out some of my thoughts on this, and so I thought I'd focus on my Yale law journal piece, which is titled "Proposing a Place for Politics: An Arbitrary and Capricious Review," which was just published this past October, October of 2009.

So in the article, essentially, the question that I'm looking at is the question involving administrative rule-making decisions. So I'm talking about informal notice and comment kind of rule-making proceedings initiated by agencies, and the question that I was looking at is when courts engage in arbitrary and capricious review.

For those of you that have forgotten a bit what arbitrary and capricious review is all about, thinking back to our law principles, arbitrary and capricious review essentially is just a reason-giving requirement that's imposed upon agencies. So it tells agencies when you act, you must give us an adequate or sufficient justification, a reason for why you've acted in the way that you've acted.

So when courts impose this reason-giving or apply this reason-giving requirement in reviewing agency decisions, but they start from the assumption that political influences or political factors or political explanations could never help to adequately justify an agency's decision in a rule-making context. In other words, should they apply arbitrary and capricious review in a way that we demand technocratic, expert-driven terms, or instead, should we apply arbitrary and capricious review in a way that might be read to allow political influences to play a role such that we could say that politics sometimes helps to legitimize rather than dictate agency decision-making.
So that's the question that I started with in this project, and I start out by essentially trying to paint a descriptive picture of where we stand today, and so what I've determined as where we stand today is relatively clear. Courts agency scholars are like all of them essentially start from the standpoint today of saying agency decision-making needs to be technocratic or expert-driven. It seems to be the point that we're at.

So if you take agencies to begin with, for example. Agencies, when they explain their rule-making decisions, when you look at the statements of basis and purpose that accompany agencies' final rules, they're generally filled with cites to the statutes, to the science, to the facts, to technocratic reasons for why they made the decision that they made.

So they either affirmatively hide, or they just fail to disclose, fail to mention, all of the interaction that they had with the White House Office of Management and Budget, for example, or the interaction that they had with the President's staff, directions they got from the Executive Office about how to proceed, or maybe even the fact that they should be proceeding, that they should be opening rule-making proceedings. That just doesn't get mentioned.

So if we take a common example, if we think back to the 1990s when President Clinton - it was a major Clinton initiative to try to regulate teen smoking in the 1990s, and President Clinton, who personally announced the initiation of the rule-making proceeding by the FDA that was going to regulate teen smoking, and then when the rule was finally promulgated in a Rose Garden ceremony, President Clinton personally announced the promulgation of the rule, taking some credit for the fact that this rule had finally come about.

So it was really a major, major Clinton initiative, and yet, when you read through the extraordinarily lengthy statement of basis and purpose accompanying the FDA's final rule, you don't get any hint of the Presidential involvement. There's barely even a reference to the President's involvement at all. Rather, it speaks in technocratic terms.

So that's generally the norm. There's a few books, a few outliers I could talk about later if anybody was interested where agencies do mention political influences, but it's really quite rare. The FDA proceeding is more of the norm.

Judicial review is similarly very technocratic and focused today. Massachusetts vs. EPA, the global warming case that I just mentioned earlier, is a great example of that. In Massachusetts vs. EPA, when the court was reviewing the EPA's refusal to regulate greenhouse gases that come from certain motor vehicles, the court really seemed to demand expert-based decision-making. So the court said to the EPA, "Yes, you have statutory authority." So that was a legal question.

But then the EPA had said, well, even if we have statutory authority, we decline to regulate for a variety of policy-driven reasons. We don't want to step on the President's toes in the foreign policy arena, we don't want to have piecemeal regulation, this is an area that cries out for more comprehensive
regulation, and there's some scientific uncertainty, which also suggests to me to sort of wait for more comprehensive regulation.

Those policy-driven kinds of explanations, the court found inadequate. So in the end, the court seemed to be sending a very strong message to the EPA, which was go back to the drawing board, put on your hat as an expert and figure out whether these emissions endanger the public health and welfare. Figure out whether there is endangerment that exists here. So that's just an example of a recent arbitrary and capricious review case where the court engaged in this kind of technocratic model that's really come to be the norm today.

Scholars generally have followed the line of agencies and courts in terms of tending to accept the notion that politics shouldn't be proper. Accepting the notion that politics should be viewed as a dirty word, in other words. There are two really notable exceptions that I should mention. One of them is Christoper Edley, who's the Dean at Berkley, and the other one is Elena Kagan, who's former Dean at Harvard, and notable, or should be notable to all of us because she's currently Solicitor General, and she's one of the people whose name is being floated most prominently to potentially replace Justice Stevens on the United States Supreme Court.

Her article that touches on this topic, I think is an interesting one, to see if she has nominated, whether it comes out in the confirmation proceedings, because that's somewhat controversial, the fact that she's taking the stance that politics happens all the time in the administrative world. Her article is titled "Presidential Administration" and she chronicles the involvement of the President in administration. And she, at the very end, in a short section in her article, floats out some implications of this, and one of the implications that she suggests is that perhaps we need to rethink arbitrary and capricious review. Perhaps it does need to take into account political influences. That's sort of the path then that I go down in this article.

So Kagan and Edley are two of the anomalies that I should note in the scholarly world. But otherwise, for the most part, scholars have sort of started from the same standpoint, which is politics is bad. A bad word. It doesn't belong in the legal context.

So that's kind of the picture that we're at in terms of the descriptive picture, is that courts, agencies and scholars alike, seem to have assumed that rule-making proceedings, administrative rule-making proceedings, need to be viewed as technocratic in nature. So in my article, I make the case for change, the argument for change, once I described the state we're at and make the normative case for why we should move into a new model, a different model that would tweak arbitrary and capricious review. Not lessen it, but tweak it such that more factors would be accepted as adequate reasons justifying agencies' decisions.

So essentially, my bottom line argument is that what counts as a valid or an adequate reason for agency decision-making should be expanded to include political influences from certain political factors. The President, other high level executive officials, Congress. When those factors are openly and
transparency in the rule-making record, that's one key, because part of the basis for my article is trying to achieve greater monitoring and transparency and accountability.

So if it's not openly disclosed in a rule-making record, it doesn't count, and as long as the statutory scheme can't be read to foreclose considerations of the factors that are considered. I am not proposing that any and all political influences should be read to legitimize. Rather, you have to try and draw a line to some degree between good politics and bad politics, permissible politics and impermissible politics.

That is probably the hardest question that my project raises is: How do we actually draw this line? It is a tough one to draw. Is it going to be one that courts could police? Part of the suggestion, although this is tentative at this stage and something that I can think about in future projects. Part of the suggestion I have is we can roughly think of good politics or permissible politics as being those influences that seek to further policy considerations or public values that are in some way only generally tied to the statutory scheme or the statutory purpose that is at issue. But illegitimate political influences, on the other hand, they are not going to be tied to public values to the statutory theme, to statutory general purposes or goals. If they are unconnected in any way then to the public values with public interests, it would be viewed as illegitimate.

For example, raw politics, pure partisan politics, would fall, likely on the side of an impermissible one. So, what would all of this mean? To give you a concrete example. HHS, the provider conscience rule. Something that some of you probably read about in the paper. A Bush-era rule that forbid medical facilities that receive federal money from discriminating against health care providers who worked years to perform certain procedures like abortions. So when Obama came into office and the Obama administration was thinking about rescinding this, how do you go about explaining as the new Obama administration, why you want to rescind this Bush-era rule? In terms of my thinking, it would be legitimate for HHS to explain. Part of the reason why we are going to rescind this is because President Obama has publicly articulated his pro-choice agenda. He has explained why his pro-choice agenda helps to serve the public interests.

It wouldn't be permissible, of course, on the hand, if Obama's HHS said, "President Obama directed us to rescind the rule so that he could give kind of a favor, a thank you, to the various pro-choice organizations that supported his campaign." Of course that would be impermissible.

So again I am not suggesting there is not going to be a line to draw. There is one and that is the tough issue, just like the fact that those two examples I just gave you. One is on the easier side of the line, clearly, and one is not.

What sorts of benefits would flow if we moved towards this type of system? Why do I think it is worthwhile making this proposal? There is mainly four main benefits that I see flowing from moving towards a greater acceptance for politics, greater acknowledgment of politics in the rule making arena. The first one is doctrinal, essentially. It has to do with the argument that
there is some vacillation in administrative law doctrines between an embrace... Perhaps the myopic embrace right of expertise on the other hand, and an embrace of politics on the other hand.

So some doctrine like the famous Chevron doctrine, which tells us that agencies get deference for reasonable interpretations of ambiguity, seem to acknowledge a rule for political influences. Part of the reason why that courts say you give deference to agencies in that context is because when there are multiple reasonable interpretations... Not up to the unelected judiciaries to pick one or the other, rather that should be the choice they are asking the executive branch. And it can change their choice from administration to administration. So there is some tension between the embrace, to some degree, of political influences in that kind of a doctrine versus hard-look, which really hasn't moved towards embracing political influences at all. So that is one benefit that I see.

Another is that I think if you gave a role, an acknowledged role to political influences, we help create a better separation between science and politics. Think about all the articles that you read in the papers during the recent Bush administration that charge the Bush administration with having manipulated science. It happened in the global warming context in many areas where the charges thrown at the Bush administration saying that those that are supposed to be acting in a scientific manner have manipulated the science or manipulated the data to serve political end.

Whether or not those charges are true, it certainly highlights the fact that there can be some pressure on agencies to feel the need to line up science with the preferred policy outcome in certain circumstances. So do you give both a role rather than focusing only on one side of the equation? Then perhaps you'll take some pressure off that problem.

The third major benefit that I see, which is more of a minor one, has to do with dealing with this ossification charge that's often thrown against arbitrary and capricious review. Many argue that "hard look" review, by having agencies give us this long laundry list of reasons for why they've done what they've done, ossifies or slows down the rule-making process. And so, if you give courts yet another reason for deferring to agencies, then perhaps you can help soften that ossification charge. Although, by no means, do I think it will eliminate it.

The main reason that I think this is beneficial, the biggest benefit that I see flowing from my proposal - has to do with accountability and monitoring. By bringing these political influences out in the open - influences that everyone acknowledges are going on all the time - from underneath the rug, we're going to enable greater accountability, greater monitoring, and greater transparency, which is really where I see the biggest benefits lying. But I'm not naive. I know that this requires some significant change, and there will be a lot of hurdles and obstacles in the way of getting a proposal like this to succeed.

I think there are really five main objections that you might think about. The first would have to do with whether the carrot that I'm offering needs to be
balanced by a stick. The carrot being if you disclose these influences then you can get some additional level of deference from the courts. Do we need to balance that with a stick where we tell agencies, if you fail to disclose these influences, you're going to be penalized in some way?

And that's something that I do think is really worth some thought. There's a new article coming out this spring by Professor Nina Mendelson at Michigan, and she argues essentially for just that. She argues that we don't know enough about political influences.

Like me, she says we all know it's going on. It's going on all the time, but it's not disclosed. And so, her bottom line is we can't figure out what's a good political reason versus a bad political reason without at least having the reasons disclosed.

So let's pass a statute - here's one of her main suggestions - that mandates some disclosure, at least disclosure of certain communications. Primarily, she's focused on communications between OMB and the agencies, mandating that they disclose some of these influences. So if you went down that path then I think you'd have your stick provided more easily to help balance the carrot that I'm dangling out there.

Another concern is that separation of powers issues might be raised. There's judicial dislike of politics. Again, many judges like my students and like many of you in the room just think of politics as being a dirty word, so that's likely to get in the way.

The difficulty of judicial review is how manageable would it be for courts to draw these lines between good and bad politics? Is that something that would ever be possible? That's another one of the obstacles that I have to deal with and try to deal with in my paper.

And finally, there's what you could think of as the "chicken-and-egg" problem, as Ed Meese put it, or the "first mover" dilemma. Are agencies going to be brave enough to start acknowledging that these sorts of influences are influencing their decisions, when they're not sure what courts are going to do?

Or will courts send some signals to agencies ahead of time to try to enable some guinea pig to step forward and start relying upon these considerations? So there's that "first mover" dilemma also that might stand as an obstacle towards achieving change in this area.

So that's just a quick highlight of some of the obstacles. I'd be happy in Q&A to talk about in more detail some of my main thoughts on those. Hopefully, this gives you a sense of it. One of these concrete projects of mine is meant to try to struggle with this question of whether we should always be assuming that politics doesn't play a proper role, or shouldn't be able to play a proper role in the legal context. So I'd be happy to answer questions.

[applause]
Donna?

[pause]

Yeah. I do think there are a couple of things to keep in mind, in terms of executive versus independent agencies that could be quite significant. One is under my proposal, if a statute can be read to foreclose political influences from being a permissible decisional factor then, of course, agencies shouldn't be able to take that factor into account.

So with independent agencies, some of how they were created, some of the legislative history behind the statutory schemes supporting their creation, could be read potentially to suggest that political influences are not a relevant decisional factor that should remain on the table.

That suggested--there was a recent case. The frigging expletives case, the FCC versus Fox, where Stevens actually talks about the legislative history behind the creation of the Federal Communications Commission. And he makes sort of a point along those lines. That it was meant to be an agency that's supposed to be insulated. Of course, that's the reason why it's an independent agency.

So I think that's something that you'd have to think through. Is the statutory scheme with respect to the independent agency that you're talking about and whether it would foreclose the consideration. But if you get past that hurdle and you assume that this specific statutory scheme you're talking about doesn't foreclose political influences as a relevant decisional factor. Then I'm not sure that it matters so much if it's independent or executive, because independent agencies of course aren't independent from politics.

William makes this point in the FCC case. They're just insulated from the President, but not from politics. And so again I think the same benefits would flow if you get them to disclose the political influences. Maybe they're coming more from Congress than they're coming from the President. But the same accountability and transparency and monitoring principles should flow, whether you're talking about executive or independent. It's just that there's a bigger hurdle to get over for independent in terms of whether it's a permissible decisional factor, I would say.

[pause]

Yeah. If you go down that path then it just helps, as you say. It helps support my position that at least as to the executive agencies, it shouldn't be all that controversial. And yet it is, right? So why, why is it so controversial? Why is it so hard for so many people to stomach the notion that we now know?

As I said, politics play a role. Why is it so hard to stomach the notion that we should have those roles brought out into the open? Particularly, as you say, when we're talking about executive agency?
Yeah.

[pause]

Yeah.

[pause]

Yeah. The FDA and EPA are two that have faced a lot of press lately, right? A lot of attention in the public eye for what people would view I think as tainted decisions or bad decisions. You can't answer it. In my mind, you can't answer it blanket across the board as to the EPA as a whole. It's either OK or not OK. Again it's going to depend on the specific statutory scheme that we're talking about, the relevant specific statutory provision.

In Massachusetts versus EPA, we're talking about the EPA. But we're talking about the section 202A of the Clean Air Act. And whether the statue forecloses certain decisional factors or doesn't. In my mind the statute didn't say anything about the decisional factors that should factor into the mix when an agency is deciding whether or not to initiate the rule making proceeding. Just going to be a bit more specific...

[pause]

Well, if you've...

**Woman 1:**

That's why you're getting law involved.

[pause]

**Kathryn:**

I think implicit in your question is the assumption that if you had a case where the facts and the science are clear, right? As to the answer, it's clear that substance is harmful and needs to be banned. Or if it's clear, right? What the answer should be, based on science or facts. I'm not suggesting that politics should be allowed to come in, that an agency should be able to rely upon politics to trump science. But while they're in those situations which are muddy, where there's not a clear answer based on the science or the facts. There's not a clear answer based on the law. Rather, there's multiple open options. Or perhaps the science and the facts lean more heavily towards answer A but don't rule out answer B. It's in those situations where it would be much more helpful to see the political influences brought to light.

Your question asking about the EPA and the FDA brings up an example in my mind about one situation where the FDA recently was said to have engaged in doing bad politics. The Tamino versus Totti case, which is an interesting one involving a drug, Plan B. Emergency contraception. The case is particularly interesting because it's not very often that we can actually get the discovery to find out that the bad politics was going on.
That's part of the problem with this. And that's why maybe Nina Mendelson's proposal that we need an actual stick to force disclosure, maybe that is the right route. But in this FDA case that I'm thinking of involving the drug Plan B, the litigants have made a strong enough showing of bad faith on the part of the FDA that they were able to get the discovery they needed to have the court ultimately determine that the FDA had acted in an arbitrary and capricious manner.

But they were aided. The litigants were aided by the fact there was a GAO study into the issue. There had been a lot of attention to that particular issue involving Plan B, which helped them to prove that there were really bad politics going on there.

[pause]

Yeah. The desire to see agencies again, which is implicit in your question, as being scientific and being factual, right? And you say, "But they're not." And that's part of... I think, my point, right?

That in those situations where it's not facts and it's not science always driving certain decisions. Where it's really much more of a policy choice, and wouldn't we like to know what those influences and those factors are that are making the decision come to outcome A or B? So that we can hold the decision makers accountable, so that we can benefit from accountability and monitoring, so I think I'm copacetic to some degree to the points that you're making.

[pause]

I see that I'm just running out of time. And I don't want to eat up Sean's time. So I should probably hand over the mike to Sean, I would think.

**Man 1:**

Very good.

**Kathryn:**

Thank you.

[applause]

**Sean:**

Thanks.

[pause]

**Sean:**

OK. Thanks, Kathryn. Now we're going to switch gears a bit. OK, about something different, about law and entrepreneurship. We will actually get to some bio-tech stuff though, in the very glancing kind of passing way. The
title of my talk is "Bridging Law and Business," teaching research and clinic innovations in law and entrepreneurship. What I'm going to try to do in 20 minutes. And I'm always overly optimistic about what I can get done, is talk about the interface of lawyers and entrepreneurs in the first place. What it is that lawyers do with and for entrepreneurs? Talk about the innovation entrepreneurship ecosystem. Which actually is a focus on attention now, in part by the Obama administration, without a call for information actually on how we help build innovation ecosystems. That's actually very exciting personally to me because it's something I think it quite important and is something I've been trying to do through the clinic and through a lot of the things I'm going to talk about today.

And then, not surprisingly, I'm going to bring it into professional schools into the law school but also into other professional schools on the campus and talk about how those places can be the locus of advancing innovation ecosystems. Both making it happen, studying, thinking about it.

Then I'm going to shift to a more theoretical approach to talk about a new way of thinking about law innovation entrepreneurship. How they go together and how many disciplines in fact work that will then help us reintegrate teaching research and service.

As Dean Testy said, they shouldn't be separate things. Sometimes they are separate things. There has been a trend to separate them more and more and I think that they truly can be brought together and reinforced.

Is there a field of law in entrepreneurship? Insert reference to law of the horse or whatever other kind of thing, right? We make up fields on law all the time. We have cyber law and biotech law, just to say that I do some work in. Are they really field of law? They're not contracts, they're not torts, they're not standard legal categories. Are we just kind of making this up? Well, sort of.

Another way to think about legal fields, and this is particularly I think, how a lot of practitioners have come to view legal fields, is they do say there is a field of biotech law or cyber law but what they mean is it becomes industry or client focused, or rather an activity that is going on. There is a bunch of ways law interfaces with that area and that becomes the field.

That leads to the next thing. Are we just hybrid specialists? At times in my career, I think I've portrayed as IP/corporate securities and I've always been trying to say: "No, I actually do one thing. I do commercialization and entrepreneurship." To do that, particularly in the technology space, you need to cover a lot of different areas of traditional categories of law. Again, intellectual property, corporate law, securities law, things like that.

That leads to the next problem. Are we really jack of all trades, master of none? I admit to that frequently. I find myself in my classes often saying: "I'm not a master of this but I'm going to tell you what I think about that field because it's relevant." You need to think about that. Let's say tax, say Sam or somebody else who really knows tax, so I fake tax in the classroom and then I quickly disclaim and say: "See Sam, he can talk to you about tax for real."
For this problem in front of us right now, even if we're in a securities law class or an IP class or a biotech law class, we can't ignore that. We can't separate everything artificially and say: "All we can talk about right now are the patent issues." That leads to an odd way of viewing the clients problems and what we do as lawyers.

What's the core of law and entrepreneurship? For me, it really is governance and deals. What do I mean by that? Governance is how you put together the legal entity in which the entrepreneur is going to do his or her business venture. The deal is any of the transactions or the relationships among parties that are memorialized in contacts. They are much richer than just the written contract. There is more going on there but I think you can break it down into governance and deals. Focusing on those issues.

A question that comes up frequently is, is this even the practice of law? Some state bars have angsted about this. Why? Well, because if you're trying to say what is unauthorized practice of law you have determine first what the practice of law is. We kind of skirt the boundaries somehow because there is nothing that prevents parties from writing their own contract. We, as lawyers, might think we can help them do it better. Even in front of the patent office, if you're an inventor you can get your patent issued just between you and the patent office. You don't need that patent lawyer.

On the other hand, there is a lot of value add that we do. There is this question lingering out there. That exacerbates this sense of what is exactly is this that we do?

And now to complicate it even further. For lawyers who work with entrepreneurs it's not even just trying to have some handle on multiple areas of law, it's multiple disciplines too that you have to have some working knowledge of to be effective with your entrepreneurial clients.

Professional schools can and do serve as a hub of teaching research and service for entrepreneurship service providers. I threw that word in and that throws it off a little bit from what might you normally be thinking about when I say: "I have an entrepreneurship program at a university."

Traditionally it's not that old of a field but a lot of entrepreneurship programs are in the business school or maybe the engineering school but they need to focus on training people to be entrepreneurs. Of course, that's a great starting place. We think we want entrepreneurs, you may disagree with that but if we want to entrepreneurs we need to have a place to have them thinking about how to become entrepreneurs.

The focus of this talk is not to train people on how to be the entrepreneur but how to serve the entrepreneur. To help the entrepreneur to achieve their goals. That's why I threw that word in here and that's what we're going to focus on for the remainder of this talk.

Still, law, business and engineering schools, even though these latter two often mainly focus on producing the entrepreneurs, they all can and should work together to help develop entrepreneurship and it's full ecosystem.
discipline now, law, business and engineering and the subcategories within those, need to understand the other and the entrepreneur.

Why? Well, because when an entrepreneurial venture is moving forward, there is a cast of supporting players who have to come together and coordinate their activities. It's not just the lawyers, it's the accountants, business consultants, a whole range of folks who have to come together and coordinate their activities to the entrepreneur. They also need to understand what the other is doing.

It doesn't mean I need to become the MBA and that probably never will happen. I won't be as good at churning out those spreadsheets and doing things like that but I have to understand at least enough to read the spreadsheets and read the financial statements.

On the flip side of that, each of us who is sitting in a specialty area needs to meet the other one halfway and figure out how to communicate the concepts of our field and the important things we are doing in accessible language and context.

Bringing these things together and allowing teams to work together to start understanding how to coordinate your activities is quite critical. It is also critical to understanding the ecosystem itself.

First steps. What have we done so far at the law school? Well, we have the entrepreneurial law clinic that I started a few years ago. It's actually a joint venture of the law school and the Foster School of Business. In particular, the center for innovation and entrepreneurship there. What we focus on again, is serving the entrepreneur and not being the entrepreneur.

We haven't really defined what I mean by entrepreneurship yet. These categories of the clients we serve will help give a sense of how the full range. Even though a lot of times I made default into sounding like I'm talking about just technology entrepreneurs, I actually always mean to be speaking more broadly of entrepreneurship.

I'm including first and foremost, low income micro-entrepreneurs. No technology involved at all. They want to start a store or some kind of craft activity or any number of things. Small micro-entrepreneur because they want two or maybe three people involved, max. How do they get there venture going.

And yes, of course the technology stuff; high-tech life sciences, clean green tech. Also nonprofit and social ventures. Seattle is a great place now because we have a lot of social entrepreneurship going on. We always have but in particular, now there are a lot of twenty-something's who are out there doing all these great amazing things. A lot of whom have come into the clinic for help launching their venture.

We also work with UW's Center for Communication, it used to be called Tech Transfer, to help the researchers at UW think through how to spin-off UW technology. There's a lot of different ways you could go with spinning
off a technology including just licensing it to a big establishing company or building a startup venture around it. How do you think through what's the best way to go?

We are also part of and partly funded by NAH through the Institute of Translations Health Sciences. There again, we help not only UW researchers but all of the researchers who are at institutes who are part of ITDH. We help them think through what they can do with the great science breakthrough they have, advancing it from being "cool science" into some sort of product or service that can actually help cure people, help diagnosis illness, etc.

The basis of the clinic then, from the student's perspective, is experiential, team-based learning among MBA students. So each team in the clinic has three law students: IP focus, corporate law focus, and tax law focus. And they work with MBA students from a range of the MBA specialties, whether it's accounting and finance, or management operations, marketing, and things like that. And that team then serves the client and goes over - as I'll talk about in a moment - all the legal and business issues that venture might face.

We also harness the experience of local attorneys and business executives because they supervise the student teams. This actually came about as a completely pragmatic fix to the fact that when I got here, - as a regulatory, so-called doctrinal, faculty member - I didn't come here to build a clinic. I was not a member of the Washington State Bar, and so, we had to go back and forth as to whether I could actually supervise a clinic, when I decided, for whatever odd reason that I wanted to start a clinic.

So I figured why don't you just use local practitioners? They can supervise. Later, I did end up coming into the Washington Bar. But I discovered that this was a great mechanism because it could scale-up the clinic more. We have more supervisors. And we get the students working with local practitioners, so they're not just talking to me.

They're talking to potential future employers, and it brings that practitioner community back into the UW, in a way that's not just about us going out and doing some fund-raising. Fund-raising is important, - I'm looking at my dean here - but it's not the only way in which we should involve our community.

What does it do for the attorneys? Well it gives them targeted, pro bono opportunities. A lot of the attorneys we target to come and supervise free legal services are ones who don't normally fit in with regular pro bono opportunities. Normal pro bono opportunities, or at least traditional ones, are often around criminal cases, or landlord/tenant, or asylum cases. There's a whole range of things that are still, I think, truly the heart of pro bono services. The neediest people need these kinds of services.

But why leave our corporate attorneys, our IP attorneys, and tax attorneys with no pro bono opportunities, or force them to go and act in an area in which they don't have real expertise, when we can have them help us in the clinic to help poor folks who want to start a business? So that's worked out quite well.
A service that we do is we don't just do any kind of random thing for the client. We have a highly-structured legal and business audit that we make all of our clients go through before we'll do any other things for them. And as long as you do a due diligence type of exercise, we want the client to have a chance to undergo the kind of intensive analysis that an outside investor, or a bank that might loan them money, or anyone else who might be looking at them later on will do to see whether this business seems sound, or be successful.

Serial entrepreneurs are quite good at doing this kind of analysis of the venture before they launch it. They also, if they have enough money, are used to bringing in specialized attorneys to help them think through it. First-time entrepreneurs don't have this. Lower-income folks don't have this. So we give them that kind of a service.

And moving forward from that we do what we call preventive legal services. And we help them establish and maintain proper documents, procedures, and governance. All these are good housekeeping things to make sure they don't make what seem like minor missteps in the early days that can become major problems later on and lead to litigation.

And an easy way to think about this, my motto has become "I don't want any business to fail because of some dumb legal issue. A business should fail on its own merits". That sounds harsh. But think about it. That's what should happen. It turns out there's not really a market for the product. OK. You gave it a chance and you went for it. It shouldn't fail though because of some little legal thing.

And then, we will sometimes do other transactional procurement compliance. By that I mean some trademark issuance, and things like that as indicated. But we try to hand off these clients, once we've brought them through the audit service to regular counsel, and try to get them in a situation where they can afford regular counsel and move them on from there.

Now, I also started revamping a lot of so-called doctrinal courses. They are sort of in hand with setting up the clinic because I also tried to teach in the area of transactional law analogue, you know that the other traditional law school teaching method doesn't do so well for transactional law. It doesn't help you understand what deal lawyers are really doing.

And so, when I started doing them was doing course long hypothetical or case studies. It is kind of a simulation where we have the same cast of characters from the beginning of the course through to the end. It is often some business that is being formed. We got concerned that it's kind of a one trick pony thing for me but if it is a really good pony and a good trick, just keep riding it.

So it hasn't fill me yet. We followed the life cycle of a business or deal. OK. So starting in the beginning, where is it all go? And if you are kind of crafty about it, artificially manipulate some things. You can kind of trigger all the main topics you wanted to cover in the course of the doctrinal matter. But do it because it's triggered by something that happens in the hypothetical. OK.
As you march along through the quarter. And then for good measure then, we also do some negotiation and drafting of governance and ideal documents. We get to policy for thinking about the impact of legislation and rule making on business. A lot of areas that I think about teaching again in high tech fields that are constantly undergoing scrutiny.

There is a lot of rule making that is happening related to them. So it is kind of easy. I just sit back and wait for something else to come out of Washington DC and then drop them on my students and say, how does this impact? This thing that just happened. This rule that just came out are the business that we are talking about. You have to analyze and why.

The heart of what I'm trying to do then is to teach them to think about the law business kind of hybrid space. OK? And in particular then, I started using the term private ordering that other people have been using in a legal editor for quite a while now. I'm not sure if it's entirely for what I'm trying to deal or rather it may only cover part of it. But it is the only term I can find that everyone at least sort of uses and understands.

Private ordering is often a term used when you are going to have an ultimate kind of a governance dispute resolution mechanism. So it is like an alternative to the courts. It's like a kind of a private ordering system. But I mean it's a cover not just the kind of law of the entity, governance thing but law of the deal. And so thinking about it that when you have parties enter into contracts, particularly kind of contracts that will set up a relationship that will last for years not just a one off, one shot deal.

That then they are very much a sort of area of law that... Set of law that is created and I'm captain of that under this private ordering term as well. OK. Now, part of ordering and I tried to teach my student is happening within the bounds of statutory, regulatory in Kate's law. And so it means that I do something a little unexpected from my students, they've gotten very good to the first year, what not at learning how to think about case law first and foremost.

And then even statutory regulatory law and I say to them push that all to the side, OK. That's all good stuff but now, we'll come back to this in a second. This is what I'm really talking about here. What I am going to try to teach you about is what goes on or what I call the free play zone. I am just making this stuff out right? But I said I'll practice what I preach. This is what... We are doing the transactional page, right along, we are just making it up, OK.

Now, we are making it up in a bounded environment though. So, we have... Let's say you have a bio tech start up or try to think about how to form this tech? So it is not just a matter in of filling in a simple articles of incorporation's, some pre-print form like the one the Secretary of State has online. It's much more new ones than that and you have to think about creating exactly the kind of entity you want, exact kind of governance mechanisms.

The deals that we are going to be struck with all the players involved. And all of these has to be done within the bounds of securities law, cooperation's
law, IP, competition law, just to name a few things. FDA and human subjects and regulation. But still this is a zone left in here in which you have some legal room. Actually quite a lot of wiggle room often.

And in some ways, you can look at the evolution of a lot of statutory law as looking at how tightly you shrink that pre-play zone. So at different times in the history of this country and other countries, the zone gets shrunken down and it's very little area of movement. And other times, it gets to be quite large.

Now, the documents we used though as opposed to statutory are regulatory documents. They are almost always a blend of law and business language and concepts. So, they are very much in this hybrid space. And the challenge is that traditional law and even MBA training doesn't really get you where you need to be to understand that.

An example is a venture capital deal. To hear the businessperson talk it's almost this sense of, it's a private financing so it outside of the security laws entirely. Well no, it's actually no outside of it at all. It's in here. Think about all of the zoning laws and securities. You have a safe harbor in which you might be able to structure your deal but how you structure it is going to matter quite a bit as to whether it stays within the free place safe zone or whether it goes outside of that.

In key deal terms, other than just the price of stock, price per shares and price of purchase, are actually very much legal terms that are going to be negotiated. Especially if your using preferred stock. Registration rights, meaning can the investors force the company to register the stock the SCC so it can be sold freely and trigger an IPO. Liquidation preferences, who gets paid out first it there is a bankruptcy of the company. Voting, how many votes per share. Do you get board seats? All these things are legal and nature and yet they're not defined or limited by the state corporations law in what you can do. You get the free play zone and you have to decide how you want to set that up.

IP strategy is similar. I said, with a little hyperbole here: "Anyone can get a patent issued." I know that if there are any patent lawyers in the room, you'll cringe at that. Although on the other hand, real good patent prosecutors will nod a little bit and say: "You'll always get some kind of claims issued." The question though is, how well do they map on and serve what the client is actually trying to do? Does that final patent that gets issued actually achieve the goals that business needed?

And further, IP is not just all about patents. In the kind of way I do intellectual property and most entrepreneurship do, is again it's this hybrid legal business counseling. It has to incorporate all IP tools; copyright, trademark, patent, trade secret and also related areas such as publicity rights as applicable, privacy, contractual means to protect data, and know-how materials, et cetera.

What's the big idea here? It might be sounding like I'm ending towards a model of law school that's going to be the dreaded trade school model. Skills
based and all we do is teach students is how to shuffle paper and fill out forms. I would try to fight against that. No, what happens is we have a false dichotomy that's been set up. We have this trade school versus academic notion. Two very different models. Practice skills versus theory. I'm rejecting that.

I'm saying invoke the 80/20 rule and realized that there is a 10 percent on one extreme of pure skills and I mean that in the negative sense that people use it. Anyone can be taught. A paralegal can be taught to fill out a form but that's only the ten percent of what you would need if you're thinking richly about skills and the stuff I want to talk about.

At the other extreme you have pure theory that is completely untethered from what's going on in the real world. My argument then is that 80 percent of what we really should be focusing on and what everyone should mostly care about is actually something that blends these things. It's in the middle.

Now, I'm am going to go very theoretical on you. Invoke Aristotle. Release Aristotelian terms. I'm applying my brief tour through graduate level philosophy and hijacking some terms I learned along the way. Because I didn't learn enough about them, I think I can just freely use them for whatever I want. Actually these should hue pretty closely to a lot of ways these terms have been used historically over time, but I do want to recapture them in a new way.

Episteme is a profession or field body of "scientific," and I'm putting that in air quotes, knowledge or facts. I'm not trying to talk about this as theory. Theory is something that can happen in any way of practicing. It's not just the knowledge you have but I'm using the term practice here. When you think about the traditional dichotomy between theory and practice, we think about as if that's all that lawyers or any professional thinks about. You are doing something actively in the world or you're just thinking theoretically and that's not what I'm setting up with this episteme.

Episteme is just the generally accepted principals or knowledge points within a field. I'm putting "scientific" in air quotes because I don't mean it to be Science with a capital s. I just mean science in an older sense of the term science that just means to study an area. In fact, I know this will sound controversial, but you could have a science with a small s, the science of astrology, not to say astrology is scientific in the way we think of science today, but it does mean you could say: "Well, I could study what astrologers do or claim to be doing and study the steps they claim to go through. The reading of tarot cards. That could make a science out of something.

That's all I mean by episteme. It's just saying what is the generally accepted set of principles and facts that a profession taps into when they are doing their field. The temptation is to use the word "practice" to mean "doing." Thinking like a lawyer.

I loved it when I was in philosophy and we would now do philosophy. I didn't understand how you would do philosophy. I thought philosophy was just learned but there are active ways of doing it.
I'm using the term practice to mean what problem needs to be solved at a given time. Your client comes to you and does the practice part. They say: "I want to start a business." Getting back down to the mundane here. You now take the role of the lawyer and any professional is techne. Techne meaning an artisanal ability to bridge between episteme, the generally accepted principals of that field that your going to use, and praxis, what the end result is supposed to be, to craft and deliver innovative solutions.

Why I don't want to use the terms tran, praxis for these things here is because techne will have it's own theory and practice aspects to it. That's what we really need to be focusing on in professional schools. This is really what we as lawyers do, whether we're in the academy or whether we're practicing.

It's true that in the academy we might tend to be the place that systematizes the knowledge that the practitioners are using but we are also thinking about systematizing and thinking about the ways in which it gets done.

If you take any field you have your episteme, your client comes to you with something you need to do, the techne then mediates between those things. It gets even more complicated because the professional here is not just tapping into one body of knowledge, on episteme. There's multiple ones.

As I mentioned before, when I work with entrepreneurial clients I have to think a little bit about IP law. What are the standard principles there? Little bit about corporate securities law, a little bit about tax.

Entrepreneurs do something quite similar, any professionals do. Entrepreneurs are saying: "OK, globing warming seems to be a problem. There's probably a market for goods and services that will somehow combat global warming or help us do more green technologies." They then act as this techne change agent to establish things that are there and come up with a whole new kind of solution that actualizes the substatic knowledge that is in those fields.

There's much more to that than you can probably guess. It's the book project that I'm working on during my sabbatical right now, while I'm standing here. No. If anyone is interested in the book topic, I will give you more on that.

The play that this gives us is we can basically reintegrate teaching, research and service by focusing on this techne space in this techne model because it's both a research and a teaching agenda. It helps us to understand and study how innovation actually happens in all fields and at all levels. Innovation in legislation. Innovation in administrative rule making. All these things, you can use this techne model to do that. It helps us to teach the next generation how to operate across the full spectrum of their profession not in some narrow construct of theory versus practice.

It's more than just technique, which is one of the historical uses and that's why I want to clarify that. It has it's own theory and practice aspects. Think about the things we use in law like the theory of the case, the theory of the
deal. It's very much about the active practice of the field yet it is bonafide theory.

Our service then, as a professional school comes from delivering on this new teaching agenda. We both sort of study it and do it at the same time. Just to give you a little preview, this summer we're going to be working on a new law, business and entrepreneurship program that will be somewhat based around this agenda. We will then be looking at how we can become a major hub for thinking and training in the areas of law, business..