

The **BOISI CENTER** *for*

RELIGION *and* AMERICAN PUBLIC LIFE

Symposium on Religion and Politics

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Christian Conservatism

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Religion in the Classroom

M. G. "Pat" Robertson

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RELIGION IN THE CLASSROOM*

M.G. "Pat" Robertson**

In this essay, Chancellor Robertson addresses the role religion has had in society, and in the public schools in particular. He stresses the significance religion had to the Founding Fathers and in the inception of a public school system in America. Chancellor Robertson maintains that the remnants of our country's religious heritage can still be seen today. He warns, however, of the dangers that can result, and in fact have resulted, because of the absence of religion in modern society. Chancellor Robertson argues that many Supreme Court cases have distorted the Establishment Clause, resulting in numerous violations of students' freedom of religious expression. He concludes by urging that many Americans want religion returned to the public classroom and to its place in society.

* * *

Thank you very much. I appreciate that gracious invitation and also the privilege of being here to address this distinguished group in such distinguished company, including the dean of the law school, Dean Krattenmaker, who is himself a noted constitutional expert and served as a clerk to Justice Harlan of the Supreme Court. So I feel somewhat humbled to be in the midst of such distinguished legal talent, but I hope you will bear with me.

Several years ago, the American people were horrified to learn of the gang rape of a teenage girl by a group of teenage boys that took place in a crowded pool hall in a seaport town in Massachusetts. Imagine the scene. An innocent, young woman was seized by six ruffians. She clawed desperately to free herself from their grasp. Yet, they were too strong. She screamed for help, yet the patrons looked on indifferently. Her clothes were ripped from her body, then she was pinned down on a pool table while one

* This is, in essence, the original speech given by Chancellor Robertson at the symposium on "How Much God in the Schools?", sponsored by the Student Division of the Institute of Bill of Rights Law at the Marshall-Wythe School of Law, College of William and Mary, on February 23, 1995. Some minor edits have been made for the sake of clarity, and explanative footnotes have been added to update the reader and support Chancellor Robertson's assertions. For a full and academic discussion of the points of law raised in Professor Nadine Strossen's essay, please refer to M.G. "Pat" Robertson, *Squeezing Religion out of the Public Square—The Supreme Court, Lemon, and the Myth of the Secular Society*, 4 WM. & MARY BILL RTS. J. 223 (1995).

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after another of the young men violated her body, her dignity, her very soul. They stole her self respect. They stole her hopes and dreams. They stole her trust in people. And, worst of all, they stole her virtue and her faith in God.¹

Rape is a horrible crime, but my message tonight is not about the brutal rape of a young woman. I want to tell you about a much more insidious rape, a rape that has been repeated over and over, a rape that was not directed against the virtue and self worth of a few individuals. I am talking about a rape of our entire society. A rape of our nation's religious heritage, a rape of our national morality, a rape of time-honored customs and institutions—yes, and, especially, a rape of our governing document, the United States Constitution. Who is responsible for this violation? Consider these suspects: learned Justices of the Supreme Court, joined by so-called legal scholars with multiple degrees from prestigious schools of law, and paid representatives of such benign sounding organizations as the American Civil Liberties Union.

Of course, back in 1962, some of us screamed for help as the garments of civic virtue were being ripped from our society. We cried out in anguish as each successive assault tore something precious within the viscera of our nation. But, like the bystanders in the Massachusetts pool hall, few heeded our cries.

Ladies and Gentlemen, I submit to you tonight that after forty years of repeated assaults, our nation is battered and torn asunder, and that many of our children, like the young lady in Massachusetts, have lost faith in ultimate goodness because they have lost faith in God.

Consider the facts. After a forty year assault on religious faith in our schools and public institutions, the liberal predators have given our nation the following: America leads the world in the use of illegal drugs. America leads the world in pregnancies to unwed teenagers. America leads the world in abortion. America leads the world in violent crime. America leads the world in the percentage of the population incarcerated in prisons. America leads the world in divorce. With thirty million problem drinkers, America is second only to France in the percentage incidence of alcoholism. In reading skills, America's students fall behind students from every other developed nation. Americans with serious reading disabilities (at 83,000,000) comprise almost one third of the population.²

¹ UPI, Mar. 18, 1983, *available in* LEXIS, News Library, UPI File (search for records containing "rape" and "pool").

² KEITH A. FOURNIER, *A HOUSE UNITED? EVANGELICALS AND CATHOLICS TOGETHER—A WINNING ALLIANCE FOR THE 21ST CENTURY* 121 (1994); PAT ROBERTSON, *THE TURNING TIDE: THE FALL OF LIBERALISM AND THE RISE OF COMMON SENSE* 21, 192, 214 (1993); *see also* William J. Bennett, *Getting Used to Decadence: The Spirit of Democracy in Modern America*, 477 *THE HERITAGE LECTURES* 3 (1993) (Address Before the Heritage Foundation's President Club). *See generally* DAVID BARTON, *AMERI-*

What solutions do our liberal leaders offer to solve the moral dilemma they have created? Guards and metal detectors at the entrances to public schools; machines to dispense condoms in the male and female washrooms of high schools and junior high schools; one hundred thousand new policemen on the streets; 8.3 billion dollars in new appropriations for prison construction; mandatory sentences for convicted felons; life in prison for three-time criminal offenders. And, of course, many voices cry out for expanded executions of criminals by electrocution, gassing, or lethal injection.

Yet, in the midst of social and moral collapse, the American Bar Association recently warned of the danger that would come to America if little children could once again be allowed to acknowledge God in America's schools.³

I submit to you tonight that such a position is utter nonsense. I call on the ABA and each of you to heed the words of a former graduate of William and Mary, George Washington,⁴ who presided at the Constitutional Convention and then became our first President. He said the following: "Let us, with caution, indulge the supposition that morality can be maintained without religion . . . reason and experience forbid us to expect public morality in the absence of religious principle."⁵ I repeat his words for emphasis: "reason and experience forbid us to expect public morality in the absence of religious principle."⁶

To paraphrase the nation's first president, without religious principle to guide them, people will tend to be immoral and careless about marital obligations. They will, if it suits their interests, lie, cheat, steal, commit violent acts, and abuse drugs and alcohol. Guards and metal detectors, more prisons, and expanded death sentences will not deter them in the absence of religious principle.

America's second president, John Adams, another key figure in the drafting of the Constitution, believed that freedom under a democratic system of government was only possible to a people with inner moral self-restraint. I quote the remarks of Adams made shortly after the conclusion of the Constitutional Convention: "Our Constitution [is] made only for a moral

CA: TO PRAY OR NOT TO PRAY? (1994); DAVID BARTON, *THE MYTH OF SEPARATION* (1992) [hereinafter BARTON, *THE MYTH OF SEPARATION*]; WILLIAM J. BENNETT, *THE INDEX OF LEADING CULTURAL INDICATORS: FACTS AND FIGURES ON THE STATE OF AMERICAN SOCIETY* (1994).

³ Tony Mauro, *Lawyers Lodge Objection to Parts of GOP Agenda*, USA TODAY, Feb. 15, 1995, at 2A.

⁴ Technically speaking he is not a graduate, but rather a licensee. In 1749, George Washington was granted his license as a surveyor by the College of William and Mary. JOSEPH N. KANE, *FACTS ABOUT THE PRESIDENTS* 8 (4th ed., 1981).

⁵ 35 WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745-1799, at 229 (John C. Fitzpatrick ed., 1940).

⁶ *Id.*

and a religious people. It is wholly inadequate for the government of any other.”⁷ To put Adams’s words another way, constitutional government, as we know it, is no better than the religious faith of the people. If the religious faith of the people is eroding, constitutional freedom will be eroding along with it.

In fact, both Washington and Adams realized the truth found in the Proverbs of King Solomon, who wrote: “Where there is no vision of God, the people run amok.”⁸ Indeed, where there is no objective standard beyond the changing whims of a transitory political or judicial majority, the people can find no transcendental truths to which they can adhere. If people do not believe in eternal rewards or eternal punishments, then they readily ask, what harm can there be in hedonism (if it does not raise their cholesterol level), or lawlessness (so long as they do not get caught)?

I submit to you tonight that those who misuse the Constitution to exclude religion from the schools, the public square, and the deliberations of elected bodies are those who are the true enemies of the Constitution itself.

As we consider religion’s role in the classroom, I would call to your mind the following inescapable facts:

The birthday of the United States is considered by most of our citizens to be July 4, 1776, the date of the signing of the Declaration of Independence. The central thrust of the argument contained in that foundational document was that there is a Creator, who had established transcendent standards of morality for the conduct of human relations, and who had created men equal and had further endowed them with rights which could not be taken away by temporal government.

Thomas Jefferson, the author of the Declaration, warned the nation that our liberties could not be secure if we forgot that they were “a gift of God.”⁹ On the frieze surrounding the interior of the Jefferson Memorial in our nation’s capital, are these words: “I have sworn on the altar of God eternal enmity over every form of tyranny over the mind of man.”¹⁰

Jefferson’s offhand remark to the Danbury Baptist convention about “a wall of separation between church and state”¹¹ certainly bore no resemblance to his own passionately expressed conviction that the fire of religious faith was the sure foundation for political freedom.

⁷ 9 THE WORKS OF JOHN ADAMS—SECOND PRESIDENT OF THE UNITED STATES 229 (Charles F. Adams ed., 1969); *see also* RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 95 (2d ed. 1988).

⁸ *Proverbs* 29:18.

⁹ SAUL K. PADOVER, THE COMPLETE JEFFERSON 677 (1943).

¹⁰ THOMAS JEFFERSON: WORD FOR WORD 4 (Maureen Harrison & Steve Gilbert eds., 1993).

¹¹ PADOVER, *supra* note 9, at 518-19 (referring to a letter from Thomas Jefferson to the members of the Danbury (Connecticut) Baptist Association, Jan. 1, 1802).

In 1789, the same year as the drafting of the First Amendment, Congress passed the Northwest Ordinance, considered one of the three foundational documents of the organization of the emerging United States.¹² In that Ordinance were these words: “religion, morality, and knowledge, being necessary to good government”¹³ With that mandate, schools were to be established with public funds to teach children religion and morality.¹⁴

Without question, any education without biblical instruction would have been unthinkable when the nation ratified the First Amendment to the Constitution. A recent University of Houston study endeavored to categorize the major influences on the Founding Fathers of this nation by an analysis of their writings.¹⁵ They found that thirty-four percent of the quotes in the Founders’ writings were taken directly from the Bible, and another sixty

¹² See *Wallace v. Jaffree*, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting). The Northwest Ordinance was passed by Congress at the same time that they were drafting the Bill of Rights. Coupled with the Declaration of Independence and the Articles of Confederation, it is considered one of the “organic documents” of the nation. See Art. 1 U.S.C.A. 1-23 (West 1987) (preface) (setting forth in print the Organic Laws: The Declaration of Independence of 1776, The Articles of Confederation of 1777, and The Ordinance of 1787: The Northwest Territorial Government). In effect, the Northwest Ordinance was a constitution for the newly acquired areas that were to become the Great Lakes states. See 28 U.S.C. §§ 1331, 1337 (1948).

¹³ Northwest Ordinance, ch. 8, 1 Stat. 52 (1789).

¹⁴ *Id.* ch. 8, cl. III (“Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”). David Barton writes:

The First Amendment was produced from June 7 through September 25, 1789; the “Northwest Ordinance” was passed from July 17 to August 7, 1789—both were passed by the same Founding Fathers, and the “Northwest Ordinance” was passed directly in the midst of their drafting of the First Amendment (which—over the last three decades—the Court has interpreted as prohibiting religious activities and teachings in public schools).

Significant in the “Northwest Ordinance” was Article III, which provided for education in the territories. Article III stipulated that for a territory to become a state, their schools *must* teach religion and morality as well as knowledge!

DAVID BARTON, EDUCATION AND THE FOUNDING FATHERS: A BOOKLET BASED ON THE VIDEO AND AUDIO BY THE SAME TITLE 6 (1993) [hereinafter BARTON, EDUCATION AND THE FOUNDING FATHERS] (footnotes omitted); see also BARTON, THE MYTH OF SEPARATION, *supra* note 2, at 37-38 (detailing how the wording of the Northwest Ordinance found its way into the state constitutions, especially in Ohio and others in the Northwest Territory, and as a result brought about legislation that was the foundation of what became the public schools of these states).

¹⁵ DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 141-43 (1988); see also JOHN EIDSMOE, CHRISTIANITY AND THE CONSTITUTION 51-53 (1987). See generally DAVID BARTON, AMERICA’S GODLY HERITAGE: A TRANSCRIPT OF THE VIDEO AND AUDIO BY THE SAME TITLE (1990).

percent were inspired by its teachings.¹⁶ One simply cannot understand the American experiment of ordered liberty without also understanding the role of faith in God and the tenets of Scripture in the lives of the nation's Founders.

Consider with me the birth of American institutions of education. The Massachusetts School Law of 1647 enacted the first public school system in America.¹⁷ It was expressly intended to teach children to read and write so they could understand the Scriptures. In fact, the Bible was their textbook.¹⁸ Harvard was founded in 1636. Its founding goals were to: "Let every student be plainly instructed and earnestly pressed to consider well the main end of his life and studies is to know God and Jesus which is eternal life . . . and, therefore, to lay Christ in the (beginning) as the only foundation of all sound knowledge and learning."¹⁹ The reading of the Bible was an integral part of its educational program. Yale was founded as a college for the liberal and religious education of suitable youth.²⁰ Among the many rules that were established to build character was attendance at morning and evening prayer.²¹ Why was the College of William and Mary founded here in 1693? The original charter calls for the school to pursue education that serves the cause of Christ—to train pastors, to educate the youth piously,

¹⁶ LUTZ, *supra* note 15, at 141-43.

¹⁷ THE CODE OF 1650, BEING A COMPILATION OF THE EARLIEST LAWS AND ORDERS OF THE GENERAL COURT OF CONNECTICUT 92-93 (Hartford, Silus Andrus 1822); *see also* 20 THE ANNALS OF AMERICA: GREAT ISSUES IN AMERICAN LIFE, A CONSPECTUS 364-66 (1968).

¹⁸ One can easily deduce from the wording of the law, and the social setting in which it was implemented, that the Scriptures were a primary text in the classroom. The New England Primer incorporated much Scripture into its text, as stories and vocabulary. The Bible was the main study guide, and the most common book, in the colonial period. If this is not clearly evident to the study of history, consider the testimony of Fisher Ames:

Should not the Bible regain the place it once held as a schoolbook? Its morals are pure, its examples are captivating and noble. . . . In no Book is there . . .

English, so pure and so elegant, and by teaching all the same they will speak alike, and the Bible will justly remain the standard of language as well as of faith.

WILLIAM J. FEDERER, AMERICA'S GOD AND COUNTRY ENCYCLOPEDIA OF QUOTATIONS 26 (1994). Ames "was a Congressman from Massachusetts in the First Session of the Congress of the United States, during the time the *Bill of Rights* were being formulated. It was Fisher Ames who had suggested the wording of the *First Amendment*, which was adopted by the House." *Id.*

¹⁹ PETER G. MODE, SOURCEBOOK AND BIBLIOGRAPHICAL GUIDE FOR AMERICAN CHURCH HISTORY 74-75 (1921).

²⁰ *Id.* at 109-10.

²¹ *Id.*

and to endeavor to “propagate . . . the Christian faith amongst the Western Indians.”²² This threefold mission was oft repeated in the first hundred years of this institution’s life.

These colleges and universities were not abnormalities. The historical record of education in America demonstrates that 123 of the first 126 colleges formed in America were incorporated with overtly Christian foundational statements.²³ Even at the turn of this century, it was very rare to find a college president who was not also an ordained clergyman. Education, morality, and religion were inseparable. This concept was as true in public school as it was in the private schools.

Vestiges of our religious history still live in the public life of America. The President swears an oath of office with his hand placed on the Bible. Both houses of Congress begin their sessions with prayers led by a chaplain whose salary is paid by public funds. The Supreme Court sits in a chamber upon whose walls are engraved the Ten Commandments. And, Court sessions begin with a prayer: “God bless this honorable Court.” Witnesses giving testimony in court swear to tell the truth “so help me God.”

Our national Pledge of Allegiance contains the phrase: “one nation under God.” Our coins contain the words: “In God We Trust.” The United States Constitution was signed and dated with a reference to Jesus Christ: “In the year of our Lord.” The Constitution of every state in the United States contains some reference to God. For example, the motto of the State of South Dakota is “Under God The People Rule.”²⁴ Each year, the President and Congress decree a day for thanksgiving to God. We celebrate in May of each year a National Day of Prayer. Our armed forces go into battle accompanied by chaplains paid with government funds.

Our city names bear witness to religious faith and tradition: Los Angeles, San Francisco, Los Cruces, Santa Fe, Bethlehem, Zion, Philadelphia. There is so much more that time does not permit me to enumerate.

Perhaps, the best summation of our religious history was made by a former Yale University law professor, later an Associate Supreme Court Justice, William O. Douglas, who wrote in 1952 in *Zorach v. Clausen*:²⁵

²² JAMES J. WALSH, *EDUCATION OF THE FOUNDING FATHERS OF THE REPUBLIC: SCHOLASTICISM IN THE COLONIAL COLLEGES* 104-05 (1970). In its original, the charter’s text reads, “*Christian faith . . . be propagated amongst the Western Indians, to the Glory of Almighty God.*” *THE HISTORY OF THE COLLEGE OF WILLIAM AND MARY: FROM ITS FOUNDATION 1660-1874*, at 3 (Richmond, J.W. Randolph & English 1874) (available at Rare Books Dep’t, Swem Library, College of William & Mary, Williamsburg, Virginia) (emphasis added).

²³ David Barton’s research has led him to conclude that “106 of the first 108 colleges formed in America—and 123 of the first 126—were formed on Christian principles.” BARTON, *EDUCATION AND THE FOUNDING FATHERS*, *supra* note 14, at 7.

²⁴ 12 *THE NEW ENCYCLOPEDIA BRITANNICA* 155 (15th ed. 1994)

²⁵ 343 U.S. 306 (1952).

We are a religious people whose institutions presuppose a Supreme Being . . . [W]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.²⁶

In 1913, President Woodrow Wilson warned us that “[a] nation which does not remember what it was yesterday, does not know what it is today, nor what it is trying to do. We are trying to do a futile thing if we do not know where we came from or what we have been about.”²⁷ Yet, in 1995, our Supreme Court has forgotten its past and is in danger of losing its future. Successive activist courts and judges have willfully rewritten our religious history. They have distorted the clear intention of the Framers of our Constitution. And, they have robbed our nation’s school children of the religious foundation that is the only stability possible for them in our fast-paced world of sex, drugs, and violence.

So, we come to a Symposium such as this to debate how little of the influence of Almighty God we puny mortals will tolerate in our schools and in our troubled society.

I will not enumerate the many Court cases from 1962 which did violence to our history or to the clear understanding of the “Establishment of Religion” Clause of the First Amendment to the Constitution. I protest with all my being the judicial distortions which have forbidden little children to pray or read the Bible in school; which have taken the Ten Commandments from classroom walls; which have denied a Christian teacher the right to have a Bible on his desk; which have implied that religion is a dangerous infection which must be confined, if possible, within the walls of a church; that have struck down laws of sovereign states merely because their authors may have entertained a religious motive in the drafting process of the legislation.

In 1990, it was my privilege to found the American Center for Law and Justice to fight in the courts for the religious freedom of believers. Since that time, the American Center has met such a need that its active cases in 1994 numbered one-thousand. We receive at the Center about forty calls each week which describe in detail a vendetta against people of faith by the public school system. By way of illustration, consider these shocking abuses under the rubric of “separation of church and state.”²⁸

²⁶ *Id.* at 313.

²⁷ FEDERER, *supra* note 18, at 697.

²⁸ Many of these cases are pleas for help made in the past few years to the Ameri-

In DeKalb County, Georgia, two teenage boys were suspended from school for "possession of Christian literature."²⁹ In Metropolis, Illinois, an honors student was arrested, handcuffed, and put in a police car for praying at the school flag pole at seven-thirty in the morning before the start of the school day.³⁰ In an elementary school, a fifth grader was made to stand at punishment for mentioning God and Jesus Christ during his recess period. In another school, a first grader was asked the meaning of Christmas. When she answered, "[a]nimals and a manger," her teacher snapped, "[i]t is against the law to talk about religion. Go back to your desk and put your head down."³¹ In another school, a child was asked to name her hero. She wrote, "Jesus Christ." The teacher said, "I mean live heroes." When the child said she believed Jesus was alive, she was sharply reprimanded.³² In yet another school, a high school boy brought his Bible to class one day. When his teacher saw it, she held it up and snarled, "Get this thing out of here!"³³

These examples are not aberrations.³⁴ They have become the norm, as

can Center for Law and Justice and its affiliate organizations. Because less than one percent of such cases end up in a court of public record, little documentation can be released to the general public. ACLJ archivist Steven Box has searched the records and reports finding six to twelve cases with fact patterns similar to each of the cases discussed herein. Both counselling etiquette and attorney-client privilege deny us the ability to list full disclosures on all our contacts.

²⁹ JAY SEKULOW, FROM INTIMIDATION TO VICTORY: REGAINING THE CHRISTIAN RIGHT TO SPEAK 58-59 (1990); see also ROBERTSON, *supra* note 2, at 311.

³⁰ Carolyn Bower, *Police Break Up Prayer Session Being Held at School's Flagpole*, ST. LOUIS POST-DISPATCH, Sept. 13, 1991, at 6A; see also William W. Horne, *Defending the New Civil Disobedience*, AM. LAW., 58, 61 (1991).

³¹ ROBERTSON, *supra* note 2, at 9.

³² *Id.* at 316.

³³ Cf. KEITH A. FOURNIER, RELIGIOUS CLEANSING IN THE AMERICAN REPUBLIC 12 (1993) (citing case of Clarence Harrison Musslewhite); see also ROBERTSON, *supra* note 2, at 309-11.

³⁴ On February 15, 1994, Jay Sekulow, Chief Counsel of the American Center for Law and Justice, and Keith Fournier, Executive Director of the ACLJ, petitioned the Honorable Janet Reno, Attorney General of the United States, and the Honorable Richard W. Riley, Secretary of Education, for a redress of grievances concerning patterns of continuous and ongoing violations of the Equal Access Act, 20 U.S.C. §§ 4071-4074 (1988). The goal of the submission was to move the Federal government to issue regulations requiring school districts that receive federal funding to certify that they are in compliance with the requirements of the Equal Access Act. In the cover letter, Mr. Sekulow stated that ACLJ staff attorneys are "confronted daily by situations in which local school districts flagrantly disobey the Act and, thereby, violate the civil rights of public secondary school students who have sought access to their schools' club forum in order to form a Bible club or prayer group." Letter from Jay Sekulow, Chief Counsel of the American Center for Law and Justice, to Janet Reno, Attorney General of the United States, and the Honorable Richard W. Riley, Secretary of Education 2 (Feb. 15,

ignorant or malevolent public school teachers and administrators put into effect the religious cleansing in the schools that they believe has been mandated by the courts.³⁵ Only a valiant legal effort by our American Center

1994) (on file with the Virginia Beach offices of the ACLJ and the *William & Mary Bill of Rights Journal*). Mr. Sekulow attached a lengthy appendix to his letter, vouching for its accuracy to the Attorney General and Secretary of Education with the sentence, "I have attached to this letter a chart which summarizes some eighty-five incidents that occurred in the last four months in which the Center has provided assistance to public school students." *Id.*

The 1994 response to the ACLJ petition was less than enthusiastic. James P. Turner, Acting Assistant Attorney General, Civil Rights Division, demurred, writing that "since [the Department of Justice is] without jurisdiction to prosecute, the Civil Rights Division does not investigate alleged violations of the [Equal Access Act]." Letter from James P. Turner, Acting Assistant Attorney General, Civil Rights Division, to Jay Alan Sekulow, Chief Counsel of the American Center for Law and Justice (Mar. 9, 1994) (on file with the Virginia Beach offices of the ACLJ and the *William & Mary Bill of Rights Journal*). Judith A. Winston, General Counsel for the United States Department of Education, responded that while her office shared the ACLJ's concern about compliance, "we believe that Congress intended the Act to be enforced primarily at the local level." Letter from Judith A. Winston, General Counsel for the United States Department of Education, to Jay Alan Sekulow, Chief Counsel of the American Center for Law and Justice (Mar. 30, 1994) (on file with the Virginia Beach offices of the ACLJ and the *William & Mary Bill of Rights Journal*). Like the Department of Justice, the Department of Education contended that "[t]he Equal Access Act does not assign this Department or any other Federal department or agency the responsibility to enforce its provisions. . . . Consequently, we have not issued the regulations that you suggest." *Id.*

Thus the case presented by the ACLJ in the February 15, 1994 letter was closed, until re-opened by President Clinton on July 12, 1995.

³⁵ President Clinton put this ongoing problem of school-based religious discrimination into the public spotlight in his July 12, 1995 address to the students of James Madison High School:

So what's the big fight over religion in the schools and what does it mean to us and why are people so upset about it? I think there are basically three reasons. One is, people believe that—most Americans believe that if you're religious, personally religious, you ought to be able to manifest that anywhere at any time, in a public or private place. Second, I think that most Americans are disturbed if they think that our government is becoming anti-religious, instead of adhering to the firm spirit of the First Amendment—don't establish, don't interfere with, but respect. And the third thing is people worry about our national character as manifest in the lives of our children. The crime rate is going down in almost every major area in America today, but the rate of violent random crime among very young people is still going up.

President Bill Clinton, Religious Liberty in America, Address at James Madison High School, Vienna, Virginia (July 12, 1995) (transcript *available in* LEXIS, News Library, U.S. File).

In addressing the issue of being religious in school the President stressed: "The First Amendment does not—I will say again—does not convert our schools into religion-free zones." *Id.* Turning to the issue of those who believe otherwise, President

for Law and Justice, complete with hundreds of damage suits, temporary restraining orders, or threats of litigation, has, in some measure, slowed the antireligious onslaught facing the school children of America.³⁶

I agree with the Chief Justice of the United States, William Rehnquist, who has stated that the current Establishment Clause rulings of the Supreme Court are fatally flawed because they do violence to the clear intention of the Framers of the Constitution and the historical practices of our nation.³⁷ I also agree with the brilliant Associate Justice Antonin Scalia, who has noted that the flawed three-part test of *Lemon v. Kurtzman*³⁸ is like an un-

Clinton told his student audience that “[t]here are those who do believe our schools should be value-neutral and that religion has no place inside the schools. . . . I think that wrongly interprets the idea of the wall between church and state. They are not the walls of the school.” *Id.*

Invoking as evidence what some would dub a “parade of horrors,” President Clinton listed many instances of school-based religious discrimination. *Id.* He clearly stated that he wants the religious rights of these students respected pursuant to the Constitution, and that this has not been done in many instances. “Some school officials and teachers and parents,” the President stated, “believe that the Constitution forbids any religious expression at all in public schools.” *Id.* According to the former constitutional law teacher Bill Clinton, “That is wrong.” *Id.*

³⁶ The President’s July 12, 1995 directive to the Departments of Education and Justice concerning religion in the schools reveals his depth of passion for the subject. President Clinton wrote “I share the concern and frustration that many Americans feel about situations where the protections accorded by the First Amendment are not recognized or understood.” *President’s Memorandum on Religious Expression in Schools*, N.Y. TIMES, July 13, 1995, at B10. The American Center for Law and Justice has for years received a constant barrage of calls from students, employees, and others who are facing discrimination because of their faith—discrimination at the hands of teachers, and other government agents who either misunderstand or refuse to recognize First Amendment rights. The ACLU and others had decried and minimized these discriminatory patterns, charging the ACLJ and others with fabrication of cases. Yet in his July 12, 1995 directive President Clinton himself pointed out that “[t]his problem [of religious discrimination] has manifested itself in our Nation’s public schools. It appears that some school officials, teachers and parents have assumed that religious expression of any type is either inappropriate, or forbidden altogether, in public schools.” *Id.* Like his speech on the same day, the President named many specific fact patterns of religious discrimination, and most all of them could be lifted right out of the files of the ACLJ. *Id.*

In keeping with the spirit of the civil rights movement (and in keeping with the 17 month old ACLJ request), President Clinton responded to these ongoing abuses: “I hereby direct the Secretary of Education, in consultation with the Attorney General, to use appropriate means to ensure that public school districts and school officials in the United States are informed, by the start of the coming school year, of these interpretations of the Equal Access Act.” *Id.*

³⁷ See *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

³⁸ 403 U.S. 602 (1971).

welcome “ghoul” that continues to rise from the grave, that must once and for all be put to death by driving a stake through its heart.³⁹

Surveys of the American people by the Gallup organization over the past fifteen years show each year that eighty percent of the American people want prayer returned to the public schools of the nation.⁴⁰ The people have waited patiently for judges to reverse their error, but to no avail. Now, to the liberal activist judges and their friends and allies, the people of America say very simply: you have violated us long enough. We want our history back. We want our traditions back. We want our Constitution back. And, we want God back in the schools of America.

I want to make this point clear. I am not talking about creating a theocracy in America. I am talking about safeguarding the precious liberties of all Americans and all people of faith.

I submit to you tonight that, if the people cannot obtain what they want by judicial means, they will insist that, during the life of this new Congress, there will be passed an Amendment to the Constitution—not the much discussed School Prayer Amendment—but an amendment that guarantees religious expression for young and old, in our schools, and every other public place, an amendment to restore the proper understanding of the First Amendment. Once Congress has acted, ratification by the states will be swift and certain.

I emphasize that such an amendment will be the beginning, not the end, of the long road back to moral health in this nation. For now, I pray that men and women of good will can lay aside those things that divide them in order to work for a time when this nation is once again one nation under God!

Thank you, and God bless you.

³⁹ See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2149-50 (1993) (Scalia, J., concurring in judgment).

⁴⁰ Rochelle L. Stanfield, *The Amen Amendment*, NAT'L J., Jan. 7, 1995, at 22.

Squeezing Religion Out of the Public Square- The Supreme Court, Lemon, and the Myth of the Secular Society

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it for human persons, is intrinsically voluntary because it involves adherence to certain propositions as *true*, as really disclosing a transcendent reality which is a fit object of worship and prayer. Religion is, and should be acknowledged as, a basic human good. Government ought to promote it. The religion clauses, construed faithfully on an originalist basis, work no barrier to that proposal. The *Lemon* test does. Thus, we should get rid of the *Lemon* test.³¹

II. THE POSITIVE ROLE OF RELIGION IN THE CULTURE AND POLITICS.

To the believer, of course, religion is important—indeed, the most important element in human existence—because it provides the framework within which man relates to God, the Supreme Being. And to the Christian, man gains eternal life through faith in Jesus Christ.

At least one hundred million Americans claim membership in one or more Christian denominations. American Christians not only believe that God exists to bring eternal life, but that God has established moral laws which form the only objective standard by which the personal or collective actions of human beings living on earth can be judged. Today's Christians are the spiritual heirs of the founders of America, whose profoundly religious beliefs have shaped our institutions.

The constitution of every single state in the United States contains some reference to God. Our pledge of allegiance to the flag of the United States, our coinage, and our patriotic songs all acknowledge a supreme being. This fact was recognized in the well known case decided by a previous Supreme Court, *Zorach v. Clauson*,³² in which Mr. Justice Douglas wrote: “[W]e are a religious people whose institutions presuppose a Supreme Being.”³³ This nation's founding document, the Declaration of Independence, recognized the reality that human rights come not from government, but from God: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.”³⁴

The concepts of “self-evident truth” and “unalienable rights” both have a long pedigree in Christian thought. “Seventeenth century Enlightenment rationalists did not coin the term ‘self-evident.’ Medieval theologians used the term centuries earlier, tracing their views of ‘self-evident’ to the teachings

³¹ Gerard V. Bradley, *Protecting Religious Liberty: Judicial and Legislative Responsibilities*, 42 DEPAUL L. REV. 253, 260-61 (1992).

³² 323 U.S. 306 (1952).

³³ *Id.* at 313.

³⁴ DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

of St. John of Damascus.”³⁵ Medieval Christian thinkers such as Thomas Aquinas regarded “self-evident” knowledge as “first principles” naturally implanted in men by God.³⁶ Aquinas’ thought was built on a biblical understanding of knowledge. John Locke, who had an undeniable influence on the drafting of the Declaration, built upon this same biblical understanding in formulating and setting forth his own view of self-evident truth.³⁷

Likewise, the concept of “unalienable rights”—including rights to life, property, liberty, and the pursuit of happiness—is traceable back to medieval Christian theological and legal thought, and ultimately to Scripture.³⁸ As one commentator has noted:

The doctrine of individual rights was not a late medieval aberration from an earlier tradition of objective right or of natural moral law. Still less was it a seventeenth-century invention of Suarez or Hobbes or Locke. Rather, it was a characteristic product of the great age of creative jurisprudence that, in the twelfth and thirteenth centuries, established the foundations of the Western legal tradition.³⁹

Some would argue that even though human rights might have had religious roots, those rights are now secured by their inclusion in the Bill of Rights and can continue to be secured by a consensus of the American people.⁴⁰ But consensus, absent any objective basis of morality, provides no

³⁵ GARY T. AMOS, *DEFENDING THE DECLARATION* 77 (1989).

³⁶ THOMAS AQUINAS, *SUMMA THEOLOGICA* Pts. I-II, Q. 100, Art. 3 (Dominican trans., Christian Classics 1981); see AMOS, *supra* note 35, at 76, 78.

³⁷ See generally AMOS, *supra* note 35, at 75-101. Amos concludes that Locke’s views were not of the Enlightenment. Rather, his use of the term “self-evident” was religious. Thus, the founders used a Christian idea when they used the term “self-evident” in the Declaration of Independence. *Id.*

³⁸ See *id.* at 103-11, 115-21.

³⁹ Brian Tierney, *Villey, Ockham and the Origin of Individual Rights*, in *THE WEIGHTIER MATTERS OF THE LAW: ESSAYS ON LAW AND RELIGION* (John Witte, Jr. & Frank S. Alexander eds., 1988), quoted in AMOS, *supra* note 35, at 124.

⁴⁰ For example, at a panel discussion held on September 30, 1994, in conjunction with the dedication of Robertson Hall (Regent University’s Law and Government Building), Barry Lynn stated:

I get my rights from the Bill of Rights and from our Constitution, but I exercise my responsibilities because I am a Christian. And I think we can revere, respect, and celebrate the protections of our Bill of Rights and still not only exercise responsibilities ourselves, but indeed urge other people to do the same.

Defining American Culture: A Panel Discussion, 2 LIBERTY, LIFE, AND FAMILY 93 (forthcoming 1995) (remarks of Barry Lynn, Executive Director of Americans United for Separation of Church and State). In his summary remarks at the discussion, Robert Peck of the ACLU stated that there tended to be much agreement among the panel

secure basis for human rights. As noted by one commentator, principles such as liberty "are like cut flowers: they come from certain roots, and those roots are religious roots. When the cut flowers are severed from their roots they maintain their beauty for a while But in time, without the nourishment of the soil, those values will wither and die" ⁴¹

How can "consensus" secure rights? For instance, suppose our society forms a consensus that this country is overpopulated and that a good solution to that problem would be to force pregnant women to abort if they already have two children? What would prevent us from enacting such a law? Some might answer: "the Due Process Clause." But the Constitution itself is a legal document, subject to amendment.⁴² Although amending the Constitution is a more cumbersome process than enacting statutes, if sufficient "consensus" exists, nothing in the positive legal order prevents the people from amending the Constitution, for better or worse.

Moral relativism, which denies both transcendent truth and objective morality, can lead in the legal order to a crude legal positivism in which law is essentially just an assertion of the lawmaker's will. According to Hans Kelsen, the twentieth century's foremost positivist jurist, "legal norms . . . are not valid by virtue of their content. *Any* content whatsoever can be legal; there is no human behavior which could not function as the content of a legal norm."⁴³ As two commentators have noted:

When Kelsen wrote that "[a]ny content whatsoever can be legal," he meant it. Witness Kelsen's response to Nazi law that authorized concentration camps, forced labor, and murder: "Such measures may morally be violently condemned; but they cannot be considered as taking place outside the legal order" Thus, to the positivist, "the law . . . under the Nazi-government was law" ⁴⁴

members regarding rights "[n]ot because of any religious-based agreement, but because we all believe in those principles of liberty and justice for all." *Id.* (remarks of Robert Peck, Legislative Counsel for the ACLU).

⁴¹ *Id.* at 114 (remarks of Mona Charen, syndicated columnist).

⁴² See U.S. CONST. art. V.

⁴³ Hans Kelsen, *The Pure Theory of Law*, 51 LAW Q. REV. 517, 517-18 (1934) (emphasis added).

⁴⁴ Charles E. Rice & John P. Tuskey, *The Legality and Morality of Using Deadly Force to Protect Unborn Children from Abortionists*, 5 REGENT U. L. REV. (forthcoming 1995) (citing HANS KELSEN, *PURE THEORY OF LAW* 40 (Mat Knight trans., 1967); HANS KELSEN, *DAS NATURRECHT IN DER POLITISCHEN THEORIE* 148 (F.M. Schmoetzel ed., 1963), *quoted in* F.A. HAYEK, 2 LAW, LEGISLATION AND LIBERTY (THE MIRAGE OF SOCIAL JUSTICE) 56 (1976)). Regarding deadly force against abortionists, Rice and Tuskey conclude that intentionally killing or injuring abortionists is neither legally nor morally justifiable, *id.*, a conclusion with which I fully agree.

This is not to say that America is sliding into Nazism. But it is to say that outside of a framework of a transcendent, objective morality (that is, a religious framework), the human being can have no intrinsic value. This is true of law as it is of philosophy. As Oliver Wendell Holmes noted, for the lawmaker who does not anchor his will to an objective moral order, there is “no reason for attributing to man a significance different in kind from that which belongs to a baboon or grain of sand.”⁴⁵ Without a transcendent truth, human worth becomes a question of utility or aesthetics. Without an objective standard of right and wrong we cannot protect human rights—indeed human life itself—because it is “right” to do so. We can only protect human rights because doing so serves the “utility” decreed by the majority consensus of the moment. We thus act at our own peril when we exclude the religious voice from the political and legal process because the exclusion of that voice removes from the political arena the only world view on which human rights and dignity find any secure footing.

This country’s Founders understood well the connection between a transcendent moral order and human rights. This understanding was reflected in the Declaration of Independence, which spoke of a “Creator” who endowed his creatures with “unalienable rights,” thereby using terms with a long religious pedigree.⁴⁶

The generation that founded this country also understood that religion was essential to the experiment in liberty and self-government this nation represented. For those Founders, “liberty depended on faith.”⁴⁷ This is clearly stated in one of the core founding documents of the nation, the Northwest Ordinance. Originally passed in 1787, this act expressly stated that “[r]eligion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”⁴⁸ This understanding was also reflected in the statements of individual Founders. Perhaps the most striking example is George Washington’s farewell address in 1796:

Of all the dispositions and habits which lead to political

⁴⁵ Oliver W. Holmes, *Natural Law*, 32 HARV. L. REV. 40, 43-44 (1918).

⁴⁶ See *supra* text accompanying notes 33-41.

⁴⁷ Gerard V. Bradley, *Imagining the Past and Remembering the Future: The Supreme Court’s History of the Establishment Clause*, 18 CONN. L. REV. 827, 835 (1986) [hereinafter Bradley, *Imagining the Past*]; see also HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 210 (1993) (stating that it “was undoubtedly the view of the men who framed the Constitution” that “the very existence of constitutional law in the United States, and therefore of freedom of belief or disbelief, rests ultimately on the religious faith of the American people”); GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 123-24 (1987) [hereinafter BRADLEY, CHURCH-STATE RELATIONSHIPS].

⁴⁸ NORTHWEST ORDINANCE ch. 8, 1 stat. 52 (1789).

prosperity, Religion and morality are indispensable supports And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle.⁴⁹

John Adams, a key draftsman of the United States Constitution and our second President, believed that “religion and virtue are the only foundations, not only of republicanism . . . but of social felicity under all governments and in all combinations of human society.”⁵⁰ In Adams’ view, “our [C]onstitution was made only for a moral and religious people [and was] wholly inadequate for the government of any other.”⁵¹ Even Jefferson, who has been erroneously viewed as the patron saint of the modern secular state, stated in his first message as President that “the liberties of a nation [cannot] be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God.”⁵²

What was true in the eighteenth century remains true today: Religion is indispensable to liberty and self-government. As the founding generation realized, it is incongruent to believe that a people can govern themselves as a nation if they cannot govern themselves as individuals. Religion provides a transcendent, objective moral standard by which people may govern their conduct, a standard “that determines how people treat other individuals and how they define their social duties.”⁵³ It is only possible to determine “right” or “virtuous” behavior if one knows what is “right” or “virtuous.” Moreover, there can be no freedom among a self-governing people unless they are controlled by individual virtue and self restraint enforced by a belief in eternal rewards and eternal punishment.

The transcendent moral standard provided by religion also allows the governed to judge the actions of their governors against something other

⁴⁹ 35 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745-1799, at 229 (John C. Fitzpatrick ed., 1940).

⁵⁰ Letter from John Adams to Benjamin Rush (Aug. 28, 1811), in 9 THE WORKS OF JOHN ADAMS 635, 636 (C. Adams ed., 1854).

⁵¹ RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 95 (2d ed. 1988).

⁵² PADOVER, *supra* note 1, at 677; *see also* Bradley, *Imagining the Past*, *supra* note 47, at 835 n.43 (“Jefferson feared a future American shorn of Christian morality.”); Fischer, *supra* note 8, at 327 (“Even Thomas Jefferson, not known as one with orthodox religious beliefs, questioned whether America’s liberties could remain secure if their only firm basis—a belief that they are a gift from God—is removed.”).

⁵³ Bradley, *Imagining the Past*, *supra* note 47, at 826.

than their own often transitory (and sometimes harmful) self-interest. “[T]he only sure guide to enacting ‘just’ laws is a jurisprudence that recognizes that there is such a thing as ‘justice.’”⁵⁴ It is only against a philosophical backdrop that recognizes “right” from “wrong” that a citizen can have standing to tell a government that what it is doing is “wrong.” Throughout our history, religiously motivated people have stood up to tell their government that what it was doing was “wrong.” During the civil rights movement, for example, a Protestant minister, Dr. Martin Luther King, Jr., challenged the “consensus” that tolerated government sponsored discrimination by asserting a religious belief in the inherent dignity of every human being as a child of God.⁵⁵ Dr. King’s work, therefore, was explicitly and self-consciously religious.⁵⁶

Those who argue that religion, morality, and law do not mix should bear in mind Dr. King’s legacy—a legacy consistent with the American political tradition. “[A]n interpretation of the establishment clause that sees in the disestablishment decision a public commitment to the exclusion of religious influence and rhetoric from politics and government puts the decision at odds with much of the American political tradition.”⁵⁷

III. *LEMON*—SQUEEZING RELIGION FROM THE PUBLIC SQUARE

The religious world view should, indeed must, have a place in our cul-

⁵⁴ Charles E. Rice, *Natural Law, the Constitution, and the Family*, 1 LIBERTY, LIFE & FAM. 77, 78 (1994).

⁵⁵ This belief is reflected in a speech Dr. King made on August 28, 1963, before over 200,000 people in Washington, D.C., in which he stated:

When we let freedom ring, when we let it ring from every village and every hamlet, from every state and every city, we will be able to speed up that day when all God’s children—black men and white men, Jews and Gentiles, Protestants and Catholics—will be able to join hands and sing in the words of the old Negro spiritual, “Free at last! Free at last! Thank God almighty, we are free at last.”

Martin Luther King, Speech of Aug. 28, 1963, *quoted in* WILLIAM J. BENNETT, *THE BOOK OF VIRTUES* 576 (1993).

⁵⁶ Dr. King was also “frustrated by a media establishment which ignored the religious and philosophic basis of his life’s work.” Fischer, *supra* note 8, at 325. Reflecting on the media, Dr. King noted that “[t]hey aren’t interested in the *why* of what we’re doing, only in the *what* of what we’re doing, and because they don’t understand the *why* they cannot really understand the *what*.” NEUHAUS, *supra* note 51, at 98. “To Dr. King, the *why* not only counted, it was the core of his ideas. Take out the *why*, and the *what* lacked coherency.” Fischer, *supra* note 8, at 325.

⁵⁷ Smith, *Separation and the “Secular,” supra* note 3, at 989; *see also* McConnell, *Religious Freedom, supra* note 8, at 144 (“From the War for Independence to the abolition movement, women’s suffrage, labor reform, civil rights, nuclear disarmament, and opposition to pornography, a major source of support for political change has come from explicitly religious voices.”).

Constitutional Interpretation the Old Fashioned Way

Justice Antonin Scalia delivered the following remarks at the Woodrow Wilson International Center for Scholars in Washington, D.C., on March 14, 2005.

JUSTICE SCALIA: It's a pizzazzy topic: Constitutional Interpretation. It is however an important one. I was vividly reminded how important it was last week when the Court came out with a controversial decision in the *Roper* case. And I watched one television commentary on the case in which the host had one person defending the opinion on the ground that people should not be subjected to capital punishment for crimes they commit when they are younger than eighteen, and the other person attacked the opinion on the ground that a jury should be able to decide that a person, despite the fact he was under eighteen, given the crime, given the person involved, should be subjected to capital punishment. And it struck me how irrelevant it was, how much the point had been missed. The question wasn't whether the call was right or wrong. The important question was who should make the call. And that is essentially what I am addressing today.

I am one of a small number of judges, small number of anybody — judges, professors, lawyers — who are known as originalists. Our manner of interpreting the Constitution is to begin with the text, and to give that text the meaning that it bore when it was adopted by the people. I'm not a "strict constructionist," despite the introduction. I don't like the term "strict construction." I do not think the Constitution, or any text should be interpreted either strictly or sloppily; it should be interpreted reasonably. Many of my interpretations do not deserve the description "strict." I do believe, however, that you give the text the meaning it had when it was adopted.

This is such a minority position in modern academia and in modern legal circles that on occasion I'm asked when I've given a talk like this a question from the back of the room — "Justice Scalia, when did you first become an originalist?" — as though it is some kind of weird affliction that seizes some people — "When did you first start eating human flesh?"

Although it is a minority view now, the reality is that, not very long ago, originalism was orthodoxy. Everybody, at least purported to be an originalist. If you go back and read the commentaries on the Constitution by Joseph Story, he didn't think the Constitution evolved or changed. He said it means and will always mean what it meant when it was adopted.

Or consider the opinions of John Marshall in the *Federal Bank* case, where he says, we must not, we must always remember it is a constitution we are expounding. And since it's a constitution, he says, you have to give its provisions expansive meaning so that they will accommodate events that you do not know of which will happen in the future.

Well, if it is a constitution that changes, you wouldn't have to give it an expansive meaning. You can give it whatever meaning you want and, when future necessity arises, you simply change the meaning. But anyway, that is no longer the orthodoxy.

Oh, one other example about how not just the judges and scholars believed in originalism, but even the American people. Consider the 19th Amendment, which is the amendment that gave women the vote. It was adopted by the American people in 1920. Why did we adopt a constitutional amendment for that purpose? The Equal Protection Clause existed in 1920; it was

adopted right after the Civil War. And you know that if the issue of the franchise for women came up today, we would not have to have a constitutional amendment. Someone would come to the Supreme Court and say, “Your Honors, in a democracy, what could be a greater denial of equal protection than denial of the franchise?” And the Court would say, “Yes! Even though it never meant it before, the Equal Protection Clause means that women have to have the vote.” But that’s not how the American people thought in 1920. In 1920, they looked at the Equal Protection Clause and said, “What does it mean?” Well, it clearly doesn’t mean that you can’t discriminate in the franchise — not only on the basis of sex, but on the basis of property ownership, on the basis of literacy. None of that is unconstitutional. And therefore, since it wasn’t unconstitutional, and we wanted it to be, we did things the good old fashioned way and adopted an amendment.

Now, in asserting that originalism used to be orthodoxy, I do not mean to imply that judges did not distort the Constitution now and then, of course they did. We had willful judges then, and we will have willful judges until the end of time. But the difference is that prior to the last 50 years or so, prior to the advent of the “Living Constitution,” judges did their distortions the good old fashioned way, the honest way — they lied about it. They said the Constitution means such and such, when it never meant such and such.

It’s a big difference that you now no longer have to lie about it, because we are in the era of the evolving Constitution. And the judge can simply say, “Oh yes, the Constitution didn’t used to mean that, but it does now.” We are in the age in which not only judges, not only lawyers, but even school children have come to learn the Constitution changes. I have grammar school students come into the Court now and then, and they recite very proudly what they have been taught: “The Constitution is a living document.” You know, it morphs.

Well, let me first tell you how we got to the “Living Constitution.” You don’t have to be a lawyer to understand it. The road is not that complicated. Initially, the Court began giving terms in the text of the Constitution a meaning they didn’t have when they were adopted. For example, the First Amendment, which forbids Congress to abridge the freedom of speech. What does the freedom of speech mean? Well, it clearly did not mean that Congress or government could not impose any restrictions upon speech. Libel laws, for example, were clearly constitutional. Nobody thought the First Amendment was *carte blanche* to libel someone. But in the famous case of *New York Times v. Sullivan*, the Supreme Court said, “But the First Amendment does prevent you from suing for libel if you are a public figure and if the libel was not malicious” — that is, the person, a member of the press or otherwise, thought that what the person said was true. Well, that had never been the law. I mean, it might be a good law. And some states could amend their libel law.

[TO THE CAMERAMEN COVERING THE SPEECH] Could we stop the cameras? I thought I announced a couple of shots at the beginning was fine, but click, click, click. Thank you.

It’s one thing for a state to amend it’s libel law and say, “We think that public figures shouldn’t be able to sue.” That’s fine. But the courts have said that the First Amendment, which never meant this before, now means that if you are a public figure, that you can’t sue for libel unless it’s intentional, malicious. So that’s one way to do it.

Another example is the Constitution guarantees the right to be represented by counsel. That never meant the state had to pay for your counsel. But you can reinterpret it to mean that.

That was step one. Step two, I mean, that will only get you so far. There is no text in the Constitution that you could reinterpret to create a right to abortion, for example. So you need something else. The something else is called the doctrine of “Substantive Due Process.” Only lawyers can walk around talking about substantive process, in as much as it’s a contradiction in terms. If you referred to substantive process or procedural substance at a cocktail party, people would look at you funny. But, lawyers talk this way all the time.

What substantive due process is is quite simple — the Constitution has a Due Process Clause, which says that no person shall be deprived of life, liberty or property without due process of law. Now, what does this guarantee? Does it guarantee life, liberty or property? No, indeed! All three can be taken away. You can be fined, you can be incarcerated, you can even be executed, but not without due process of law. It’s a procedural guarantee. But the Court said, and this goes way back, in the 1920s at least, in fact the first case to do it was Dred Scott. But it became more popular in the 1920s. The Court said there are some liberties that are so important, that no process will suffice to take them away. Hence, substantive due process.

Now, what liberties are they? The Court will tell you. Be patient. When the doctrine of substantive due process was initially announced, it was limited in this way, the Court said it embraces only those liberties that are fundamental to a democratic society and rooted in the traditions of the American people.

Then we come to step three. Step three: that limitation is eliminated. Within the last 20 years, we have found to be covered by due process the right to abortion, which was so little rooted in the traditions of the American people that it was criminal for 200 years; the right to homosexual sodomy, which was so little rooted in the traditions of the American people that it was criminal for 200 years. So it is literally true, and I don’t think this is an exaggeration, that the Court has essentially liberated itself from the text of the Constitution, from the text and even from the traditions of the American people. It is up to the Court to say what is covered by substantive due process.

What are the arguments usually made in favor of the Living Constitution? As the name of it suggests, it is a very attractive philosophy, and it’s hard to talk people out of it — the notion that the Constitution grows. The major argument is the Constitution is a living organism, it has to grow with the society that it governs or it will become brittle and snap.

This is the equivalent of, an anthropomorphism equivalent to what you hear from your stockbroker, when he tells you that the stock market is resting for an assault on the 11,000 level. The stock market panting at some base camp. The stock market is not a mountain climber and the Constitution is not a living organism for Pete’s sake; it’s a legal document, and like all legal documents, it says some things, and it doesn’t say other things. And if you think that the aficionados of the Living Constitution want to bring you flexibility, think again.

My Constitution is a very flexible Constitution. You think the death penalty is a good idea — persuade your fellow citizens and adopt it. You think it’s a bad idea — persuade them the other way and eliminate it. You want a right to abortion — create it the way most rights are created in

a democratic society, persuade your fellow citizens it's a good idea and enact it. You want the opposite — persuade them the other way. That's flexibility. But to read either result into the Constitution is not to produce flexibility, it is to produce what a constitution is designed to produce — rigidity. Abortion, for example, is offstage, it is off the democratic stage, it is no use debating it, it is unconstitutional. I mean prohibiting it is unconstitutional; I mean it's no use debating it anymore — now and forever, coast to coast, I guess until we amend the Constitution, which is a difficult thing. So, for whatever reason you might like the Living Constitution, don't like it because it provides flexibility.

That's not the name of the game. Some people also seem to like it because they think it's a good liberal thing — that somehow this is a conservative/liberal battle, and conservatives like the old fashioned originalist Constitution and liberals ought to like the Living Constitution. That's not true either. The dividing line between those who believe in the Living Constitution and those who don't is not the dividing line between conservatives and liberals.

Conservatives are willing to grow the Constitution to cover their favorite causes just as liberals are, and the best example of that is two cases we announced some years ago on the same day, the same morning. One case was *Romer v. Evans*, in which the people of Colorado had enacted an amendment to the state constitution by plebiscite, which said that neither the state nor any subdivision of the state would add to the protected statuses against which private individuals cannot discriminate. The usual ones are race, religion, age, sex, disability and so forth. Would not add sexual preference — somebody thought that was a terrible idea, and, since it was a terrible idea, it must be unconstitutional. Brought a lawsuit, it came to the Supreme Court. And the Supreme Court said, "Yes, it is unconstitutional." On the basis of — I don't know. The Sexual Preference Clause of the Bill of Rights, presumably. And the liberals loved it, and the conservatives gnashed their teeth.

The very next case we announced is a case called *BMW v. [Gore]*. Not the [Gore] you think; this is another [Gore]. Mr. [Gore] had bought a BMW, which is a car supposedly advertised at least as having a superb finish, baked seven times in ovens deep in the Alps, by dwarfs. And his BMW apparently had gotten scratched on the way over. They did not send it back to the Alps, they took a can of spray-paint and fixed it. And he found out about this and was furious, and he brought a lawsuit. He got his compensatory damages, a couple of hundred dollars — the difference between a car with a better paint job and a worse paint job — plus \$2 million against BMW for punitive damages for being a bad actor, which is absurd of course, so it must be unconstitutional. BMW appealed to my Court, and my Court said, "Yes, it's unconstitutional." In violation of, I assume, the Excessive Damages Clause of the Bill of Rights. And if excessive punitive damages are unconstitutional, why aren't excessive compensatory damages unconstitutional? So you have a federal question whenever you get a judgment in a civil case. Well, that one the conservatives liked, because conservatives don't like punitive damages, and the liberals gnashed their teeth.

I dissented in both cases because I say, "A pox on both their houses." It has nothing to do with what your policy preferences are; it has to do with what you think the Constitution is.

Some people are in favor of the Living Constitution because they think it always leads to greater freedom — there's just nothing to lose, the evolving Constitution will always provide greater and greater freedom, more and more rights. Why would you think that? It's a two-way street. And indeed, under the aegis of the Living Constitution, some freedoms have been taken away.

Recently, last term, we reversed a 15-year-old decision of the Court, which had held that the Confrontation Clause — which couldn't be clearer, it says, "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witness against him." But a Living Constitution Court held that all that was necessary to comply with the Confrontation Clause was that the hearsay evidence which is introduced — hearsay evidence means you can't cross-examine the person who said it because he's not in the court — the hearsay evidence has to bear indicia of reliability. I'm happy to say that we reversed it last term with the votes of the two originalists on the Court. And the opinion said that the only indicium of reliability that the Confrontation Clause acknowledges is confrontation. You bring the witness in to testify and to be cross-examined. That's just one example, there are others, of eliminating liberties.

So, I think another example is the right to jury trial. In a series of cases, the Court had seemingly acknowledged that you didn't have to have trial by jury of the facts that increase your sentence. You can make the increased sentence a "sentencing factor" — you get 30 years for burglary, but if the burglary is committed with a gun, as a sentencing factor the judge can give you another 10 years. And the judge will decide whether you used a gun. And he will decide it, not beyond a reasonable doubt, but whether it's more likely than not. Well, we held recently, I'm happy to say, that this violates the right to a trial by jury. The Living Constitution would not have produced that result. The Living Constitution, like the legislatures that enacted these laws would have allowed sentencing factors to be determined by the judge because all the Living Constitution assures you is that what will happen is what the majority wants to happen. And that's not the purpose of constitutional guarantees.

Well, I've talked about some of the false virtues of the Living Constitution, let me tell you what I consider its principle vices are. Surely the greatest — you should always begin with principle — its greatest vice is its illegitimacy. The only reason federal courts sit in judgment of the constitutionality of federal legislation is not because they are explicitly authorized to do so in the Constitution. Some modern constitutions give the constitutional court explicit authority to review German legislation or French legislation for its constitutionality, our Constitution doesn't say anything like that. But John Marshall says in *Marbury v. Madison*: Look, this is lawyers' work. What you have here is an apparent conflict between the Constitution and the statute. And, all the time, lawyers and judges have to reconcile these conflicts — they try to read the two to comport with each other. If they can't, it's judges' work to decide which ones prevail. When there are two statutes, the more recent one prevails. It implicitly repeals the older one. But when the Constitution is at issue, the Constitution prevails because it is a "superstatute." I mean, that's what Marshall says: It's judges' work.

If you believe, however, that the Constitution is not a legal text, like the texts involved when judges reconcile or decide which of two statutes prevail; if you think the Constitution is some exhortation to give effect to the most fundamental values of the society as those values change from year to year; if you think that it is meant to reflect, as some of the Supreme Court cases say,

particularly those involving the Eighth Amendment, if you think it is simply meant to reflect the evolving standards of decency that mark the progress of a maturing society — if that is what you think it is, then why in the world would you have it interpreted by nine lawyers? What do I know about the evolving standards of decency of American society? I'm afraid to ask.

If that is what you think the Constitution is, then *Marbury v. Madison* is wrong. It shouldn't be up to the judges, it should be up to the legislature. We should have a system like the English — whatever the legislature thinks is constitutional is constitutional. They know the evolving standards of American society, I don't. So in principle, it's incompatible with the legal regime that America has established.

Secondly, and this is the killer argument — I mean, it's the best debaters argument — they say in politics you can't beat somebody with nobody, it's the same thing with principles of legal interpretation. If you don't believe in originalism, then you need some other principle of interpretation. Being a non-originalist is not enough. You see, I have my rules that confine me. I know what I'm looking for. When I find it — the original meaning of the Constitution — I am handcuffed. If I believe that the First Amendment meant when it was adopted that you are entitled to burn the American flag, I have to come out that way even though I don't like to come out that way. When I find that the original meaning of the jury trial guarantee is that any additional time you spend in prison which depends upon a fact must depend upon a fact found by a jury — once I find that's what the jury trial guarantee means, I am handcuffed. Though I'm a law-and-order type, I cannot do all the mean conservative things I would like to do to this society. You got me.

Now, if you're not going to control your judges that way, what other criterion are you going to place before them? What is the criterion that governs the Living Constitutional judge? What can you possibly use, besides original meaning? Think about that. Natural law? We all agree on that, don't we? The philosophy of John Rawls? That's easy. There really is nothing else. You either tell your judges, "Look, this is a law, like all laws, give it the meaning it had when it was adopted." Or, you tell your judges, "Govern us. You tell us whether people under 18, who committed their crimes when they were under 18, should be executed. You tell us whether there ought to be an unlimited right to abortion or a partial right to abortion. You make these decisions for us." I have put this question — you know I speak at law schools with some frequency just to make trouble — and I put this question to the faculty all the time, or incite the students to ask their Living Constitutional professors: "Okay professor, you are not an originalist, what is your criterion?" There is none other.

And finally, this is what I will conclude with although it is not on a happy note. The worst thing about the Living Constitution is that it will destroy the Constitution. You heard in the introduction that I was confirmed, close to 19 years ago now, by a vote of 98 to nothing. The two missing were Barry Goldwater and Jake Garnes, so make it 100. I was known at that time to be, in my political and social views, fairly conservative. But still, I was known to be a good lawyer, an honest man — somebody who could read a text and give it its fair meaning — had judicial impartiality and so forth. And so I was unanimously confirmed. Today, barely 20 years later, it is difficult to get someone confirmed to the Court of Appeals. What has happened? The American people have figured out what is going on. If we are selecting lawyers, if we are selecting people to read a text and give it the fair meaning it had when it was adopted, yes, the most important

thing to do is to get a good lawyer. If on the other hand, we're picking people to draw out of their own conscience and experience a new constitution with all sorts of new values to govern our society, then we should not look principally for good lawyers. We should look principally for people who agree with us, the majority, as to whether there ought to be this right, that right and the other right. We want to pick people that would write the new constitution that we would want.

And that is why you hear in the discourse on this subject, people talking about moderate, we want moderate judges. What is a moderate interpretation of the text? Halfway between what it really means and what you'd like it to mean? There is no such thing as a moderate interpretation of the text. Would you ask a lawyer, "Draw me a moderate contract?" The only way the word has any meaning is if you are looking for someone to write a law, to write a constitution, rather than to interpret one. The moderate judge is the one who will devise the new constitution that most people would approve of. So, for example, we had a suicide case some terms ago, and the Court refused to hold that there is a constitutional right to assisted suicide. We said, "We're not yet ready to say that. Stay tuned, in a few years, the time may come, but we're not yet ready." And that was a moderate decision, because I think most people would not want — if we had gone, looked into that and created a national right to assisted suicide, that would have been an immoderate and extremist decision.

I think the very terminology suggests where we have arrived — at the point of selecting people to write a constitution, rather than people to give us the fair meaning of one that has been democratically adopted. And when that happens, when the Senate interrogates nominees to the Supreme Court, or to the lower courts — you know, "Judge so-and-so, do you think there is a right to this in the Constitution? You don't? Well, my constituents think there ought to be, and I'm not going to appoint to the court someone who is not going to find that" — when we are in that mode, you realize, we have rendered the Constitution useless, because the Constitution will mean what the majority wants it to mean. The senators are representing the majority, and they will be selecting justices who will devise a constitution that the majority wants. And that, of course, deprives the Constitution of its principle utility. The Bill of Rights is devised to protect you and me against, who do you think? The majority. My most important function on the Supreme Court is to tell the majority to take a walk. And the notion that the justices ought to be selected because of the positions that they will take, that are favored by the majority, is a recipe for destruction of what we have had for 200 years.

To come back to the beginning, this is new — 50 years old or so — the Living Constitution stuff. We have not yet seen what the end of the road is. I think we are beginning to see. And what it is should really be troublesome to Americans who care about a Constitution that can provide protections against majoritarian rule. Thank you.

Thanks to Jeffrey King of www.threebadfingers.com for transcribing Justice Scalia's speech from the CSPAN broadcast.