

SOME THOUGHTS ON OUR PRESENT
DISCONTENTS AND DUTIES: THE CARDINAL,
OLIVER WENDELL HOLMES, JR., THE UNBORN,
THE SENATE, AND US

Stephen B. Presser[†]

It is an honor to be invited to comment on Cardinal George's "Law and Culture,"¹ and a privilege to be in a position of helping to set the tone for the founding of a new Catholic law school, Ave Maria School of Law. I disagree with almost nothing the Cardinal said, so I have little but praise for his remarks. His rhetorical strategy (if such it was) of invoking Oliver Wendell Holmes, Jr. and then exploding Holmes's jurisprudence was bracing and necessary. We are slowly beginning to understand in the legal academy that Holmes's "bad man" theory of law and the philosophy of "legal realism" from which it flows are obfuscatory at best and deeply pernicious at their worst.

To separate radically law and morals as Holmes tried to do, and as most legal thinkers did in the late twentieth century, is to create a culture of anomic despair.² Sad to say, the three-person plurality in the United States Supreme Court's decision in *Planned Parenthood v. Casey*³ thoroughly embraced this jurisprudential lunacy when they declared, in the notorious "mystery passage," that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."⁴ In a Catholic law school, I would think, the understanding of legal

[†] Raoul Berger Professor of Law, Northwestern University School of Law; Professor of Business Law, Kellogg School of Management, Northwestern University; and Associate Research Fellow, Institute of United States Studies, University of London.

1. Francis Cardinal George, O.M.I., *Law and Culture*, 1 AVE MARIA L. REV. 1 (2003).

2. For the best current attack on Holmes, and criticism of his jurisprudence as leading to chaos and despair, see ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* (2000).

3. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (plurality opinion of Justices Kennedy, O'Connor, and Souter).

4. *Id.* at 851.

education and of the good life ought to be the opposite of the “mystery passage.”

The Church, as Dostoevsky famously reminded us, must be recognized as offering the people “miracle, mystery, and authority.”⁵ These offerings, embraced by someone who takes his or her faith seriously, lead to a rather different view of law than that of the “mystery passage.” It would take a good Catholic theologian, not a mere law professor, to explore all the ramifications of where the “mystery passage” goes wrong, but a few simple points are obvious. “The mystery of human life,” is not something we can define for ourselves; indeed, I believe that the Catholic religion teaches us that it must remain a mystery known only to God. The best we can do, moved by our Catholic faith, is to appreciate the miracles that give us evidence of the existence of the divine in ourselves and in the universe, and to do so with the aid of the authority of the Catholic Church, its doctrine, and its hierarchy. Anyone with even the most rudimentary grasp of Christianity intuits that liberty or life should not be all about “defining one’s own” values and concepts. Meaning in life flows from interaction with others and more from selfless altruism than from individualistic indulgence. Meaning in life comes from participation in a culture, not from isolated self-definition, or, as it was popularly known in the sixties and seventies, “self-actualization.”

This leads me to the one point of disagreement I had with the Cardinal. He appears to assume that one can speak confidently about a single American legal culture, and that the world is tending toward a single global culture.⁶ He seeks to awaken us to the need to make sure that culture does not tumble further into the amoral Godless abyss suggested, for example, by the “mystery passage.”⁷ As a legal and constitutional historian, however, my view of what is going on now in America is not the formation of a single culture, but, as the scholars at the American Enterprise Institute have been arguing for

5. FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* 307 (Andrew H. MacAndrew trans., Bantam Books 1970) (1880). I mean to use what Dostoevsky wrote here in a positive fashion, to suggest that “miracle, mystery, and authority” are helpful to the search for truth and to liberty, although the famous “Grand Inquisitor” episode can certainly be interpreted in a number of ways. Some have suggested that “miracle, mystery, and authority” are antithetical to human freedom. For some of the complications, *see, e.g.*, William P. Marshall, *The Other Side of Religion*, 44 *HASTINGS L.J.* 843 (1993) (concluding that embracing “miracle, mystery, and authority” entails surrendering freedom, while acknowledging the complexity of Dostoevsky’s portrayal of the Grand Inquisitor).

6. *See generally* Cardinal George, *supra* note 1.

7. *Id.* at 7.

some years, a battle of cultures, an ongoing cultural war for the hearts and minds of Americans.⁸ This has been a longstanding struggle in America for the last three centuries, likely throughout the two millennia of Christian civilization, and probably for eons before. Right now, along the political dimension, we characterize this as a struggle between “conservatives” and “liberals,” but, at the founding of a law school devoted to recapturing the best of our traditions, perhaps it is useful to remember how our Constitution’s framers understood this cultural battle.

As I have tried to show on a number of occasions, if one were to sum up the beliefs of the Federalist framers and articulators of the Federal Constitution, one might simply say that they understood that one cannot have order without law, one cannot have law without morality, and one cannot have morality without religion.⁹ As Cardinal George makes clear,¹⁰ and as George Washington proclaimed in his famous Farewell Address, religion and morality are the foundation of good government,¹¹ and to ban them from the public square, as five Justices on the current Supreme Court virtually insist on doing, is contrary to our tradition, and contrary to common sense.

Apparently, however, throughout American history there have always been those like the majority of the justices who decided *Lee v. Weisman*¹² (prohibiting school-sponsored prayers at public school graduations) and *Santa Fe Independent School District v. Doe*¹³ (prohibiting prayer at public school football games). Otherwise, there would have been no need for Washington to say what he did, or for the Federalists to reject the Articles of Confederation in favor of a new fundamental law for the nation. Indeed, the problem for the Federalists was not so much the attempt to drive religion and

8. For a typical reflection on the cultural wars, by an American Enterprise Institute (AEI) scholar, see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

9. For my two book-length reflections on this matter see STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS, AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* (1991) [hereinafter PRESSER, *THE ORIGINAL MISUNDERSTANDING*], and STEPHEN B. PRESSER, *RECAPTURING THE CONSTITUTION: RACE, RELIGION AND ABORTION RECONSIDERED* (1994) [hereinafter PRESSER, *RECAPTURING THE CONSTITUTION*].

10. Cardinal George, *supra* note 1, at 10.

11. George Washington, Farewell Address (September 19, 1796), *reprinted in THE AMERICAN REPUBLIC* 72, 76 (Bruce Frohnen ed., 2002).

12. 505 U.S. 577 (1992).

13. 530 U.S. 290 (2000).

morality from the public square; it was the threat of complete anarchy and lawlessness.

The Cardinal hints that we have a deeper problem in our culture, a deeper problem revealed by the epiphenomena of the naked public square, the disintegration of marriage, and the easy availability of abortion.¹⁴ We faced this deeper problem in the first years of our polity, and we are facing it again now. In the earliest years of our republic (as had been true for the years immediately preceding our independence) some Americans were so consumed with selfish schemes for financial gain or with demagogic appeals to gain power that the rule of law itself was at risk. Thus, unscrupulous state legislatures suspended contractual debts, issued increasingly worthless paper currency and declared it legal tender, and made property generally precarious. In many states, the courts themselves were simply unable to function in the face of widespread disobedience of the law, a disobedience that even resulted in two rebellions in Pennsylvania after the establishment of the Constitution.¹⁵

The scheme of the Federal Constitution was to counter the tendencies toward disorder, selfishness, and economic chaos in the young republic through its checks and balances, but more importantly through its separation of the legislative, executive, and judicial powers, and through its scheme of federalism, or dual sovereignty.¹⁶ Cardinal George claims not to be a lawyer, but his understanding of the law and Constitution is far in advance of many current law Professors. I suspect he checked himself from making this point, since in his position it might be a bit unseemly to launch a broadside against the nation's judiciary, but he might have expanded on his theme by suggesting that part of our current crisis of law and morality is the fact that we have allowed our courts, and particularly our federal courts, to bring us far afield of our original structural constitutional understanding as well as our original jurisprudential understanding.

Montesquieu taught the framers that liberty could not be preserved unless the legislative, executive, and judicial functions are

14. Cardinal George, *supra* note 1, at 7-12.

15. For the events preceding the formation of the Constitution, see the now classic account, GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (The Univ. of N.C. Press 1969). For the two Pennsylvania rebellions, see for example PRESSER, *THE ORIGINAL MISUNDERSTANDING*, *supra* note 9.

16. *See generally* WOOD, *supra* note 15.

separated,¹⁷ but many judges of the past half-century have lost this teaching. Contrary to what one reads in the media, the Church, especially after Vatican II, has been committed to the achievement of human liberty, properly understood.¹⁸ It is important for us to recognize that much of what has happened in the courts in the past few decades really does represent a threat to liberty. Those who would further the culture of individualism, secularism, abortion on demand, and sexual gratification outside of traditional marriage, unable to secure their goals through the legislative process, turned to the courts to impose their vision of society by law. They imposed their vision on the rest of us, and thus deprived us of a fundamental element of liberty: the liberty to make our own laws through our elected representatives and through assemblies of the people.¹⁹ The courts, particularly the Warren Court, flush with the success of (it ought to be admitted) their judicial legislation in the areas of race, criminal procedure, and exercise of the franchise, somehow obliged. As Robert Bork, one of our most visible cultural warriors, one instrumental in the founding of *Ave Maria*, recently reminded us, it ought to be the task of thoughtful lawyers to try to return us to a judicial culture where judges judge, and do not legislate.²⁰ In such a culture, the original principles of the Constitution and of our polity will be able to be reasserted.²¹ The Cardinal is quite properly, I think, calling for this judicial culture.

This is not an easy task, because almost all of the legal materials currently at hand are imbued with Holmesian jurisprudence. These materials are drenched with the notion that ours is a “living constitution” that ought to be changed (by judges) with the times, and that, to paraphrase Holmes himself, the law should be adjusted (by judges) in accordance with whatever is now regarded as “convenient.”²² Holmes never bothered to tell us precisely how

17. The importance of Montesquieu’s theories about the separation of powers to the American Constitution is explored in James Madison’s famous Nos. 47-51 of *The Federalist*. See THE FEDERALIST NOS. 47-51 (James Madison).

18. For the story of how the march of liberty has proceeded with Christian civilization, see for example M. STANTON EVANS, *THE THEME IS FREEDOM: RELIGION, POLITICS, AND THE AMERICAN TRADITION* (1994).

19. See generally PRESSER, *RECAPTURING THE CONSTITUTION*, *supra* note 9.

20. Robert H. Bork, *Adversary Jurisprudence* (The survival of culture: IX), 20 NEW CRITERION 6 (2002).

21. *Id.*

22. OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881).

judges were supposed to figure out what was “convenient,” though his most prominent latter-day follower, Richard Posner, seems to suggest that judges ought to be engaged in cost-benefit analysis, in order to promote efficiency or wealth maximization.²³ Holmes did hint, however, that whenever the legislature gave clear direction he was prepared to follow it, even to the extent that if his fellow citizens wanted to go to Hell, he would facilitate it, since that was his “job.”²⁴

Holmes probably was not the Antichrist, but he surely gave the Prince of Darkness a run for the money, and it’s no wonder, then, that the Cardinal, a man of God, has some reservations about Holmes. A jurisprudence modeled on efficiency, wealth maximization, and the facilitation of individual desires has a certain clarity to it; it seems to have something to do with “liberty,” and it is no wonder that its appeal in the modern age is all but irresistible. The “liberty” encouraged by much of modern jurisprudence is actually license, and the “liberty” of things such as a woman’s “right to choose,” ignores some fundamental obligations, such as the need to respect the sanctity of human life. How then to resist the overwhelming victory of Holmesian jurisprudence in the academy? How then, properly to fight the cultural war in law school?

What is needed is a set of principles with which to arm law students and lawyers as they set about the work that Ave Maria was founded to do. The Nicene Creed certainly is one such useful set of principles, and is good for the salvation of our souls, but for the immediate jurisprudential and philosophical tasks before us more is needed. The best such principles for lawyers that I have found were given in a book that ought to be required reading for all first year students at Ave Maria, Russell Kirk’s *The Conservative Mind*.²⁵ Kirk’s book was the inspiration for the modern conservative movement that led to the election of Ronald Reagan, and was thus indirectly responsible for the West’s victory in the Cold War against the Soviet Union (another interesting cultural struggle, on an international scale). Lest I might seem to be unduly partisan by suggesting that the proper task of lawyers is to learn from conservative philosophy, I should remind you that the practice of law and the practice of judging ought to be viewed primarily as a

23. See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* (1995).

24. Letter from Justice Oliver Wendell Holmes to Harold J. Laski (March 4, 1920), in 1 *HOLMES-LASKI LETTERS*, at 249 (Mark DeWolfe Howe ed., 1953).

25. RUSSELL KIRK, *THE CONSERVATIVE MIND: FROM BURKE TO ELIOT* (Regnery Publ’g 7th rev. ed. 1986).

conservative enterprise, as it has traditionally been viewed. In a sense, of course, we are all liberals, since what we seek to conserve is our traditional notions of liberty, and the rule of law in particular, that makes liberty possible. We understand, however, that we should be looking backward, to preserve what we have gained from the framers, and reluctant to undertake radical restructuring in the pursuit of some abstract vision of individual indulgence, such as that expressed in the “mystery passage.”

Accordingly, we should recognize that Russell Kirk had something of a delicate balancing act to perform because he held, with Edmund Burke, that part of what made conservatives was an unwillingness to believe in abstractions divorced from human experience. Nevertheless, he still took a stab at limning a set of postulates of proper politics that applies nicely to law. He called these “six canons of conservative thought,” and they were:

- 1) Belief in a transcendent order, or body of natural law, which rules society as well as conscience. . . .
- 2) Affection for the proliferating variety and mystery of human existence, as opposed to the narrowing uniformity, egalitarianism, and utilitarian aims of most radical systems. . . .
- 3) Conviction that civilized society requires orders and classes, as against the notion of a “classless society.” . . .
- 4) Persuasion that freedom and property are closely linked. . . .
- 5) Faith in prescription and distrust of “sophisters, calculators, and economists” who would reconstruct society upon abstract designs. . . .
- 6) Recognition that change may not be salutary reform: hasty innovation may be a devouring conflagration, rather than a torch of progress. . . .²⁶

Kirk’s six canons are perfectly consistent with the teaching to which Cardinal George subscribes, and to which Ave Maria is dedicated. It will come as no surprise, then, to learn that Russell Kirk was received into the Catholic Church at the age of 45. The practical political philosophy that he had worked out (or perhaps the working of the Holy Spirit) lead him eventually to embrace the faith in the same manner as did Newman and Chesterton. This is not the place to explore all the implications of these six canons; it took Kirk many

26. *Id.* at 8-9.

books and all his life to do so, but just to skim them is enough to suggest where Holmes and the legal realists erred, and where the Cardinal does not. The quick skimming also suggests how difficult, in the early twenty-first century, it is to live by, promote, and pronounce these canons. Where the media and the academy now seek to promote a vision of “diversity” that is actually intolerant with regard to any departures from the ideological postulates of the American left,²⁷ Kirk sought to recognize the inevitability of hierarchies, orders, differences in ability, and differences in wealth that are a feature of any society that seeks to endure.²⁸ While, as the Cardinal reminded us, the currently dominant media and academic culture seeks to drive religion from the public square, Kirk affirmed his belief that a society cannot function without a belief in natural law that governs society as well as individual conscience (again, so much for the “mystery passage”).²⁹

This insistence of Kirk’s in his first canon, that we ought to “belie[ve] in a transcendent order, or body of natural law, which rules society as well as conscience,” is not hard for most associated with Ave Maria to accept, and, indeed, is really not much more than the invocation of “nature and nature’s God” that we discover in our founding documents, such as the Declaration of Independence. Nevertheless, for a lawyer or law professor to express this belief today, in the midst of our current cultural controversy, is an act of considerable courage. It was not unusual even a hundred years ago for Justices of the United States Supreme Court, to declare that ours was a “Christian Nation,”³⁰ but just a scant few years ago a Governor of Mississippi reiterated that mantra and he was roundly excoriated and condemned by the nation’s press.³¹ From time to time we still acknowledge (at least in first year law classes) that the basis of our system of private law is the English common law. Sir William

27. This is the subject of the splendid recent polemic, ANN COULTER, *SLANDER: LIBERAL LIES ABOUT THE AMERICAN RIGHT* (2002).

28. KIRK, *supra* note 25, at 8-9.

29. *Id.* at 8.

30. See, e.g., Stephen B. Presser, *Some Realism about Atheism: Responses to The Godless Constitution*, 1 TEX. REV. L. & POL. 87, 91 (1997) (reviewing ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* (1997)) [hereinafter Presser, *Some Realism*].

31. For typical media criticism of Governor Fordice, see for example Reed Branson, *Fierly Fordice Leaves a Near Recluse; His Eight Years will be Remembered for Gaffes, Lurches*, THE COMMERCIAL APPEAL (Memphis, Tenn.), January 11, 2000, at B1, and for a more balanced treatment, PRESSER, *RECAPTURING THE CONSTITUTION*, *supra* note 9, at 274-75.

Blackstone, the most famous expositor of that body of principles, as did many judges, wrote that Christianity was a part of the common law.³² The current conventional wisdom (or at least that of those temporarily dominant in the ongoing cultural war), instead, is that ours is a "Godless Constitution,"³³ and that the plan of the framers was to make the world safe for secularism. Nothing could be further from the truth,³⁴ but to dispel this misunderstanding is a formidable undertaking.

Those who would seek to remove religion from the public square appear convinced that all religion has ever done is to promote controversy, strife, and religious wars. Somehow, they argue, the proposition that our civilization is a Christian one instantly makes some believe that those who adhere to that proposition are preparing the way for the rise of an American Fascism. The extraordinary contributions of Christianity to art, to literature, and, indeed to politics and liberty itself, are either deliberately ignored, or, more likely, completely unknown.³⁵ It ought to be the task of Ave Maria, and others like it, to remind us of these contributions, and to remind the doubters that the Catholic religion, especially since Vatican II, is based on an understanding that tolerance for other approaches to God is fundamental in the faith journey on which we are all engaged.

As the Cardinal reminds us in his critique of Holmes, our problem as a society (given the current state of our cultural wars) is not simply that we now either run from religion or fail to take it seriously; it is that we do not seem to understand the truth of the framers' belief that without religion there is no basis for morality.³⁶ Indeed, the best proof of this is our current amoral state, particularly in our politics. If one reads carefully the *Federalist*, the masterwork in American politics by Hamilton, Madison, and Jay, one is repeatedly struck by the authors' understanding that leadership in the new nation had to be limited to persons of high moral character, persons, in particular, who could put

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32. On American acceptance and occasional rejection (e.g., Jefferson) of the proposition that Christianity was a part of the common law, see for example Stuart Banner, *When Christianity was Part of the Common Law*, 16 *LAW & HISTORY REV.* 27 (1998).

33. ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* (1997).

34. See, e.g., Presser, *Some Realism*, *supra* note 30 (refuting the claim that ours is a "Godless Constitution"), and PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002) (arguing that "separation of church and state" was not the intention of the framers).

35. For a useful corrective, see EVANS, *supra* note 18.

36. Cardinal George, *supra* note 1, at 3-5.

aside personal temptations to wealth and indulgence, altruistically to serve the nation.

In what recently amounted to a national referendum on morality in politics, the impeachment proceedings against former President Clinton, we saw to what an extent a good portion of the nation (one side in the cultural war) believed that personal morality had nothing to do with politics. To be as precise about this as possible, those of us who argued for the impeachment and conviction of then President Clinton, did so because we believed that he had committed perjury, obstruction of justice, and witness tampering, all of which were felonies, and all of which would have gotten anyone else about three years in the federal penitentiary.³⁷ We took the position that someone who was supposed to be the chief federal law enforcement official should not be someone who flaunted the laws with impunity when it served his personal interest. There were good reasons, then, apart from the President's personal morality, or lack of any, to remove him from office.³⁸

The President's defenders, however, and they included half of the Senate of the United States and all but a handful of members of the Democratic party serving in the United States Congress, claimed that all that was involved was the President's personal sexual peccadilloes, which, they argued, did not reach the sort of misconduct, the kind of abuse of governmental power, so to speak, that the framers believed constituted the "high crimes or misdemeanors" necessary for removal. In effect, what they argued was that even if the President lied under oath to cover up his affair with a White House intern, and sought to get others to be engaged in the cover up, the matter was personal, not political. As Arthur Schlesinger, Jr., the noted American historian, said, in one of the most egregious moments of Congressional testimony on the issue, "Gentlemen always lie about their sex lives."³⁹

Schlesinger and the other defenders of the President seemed incapable of grasping that President Clinton was not simply behaving as a "gentleman," but rather was frustrating the rule of law. The more mind-boggling aspect of this was that they really saw nothing

37. For a powerful argument to this effect see RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* (1999).

38. For the case for impeachment and removal, see for example Stephen B. Presser, *Would George Washington Have Wanted Bill Clinton Impeached?*, 67 *GEO. WASH. L. REV.* 666 (1999).

39. For a devastating critique of Schlesinger's testimony, see for example Stuart Taylor, Jr., *All the President's Professors*, 30 *THE NAT'L JOURNAL* 2696 (November 14, 1998).

much wrong with leaving in office a married President who, instead of regarding his office as a sacred trust, was using the Oval Office for carnal trysts. I do believe that the framers, had they been sitting as Senators in the chamber trying the President on impeachment charges, would have voted to convict. Those actually trying the President even refused to permit live witnesses to testify,⁴⁰ as the outcome of acquittal was certain to them well before the beginning of the Senate "trial." At least the members of the Democratic Party in the Senate (none of whom voted to convict the President), and several Republicans, appear to have concluded that since Mr. Clinton remained popular, it was wrong to remove him, lest his removers face a hostile electorate at the next election.

Politics triumphed over morality and the rule of law in the Clinton impeachment, and it was a sign that something was deeply wrong with our politics. It was also a sign, I think, that among most members of Congress (and among most of the chattering classes, if not among most of the voting public), there had come to be a sense that there really were no moral standards to which a President could be subjected. The currently dominant cultural perspective, in other words, as the Cardinal also acknowledges, is not just that law should be separated from morality (as Holmes believed), but also that there really are no objective standards of morality that even Presidents should be required to honor.⁴¹ Our problem, then, is not only to recover the understanding that law is inevitably bottomed on morality, but also to recover morality itself.

Most at Ave Maria probably have no problem figuring out morality. Their moral sense is surely part of what would have led them to this law school, after all. The most pressing problem for the lawyers that this school aspires to turn out remains preserving the rule of law. It has never been more threatened in this country than it is now. The failure of the Republican-majority United States Senate to take its responsibilities seriously in the case of the Clinton impeachment was bad enough, but recent occurrences in the federal judicial confirmation process have led to uncharted and dangerous territory. One of the most influential Senate Democrats, Charles Schumer of New York, has tipped the hand of his party in two hearings held by his Senate Subcommittee, on what he called "judicial

40. 145 CONG. REC. S1018 (daily ed. Jan. 27, 1999). Fifty-five Republicans and one Democrat voted for the appearance of witnesses. The remaining forty-four Democrats voted against the motion.

41. Cardinal George, *supra* note 1, at 7.

ideology.”⁴² The principal argument that Senator Schumer and some of the witnesses the Democrats called before his subcommittee made was that it was wrong for the bench to be populated by persons who adhered to a single “judicial ideology,” and that it was better to have a “balance” of ideologies on the bench.⁴³ In the abstract this seems to make sense, since “balance” is almost always a good idea, until one realizes that the concept of “judicial ideology,” as invoked by Senator Schumer, is really a tool to use in preserving the courts as policy-makers rather than implementers of the rule of law.

The spur to the Schumer hearings on “judicial ideology” was the promise by then-candidate George W. Bush that the judges he would appoint would be in the mode of Justices Antonin Scalia and Clarence Thomas. Mr. Bush hailed these two as the Supreme Court’s foremost champions of interpreting the Constitution in accordance with its original understanding, and as the two Justices most committed to abjuring legislating from the bench.⁴⁴ Mr. Bush’s detractors, as they had done in the case of the nomination of Robert Bork to the Supreme Court, attacked the notion of more Scalias and Thomases, and claimed that they would roll back the purported advances in jurisprudence of the Warren and Burger Courts, most notably in the areas of race, religion, and abortion.⁴⁵ Somehow, Mr. Schumer, his fellow Senate Democrats, and their witnesses appeared to be arguing that a preference for particular outcomes of cases could legitimately be described as a “judicial ideology,” and it was imperative that Mr. Bush not be able to “stack the courts” with proponents of only one judicial ideology. One cannot help but conclude that what Senator Schumer really meant was that he and the other Democrats in the Senate wanted to ensure that under no circumstances would the bench be allowed to become committed to reversing the public policies, such as abortion on demand, that the courts had been promoting in recent years. Senator Schumer and his colleagues, then, do not want to see the philosophy of a “living constitution” replaced

42. On these hearings see Stephen B. Presser, *Should Ideology of Judicial Nominees Matter?: Is the Senate’s Current Reconsideration of the Confirmation Process Justified?*, 6 TEX. REV. L. & POL. 245 (2001) [hereinafter Presser, *Judicial Ideology*].

43. For this notion of the need for ideological “balance” on the bench, see for example the testimony of witnesses Professor Laurence Tribe and Professor Cass Sunstein reproduced in *Hearing Before the Senate Committee on the Judiciary Subcommittee on Administrative Oversight and the Courts on Should Ideology Matter?: Judicial Nominations 2001, June 26, 2001*, 50 DRAKE L. REV. 429 (2002).

44. Presser, *Judicial Ideology*, *supra* note 42, at 250.

45. *Id.*

as the dominant jurisprudence on the bench, even though that is Mr. Bush's avowed goal. It ought to be the responsibility of all of us to protest strongly what Senator Schumer and his colleagues are trying to do. We must resist the notion that judges who are committed to returning the courts to their assigned Constitutional role of judging rather than legislating exhibit a "judicial ideology" that needs to be balanced by the presence of others. The kind of judges that President Bush stated that he would appoint, if they exhibit a "judicial ideology," exhibit the only legitimate one. Pointing this out ought to be viewed as similar to the task the Cardinal assigns of reestablishing the linkage between law and morality and reestablishing in our culture the belief in objective morality.⁴⁶ Senator Schumer's view, it seems to me, is similar to suggesting that it is necessary to balance truth with falsehood, lest we should permit truth to prevail.

It will be necessary, then, to win this current political and cultural battle over "judicial ideology," by seating judges of the kind Mr. Bush seeks to appoint, before there can be any hope of accomplishing what the Cardinal would like to see: a bench ready to protect human life from those who do not recognize the miracle of personhood from the time of conception.

There is, of course, a second strategy that could accomplish what Cardinal George calls for, a reversal of cases such as *Roe v. Wade* and *Planned Parenthood v. Casey*, and this is the passage of a Constitutional Amendment such as the proposed "Human Life Amendment."⁴⁷ Such an Amendment would put right into fundamental law the Cardinal's tenet that legal personhood begins with conception.⁴⁸ Unfortunately, the immediate passage of that Amendment is unlikely. It is now almost impossible to pass Constitutional Amendments, because a significant number of Senators subscribe to the notion that all Constitutional Amendments ought to be presumptively regarded as unwise. This is especially true with regard to those amendments that might be construed by these Senators as restrictions on their conception of "liberty," a conception that includes what they would label a "woman's right to choose." For the same political reasons that they would oppose any judicial nominees who adhere to the beliefs of Scalia and Thomas, many

46. Cardinal George, *supra* note 1, at 7.

47. The text of that proposed Amendment is "The paramount right to life is vested in each human being from the moment of fertilization without regard to age, health or condition of dependency." H.J. Res. 90, 104th Cong. (1995).

48. Cardinal George, *supra* note 1, at 8-9.

Senators would throw themselves in the way of any Human Life Amendment, just as they have frustrated attempts to pass the Flag Protection Amendment and other such efforts.⁴⁹

The difficulty of seeking to do what the Cardinal recommends is certainly not an argument against it. If, as he suggests, and as many of us believe, we have a duty to God, to the country, to the unborn, to our families, and to ourselves to see that justice is done, the obstacles in the way must not deter us. It is, after all, in that kind of a struggle, in that kind of a cultural battle, that we come to realize why we have become lawyers. I agree with the Cardinal that through the effort to transform the culture and the legal rules, we discover how the practice of law ought to be done consistently with our faith.⁵⁰ In one of his occasional moments of true insight, even Oliver Wendell Holmes, Jr., in the speech to the Boston University Law students to which the Cardinal referred, sought to argue that by studying law, one could “catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.”⁵¹ The Cardinal gets it right, and, in that instance, so did Holmes.

49. For the obstacles to any such amendments, see for example Stephen B. Presser, *Constitutional Amendments: Dangerous Threat or Democracy in Action?*, 5 TEX. REV. L. & POL. 209 (2000).

50. Cardinal George, *supra* note 1, at 17.

51. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 478 (1897). Reprinted in 110 HARV. L. REV. 991 (1997).