

The rise of research and the decline of religion: What's wrong with modern universities¹

by Kevin E. Schmiesing

Somewhere around the middle of my fourth year of graduate studies in history, when I had finished my course work and was immersed in research for my dissertation, my adviser handed me a book he had co-edited entitled *Religious Advocacy and American History*.² The essays it contained were the product of a conference on the subject which brought together scholars of various Christian denominations, as well as a few non-believers. My adviser, one of the latter, remarkable for his combination of personal friendliness and intellectual belligerence toward Christians, provided a telling commentary on the absence of interest in religion in today's academy by asking rhetorically as he happily unloaded one of his copies on this Catholic student, "Who else am I going to give it to?"

It is not quite true that there is no "interest" in religion among scholars at the top universities in the United States. There has, in fact, been quite a lot of interest in the topic recently among historians, for instance. It is "religious advocacy," or bringing one's personal religious beliefs to bear on one's scholarship, which is disdained. For the most part, of course, this is the case because many scholars have no personal religious beliefs (at least of a traditional sort) in the first place. But even among Christians, including Catholics, there is a distinct unwillingness to let religious beliefs have influence in the realm of

academia. Father Richard John Neuhaus has written of a "naked public square," a consequence of the privatization of religion in America. Universities are part of that phenomenon.

This is not an original observation. Many Christians, and presumably most Catholics of a Franciscan University stripe, deplore the situation. What is less well-appreciated are the historical and philosophical origins of the universities' banishment of religion. The problems

of how the universities came to this state, and what to do about it, are subjects to which I have lately given some thought. Through three and a half years of graduate study I had not contemplated just what it was about my experience that was unsettling. I knew most professors and fellow students didn't share my religious *Weltanschauung*—that was clear enough. Yet there seemed to be more to the problem than a lack of Christian faith. My adviser's book
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A wake-up call regarding the judicial usurpation of politics

by Michael Peck

A disturbing development taking place in our system of government today is the judicial usurpation of politics. A host of law professors and judges have voiced their dismay in case opinions and articles on the subject, but despite their arguments and protests the trend goes on unchecked. What is more disturbing is the apathy prevalent in the majority of the American public concerning this issue. What is happening is not a political squabble between lib-

erals and conservatives but the end of democracy itself.

In the last fifty years of Supreme Court rulings there has been a surprising number of unprincipled decisions in which the court has taken legislative power away from states. Increasingly, important moral and cultural issues are being decided not by debate, representative politics, votes and elections, but by Supreme Court rulings. The most obvious example is the *Roe v. Wade* decision, which made abortion a "right"

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QUESTIONS, COMMENTS, AND CONTINUING CONVERSATIONS



Enjoying the Concourse

I left Honors 301 on break the other day and our class sat in our usual position in the Egan hallway, but there was none of the usual banter, none of the teasing twelve-minute stress-relief. There was a new *Concourse* out, and our collective nose was buried in the articles. Despite its infrequent schedule, your journal is an important part of life on campus, and I truly enjoy reading it each time it arrives.

By the way, I think Joe Sobran is wrong about Shakespeare because he (JS) is a closet parricide. With a father that ran out on him, Sobran can't take authority at face value. Because of that, he is always "biting the hand that feeds him." Thus his stance on the Jewish

question as well. Thanks again for the *Concourse*.

Michael Magree
Junior, classics/philosophy major

The editor replies:

My thanks for the very encouraging remarks. It's always nice to hear that the Concourse is appreciated.

Readers should note that the frequency of our publishing schedule depends almost entirely on the number of articles submitted to us. If you'd like us to appear more often, please keep them coming!

I don't know anything about Sobran's childhood, or his alleged psychological dysfunctions. I formed my opinion based on the overwhelming evidence he laid out in his book. (It's interesting to observe that critics of Sobran's theory seem never to address the substance of his argument.) But if we're going to bring up the psychology of the case, I might just as well point out that if some people are disposed by nature or circumstance to be anti-establishment, many more are disposed to be conformists. These will disregard any amount of evidence rather than admit the possibility that truth could be on the side of a rogue amateur who refuses to toe the orthodox scholars' line.*

* See the Post Script section of Vol. III, issue 6. Sobran's book, published by The Free Press in 1997, is titled *Alias Shakespeare*. It argues that the real bard is Edward de Vere, seventeenth Earl of Oxford.

Some follow-up remarks in the Tolkien discussion

First, I must thank Justine Schmiesing for the continued excellence of her footnotes, one of which alerted me to the fact that I had won last year's Grand Prize. I am astounded by her ability to strike gold with points she deems too trivial to be included in the main body of her text. However, if I invited everyone who helped me with my prize-winning article to join me at The Grand Concourse Restaurant, I'd go broke. (Those who have seen Mrs. Schmiesing's reply will understand.)

On to some unfinished business from my last article:

It would be possible for Trolls to exist after all! In *The Two Towers* Treebeard says, ". . . Trolls are only counterfeits, made by the Enemy. . . in mockery of Ents, as Orcs were of Elves." In a footnote to the etiyay "The Druedain" in *Unfinished Tales* Tolkien writes, "Morgoth. . . can make no living thing." Because of this, it seems to me that only one meaning can be given to Treebeard's statement. Trolls, like the Ents, are spiritual beings who have taken on some sort of physical form.

Some may say that Mrs. Schmiesing has proven with her latest objection that only men and hobbits could exist, but none of Middle Earth's
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A proper pluralism: Balancing truth with freedom of conscience

by Omar F. A. Gutierrez

TO ANSWER THE QUESTION THAT ENDED JOANNA BRATTEN'S ARTICLE "PLURALISM AND ORTHODOXY" (VOL. IV, ISSUE 1) A GOOD AND FAITHFUL

CATHOLIC MUST DEFINITELY ANSWER, "NO." MS. BRATTEN'S question reads, "We are called, yes, to make believers of all the world; but are we somewhere, somehow, permitted to make exceptions?" She asks in effect whether we might accept the pious Muslim as a good and faithful follower of his conscience and then leave him there as a Muslim. The idea, as she illustrates, is that the Lord will have mercy on the Muslim, much like Aslan had mercy on the young Calormen soldier in Lewis' *The Last Battle*. Aslan deemed the soldier's worship of a false god as being, ultimately, worship of Himself, since the soldier was "pure of heart and devoted entirely to what he believed to be right and good," as Ms. Bratten put it.

What more can one ask of a human being than that he follow his conscience? The answer to that question depends greatly on the view of the relation between the person and truth.

The question of religious freedom and of the related issue of the liberty of conscience has been a hot topic in and outside the Church since the early to mid-1800's. Four years after the 1870 Vatican I declaration on Papal infallibility, John Henry Cardinal Newman penned a two hundred page

open letter to the Duke of Norfolk (then the ranking Catholic in England) in response to former Prime Minister Gladstone's publicly calling into question the ability of Catholics to be loyal subjects of the English Crown. As Gladstone saw it, if a Catholic was obliged to follow the will of the Pope, he was not free to vote according to England's best interests. Gladstone was in part reacting to the then-infamous *Syllabus of Errors*, published in 1864 by Pope Pius IX. The *Syllabus* explicitly stated, among other things, that in a Catholic State one cannot think it correct to allow other faiths to express themselves freely and openly. Error number fifteen reads, "Every man is free to embrace and profess the religion which he, led by the light of reason, thinks to be the true religion." That statement is an error. So, phrased differently, Pius IX is saying that no man has the right

to choose "by the light of reason" any religion but the Catholic religion. This would seem to eliminate the possibility of a Catholic's believing in religious freedom. As Gladstone and many others saw it, the Pope was calling the faithful to ignore their consciences and blindly follow the word of the *Pontifex Maximus*.

Canon fifteen and many others in the *Syllabus* are sometimes hard to

swallow. But they become down right baffling when we contrast them with what the Fathers of Vatican II wrote in *Dignitatis Humanae*: "This Vatican Council declares that the human person has the right to religious freedom." The apparent contradiction with earlier Church teaching is among the things that led many—now no longer with the Church—to consider the Council invalid. It does seem, does it not, that the Church altogether changed her position on religious freedom between 1864 and 1965? But I assure you she did not, and the explanation of this seeming contradiction sheds much light on how we can balance the belief in the truth of our Faith with respect for other faiths, or more accurately *persons* of other faiths.

Islam is wrong. Jesus was not just another prophet. In light of the *fact* that Islam is wrong no man anywhere has the right to adhere to it. And I know that Islam is factually erroneous because faith, as Josef Pieper tells us, is "an unrestricted, unreserved, unconditional assent,"¹ and I have faith that God, the very sustainer of all being, has

Other faiths
have truth
in them,
and so the
believer of
Islam can
direct his
conscience
towards the
truth in
Islam with-
out ever
learning of
their
foundation
in the
Word.



revealed Himself more completely in the Catholic Faith. Faith is an action of the will. It must be unwavering and “unreserved,” because, as Newman writes, “A person who says, ‘I believe just at this moment...but I cannot answer for myself that I shall believe tomorrow,’ does not believe.”² I do not *trust* that what is revealed is true; I *know* it is true, and this type of knowledge is referred to here as faith.

Looked at from this perspective, there is no such thing as religious freedom. Freedom is often thought as being freedom from acting. It is more accurately understood as freedom to act rightly. Therefore, insofar as the Islamic religion (or any other religion) is wrong, no one is free to hold it. No one is properly free to think that a thing can be and not be at the same time and in the same respect. No one is free to hold true something that is not true. No one is free to think that erroneous notions are accurate ones. To think such a thing would be an act of violence towards one’s nature, a nature directed towards truth. To think such a thing is to attempt to create truth.

While the Church most assuredly

states that no one has the right to follow error, she also states that all men are bound to follow their conscience. The Pope quotes St. Bonaventure when he writes, in *Veritatas Splendor*: “conscience is like God’s herald and messenger; it does not command things on its own authority, but commands them as coming from God’s authority, like a herald when he proclaims the edict of the king. This is why conscience has binding force” (58). *Gaudium et Spes* says, “Conscience is the most secret core and sanctuary of a man. There he is alone with God, Whose voice echoes in his depths” (16). If a man’s conscience, formed in a Muslim society by Muslim parents, tells him to be Muslim, then he *must* be a faithful and dutiful Muslim.

Conscience is not infallible, but each person is, regardless, bound to follow it. I accept the pious Muslim for being a follower of his conscience. In fact I commend him for it. He may very well be a better follower of his conscience than I, a Christian, and consequently might please God more. However, at the same time, I am bound by Christ’s words, “Go therefore and make disciples of all nations.”³ I find it nec-

essary, then, to attempt to better inform his conscience of the full truth of Jesus Christ our Lord. I cannot condemn him for being Muslim, if he is following his conscience, but I most certainly can condemn his erroneous religion.

Pius IX and Vatican II are not at odds with each other. They merely approach the question of Truth from two different standpoints. No one has the right to claim that they have arrived by reasonable deduction to the fact that any other Faith but the Catholic Faith is true, because no other Faith is as true as the Catholic Faith. But all have the duty to follow their consciences, even if their conscience leads them away from the truth, so long as they are ignorant of its doing so. That right and responsibility is granted to them by virtue of their dignity as human persons.

With C.S. Lewis, I think it very likely that, when the Judgement arrives, non-Christians who attempted to mold their consciences in truth, and followed them faithfully throughout their lives, will be looked upon with much mercy by our Lord. St. Justin Martyr spoke of the “spermatic Logos” the “seeds of the Word” that are part of all creation by virtue of the fact that “all things were made through him, and without him was not anything made that was made.”⁴ Other faiths have truth in them, and so the believer of Islam can direct his conscience towards the truth in Islam without ever learning of their foundation in the Word.

In short, errors do not have rights but the erroneous do. And so finally to answer Joanna K. Bratten’s question: No, we may not make exceptions. But yes, we may make allowances. ■

Omar Gutierrez graduated from FUS in 1997. He is presently a lay student of theology at the Angelicum in Rome.

¹ Josef Pieper, *Faith, Hope, Love* (Ignatius, 1986), 28

² John Henry Newman, “Faith and Doubt,” in *Discourses to Mixed Congregations* (London, 1881), 216

³ Matthew 28:19 (RSV)

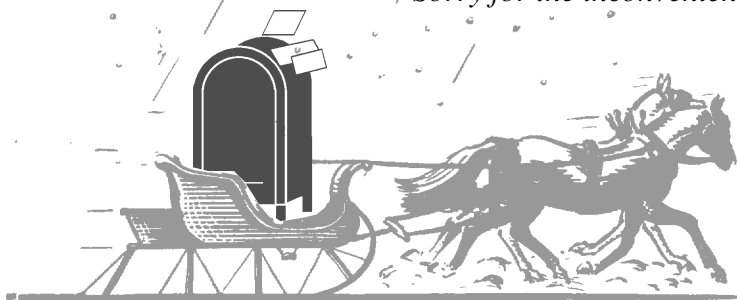
⁴ John 1:3 (RSV)

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If you lack access to the internet, for the time being you can drop off articles with Tony Flood in the philosophy department or contact Justine Schmießing at 264-1618.

Sorry for the inconvenience!



Conversations

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other inhabitants. I'm not quite so sure. Her argument is based primarily on Romans 8:20, "All of creation is in bondage to decay." She maintains that this verse indicates that no non-human sentient races could exist in "our space and time," since if they were sinless it would be unjust of God to place them in a fallen universe and if they were sinful they would have to have been created that way, which would also be unjust of God, since Man caused the universe to fall through original sin. Sounds good, doesn't it? But there are loopholes.

First, in yet another famous footnote Justine admits, "'Our space and time' would not include angels or other beings for whom God might choose to create another space and time." This is significant, for it leaves the door open for the existence of the Valar, the Maiar, Melian, Gandalf, Saruman, Radagast, the "Blue Wizards," Ents, Morgoth, Sauron, Trolls, Dragons, Balrogs, Tom Bombadil, Goldberry, werewolves, vampires, barrow wights and giant spiders. Tolkien portrayed all of these as being either angels or demons that had taken physical forms. Therefore, they are not true inhabitants of our space and time; rather, they are "visitors." Thus, Justine's objection does not apply to them.

We have come to agreement on the possibility of the existence of the hobbits. The giants, the monster in the mere outside Moria, the Mewlips, and the giant turtles remain on the "not enough info to decide" list.

The Orcs were bred from the Elves. I know Tolkien gives the alternative that they were bred from Men, but since the Orcs appear in the history of Middle-Earth before Man comes into existence, I doubt that this is the correct explanation of their origins. Thus, since Orcs were bred from Elves, we would prove the possibility of the existence of Orcs by proving that of Elves. That leaves us with only two races of Middle-Earth the possibility of whose existence

needs to be proven: Elves, Dwarves and Orcs.

For these, too, I hold that Justine's argument does not apply. Why? Because she has based her argument on the presence of original sin in the universe. Such an argument cannot rule out the existence of Tolkien's Elves and Dwarves, because he conceived of them as coming into existence millennia *before* Adam and Eve did. And if Adam and Eve didn't yet exist, how could their sin have prevented Elves and Dwarves from being created? Similarly, if some alien race had been created before Adam and Eve committed original sin, I see no reason why it could not still exist now, especially if the parents of that other race have also sinned.

And by the way, the quote from Romans might also be used to buttress one of the arguments in my previous article. I claimed that Christ's passion, death and resurrection could apply for the salvation of non-human sentient beings, as well as to us, since Christ's instruction to the apostles near the end of Mark's Gospel is, "Go out into the entire cosmos and preach the gospel to every creature." Romans 8:20-21 reads, "for the creation was subjected to futility, not of its own will but by the will of him who subjected it in hope; because the creation itself will be set free from its bondage to decay and obtain the glorious liberty of the children of God." This could very well be interpreted as meaning that Christ died to redeem not just the human race but all of creation. Thus aliens and Elves and Dwarves could also attain salvation through Christ.

I congratulate Justine Schmiesing for having valiantly defended her theory that Catholic teaching rules out the possibility of the existence of non-human sentient life in our universe, but I nevertheless remain unpersuaded.

In reply to Joanna Bratten:

Since my article inspired Joanna Bratten's on Pluralism in Vol.IV, issue 1, I should say a word or two on the questions she raises. I would suggest



that the proper way a Catholic should balance religious pluralism and religious orthodoxy is to hold fast to the fact that the Catholic Church alone contains the fullness of Divine Revelation, but to admit that other religions can and do contain parts of the truth, to greater or lesser degrees, and to commend them for the truths they do perceive. But we should go on to encourage their adherents to find the fullness of Truth contained in the Holy Catholic Church. As far as non-Catholics living more exemplary lives than Catholics goes, I would suggest first that they are the exception rather than the rule. I would then suggest that they are only possible because the Church's prayers for the salvation of all mankind enable the outpouring of grace upon those "men of good will" who are outside the Church's fold. Salvation comes through the Church for non-Catholics as well as for Catholics. So why should we make converts of all nations? To enable them to participate in God's plan of salvation and to ensure that more than a bare minimum of people respond to God's grace and attain salvation.

Michael Healy, Jr.
Junior, philosophy major

Michael Healy was last year's recipient of the annual Concourse Grand Prize (dinner for two at The Grand Concourse Restaurant in Pittsburgh) for his article "How hobbits and company might really exist," published in Vol.III, issue 4. See also Justine Schmiesing's reply-with-footnotes in Vol.III, issue 6.

Modern Universities

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put me onto the scent of something rotten deep in the core of higher education.

More exactly, it was Daryl Hart's essay which piqued my interest. Hart is one of a group of evangelical Christian scholars who have been having an increasingly important impact on historical scholarship. Hart's essay, however, sounded a note of caution, imploring fellow Christians not to emphasize too much the need for believers to prove their academic credentials by participating wholeheartedly in the processes and programs of the modern American academy. Deeper than his concern over the current anti-Christian bias of many intellectuals, Hart detected problems in the very structures of learning predominating in higher education today. His caution was drawn from knowledge of the history of American universities, especially the underlying trends which had abetted the vanquishing of religion from a respectable place within these institutions.³

In the course of the twentieth century, Hart argued, the important universities had given themselves over to the goals of the political economy which supported them. As government and corporate largesse came to play an ever greater role in the funding of higher education, universities sacrificed their traditional curricula, allowing "economic interests, not "intellectual merits" to set their agenda. The new aim was the "production of knowledge," not the search for the true, the good, the beautiful. The humanities in particular made a "fatal move" by embracing the

"research ethic" which informed this new aim.⁴

Hart criticized especially the modern research universities and their emphasis on specialization. Such specialization undermines the indispensable task of generalization and ignores questions of value and meaning. He called for "a candid and thorough assessment of what the structures of modern learning do to learning itself, and whether those structures are wholesome ones for Christian minds." Evangelicals shouldn't necessarily strive to reproduce the great research universities of twentieth-century America, Hart warned. He pointed to the experience of mainline Protestant and Catholic institutions as examples of what might happen to religious beliefs in the process.⁵

These criticisms rang true. Graduate school is an important facet of the research university, and Hart's descriptions reflected my own experience. His critique of specialization and its debilitating effect on the life of the mind was not only accurate, it resonated in the wells of my memory and called forth ideas I hadn't considered for some time. It turned out that much of Hart's argument was old hat. A.P. Sertillanges recommended in 1920 that "if you want to have a mind that is open, clear, and really strong, mistrust your specialty in the beginning." Specialization, moreover, was related intimately to the loss of a religious sensibility.⁶

On the absence of religion in the university, John Henry Newman had gone further than Hart. "Religious truth," he wrote in his *Idea of a University*, "is not only a portion, but a condition of general knowledge."⁷ Compare

this to the declaration of a 1988 subcommittee of the American Association of University Professors that any institutions that mandated doctrinal fidelity of their professors had no right to proclaim themselves "authentic seats of higher learning." A school of theology requiring creedal orthodoxy ought not be included within a university, because it constituted an "unfree" entity within an "otherwise free institution."⁸

Newman had asserted that dropping any "science" (theology and philosophy were both included in the term) from the "circle of knowledge" would result in other sciences falling into error. Theology was the most indispensable of the sciences. The AAUP had gotten it exactly backwards. There was indeed something seriously wrong with the modern university.

Evangelicals like Hart seem to be, in the 1990s, in a situation parallel to that of American Catholics in the 1930s and 1940s. Catholics at that time were beginning to emerge on the academic scene, were gaining intellectual respectability, and were on the verge of developing first-rate colleges and universities. Catholic institutions of higher education were also beginning to ape their secular and Protestant counterparts in the hopes of attaining equal prestige, often with the sincere belief that such prestige equaled academic excellence. Like Hart's fifty years later, there had been some warning voices. The Jesuit George Bull, head of Fordham University's philosophy department, argued in 1938 that Catholics would do well to avoid, not emulate, the research focus of the modern university. The goal of research was "discovery," an aim consonant with an underlying belief in progress. The Catholic goal was different: "brooding over the whole Catholic life of the mind is the sense of wisdom achieved; and over the modern the sense of 'progress' or truth to be pursued." The Catholic should desire not "discovery," but "a deeper penetration into reality." Bull believed that "particularism," or specialization, which led to disintegration, was the hallmark of the "research mind." His conclusion was

Yet there seemed to be more to the problem than a lack of Christian faith. My advisor's book put me onto the scent of something rotten deep in the core of higher education.

that, “a Catholic university which accepts research as the dominant objective of its graduate school, is by that much attempting the impossible task of being Catholic in creed and anti-Catholic in culture.”⁹

I have portrayed specialization and research as the bogeys of an authentically Catholic university. The truth is not that stark. It is doubtful that Hart, Sertillanges, Newman or Bull would argue that the two are unmitigated evils. Sertillanges did not advocate avoiding specialization altogether. “We must keep from specialization,” he wrote, “as long as our aim is to become cultivated men...but we must specialize anew when we aim at being men with a function, and producing something useful. In other words, we must understand everything... in order to succeed in doing some one thing.” Bull admitted the utility, even the necessity, of research as part of the intellectual endeavor. What he criticized was research as an “attitude,” rather than an “instrument,” and as a dominant theme of graduate study. The point is that specialization and the research that accompanies it should be approached in a careful, in-

formed and considered fashion. This has not been the case in the vast majority of American universities, Catholic or otherwise. Specialization to the exclusion of generalization has been embraced as an end in itself. This obsession has trickled down into undergraduate education as well. Not only professors, graduate students, and prospective graduate students, but all those involved in higher education, might do well to ponder the words of the Jesuit a half-century ago, ignored at the time but perhaps endowed with more potency in view of subsequent events: “Research is not an education. It is a vocation. And so it must go to its own place. And the sooner the better for all universities in the world.”¹⁰ ■

Kevin Schmiesing graduated from FUS in 1994. He is currently writing a doctoral dissertation on American Catholic intellectuals from 1895-1955 for the University of Pennsylvania. He and his wife Anne (Lodzinski, '96) have one child.

¹This article is a reflection pertinent particularly to fields in the humanities. It may apply in some ways to the natural and social sciences, but is not intended to encompass all the departments

of the modern university. The role of non-liberal arts disciplines in the university is a subject unto itself.

² Bruce Kuklick and D.G. Hart, eds. (Grand Rapids, MI: William B. Eerdmans, 1997).

³ D.G. Hart, “What’s So Special About the University Anyway?” in *Religious Advocacy*, 137-156.

⁴ *Ibid.*, 147-148, 150. For a full account of the relegation of religion out of American universities, see George Marsden, *The Soul of the American University: From Protestant Establishments to Established Nonbelief* (New York: Oxford University, 1994).

⁵ Hart, 152, 156.

⁶ A.P. Sertillanges, *The Intellectual Life: Its Spirits, Conditions, Methods*, trans. Mary Ryan (Washington, DC: Catholic University, 1987; first published in French in 1920), 103.

⁷ John Henry Newman, *The Idea of a University*, ed. Frank M. Turner (New Haven, CT: Yale University, 1996; first published in 1899), 57, 59-60.

⁸ George Marsden, “Liberating Academic Freedom,” *First Things* (December 1998): 11-12. On the centrality of religion in education, see also Christopher Dawson, *The Crisis of Western Education* (Steubenville, OH: Franciscan University, 1989, reprint, 1961). For another early critique of specialization, without reference to religion, see Richard M. Weaver, *Ideas Have Consequences* (Chicago: University of Chicago, 1984, 1948), chapter 3.

⁹ George Bull, SJ, “The Function of the Catholic Graduate School,” *Thought* 13 (September 1938): 364, 376, 378.

¹⁰ Sertillanges, 120; Bull, 362, 379.

Politics

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protected by the constitution, nullifying all state laws against abortion and prohibiting any further legislation on the matter except in certain minute details. This was done in spite of the fact that abortion rights are nowhere mentioned in the constitution. This amounts to judicial legislation. Some go so far as to call it judicial oligarchy.

This is not an entirely new problem. In 1857 we saw an example of judicial usurpation in the *Dred Scott v. Stanford* decision (later overturned.) In that case, the court expanded the legal right of Americans to own slaves, although there were no constitutional criteria for their doing so. Justice Curtis had this to say in his dissenting opin-

ion: “When a strict interpretation of the constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a constitution; we are under the government of individual men, who for the time being have power to declare what the constitution is, according to their own views of what it ought to mean.” 19 How, 393, 621 (1857) (Curtis J., dissenting)

At the heart of the problem, as Justice Curtis stated, is the question of constitutional interpretation. The function of the Supreme Court is to protect the rights and liberties of Americans as specified in the constitution. In other words, the document itself provides the basis for, and sets the limits of, the court’s authority. If the court strays from

a strict interpretation of the constitution, its decisions become both arbitrary (because it substitutes its own value judgments for the law) and despotic (because it imposes those judgments on the nation, without regard for the preferences of the majority.)

Former Appellate Justice Robert Bork, in an *Indiana Law Journal* article on “Neutral Principles,” cites *Griswald v. Connecticut* as an example of the Supreme Court overstepping its authority. In that case, the court overturned the state of Connecticut’s anti-contraception laws based on a set of principles supposedly implied in a combination of constitutional amendments. According to the court majority, these “penumbras” create “zones of privacy.” While these zones are not mentioned in any constitutional amendment, the court maintained that they

constitute a right of privacy protecting certain behavior; in this case contraception. In his dissenting opinion, Justice Black accuses the court of replacing the specified meanings of the amendments (free speech and unreasonable search and seizures) with the more general term of “privacy” which he calls an “abstract and ambiguous concept which can easily be shrunken in meaning but which also can...be interpreted as a constitutional ban on many things other than searches and seizures.” Further, he said that “if properly construed neither the due process clause nor the ninth amendment, nor both together, could under any circumstances be a proper basis for invalidating the Connecticut law. 381 US 521 (1965) (Black, J., dissenting)” Bork agrees with Justice Black that this decision was based not on a proper interpretation of the constitution but on the courts subjective value preferences.

In effect, what these penumbras have done is provide the court with a free pass for interpreting the constitution so loosely that it is emptied of meaningful content.

Later in *Roe v. Wade* the Supreme Court upheld and expanded this supposed right of privacy. (In a dissenting opinion, Justice Rehnquist pointed out that this new right was not apparent to the drafters of the constitution, since if it had been they would have objected to the laws against abortion existing in thirty-six states at the time.) In *Planned Parenthood v. Casey* the court employed a similar tactic when it elaborated a new conception of liberty: “At 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. 505 US 9 (1992)” This definition

of liberty surpasses “zones of privacy” in it’s ambiguity and potential for limitless interpretation. Justice Scalia in his dissenting opinion insisted that although many women may consider abortion to be a right, it is simply not protected by the constitution, and thus the court had no authority to overrule a state law against it. Yet abortion rights were upheld in *Planned Parenthood v. Casey* on the basis of liberty, despite the fact that it has no discernible basis either in the wording of the constitution or in the intent of the framers. Again, the Supreme Court usurped the legislative function of the States.

Through cases like these, where Supreme Court decisions are not backed by the express or implied meaning of the constitution, the court is effectively declaring that the constitution can mean whatever it, the court, thinks it ought to mean. Laws it doesn’t approve may be summarily overturned, no matter how large a majority of Americans support them. Thus, the court circumvents the legislative process and imposes its own values on the nation. This is not how democracy works.

Justice Black foresaw that problem in the *Giswald v. Connecticut* decision: “The adoption of such a loose, flexible, uncontrolled, standard for holding laws unconstitutional...will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. 381 US 511 (1965) (Black, J., dissenting)” Likewise Justice Scalia warns that the court should not operate in such a political fashion lest it undermine its legitimate authority. He concludes his dissenting opinion in *Planned Parenthood v. Casey*

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with these words: “We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining. 505 US 25 (1992) (Scalia, J., dissenting)”

Many legal scholars and judges have been sounding an alarm—arguing that decisions like these have no place in a democracy. The November, 1996 issue of *First Things* featured a symposium on this topic, titled “The End of Democracy?” which included contributions from such eminent legal authorities and commentators as Robert Bork, Charles Colson, Russell Hittenger and Hadley Arkes. Although these writers differed in their sense of the extent of the problem and in their proposals for reform, all agreed that the situation is extremely serious—threatening our society at the level of its core principles.

Thus, we should recognize that this problem does not concern exclusively those in the legal profession. It is pertinent to everyone involved in the political process. Since our country is a democracy, it ought to concern all of us. A shift of political power to the Judicial branch has perhaps already distorted the proper running of a democratic system, removing legislative power out of representative politics and placing it in the hands of a committee of nine lawyers. If we are interested in preserving the democratic system, now is the time to look carefully and critically at this development asking ourselves and each other what is to be done. ■

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For more on judicial usurpation of politics, see our website for Contributing Editor Mark Fischer’s Vol. I, issue 4 article titled “When Judges Play King.”

