

THE FEDERALIST SOCIETY
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Third Annual
Barbara K. Olson Memorial Lecture

THE HON. ROBERT H. BORK

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MR. MEYER: Welcome to the Third Barbara Olson Memorial Lecture. I am Eugene Meyer, the President of the Federalist Society. The program you got when you came in here has a page describing Barbara Olson and the background for this lecture. I would only say that I first met Barbara almost 20 years ago, when she founded a chapter of the Federalist Society at Cardozo Law School.

Her enthusiasm, her dedication, her spirit, all certainly encourage me and many others involved both inside the Federalist Society and out. She was just a wonderfully warm, inspiring, encouraging figure, and we're very proud to have her as a long-time Federalist Society leader.

We are also honored, as a result, to be hosting this lecture series in her name, and we're also honored to have had Ted Olson, Ken Starr, and Robert Bork as the first three lecturers in this annual series. I might point out that, in addition to all their other qualifications, they have all served as Solicitor General of the United States, which fits well with the constitutional emphasis of this lecture.

In the inaugural Barbara Olson lecture, which I think no one who ever saw it will ever forget, Ted Olson said this. "Barbara was Barbara because America, unlike any other place in the world, gave her the space, freedom, oxygen, encouragement, and inspiration to be whatever she wanted to be." It is the American constitutional system that helped make this possible for Barbara, and that in turn makes today's lecture topic on international law so appropriate.

The lecturer is equally appropriate. A close friend of Ted and Barbara's, his name is also synonymous with fealty to the Constitution. This was perhaps most clearly shown in an unusual way. Most of the time when the integrity of public officials is tested, it is when they should resign over principle and don't. But Judge Bork, his test came the other way around. As acting attorney general, Judge Bork had the integrity to not resign because the stability of our constitutional system was in danger. It was a difficult time for a man of principle to serve in government, and an essential one.

Whether as judge on the D.C. Circuit, as Solicitor General, as a professor at Yale Law School, as a practicing lawyer, as an author, or even as an advisor of the Federalist Society, Judge Bork has combined his formidable intellect and integrity to support the constitutional principles that Barbara held dear. I should personally add that Judge Bork's advice and support from the very first days of the Federalist Society, going on to the current day, have been critical both to the general success of the organization and to

keeping it close to its mission. It does not hurt that he taught in law school half of our board of directors when he was a law professor.

The Judge is the author of four books, *The Antitrust Paradox*, *The Tempting of America*—actually, *The Tempting of America* is interesting because while the judge may not remember it, that is when he first met Barbara. Barbara was then working as a summer intern, I believe, at DOJ, and Steve Calabresi, who was working for the judge then, was rounding up some volunteers to help with proofing the galleys. He asked me to help get a couple. I asked several people, including Barbara, who was very enthusiastic, as she was in most things she did. And as I said, that was the first day they met.

In addition to *The Antitrust Paradox*, and *The Tempting of America*, the Judge also wrote *Slouching Toward Gomorrah*, and has just come out with *Coercing Virtue: The Worldwide Rule of Judges*.

With the recent discussion of international law by several Supreme Court judges, I feel confident that Barbara would have felt it especially appropriate that we have Judge Bork addressing this topic today. It is my great pleasure and honor to introduce to you Judge Robert Bork.

JUDGE BORK: Thank you. Thank you very much for that introduction, Gene, particularly the part about the books. Particularly the part about the new book. I didn't know I was talking about international law tonight, but I will quickly shift topics and go into that.

Needless to say, it's an honor to deliver a lecture named for our friend Barbara Olson, and it's a privilege to address the Federalist Society once more. Barbara had many qualities that made us love her. Let me simply say that in addition to her warmth, generosity, genius for friendship, and strong beliefs in what we believe, she was the most alive person I ever met, and she loved the Federalist Society, with good reason.

You've heard me in the past bemoan the free-wheeling ways of our courts. This evening, I would like to explore briefly the relationship between the courts and our culture. It's not a one-way relationship, even as the courts, and most notably the Supreme Court, are changing American culture. I'm reminded of Justice Scalia's dissent in which he said, "Day by day, case by case, the court is busy designing a Constitution for a country I do not recognize."

Just as surely as the court is doing that to the country, the elite culture is changing the court. That's the reason the courts, state and federal, provide a crucial battleground in our ongoing cultural wars. The struggle for the courts is now so brazenly and shamefully being waged in the Senate. It is, of course, merely one aspect over a broader contest over the shape of today's and tomorrow's culture.

We in the Federalist Society are devoted to the idea of the rule of law, which means that we want courts that are neutral in their readings of the Constitution and laws of the United States, and that in turn means originalism. That's worth fighting for and by itself has no substantive content.

The question, however, is whether we can achieve a neutral originalist court, if the culture war is lost on all other fronts. And the answer to that, I think, is decidedly, "no". It's too much to expect that a majority of the Supreme Court will be unaffected by the broader culture, particularly if they accept uncritically the postulates of that culture. It is more than a matter of the unconscious assumptions that all of us carry about in our

heads. It is, at the political level, the difficulty in confirming judges who are originalists. That is why the Senate Democrats are filibustering the President's judicial nominations. It is, for example, difficult to confirm judges who do not swear fealty to *Roe v. Wade*, and probably impossible to confirm nominees to the Supreme Court unless they take that oath of allegiance.

Somebody just told me that on the way over here, he heard on National Public Radio somebody named Ted Kennedy saying that they were not going to confirm any Neanderthals—talk about knuckle-draggers.

There are only three originalists on the court today: the Chief Justice and Justices Scalia and Thomas. I think if their judicial philosophies were known today and they were up for confirmation, they would have extreme difficulty. The court will not, in the long run, resist a dominant outlook, whether political or cultural. We saw that in the 1930s when the Justices stood out against the centralizing thrust of the New Deal. And finally, the court capitulated. Whether that was because somebody switched or whether it was because of other causes makes no difference. The great engine of judicial reform, or judicial regression, depending on how you see it, is the fact of mortality. Sooner or later, Justices die or retire, and their successors will be chosen because they will bring the law into line with the dominant culture of that time, whether that culture is ours or that of the elites.

Now, there are a variety of names for these so-called elites. I say so-called because we're talking about verbalists, people who deal with words and symbols. We're talking about not only university faculties and law school faculties, we're talking about the media. We're talking about much of the clergy of this country. We're talking about most of the foundations. We're talking about Hollywood, the entertainment industry. They are all elite in the sense that they shape opinions and they regard themselves as superior. But, their superiority in intellectual matters may be judged by the fact that members of that group range from Cornell West to Barbra Streisand to Peter Jennings. This evening, I will call them the Olympians because that name has a nastier name to it. That refers to a state of mind and spirit that has been described by Kenneth Manogue, who said, "Olympianism is the project of an intellectual elite that believes it enjoys superior enlightenment, and that its business is to spread this benefit to those living on the lower slopes of human achievement." Olympianism burrowed like a parasite into the most powerful institution of the emerging economy: the universities. Well, from there, it spread to the other culture-shaping institutions, of which perhaps the judiciary is the most powerful. And it's important to the Olympians that control the judiciary. As Lino Graglia said, "It is the nightmare of the American intellectual, it is the nightmare of the intellectual class, that public policy should fall into the hands of the American people." The only way they can avoid that is by going to the courts, in particular the Supreme Court, which is composed of intellectuals.

The courts are composed of intellectuals, but there's something else at work. Some of you have heard me tell this story. I don't care if you have or not; you're going to hear it again. There's a process of unconscious conditioning that takes place. That is, justices, even if they aren't aware of it consciously, respond to praise and try to avoid negative criticism. And of course, in today's culture, if you want to be popular in the universities and the law schools and the media and so forth, you move to the cultural left. I usually illustrate that with a story about how that works.

There was a professor of psychology who lectured his class, until they were tired of it, about unconscious conditioning, and they decided to try it on him. He was a pacer. He paced from the wall with the windows on the outside world to the wall with the door to the corridor. And as he paced towards the wall with the outside windows, the class paid rapt attention. They followed his every word. They took notes. They were just intensely interested. As he paced the other way, they began to lose interest until, when he got close to the wall, to the corridor, they were looking at newspapers, whispering to each other, and paying no attention to him. Within 15 minutes, they had him pinned to the outside wall. And I think some of that takes place with judges.

Anyway, the result has been a litany of rulings that Olympians discovered that they lose elections when their values become known, but they don't lose in the courts. The result has been a litany of rulings that impose Olympian values upon the rest of us. I'll list only a few of those, the more obvious examples, but there are probably 20 or 30 or 40.

There is, in the first place, an intense hostility to organized religion. Olympians, the elites, are either indifferent to or actively hostile to religion and that shows up in the courts, which it's now quite plain have interpreted the Establishment Clause with far more severity than was intended by the people who ratified the Establishment Clause. There's also a devotion to the cause of abortion, including the infanticide known as partial birth abortions. There is extreme sexual permissiveness, and there is the normalization of homosexuality, so I think we may shortly expect a decision creating a right to homosexual marriage.

There's the protection of the telecasting of oral sex and of computer-simulated child pornography. Sometimes, these things get preposterous. The court has, for example, held that it's a violation of the Establishment Clause for students to pray before a football game that nobody be hurt. On the other hand, they've also held that nude dancing is expressive; we won't ask, expressive of what? But, they said, therefore, it's entitled to considerable expression as speech—nude dancing as speech. Which led Ted Olson, before he became Solicitor General, of course, to say that since nude dancing was preferred to prayer as a means of communication, perhaps students should dance naked before football games. I reminded him, and I remind him now, however, that nudity must not be achieved through anything that resembles the dance of the seven veils because that has biblical connotations and is undoubtedly a violation of the Establishment Clause.

In addition to the items just mentioned, the Court has also endorsed identity politics. Among the evils of Nazism and Communism were that they sought to reduce individuals, in the one case, to their racial group, and in the other, to their class status. Though it is so far in a much milder form, that is precisely what we see happening in America with the importation into constitutional law of the concepts of multiculturalism and diversity. Individuals are reduced to their race, ethnic group, or gender. We see that, and that's become general in the society, or in the elites at least.

Clarence Thomas is expected—it's insisted—that he should vote on the basis of his race. Jean Kirkpatrick is said not to be a real woman. There seems to be an entire category of people who would otherwise qualify as minorities or as women, but have chosen instead to be Republicans.

The idea that those in a racial or gender category must have identical views is thoroughly pernicious, contrary to America's older idea of individual thought. It's sad,

therefore—indeed, it's alarming—that the Supreme Court embraced that notion in *Grutter v. Bollinger*, the case approving preferences for some minorities in admissions to the University of Michigan Law School. Aside from the fact that the decision really mocks both the Equal Protection Clause and the 1964 Civil Rights Act, it can only rest on the notion that blacks and American Indians bring intellectual diversity to the classroom precisely because they think as blacks and American Indians, not as individuals.

The effects of *Grutter* will not be confined to law schools. What is intellectually and morally desirable for higher education must be desirable everywhere in this society. The support of the Olympians for this proposition may be seen in the blizzard of amicus briefs filed in the case urging the court to uphold these soft quotas.

Now, all of these cases I've mentioned teach the American people something, and we make a mistake if we think of them as just legal judgments that move the law this way or that way because they also have moral impact. The Court is the most revered of our governmental institutions, and some of us may, from time to time, wonder exactly why that is true. But it is true. And when the public is told by the Court that our most revered document, the Constitution of the United States—people don't know what's in it, but they revere it—mandates a certain result, they tend to take that not only as a legal judgment but as a moral statement about what is proper in this society.

But in the last few years, and here, I will attempt to redeem a little bit of Gene Meyer's introduction about me, a majority of the court has embarked about a new and dramatic form of judicial imperialism. It has begun to cite, and to some degree to rely upon, decisions by foreign courts and laws made by foreign legislatures. Justice Sandra Day O'Connor, in a recent speech, said that decisions by the courts of other countries could be persuasive authority in American courts. At a time, she said, when 30 percent of the United States' gross national product is internationally derived, "No institution of government can afford to ignore the rest of the world." What the gross national product has to do with the Constitution of the United States is not entirely clear, but there seems to be some powerful connection there.

I would have thought that if there was one institution of government, the one that gets its sole authority from the original Constitution and the Bill of Rights, that can and must ignore the judicial decisions of the rest of the world, it would be the Supreme Court of the United States. She even said that an amicus brief filed by American diplomats, working abroad, of course, had influenced the court, had been influential, because they recounted the difficulties they had in admissions confronting foreigners because of the United States' endorsement of capital punishment. That would seem to follow that if we're going to be influenced by foreign courts, and if we have to worry about what our diplomats face, that perhaps capital punishment will become unconstitutional on that ground. Anyway, it strikes me as peculiar that the court now—Justice O'Connor and, I think, a majority of her colleagues—view themselves not only as judges but as statesmen, and now statesmen engaged in international affairs.

But she was outdone, probably, by Justice Steven Breyer's statement in an opinion that he found useful—his word, "useful"—decisions by the Privy Council of Jamaica and the Supreme Courts of India and Zimbabwe. Jamaica and India are preposterous enough, but Zimbabwe? The country governed, if that's the word, by the blood-stained dictator Robert Magabe. You might as well say it would be useful in interpreting the American

Constitution to seek guidance from the Iraqi Supreme Court appointed by Saddam Hussein, or perhaps the Cuban Supreme Court appointed by Fidel Castro.

Now, Scalia at his gloomiest—and his gloomiest is very gloomy, indeed—could not imagine that the country being designed by the Court day-by-day and case-by-case would turn out to be Zimbabwe.

This trend is so obvious and so delightful to Olympians, though even they might draw the line at Zimbabwe, that Linda Greenhouse could write in the *New York Times* with evident approval that it's not surprising that justices have begun to see them as participants in a worldwide constitutional conversation. That last phrase might more accurately be rephrased to say they are participants in a worldwide constitutional convention.

We might have seen this coming. For Kenneth Manogue, whom I quoted earlier, who is extraordinarily perceptive—he's not writing about law; he's writing about culture—and also said, "We may define Olympianism as a vision of human betterment to be achieved on a global scale by forging the peoples of the world into a single community based on the universal enjoyment of appropriate human rights. Olympians," he said, "instruct people; they do not obey them."

Well, that is the force behind the idea that we should pay attention to foreign courts, and indeed, behind the idea that they should pay attention to us. Belgian courts, backed by legislation, claim, and have exercised, the authority to try criminally people involved in actions in other parts of the world, whether or not there's any connection to Belgium. They tried the Rwandan nuns for massacre, their actions in relation to a massacre committed in Rwanda. They also said that a suit would lie against Ariel Sharon for actions he took 20 years ago when he was head of the Israeli army. They said, of course, they have to wait until he gets out of office as Israeli Prime Minister, but then he'll be subject to Belgian court jurisdiction. I don't think he's going anywhere near Belgium when he gets out of office.

Spain and the United Kingdom gave signs in the Pinochet affair that they, too, may be adopting a notion of universal jurisdiction. David Rivkin and Lee Casey remarked that this notion of universal jurisdiction would, "permit the courts of any state to prosecute and punish the leadership of any other state for violations of universal humanitarian norms. The rule's proponents should keep in mind that any independent state, not just right-thinking Western ones, would be entitled to prosecute violations." Of course, they were borne out by that because the Yugoslavians convicted, in absentia the leaders of NATO for the 1999 bombing of Serbia. And Bill Clinton was sentenced by that court to 20 years' imprisonment. Whatever we think should have been done here, we don't want it done there.

But before we become too contemptuous of Belgium, it is important to realize that some United States courts have adopted a version of that imperialistic doctrine, and have done so without real warrant in law. There is something called the Alien Tort Claims Act. One of my first cases when I became a judge involved that, and when I picked up the brief and saw what it was, I thought this is some modern liberal statute. But it's not; it was in the first Judiciary Act.

The Alien Tort Claims Act allows aliens to sue in our federal courts, in tort only, for violations of the Law of Nations. At the time the statute was enacted, the Law of Nations referred to relations between sovereign nations, including such matters as

ensuring the safety of ambassadors. It had nothing to say about such modern inventions as crimes against humanity. That simply was not a part of any of the Law of Nations.

The Act remained dormant for almost all of our history, until the Second Circuit Court of Appeals, I think in 1980, allowed a suit by a citizen of Paraguay against another citizen of Paraguay for injuries inflicted in Paraguay. Since then, the federal circuits that have faced the issue, with the notable exception of the D.C. Circuit, have adopted this version of universal jurisdiction. Most recently, Judge Ray Randolph gave an absolutely devastating analysis of an attempt to bring humanitarian norms under this statute. We can only hope that this is so preposterous that the Supreme Court will not go that far.

But to understand the full horror of what is taking place, you must realize that our courts are making up the Law of Nations as they go along. It wasn't there in the statute. And they're guided, of course, by a coterie of activist international law professors and the ever-present NGOs. One suit—there are lots of them like this—charges a United States corporation with a violation of the Law of Nations for refusing to bargain collectively with workers in a foreign country. These are not just aberrations.

They are a growing trend among increasingly imperialistic Western judiciaries, and it's impossible to foresee with certainty how far this imperialism will ultimately extend. You will note the parallel between our judges undertaking to become international statesmen by relying on foreign decisions and legislation and resolutions, and their desire to judge conduct around the world that has no connection to the United States, except in some cases where an American corporation is sued for actions that are legal in the country where it took those actions.

I want to suggest that we should take more seriously something that's always been a subject of laughter and ribaldry, and that is the notorious Mystery Passage that popped up in the special concurrence in *Planned Parenthood*, and it was repeated, despite the ridicule that it received, in *Lawrence v. Texas*, the case finding a constitutional right to homosexual sodomy. It is not just funny, I think, that passage. I'm afraid it points the way to the future. It tells us things not only about the unrestrained activism of the Supreme Court majority, but about our culture that encourages courts in such endeavors. Worse, it tells about a culture common to all Western nations and the coming worldwide rule of judges.

By now, you're undoubtedly sick of hearing about it. But ludicrous as it is, I increasingly think it may be crucial to our understanding of what is happening. That passage perfectly reflects the Olympian philosophy of radical individualism, which grants freedoms so long as they are the freedoms that we approve of. Bear with me while I repeat just a few lines from this immortal prose.

Justice Kennedy wrote, "These matters" -- he was talking about marriage, procreation, abortion any number of things—"These matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protection by the 14th Amendment. 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. Beliefs about these matters could not define the attributes of personhood they formed under the compulsion of the state." Now, as a matter of fact, I don't recall the last time any American legislature tried to compel beliefs about the universe or the mystery of human life. But apparently, the court thinks that's a real serious threat.

Those words are used to justify both the fictitious rights to abortion and to homosexual sodomy, but they can be used to justify any rights that come to a judge's mind. And that's really what we're talking about. It's difficult to impress people with the utter freewheeling nature of constitutional law today. There's a new chief justice from one of the southern state courts, and he summed up our constitutional law when he met a former U.S. chief justice—he was then Chief Justice of the United States. The southerner said, "I'm delighted to meet you, sir, because I have just taken an oath to support and defend anything that comes into your head."

In any event, the words of the Mystery Passage are not the only examples in the Court's opinion expressing an individualism so unconfined that Michael Greta said that they would declare government itself unconstitutional. Only the autonomous individual may decide what meaning is for him. That's not going to happen, of course, but it's worth remembering that passage because it's loaded with legal and cultural messages. First, and most obviously, the Mystery Passage and the cases it summarize demonstrate once more, and beyond the possibility of any quibble, that our Bill of Rights jurisprudence today has almost nothing to do with the Bill of Rights. When new rights are not invented, real rights are expanded beyond all recognition.

Second, the Court has been captured by—indeed, it is composed of—the Olympians. It is now the intelligentsia's heavy artillery and its Panzer divisions in the culture wars.

Third, the sanctity of these decisions is now an article of faith among Senate Democrats. They, along with a few liberal Republicans, routinely miscalled moderates, will not confirm any judges who do not place fealty to *Roe*, *Casey*, and the rest, the unhistorical anti-religion interpretation of the Establishment Clause, the desecration rulings, and so forth. In those Senators' minds, the fetid swamp of unrestrained activism has somehow become the mainstream. To paraphrase what was once said about Theodore Roosevelt, the Senate Democrats have no more use for the Constitution than an alley cat has for a marriage license.

Fourth, in the hands of the Court, radical individualism comes close to nihilism. If each individual defines meaning for himself, that can only mean that there is no allowable moral truth. Some academics approvingly call American jurisprudence post-modern, and post-modernism has been defined as the uneasy alliance between nihilism and left-wing politics. The Court's rulings on cultural matters deny the reality of what the Constitution says, as well as the moral beliefs of electoral majorities, and those rulings almost invariably move the culture to the left.

Fifth, the cases I have mentioned are worth remembering because they demonstrate that a majority of the Court is willing to make decisions for which it can give no intelligible argument. There is thus a sharp decline in intellectual honesty and integrity in the law. Constitutional law, the "constitution" of today's Supreme Court, is really no longer worth teaching because it's not an intellectual discipline any longer. It's a series of political impulses.

I remember the period I went through when I first began teaching constitutional law at Yale. The casebook had largely to do with the Commerce Clause, the Tax Clause, intergovernmental immunity, standing, ripeness, all of the usual structural matters, which were quite intellectually demanding. And the Bill of Rights was less than half of the casebook. And the cases in the Bill of Rights, a lot of them, made a lot of sense. But,

every year when the new casebook came out, the first part about the structural Constitution shrank and the Bill of Rights material expanded. As these grew larger and more mindless, I desperately tried to spend the first part of the semester on the first part of the casebook, but it finally got so small in comparison to the rest, it became obvious that I was stalling. And so, I was defeated and I have not taught a con law course to this day.

Finally, the sense of the sacred is a withered and mocked virtue in today's elite culture, and the Court shares that disregard. The sacred in our society once included the institutions of marriage, family, patriotism, decency in public displays, and most especially for today's discussion, the integrity of the Constitution. Well, all the items I listed are no longer classified as sacred, but some things have to be. It's worth recalling what John Stewart Mill wrote when he was not writing on liberty, when he was not at the height of his libertarian passage. Gertrude Himmelfarb quotes him. Mill said this. "In all political societies which had had a durable existence, there has been some fixed point, something which men agreed in holding sacred, which it might or might not be lawful to contest in theory, but which no one could either fear or hope to see shaken in practice. But when the questioning of these fundamental principles is not an occasional disease but the habitual condition of the body politic, the state is virtually in a position of civil war and can never long remain free from it and act in fact." That might have been written about the culture wars of Western nations today, and what's taking place in the Senate brings that war out into the open.

These are wars in which the judiciary is deeply immersed. Now, I must say, much as we may regret the fight to politicize the courts and in particular the Supreme Court, the Supreme Court in effect brought this on itself. The Supreme Court became a political body about 50 years ago, and has become one increasingly. Once it is recognized as a political body, it becomes a political weapon and a political prize, and you can expect senators to fight over its composition because they know it's not neutral and they want it to be un-neutral in their direction.

But anyway, every value and virtue that once was taken as sacred, not to be overthrown in practice, is now in question. One institution and one document alone are regarded as sacred. The first is the judiciary, and most especially the Supreme Court of the United States. At the same time, the Court undertakes to overthrow other principles and institutions once regarded as so fundamental as to be sacred.

We face a struggle for the culture, and as part of that, for the return to courts that are politically neutral, which means originalist. And that requires both an understanding of what is at stake, and also the will to persevere. Romaine Rollond spoke of the pessimism of the intellect and the optimism of the will.

Now, I have quoted to this society in the past the words of Walter Badgett, which we might consider for understanding what our danger is. He said, "The characteristic danger of great nations like the Romans and the British, which have a long history of continuous creation, is that they may at last fail from not comprehending the great institutions which they have created." We are in serious danger of failing at last to comprehend the rule of law, and the actual meaning of the Constitution of the United States. But a will to restore that rule and that meaning is also essential.

And for that reason, I wish to close with a few lines from T.S. Eliot. He wrote, "There is only the fight to recover what has been lost, and found, and lost again and

again, and now under conditions that seem unpropitious, but perhaps neither gain nor loss. For us, there is only the trying. The rest is not our business." But the rest is our business. And that is why we will never stop trying. Barbara Olson never did, and that is one reason why it is entirely appropriate that the Federalist Society named this annual lecture for her.

Thank you.

MR. MEYER: Thank you, Judge Bork. I know Barbara would have been deeply honored by your speech tonight, and we really appreciate it.