
SHOWCASE PANEL IV:

THE ROLE OF GOVERNMENT IN DEFINING OUR CULTURE

Hadley P. Arkes, Walter E. Dellinger, William N. Eskridge, Jr., Charles Murray, Anthony D. Romero, Phyllis M. Schlafly; Moderator: Edwin Meese III

EDWIN MEESE III: Good afternoon, ladies and gentlemen. I'm Ed Meese, and I have the privilege of moderating the panel this afternoon. On behalf of my colleagues here, I welcome you all to the last panel of the Federalist Society's 2006 National Lawyers Convention.

As you know, the theme of the Convention is limited government. We've had "showcase panels" on limited government and spreading democracy, a panel talking about the economic aspects of things like taxes and regulation, and before this a panel on the question of whether constitutional measures are necessary in order to achieve limited government. This last panel is an interesting one, I think, because it centers less around governmental things *per se* than it does around the relationship between government and the everyday lives of people. The topic is "The role of government in defining our culture."

The initial question, of course, is: What should that role be? We can think about it in terms of what the Founders had in mind, and what that role is today—if there is a difference between the original concept and how it's worked out a little over 200 years later. We might consider what the other institutions of society are that are competing perhaps with government in defining our culture, and to what extent more attention should be given them when limited government is one of our objectives. We might ask: What principles do we have to determine when government should intervene in determining culture? And whether you can ever have a governmental role in culture that is outcome-neutral? Finally, we might debate whether there is some consensus among the people generally as to what that role of government is in defining the culture, or if this a matter of continual tension, perhaps what the Founders had in mind when Publius, or Madison, wrote in *The Federalist*, that ambition and would counter ambition?

Is there a consensus today as to the role of government in defining culture? To answer this

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question in Federalist Society tradition, we have a number of people here gathered who do not always agree with each other. And so, as a result, I think we will have a lively discussion. I will introduce each person briefly before they speak. I'm not going to introduce the speakers with a lengthy introduction because, first of all, they are all so distinguished, have such lengthy backgrounds and such distinguished *curriculum vitae* that it would take up most of their time if I were to introduce them. So I will make the introductions very brief.

To kick off this session, we are pleased to have Walter Dellinger, well-known to all of you from many standpoints. A Solicitor General of the United States who has rendered great public service in various capacities, a private practitioner of law, and a law professor. Please join me in welcoming him.

WALTER E. DELLINGER: In January of 1998, the Ninth Circuit decided *Finley v. National Endowment for the Arts*. I was acting Solicitor General at the time, and the issue came quickly to my desk, along with a visit from the Director of the National Endowment for the Arts (NEA), the excellent actress Jane Alexander. The case involved the constitutionality of I believe it was the Helms Amendment, which required that the NEA take decency into account in choosing who should be awarded artistic grants. Karen Finley was one of those whose expected grant did not get renewed after the decency criteria had been invoked.

The Ninth Circuit decision ruling against the NEA was, as you might admit imagine, welcomed with great enthusiasm by the NEA. They did not care for the Helms Amendment, and when the director came to me, she said happily, "We have this wonderful loss in the Ninth Circuit, and as your client, we'll be happy for this matter to end there. There will be no need to seek review in the Supreme Court." My response was that she and I were both employees or officers of the United States; that my client was the United States; the Congress spoke for the United States; and that we had an obligation to defend acts of Congress if they were defensible

grounds for doing so. There were defensible grounds indeed, almost certain to prevail—and indeed, correctly so, in my view.

To the question of whether this isn't governmental censorship and offense to the First Amendment, my response was it may well be, but that the problem is that, if the Helms Amendment is an unconstitutional imposition of government values, then so is the NEA itself. What they do all day long, every day, is censor. And if government cannot take values into account in making awards, then we've got a much bigger problem for the Endowment than the Helms Amendment. But what we cannot do is say that because we prefer Karen Finley's art to Norman Rockwell's art, Congress can't have the reverse presumption and say we like Norman Rockwell better than Karen Finley.

Now I raise case this because it brought into sharp focus the fact that all of us want government to impose cultural values as long as they are our values. In fact, one of the moves we are all tempted to make is to define our cultural values as something other than that, which is what immediately transpires in this kind of discussion. The Director of the NEA, like most people in that community, would say, of course, that's a mistake. The Helms Amendment imposes cultural values imposed by the government; our people judge on artistic merit, and that is a different category. To which my response was, "Look, I may agree with your notion of artistic merit." In Karen Finley's act, she smears her body with chocolate and gives a paean to feminism. "But I cannot believe that if you have some equally effective actor who smeared his or her body with chocolate and made an impassioned cry to index capital gains for inflation that they would have gotten the award. It can't be. You don't make these awards on weakness of application."

So, I came away from that experience with the thought that I actually find it quite troublesome that the government funds the arts at all; that while the Helms Amendment could well be problematic, so is the funding. I find myself dismaying my friends who, like I, enjoy government-funded art, wondering about National Public Radio and National Public Television. I don't see how we get out of this box. The one thing I knew was that we couldn't say, "It's okay to prefer Karen Finley to Norman Rockwell, but not vice versa," however artistically merited that position might be. We all, I think, are drawn

by this tension. I come at it, I think, from the Cato Institute perspective. Roger would say that I am a soft Catoite, a squishy Catoite that still thinks *Lochner* was wrongly decided, in spite of his pounding. But I want to raise it in the context which I think is quite salient; that is, the role of government in shaping religious values and opinions of the population.

Since we don't really know what the new Chief Justice or Justice Alito's views will be, I believe eight of the nine Justices on the previous Court got this wrong on one principle or another. In other words, that we have a group of Justices who are comfortable with having the government impose its religious values directly by having government views of religion, government endorsement and government promotion. And there are four other justices—Stevens, Ginsburg, Souter, and often Breyer—who would have the government take cognizance of religion in a negative way, denying the use of funding by religious groups or individuals—when government funding is itself neutral. Anybody may use an interpreter for the deaf to go to school; anybody may use the school premises, first come first serve; anyone may have a student club. All of these are areas where there is government funding. And those who would exclude—including vouchers—religious people from being able to participate, also miss the notion that what ought to be controlling is the critical right of private choice.

There ought to be private choice about religion, and I believe that only Justice O'Connor, who's been underappreciated in this area, got it consistently right. By the magic of 5-4, the Court, I think, got every religious decision right for almost the entire time of the Rehnquist Court, because of her consistent voting on a very simple principle: government religion, bad; private religion, good. Her view of private religion was robust private choice. That is to say, where government provided resources for citizens to decide how to use those resources, you were free to make an intervening private religious choice: robust private choice with government itself having no role. Only she got it right in terms of shaping the religious culture.

Thank you.

MEESE: Our next speaker is Dr. Charles Murray. He is the W. H. Grady Scholar at the American Enterprise Institute. He has written a number of

books, is a well-known social scientist, and we're pleased to have him as our next speaker. Charles.

CHARLES MURRAY: Okay. What is the role of government in defining the culture? In principle, none; in practice, disastrous. Look, the culture is the constitutional system that was set up. That was the culture, which, in his first inaugural address, Jefferson defined as protecting people from injuring each other, and otherwise leaving them alone. And it's that kind of framework of liberty that creates our culture, in this country in particular.

I want to make two points about how, in practice, I think we have gotten it wrong. The first has to do with the attempts to prohibit or control individual behavior, whether you're talking about drinking, as in the case of Prohibition, or whether it's drug use or censorship of the kind that Walter was talking about. In all of this, I think there are a couple of problems that probably are not paid enough attention. It was called by an e-mail correspondent of mine "law inflation", which in effect has the same effect on law and our attitude toward the law that inflation has on money.

The point is this, that if you have a few simple laws against things that people all agree are bad—rape, robbery, murder, things like that, fraud—you have no problem. You can establish cultural capital, which says you shall obey the law because the rule of law is so important that you will not try to judge each law *de novo*. When the government gets involved in cultural issues in which large numbers of people in the population do not think they are doing anything wrong, A, you label them criminals, and B, they say to themselves, "I'm doing this thing which the government says is illegal; I'm not doing anything wrong." And people start to pick and choose which laws they're going to obey.

Tonight I'm going to go home, and first I will probably pour myself a large martini, which is legal. But if I were to light a joint, I could get put in jail for a long period of time. We have hundreds of thousands of people in jail right now for doing things like that; not because they've hit somebody while they were smoking dope, not because they abused their children, not because they robbed anybody, but because they engaged in that act—which, as far as I'm concerned, is basically like drinking a martini. I would log on to FullTiltPoker.com and play poker,

but the government has said I can't do that either. Well, you have millions of people who disagree. Every time that happens, that you have new government attempts to push and poke the personal behaviors that define our culture, you have a lot of people who say, "This is nonsense; go ahead and break the law." And, thus, you weaken the cultural capital, which is the most precious legacy we have: respect for the rule of law.

The second point has to do with attempts to positively affect the culture, to encourage stable families, religion, and the rest of it. I think it's fair to say that almost everything I have written over the last twenty years has started from the premise of the importance of the married two-parent family as the generator of a civil society. I am very, very one-sided in my view of the importance of the family. But I would also suggest to you that government no more knows how to encourage certain values regarding the family or religion or other institutions that I hold dear than the Left had when it was trying to social-engineer its values in the 1960s. So, any time you have an administration, whether it's conservative or liberal, that says, "We will use the instruments of government to push and pull and tweak," they get it wrong.

They get it wrong for a couple of reasons. Those of you who are familiar with public choice theory know that however good the idea is originally, by the time it is crafted into legislation, public choice dynamics have contaminated it beyond recognition. You also know all the political problems that go along with it. I would add that there is an incompetence inherent in this kind of effort. The smartest social scientists in the world cannot tell you what's going to happen if, for example, you have a major new tax deduction for children, just to pick one that's kind of a conservative attempt to affect the culture. We don't know how that's going to play out, but I will tell you this, that if you go to countries which, say, have tried to encourage the family by having very generous child allowances, generous maternity leave and day care centers, you're going to find plunging fertility rates, plunging marital rates, and soaring illegitimacy ratios. That's the way it has worked out in these countries which openly label their policies "child-centered." Similarly, if you go to Sweden, rural Sweden, as I did a few years ago, and drive through the country, you will see in town after town absolutely beautiful

churches, freshly painted, meticulously maintained grounds, subsidized by the government. And they're empty—empty on Sundays, as well as every other time. When government gets involved in the crucial institutions that define the culture in which we live, family and community and religion, it inherently, ineluctably, inevitably enfeebles it.

Thanks.

MEESE: Our next speaker is Anthony Romero. He has been involved in public interest law for most of his professional career, and currently serves as the Executive Director of the American Civil Liberties Union. We're pleased to have him with us today. Welcome.

ANTHONY ROMERO: Now first, I want to tell you, whenever I get a request from the Federalist Society, I tell my assistant to put it to on the very top of my list of speaking engagements. Even as I was flying down here from New York on this beautiful Saturday afternoon, I kept asking myself, "Why, again, did I accept this speech?" I will tell you quite candidly: "It's because when I put together our ACLU membership convention, and we reach out to conservatives and individuals who disagree with the ACLU, I very much appreciate it when we have individuals like Ken Starr, who came to our membership conference a year ago, Wayne LaPierre, who was there two years ago, or Bob Barr, who's spoken there several times. Bob Mueller even had the courage of his convictions to come and walk into our Coliseum, and he walked out the live Christian that he was. So I just hope to walk out with my life, out of this Coliseum.

Let me just say, I also appreciate it because it gives me an opportunity to hear from individuals that I normally don't get a chance to hear from; whom I can only read. For instance, I completely agree with much of what Dr. Murray has just said I completely agree with. It might surprise you or my the ACLU's members or even myself me how much consonance there is on some of these issues. In fact, there is a common bond between those of us who care about the rule of law and those of us who care about American values. My day-to-day work is to apply the Constitution and the Bill of Rights; to make them come alive for people; to help people who struggle for their rights to live with dignity and equality; to make that not just a paper aspiration

but a reality. That's what I we do. It's the alchemy of taking great founding principles and making it them real for people.

And I think that one of the things that liberals or progressives, if they call themselves that, have done poorly is that they have run away from the those core "American values." discussion. They've been reluctant to engage in a discussion of what it means to be an American. When I took over the ACLU right after 9/11—I was there on the job a week before the 9/11 attacks—I was very clear that we should wrap our organization in the American flag, and we should be unapologetic about being patriotic, about what defines us as a people, and what it means when we salute the flag or sing the national anthem.

What is it that makes us feel proud as Americans? What is atare those core American values?

Innocent until proven guilty. The right to due process of law. Equality under the law. To be who you are and say what you think and live and love the way you want. Those are core American values that define us as a people. And in a country with no unifying language, no unifying culture, no unifying religion, what brings us together is our adherence to these core values, that our adherence to the rule of law.

When I look at the last four years or so, I see a very significant betrayal of some of these basic values. If I were a member of the Federalist Society—I have yet not joined, although I think I could, especially with Attorney General Meese being one of the distinguished leaders of it—I would think that these are very tough times to be a conservative and a patriot. I will say quite candidly that I think the Bush administration is engaged in a wholesale betrayal of the values that you and they and some of you say they espouse. Think of the whole question around torture and abuse. Think about how some of the highest levels of our government have authored documents that allow the redefinition and backing away of long-held traditions of the protection of human rights and stability. Think about the Office of Legal Counsel's memos. One of your speakers this afternoon is an author of those memos. You have the memos from the Attorney General Mr. Gonzales, who called the Geneva Conventions "quaint and obsolete." You had this President sign into law the Military Commissions Act, which backed away from one of our greatest traditions, the writ of *habeas corpus*—shutting the courthouse doors to individuals as much entitled as

any person to deny them rights of access to the court system.

The culture that has been created by those actions is a culture of impunity, and we ought to be clear that that is what we're creating when we allow or encourage or look aside when officials take those actions. Look at the culture that has been created by the National Security Agency wiretapping program. Mr. Cheney ridiculed my organization just the other day at your Convention, saying that perhaps we were not going to suffer the great irreparable damage that the court held in Michigan. With all due respect, I take great issue with that statement. The great harm is the fact that this President decided that he did not need to adhere to the law enacted by Congress, the Foreign Intelligence Surveillance Act of 1978. This President believed that he need not go to any judge to authorize his wiretapping program, which could reach Americans in the U.S. That, my friends, leads to a culture of a President above the law. That affects all of us. And if that President really believed that he needed those powers, he ought to have engaged Congress in that discussion. Or he ought to have gone to one of the Foreign Intelligence Surveillance Court's judges and asked for their permission. To step outside that context the law, I believe, just undercuts our core American values.

It must be hard to believe in "limited government" and see changes current events in the political landscape. This abortion ban that was put on the ballot initiative in South Dakota, which lost in a predominately red state—even with many individuals, including Jerry Falwell, pouring millions of dollars into the campaign in South Dakota—would not have allowed banned abortions even in the context of rape or incest. It would be very hard for someone believing in limited government to believe that was good foreign policy.

And take the example of gay marriage, as some of you call it; the idea that government need not legislate or create this culture of rights, these "special rights" for certain groups. I will tell you, while Dr. Murray goes back to his home and pours his martini, I will go back to my home into the arms of my partner, my husband of 10 years, in a committed, solid, loving relationship. When his father came to New York from Miami dying of liver cancer, he was on our sofa. I rushed him to the hospital. I wiped his brow. I grieved when my father-in-law died.

When anything hits our families, we are married; we engage it as two co-equal, loving, committed partners. And yet, before the law we are treated as strangers. We do not have the rights that those of you who are married have. We do not have the material benefits that those of you who are married have. But regardless of whether you grant us those rights or not, we will remain married, and we'll fight for those basic rights.

Whether you choose to be on the side of granting people equality and dignity and freedom under the law or stay on the side of those who would deny people the protections, the rights, that will ensure these strong families that we all deserve and wish to have, the choice is yours. I'm confident that history will be on our side. And generations from now, when my grandkids talk about how Grandfather Manuel and Grandfather Anthony their grandfathers were not allowed to be married, and they ask their counterparts in school, "What did your grandparents think of this issue?" I hope you make them feel proud.

Thank you very, very much.

MEESE: Thank you. Phyllis Schlafly has a very long career and a very distinguished career on public policy issues. She's a lawyer, the President and Founder of Eagle Forum, and she has been active in a number of constitutional matters. Phyllis, it's a pleasure to have you with us.

PHYLLIS SCHLAFLY: Well, thank you, General Meese and friends. I want to shift gears here for a few moments. Government is the most powerful influence on our culture today because government spends about \$2-1/2 trillion a year, and every dollar carries the power to affect our culture and behavior through laws, regulations, grants, entitlements, and tax credits. And more influential than all the laws and judicial decisions, and even the media, in directing our culture is the arm of government known as the public schools. The public schools are guiding the morals, attitudes, knowledge, and decision-making of 89 percent of American children. They are financed by \$500 billion of our money each year, forcibly taken from us in taxes, federal, state and local, which the public-school establishment spends under a thin veneer of accountability to school board members and government-run elections.

Prior to the 1960s, the public schools used a McGuffey Reader style curriculum, where American kids learned not only the basics but also values such as honesty, patriotism, and respect for elders. The curriculum integrated kids assimilated by learning our language, our laws and culture. For example, the *American Citizens Handbook* published for teachers by the National Education Association in 1951 proclaimed, and I quote, “It is important that people who are to live and work together shall have a common mind, a like heritage of purpose, religious ideals, love of country, duty, and wisdom to guide and inspire them.” The message of this civics handbook was fortified by selections suitable for memorization, such as Old and New Testament passages, the Ten Commandments, the Lord’s Prayer, the Golden Rule, the Boy Scout Oath, and patriotic songs. My, how the public schools have changed, and how the teachers unions have changed since 1951.

The turning point came in the 1960s with the great influence of the humanist John Dewey and his Columbia Teachers College acolytes who argued for objective truth, against authoritative notions of good and evil, against religion and tradition. And then Sidney Simons’ 1970 book called *Values Clarification*, which sold nearly a million copies, was widely used to teach public school students to cast off their parents’ values and make their own choices based on situational ethics. Then the public schools welcomed the Kinsey-trained “sexperts” to change the sexual morals of our society from favoring sex in marriage to sexual diversity. Concepts of right and wrong were banished, and the children were taught about varieties of sex without any reference to what was moral and good.

Since the 1950s, the public schools have a rejected the Meyer-Pierce doctrine that parents have the fundamental right to control the upbringing of their children, and instead have adopted the view that the village—that is, the government—should guide the child. While tolerating massive illiteracy, the public schools are now powerfully impacting our culture by inculcating the values of situational ethics, diversity, and the easy acceptance of sex outside of marriage. American history and literature courses now teach the doctrines of U.S. guilt and multiculturalism instead of the greatness of our heroes and our successes. Public schools have become fortresses in which school administrators exercise

near-absolute power to guide the students’ values, morals, attitudes, and hopes, while parents are kept outside the blockades.

Federal courts confirm the monopoly power of the schools to affect our culture. The Ninth U.S. Circuit Court ruled last year that a public school can teach students whatever information it wishes to provide, sexual or otherwise, and that parents’ right to control the upbringing of their children does not extend beyond the threshold of the school door. After heavy criticism in Congress, the Ninth Circuit tried to soften the word “threshold,” but boldly reaffirmed the decision.

In five circuits within the last two years, federal courts have handed down anti-parent, pro-public school decisions. Federal courts upheld the right of public schools to indoctrinate students in Muslim tradition and practices, to force students to attend a program advocating homosexual conduct that used minors in sexually suggestive skits, to force students to watch a one-hour pro-homosexual video, to censor any mention of intelligent design, to use classroom materials that parents considered pornographic, to force students to answer nosey questionnaires with suggestive questions about sex, drugs, and suicide, and to deny a divorced father’s right to get his own son’s school records.

This is not only a culture issue; it is a free speech issue. The schools are censoring views that do not conform to the diversity/multiculturalism culture they are determined to teach. The courts upheld the public schools in prohibiting an anti-gay T-shirt but ordered the school to permit an extremely offensive anti-Bush T-shirt. The free speech issue has now expanded beyond the schools as the gays try to get people fired who criticize the gay agenda. The courts have upheld the constitutional right of any school child to refuse to recite the Pledge of Allegiance. But neither school nor court offered any child or parent the right to opt out of any one of these programs that I listed.

To sum up, it’s not a question of whether or if the government will or should define our culture. Government schools are, every day, powerfully defining the culture of the nation our children will live in by inculcating the values of diversity, multiculturalism, American work, situational ethics, and the easy acceptance of sex acts outside of marriage. There is no proof that the American

people have democratically chosen this definition of our culture. It has been done with the power of government employees spending the people's money. And since there is no prospect that either the public schools or taxes will be abolished anytime soon, our task is to stop government institutions from directing our culture in ways that the American people do not want to go.

Thank you.

MEESE: Thank you, Phyllis. Our next speaker is William Eskridge. Professor Eskridge is the John Garver Professor of Jurisprudence at Yale Law School. He has written a number of very important books. His specialty is in statutory interpretation, and he's going to talk to us about our subject today. Please join me in welcoming Bill Eskridge.

WILLIAM ESKRIDGE: Well, here's an irony. I actually agree with the main points made by the previous speakers, so you have two choices at this point: you can either sit down, which is not an option, or you can try to synthesize them. So, let me suggest a sort of odd synthesis of what you just heard, particularly from the panelists on my far left [Mr. Romero, Mrs. Schlafly & Mr. Murray].

It does seem to me—and Ms. Schlafly, I completely agree with you on this—that there's a strong tendency when, in our country, we have strong cultural and deep normative conflict, for each side to see the government as a needed ally in advancing their normative agenda. We saw this in the apartheid versus civil rights movement. We've seen this in the wets versus dries on the use of alcohol. We've seen this on the pro-life versus pro-choice view on abortion. We've seen this on gay rights versus traditional family values. And this is not an irrational thought because the government—and I'll go beyond Mrs. Schlafly—is teacher, police officer, and opinion leader. We're not only educated—(perhaps less so than before)—in the public schools, but the government is the locus of educational advertising campaigns that inundate us each day with information and norms. The government, moreover, as a police officer has a monopoly on legitimate coercion. The government can at least try, Dr. Murray, to force conformity or provide incentives for conformity. And then the government sees itself often as an opinion leader. Symbolic politics is often about the value of

government endorsement to carry normative weight, or at least be a signal of higher status for the victors. This seems to me the deep truth that you all have identified.

On the other hand, direct government intervention into these deep normative conflicts, it seems to me, Dr. Murray, doesn't merely usually not work but usually turns out not at all as intended. It's often counterproductive. The government produces effects that are not sought for, even by the proponents. Take the anti-same sex marriage initiatives that we've seen in recent years. As I understand it, the goal of these initiatives is either to strengthen man-woman marriage and marriage generally in the country or to bash or denigrate gays as homosexuals, or something worse. Those seem to be the main goals.

Now, it seems to me that the anti-same sex marriage movement has run into three types of problems, and I think you see this more broadly. The first is the problem of the distorted normative agenda. That is, political campaigns investing all sorts of resources to procure government intervention will often refocus attention away from the group's deeper goals. You see this in religion, for example. And so what we've seen in the traditional family values movement is that they have focused on stopping same-sex marriage, and they've done so successfully in many jurisdictions. But that has meant less focus on the deeper threats to marriage, which include high divorce rates, deadbeat dads, domestic violence rates, etc., that are genuine problems for marriages of all sorts.

Second is a problem of compromise. That is, when you get involved in the government and there's deep normative conflict—not consensus but deep conflict—then you're probably going to get a compromise, at least in many jurisdictions. These compromises can have unpredictable results. So, for example, one effect of the anti-same sex marriage movement in the last thirty years has been the generation of compromises with moderates that create new governmental forms for recognition of horizontal relationships; such things as domestic partnerships, which you see in California and dozens of American cities. You see civil unions. That's a new institution in Vermont, Connecticut, and probably New Jersey next year. You see reciprocal beneficiary institutions in Hawaii and Vermont. And sometimes, as in France and Vermont and many domestic

partnership ordinances, straight couples want to enter these institutions as well, even though they were created primarily for gay couples. By stopping gay marriage, you end up creating institutions that frustrate people and constitute competitors to marriage.

And then there's the problem of hyperfocus. That is, government attention to an issue creates hyperfocus discourse that can itself create and intensify unexpected phenomena. So, for example, anti-same sex marriage campaigns can create homophobia, but they can also create homosexuality not just as a coherent identity and a famous identity, but maybe also a fabulous identity, a sexy identity. Just ask Romeo and Juliet. As William Shakespeare recognized, state and parental disapproval will not dissuade Romeo from wanting loving Juliet—or Mercutio, as the case may be—and indeed might even make Juliet, or Mercutio, even sexier. And so, the anti-same sex marriage initiatives might get young people thinking about, and even romanticizing in unpredictable directions.

Now, the elements that I suggested—the hyperfocus problem, the compromise problem, and the misplaced agenda problem—are not unique to same-sex marriage. Clarence Thomas makes these very same arguments about the counterproductiveness of Affirmative Action. Affirmative Action, he says, has distorted the civil rights agenda away from things they should be focusing on. It has created compromises that hold back African Americans, that don't advance their lives, and creates a hyperfocus on race as a totalizing identity, perhaps even contributing to prejudice.

So, this is not a liberal versus conservative thing. It seems to me this is a truth claim. So is government unimportant in transforming culture? I think Mrs. Schaffly is right. It's very important. But the government is most powerful in transforming culture indirectly. I'll give you a couple of examples, and then the Attorney General will make me stop. I think the best example is war. You've basically got to have a government to fight a war, and war has produced, I think, deep cultural transformations in our society, including transformations that people fight for. So, for example, World War II transformed mainstream American values toward people of color, toward the roles of women, and even ultimately toward homosexuality. Government innovations as

to technology and infrastructure also can have deeper effects on culture than government. Railroads in the 19th century contributed to a national economy and culture. It was not necessarily the intent, but that was the effect. And new economic tensions fueled unionization, farm co-ops, popular political consciousness, and so on and so forth.

What about gays and lesbians? In my opinion, the anti-same sex movements are not going to deeply affect the American family in a good way, nor gays and lesbians necessarily in a bad way. For all of the DOMOs and the anti-same sex marriage initiatives, it seems to me that these will have less effect on same-sex marriage than two other government-sponsored innovations. One is the Internet. (Remember, Al Gore helped invent that; Gore and the military.) The Internet has made sexual information, as well as misinformation, widely available in ways that we never would've thought possible, and made match-making easier for gays, lesbians, bisexuals, heterosexuals, etc. Second is government-sponsored research. This has in some way contributed to the wide availability of artificial insemination technologies. And these medical technologies, in which the government probably doesn't play the primary role, enabled something the law has maybe much less to do with, at least affirmatively: creation.

Anthony speaks about same-sex marriages. According to the 2000 Census, there were 600,000 same-sex couples in the United States, probably an undercount; it's gone up by at least 100,000 since then. The Census found that a third of those female couples were raising children within the relationship; a fifth of the males were raising children within their relationship, many of them through artificial insemination and other techniques. This is transforming American culture. It's not an agenda. It's a social phenomenon that we are grappling with. The government plays a role, but not the role that you would have expected when you elected Ronald Reagan, Bill Clinton, and various Bushes.

Thank you.

MEESE: Thank you, Bill. Winding up the six initial talks here is Professor Hadley Arkes. Hadley is the Edward Ney Professor of Jurisprudence and American Institutions at Amherst College. I've known him since the days when he was a Salvatori Fellow. He's a very profound writer on a variety of

subjects, including the one that we're dealing with today. Please welcome Hadley Arkes.

HADLEY ARKES: Bill Eskridge reminds me of Mark Twain's line from *Pudd'nhead Wilson's Calendar* that Adam ate the apple not because he wanted the apple but because it was forbidden. And the great mistake was not forbidding the serpent; then he would have eaten the serpent.

I find myself in a position where I'm probably one of seven people here who thought that *Lochner* was rightly decided, and I have to play the role of the moralist here. It's like that line from Tom Stoppard, that the moralist is bound to sound like a crank haranguing the bus queue with the demented certitude of one possessed of privileged information. But I did something awkward; I prepared something to address the subject we were given. And so I may have to use an old device of mine and compress this talk Hebraically, by omitting the vowels.

I understood that the problem here at the core was the question of whether the government should shape the culture. It's curious how people affect to be unaware of the classic understanding of the connection between the logic of morals and the logic of law, and then find themselves persistently backing into the same logic, and indeed relying on it at every turn. Of course the government shapes the culture. It shapes our moral understanding because that was built into the very nature and logic of law. When we legislate, we override claims of personal choice and private freedom and replace them with a uniform rule and a public obligation. That move is coherent only as we appeal to some principle that defines what is just or unjust, more generally or universally. So, forgive me for being clinical, but when we move to a level of a moral judgment, we move away from statements of mere preference or private taste. We begin to speak about the things that are right or wrong, or unjust for others as well as ourselves. Thus, we come to the judgment that it is wrong to own humans as slaves, and we mean that it will be wrong for everyone, for anyone. And if we come to the judgment that it's wrong for parents to torture their infants, the logical response is not to say, "Ah, therefore, let's give a tax incentive to induce them to stop;" the logical response is with the voice of a command, a command that forbids that torture. To whom? To anyone. To everyone. We forbid it with the force of law.

That's not to say that it is wise to reach with the law everything that is wrong. We may hold back in prudence. But the law finds its ground of coherence and its ground of justification only in the moral ground of principle. So, when we restrict the freedom of people, we're obliged to say more than "Most of us don't like it." That's not good enough. And to get clear on the moral standards that must govern our judgment is not to legislate more, it is to legislate less. We raise the bar. That's what I, too, think. We have too much law.

The question was raised in the past: How does the law engage in moral teaching? The answer was that it teaches through the laws. When we legislate against racial discrimination in private inns and restaurants, we remove discrimination from the domain of private tastes and treat it as a matter of moral consequence. Between 1963 and 1966, opinion in the South came to be parallel with opinion in the North, with majorities in both sections holding to the wrongness of racial discrimination. We may ask: Why did the culture of the South change so strikingly in three years? Did it have something to do with new moral lessons being taught at the top of the state and taught dramatically with the laws?

In recent years, the most dramatic attempt to alter the culture, to shape a new moral understanding, has come through the efforts to impose, through the courts, a right to abortion and a notion of gay rights, including same-sex marriage. Clearly, those issues stand at the core of what we call today "the culture wars." In these cases, the project was to instruct the public gradually, persistently, that the things that elicited public recoil should now be tolerated, accepted, approved, then regarded as rightful and desirable, as things to be promoted through the use of the laws. In Massachusetts, we have seen the move to teach even more emphatically in the schools, to proclaim in the land, the new ethic contained in the orders of the court on same-sex marriage. Some administrators have declared they are merely teaching the pupils to understand the moral lessons that the law is trying to impart. Surely the most risible thing these days is to hear both proponents of same-sex marriage and even libertarians profess to be appalled at the notion of using the law to reshape the culture, the moral understanding of the public.

No one can rightly deny that the law imparts a sense of what is rightful and wrongful. The libertarians

would have us recede precisely because they wish to recede from moral judgment on certain things, perhaps racial discrimination or sexual matters. But even the libertarians are not willing to overthrow the laws on marriage. They insist that the laws require two parties competent to contract; not the marriage of children or the marriage across species, as some people have recently sought—Mr. Philip Ruple in Maine and his 37-pound dog, Lady.

Even if our libertarian friends are right—and the libertarians are right eighty percent of the time—well, what was Holmes’s line about Rufus Beck? He said his major premise was “Goddammit”. As the social scientists say, it explains a large portion of the variants. He got it most of the time. Even the libertarians wish to instruct people in the moral rightness of a government that restrains itself and respects personal freedom.

The point here is that nothing can be settled by invoking some empty slogan that the law should not try to shape morality. The law has no business speaking in the first place, unless it’s pronouncing on something of moral consequence. If we think it’s seriously wrong for a parent to withhold medical care from a child, we move to have the law register a concern and intervene. There used to be signs of saying “No Irish Need Apply,” “White Tenants Only.” They did not necessarily produce material harms. They denigrated, they produced at times certain emotional wounding. Yet the law came down to bar those kinds of signs, even when the law had not barred the freedom to engage in the discrimination in hiring or renting. Stephen Douglas famously insisted that the government should not pronounce on the vexing moral questions like slavery. People should be left to their personal choice. But if it was a matter of polygamy, say in Utah, well then he was willing to send in the troops because, now, this is serious stuff. And thus it is.

If people take seriously a right to abortion, they want to see it protected and promoted into law. They’re not content with a Federalist solution or the notion that people may be deprived of a right because they happen to live in South Dakota rather than New York. And the party that professes such a deep concern about privacy has led the charge over the years in withholding the shelter of privacy for private business and clubs respecting their own private criteria.

In the case of gay rights, there’s been an adamant opposition even to tolerating the right of people in their private enclaves, in their small businesses or rental of homes, to honor their own moral convictions on the rightness or wrongness of homosexuality. Surely, this would seem to be the place where the claims of private judgment could have been readily tolerated by people who have made privacy their anchoring slogan. Yet this doesn’t even get us to the clamor for new measures on hate speech, to censure and punish even priests who might state the traditional teachings on homosexuality.

As Lincoln said, “If slavery were right, all words against it would be wrong and could rightly be swept aside and I can grant your request to censor the federal mails to screen out the Abolitionist literature.” And so we can grant this point. If the people professing this new ethic on same-sex marriage happen to be right, well, the course they’ve taken is quite warranted. But that is the substantive question, and that is the question on which everything must finally hinge, not some cliché about the law not shaping the culture.

And so, like that character in Moliere who discovers that he’s been speaking prose all his life, some of our friends wringing their hands over the law shaping morality find that they have been doing precisely that at every turn.

