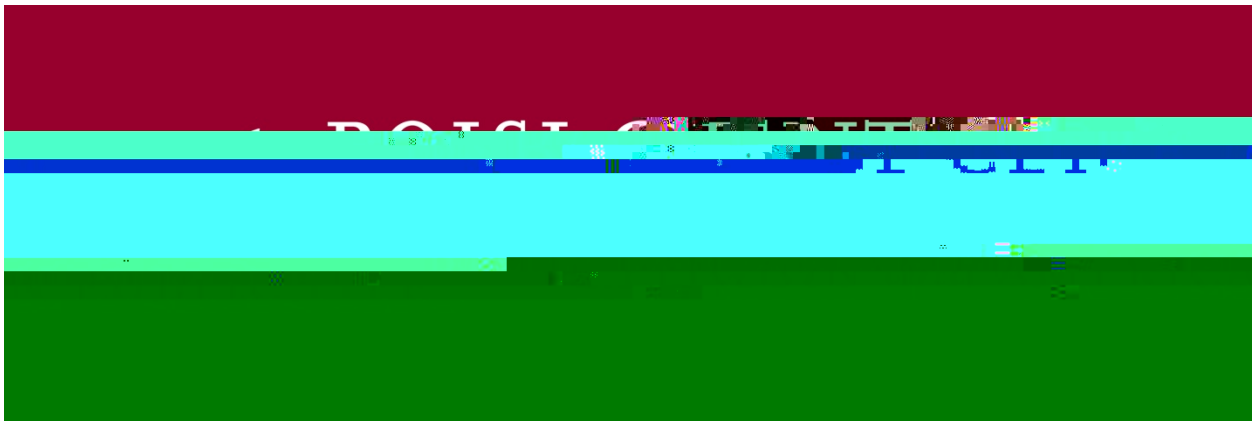

Symposium on Religion and Politics

Spring 2011

Christian Conservatism

24 quincy road, chestnut hill, massachusetts 02467
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BOSTON COLLEGE

BOISI CENTER
FOR RELIGION AND AMERICAN PUBLIC LIFE

Symposium on Religion and Politics

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William & Mary Bill of Rights Journal

Volume 4 Issue 2 Article 5

Religion in the Classroom

M. G. "Pat" Robertson

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They stole her self respect. They stole her hopes and dreams. They stole her trust in people. And, worst of all, they stole her virtue and her faith in God.[1]

Rape is a horrible crime, but my message tonight is not about the brutal

American experiment of ordered liberty without also understanding the ...

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

Surveys of the American people by the Gallup organization over the past fifteen years show each year that eighty percent of the American people want prayer returned to the public schools of the nation.[40] The people have

the liberal activist judges and their friends and allies, the people of America say very simply: you have violated us long enough. We want our history back. We want our traditions back. We want our Constitution back. And, we

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

M. G. "Pat" Robertson

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

Now, in asserting that originalism used to be orthodoxy, I do not mean to imply that judges did not distort the Constitution now and then, of course they did. We had willful judges then, and we will have willful judges until the end of time. But the difference is that prior to the last 50 years or t8dment.

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

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

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

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

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

This is the equivalent of, an anthropomorphism equivalent to what you hear from your stockbroker, when he tells you that the stock market is resting for an assault on the 11,000 level.

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

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

Conservatives are willing to grow the Constitution to cover their favorite causes just as liberals are, and the best example of that is two cases announced some years ago on the same day, the same morning. One case was Romer v. Evans, in which the people of Colorado had enacted an amendment to the state constitution by plebiscite

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

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

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

Well, I've talked about some of the false virtues of the Living Constitution, let me tell you what I consider its principle vices are. Surely the greatest — you should always begin with principle — its greatest vice is its illegitimacy. The only reason federal courts sit in judgment of the constitutionality of federal legislation is not because they've explicitly authorized to do so in the Constitution. Some modern constitutions give the constitutional court explicit authority to review German legislation or French legislation for its constitutionality, our Constitution doesn't say anything like that. But John Marshall says in

particularly those involving the Eighth Amendment, if you think it is simply meant to reflect the evolving standards of decency that mark the progress of a maturing society — if that is what you think it is, then why in the world would you have it interpreted by nine lawyers? What do I know about the evolving standards of decency of American society? I'm afraid to ask.
If that is what you think the Constitution is, then Marbury v. Madison is wrong. It shouldn't be up to the judges, it should be up to the legislature. We should have a system like the English — whatever the legislature thinks is constitutional is constitutional. They know the evolving standards of American society, I don't. So in principle, it's incompatible with the legal regime that America has established.

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

Now, if you're not going to control your judges that way, what other criterion are you going to place before them? What is the criterion that governs the Living Constitutional judge? What can you possibly use, besides original meaning? Think about that. Natural law? We all agree on that, don't we? The philosophy of John Rawls? That's yes. There really is nothing else. You either tell your judges, "Look, this is a law, like all laws, give it the meaning it had when it was adopted." Or, you tell your judges, "Govern us. You tell us whether people under 18, who committed their crimes when they were under 18, should be executed. You tell us whether there ought to be an unlimited right to abortion or a partial right to abortion. You make these decisions for us." I have put this question — you know I ask at law schools with some frequency just to make trouble — and I put this question to the faculty all the time, or incite the students to ask

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

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

I think the very terminology suggests where we have arrived — at the point of selecting people to write a constitution, rather than people to give us the fair meaning of one that has been democratically adopted. And when that happens, when the Senate interrogates nominees to the Supreme Court, or to the lower courts — you know, "Judge so-and-so, do you think there is a right to this in the Constitution? You don't? Well, my constituents think there ought to be, and I'm not going to appoint to the court someone who is not going to find that" — when we are in that mode, you realize, we have rendered the C