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KEYNOTE ADDRESS

THE ROLE OF SOCIAL JUSTICE IN JUDGING CASES

HON. STEPHEN REINHARDT*

I am pleased to participate in this conference in honor of my very distinguished colleague. Judge Noonan and I do not always agree on cases, but, far more important, we have similar views about the values that are central to how we do our job.

Judge Noonan writes eloquently about the importance of compassion. His villains are lawyers and judges who become "shackled by bureaucratic rigidity."[1] The bureaucratic mind, Judge Noonan argues, "concentrates on getting the job done efficiently, quietly, without discomfort and without imagination and without the empathy that kindness requires."[2] When lawyers and judges adhere too rigidly to legal rules, they lose sight of the broader purposes for which those rules were created—to do justice. Perhaps worse, rules create abstract categories that mask the humanity at the center of legal controversies.[3] To me, judges without compassion—and there are a fair number of them in our courts today—have simply chosen the wrong profession.

Judge Noonan practices what he preaches. His opinions exude a passion for social justice for ordinary people—workers, immigrants, and the underprivileged. This commitment to social justice is central to his, and my, understanding of how courts should conduct their business. Law is a tool—a means to an end. The goal of our legal system, like the goal of our

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* Circuit Judge, United States Court of Appeals for the Ninth Circuit. This is the text of a keynote speech delivered at the University of St. Thomas Law Journal Symposium honoring Judge John T. Noonan, Jr. in October 2003. I owe a debt to one of my law clerks, Joshua Civin, for his invaluable assistance. The views expressed are mine and not those of the United States Court of Appeals for the Ninth Circuit.

1. John T. Noonan, Jr., *The Heart of a Catholic Law School*, 23 U. Dayton L. Rev. 7, 8 (1997).

2. *Id.* at 11; *see also* John T. Noonan, Jr., *The Secular Search for the Sacred*, 70 N.Y.U. L. Rev. 642 (1995); John T. Noonan, Jr., *Choice of a Profession*, 21 Pepp. L. Rev. 381 (1994); John T. Noonan, Jr., *Education, Intelligence, and Character in Judges*, 71 Minn. L. Rev. 1119 (1987).

3. *See* John T. Noonan, Jr., *Persons and Masks of the Law* (Farrar, Straus & Giroux 1976).

government in general, is to ensure freedom and liberty and to help provide a decent life for all Americans.

Sadly, this vision is not shared by large numbers of my judicial colleagues. Far too often, justice is thought to be divorced from the workaday business of the judiciary, or worse yet, it is viewed as a concern not properly to be considered in the resolution of legal disputes.

The model judge is increasingly thought to be a technocratic proceduralist, decidedly similar to Judge Noonan's bureaucratic villain. Although I would certainly not label him a villain, our current president's favorite jurist, Justice Antonin Scalia, champions a methodology for deciding cases that seems to favor grammar over social justice. He combs dictionaries and parses sentence structure in order to resolve ambiguities in statutory and constitutional texts.[4] In a dispute between two telephone companies, Justice Scalia went so far to assess the merits of various versions of Webster's dictionary.[5]

Justice Scalia offers a seemingly sophisticated justification for his literalist proclivities. Supposedly, rigid textualism prevents judges' personal biases from infecting their judicial decision-making. Justice Scalia believes that his methodology forces judges to remain value-neutral because it constrains their decision-making to strict construction, or straight-forward application, of what texts mean. Never one to miss the opportunity for a rhetorical flourish, Justice Scalia calls this methodology originalism because the meanings that count for him are those he perceives to have existed at the time that the texts were drafted.[6]

Justice Scalia is not always successful in constraining his own strong personal opinions, however, as is evident most recently from his biting dissent in *Lawrence v. Texas*.[7] Indeed, his opinions as well as his dissents frequently mirror his fundamental social views, which he is not reluctant to publicize. In speaking engagements, Justice Scalia has been known to call himself a "fool for Christ's sake," to champion natural law, and to criticize the welfare state.[8]

Here is not the place to assess how successful Justice Scalia or any other jurist is at preventing his own opinions from affecting how he decides cases. Regardless of any ideological differences, few judges would deny the need for vigilance against the influence of improper personal biases. If a judge's religious values, for example, conflict with his legal obligations,

4. *See* Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton U. Press 1997).

5. *MCI Telecomm. Corp. v. American Tel. & Telegraph Co.*, 512 U.S. 218, 225 (1994).

6. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989).

7. 123 S.Ct. 2472, 2488 (2003) (Scalia, J., dissenting).

8. Joan Biskupic, *Scalia Makes the Case for Christianity: Justice Proclaims Belief in Miracles*, Washington Post A1 (April 10, 1996); Michael Stokes Paulsen & Steffen N. Johnson, *Scalia's Sermonette*, 72 Notre Dame L. Rev. 863, 863 (1997). A public text of Justice Scalia's remarks is not available.

he has two options: to follow the law or to recuse himself.[9] Generally, this is not a problem in the lower federal courts where one can easily find a judge of the same rank; but it may pose more of a dilemma for members of the Supreme Court.

Strict constructionists tend to lump social justice together with other problematic personal biases. This is a fundamental error. Certainly, individuals who manifest a commitment to social justice draw inspiration from diverse sources—both secular and sacred. Among Catholics, for instance, Dorothy Day, Archbishop Oscar Romero, and Bobby Kennedy all differed in their theological orientations, but they shared a passion for social justice. The important point, however, is that wholly aside from one's personal or religious beliefs, there is a universal wellspring of social justice in the United States—a wellspring that constitutes a wholly appropriate foundation for judicial decision-making. Social justice draws its inspiration from America's national legacy. That legacy breathes life into our legal institutions; and it is memorialized in our fundamental texts, most notably in the preamble to the Constitution, the Declaration of Independence, and the Bill of Rights.

By judging from the perspective of social justice, then, I do not refer to the categorical imposition of an individual judge's values, religious or otherwise. Nor do I suggest that judges should be society's moral tutors or its prophets. Social justice is not a value system that exists in a parallel universe to our legal texts and traditions; rather, social justice is a substantive legal principle that pervades all aspects of the law from torts to Social Security claims. The purpose of our legal system is not to provide an abstract code of rigid rules; rather it is to promote values that are compatible with the vision of a just existence for all individuals.

A truly catholic (with a small c) view of the Constitution incorporates the concept of social justice. There is another view, however. In keeping with their rigid textualism, originalists believe that our founding instrument is merely a technical charter that allocates responsibility among various governmental entities. While the separation of powers is undoubtedly an important feature of our republic, it is but one of the organizational tools that our Constitution provides to ensure that our system operates in an efficient and orderly manner. While orderliness is a necessary element in any society, it is far from the be all and end all of a truly democratic system.

In my view, the Constitution is a collective covenant designed to effectuate the broad purposes outlined in its preamble:

> We the People of the United States, in Order to form a more perfect Union, *establish Justice*, insure domestic Tranquility, provide

9. Antonin Scalia, *God's Justice and Ours,* 123 First Things 17, 18 (May 2002).

> for the common defence, *promote the general Welfare*, and secure the Blessings of Liberty to ourselves and our Posterity.[10]

Originalists skip over these stirring words, just as they ignore the Constitution's undeniable reliance on the self-evident truths proclaimed in the Declaration of Independence. In contrast, in the *Federalist Papers*, Justice Scalia's favorite reference book other than the dictionary, James Madison emphasizes these goals in setting forth his broad constitutional vision: "Justice is the end of government. It is the end of civil society."[11] So does a jurist whom originalists frequently cite, Chief Justice John Marshall, who wrote in *McCulloch v. Maryland*: "a constitution [is] intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."[12]

The amending process is also a tribute to the Constitution's vibrancy as a catalyst for progressive strides toward a more just society. Over time, Americans have identified areas in which the original Constitution failed to live up to the nation's evolving ideals. We the People mobilized to correct these flaws, and in so doing we have made more self-evident the Constitution's commitment to social justice.

Despite what the originalists claim, our Founders would have been proud of the Constitution's capacity for evolution. The Founders' goal was not to enshrine permanently the status quo at the time of ratification. Rather, they often referred to the Constitution as an "experiment" in government.[13] As apostles of the Enlightenment, they saw the American republic as a beacon to the world. They knew that their document was not perfect—that it contained unjust compromises, not the least of which were the explicit authorization of the slave trade until 1808 and the notorious clause reducing blacks to three-fifths of a man. Despite these compromises, the Founders' revolutionary ideals served as a challenge to future generations to improve upon the Constitution's flawed commitment to social justice.

Regrettably, the federal judiciary has frequently been an obstacle to movements that try to promote economic fairness or individual rights. *Dred Scot*,[14] *Lochner*,[15] and *Bowers*[16] are among the most notorious examples. For a brief period between the 1950s and the 1970s, this obstructionism waned. Under the leadership of Chief Justice Earl Warren and Justice William Brennan, the federal judiciary took seriously for the first time the

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10. U.S. Const. preamble (emphasis added).
11. *The Federalist No. 51*, at 324 (James Madison) (Clinton Rossiter ed., 1961).
12. 17 U.S. 316, 415 (1819).
13. *See e.g. The Federalist No. 40* (James Madison); Thomas Jefferson, *Second Inaugural Address* (D.C., March 4, 1805) (available at www.yale.edu/lawweb/avalon/presiden/inaug/jefinau2.htm).
14. *Dred Scot v. Sanford*, 60 U.S. 393 (1856).
15. *Lochner v. N.Y.*, 198 U.S. 45 (1905).
16. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

vision of social justice at the core of this nation's ideals. The Warren-Brennan Court understood that our legal system does not force judges to wait on the sidelines while other public and private institutions perpetuate injustice; for as Justice Brennan argued: "the Constitution embodies the aspiration to social justice, brotherhood and human dignity that brought this nation into being."[17] The Warren-Brennan Court provided a model for how the judiciary can utilize the law to protect the rights of the poor, the disenfranchised, and the underprivileged, as all of us who are judges are obligated to do in conformance with our oaths of office.

In contrast, the justices who form the majority of today's Supreme Court have mounted a counter-insurgency against what they perceive as the excesses of the Warren-Brennan Court. For instance, Justice Scalia dismisses Justice Brennan's approach to interpreting the Eighth Amendment as an effort "to replace judges of law with a committee of philosopher-kings."[18]

There are true differences between the humanitarian approach to judging from the perspective of social justice that was followed by the Warren-Brennan Court and the spiritless technique of strict constructionism or literalism employed by today's majority. These differences are illustrated by a hypothetical posed to Justice Scalia in a discussion period after a lecture that he gave in Rome several years ago: What should judges do if the Neo-Nazis came to power in the United States and enacted the modern-day equivalent of the anti-Jewish Nuremberg laws? Few judges would disagree that these laws would be immoral. However, Justice Scalia believes that these laws would be unconstitutional only if they violated the express protections that the majority was generous enough to grant in the Bill of Rights. Justice Scalia also suggests that the majority could amend the Constitution to restrict these rights, for democracy, he believes, does not, in itself, offer any protections to minorities. "If you want minority rights," he argues, "you must persuade the majority that you desire those minority rights, or else take up arms and conquer the majority."[19]

In my view, this is a weak and fallacious vision of democracy. Whereas strict constructionists grudgingly acknowledge the protections that the Bill of Rights explicitly enunciates, a social justice vision starts from the premise that minority rights are a fundamental part of our nation's ideals and constitute a core element of our American democracy. Minority rights stand at the same level as the remainder of the Constitution and are as integral to our system of justice as the rights of the majority. Both flow from

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17. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in *Interpreting the Constitution: The Debate Over Original Intent* 23, 23 (Jack N. Rakove ed., Northeastern U. Press 1990).

18. *Stanford v. Ky.*, 492 U.S. 361, 379 (1989); *see also* Antonin Scalia, Speech, *Of Democracy, Morality and the Majority* (Gregorian U. in Rome, June 14, 1996), in 26 Origins 81 (1996).

19. Scalia, *supra* n. 18.

identical sources. It was not by whim or chance, therefore, that the Warren-Brennan Court interpreted the Bill of Rights and other legal texts broadly to promote equal justice for all Americans—but especially for those most in need, those whom the majority is prone to isolate and oppress.

Switching from the world of hypothesis to actual cases, judging from the perspective of social justice differs from originalism because it favors, whenever possible, the charitable or humanitarian construction of legal texts. Frequently, in my line of work, disputes cannot be resolved by "mere application" of the law. The literal texts are unclear. Either they are open to several possible interpretations or they are not sufficiently specific to be of much help. Just last week, for instance, one of my more conservative colleagues remarked to me that when deciding cases he is constantly amazed by how many basic issues of constitutional interpretation and common law adjudication remain open or unresolved.

Faced with ambiguity, technocratic judges parse texts in search of narrow, minimalist solutions. Such uncharitable constructions do not reflect a partisan political approach. Among the most committed technocrats are many appointees of the most recent Democratic president, William Jefferson Clinton.

In contrast, judging from the perspective of social justice requires looking at the broader purpose of the disputed text. It rejects the tunnel-vision of Judge Noonan's bureaucratic villains and emphasizes, instead, empathy for individuals. Whereas strict constructionists insist that "legal context matters only to the extent it clarifies text,"[20] from the perspective of believers in the role played by social justice, context and purpose are far more fundamental.

The most celebrated judicial decision of the twentieth century is a case study in judging from these contrasting approaches. To a strict constructionist, *Brown v. Board of Education*[21] was a near impossible case for the plaintiffs. To those with a broader view of the Constitution, the black schoolchildren's victory was foreordained.

After the justices heard oral arguments during the 1952-53 term, the Court was badly split.[22] Perhaps concerned about its own image, the Court decided to consider the question further and put the case over to the next term. The justices requested briefing from the parties as to whether segregation in public education was considered in Congress's debates over the Fourteenth Amendment and in the state ratification conventions.[23] Mean-

20. *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001) (Scalia, J., concurring).

21. 347 U.S. 483 (1954).

22. Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* vol. 2, 776-77 (Alfred A. Knopf, Inc. 1975); Bernard Schwartz, *The Unpublished Opinions of the Warren Court* 445-69 (Oxford U. Press 1985).

23. *Brown v. Bd. of Educ.*, 345 U.S. 972 (1953) (assigning re-argument and requesting briefing on particular issues); Kluger, *supra* n. 23, at 777-79.

while, Chief Justice Vinson, who was an advocate for upholding the old separate-but-equal doctrine, died.[24] The new chief justice, Earl Warren, ultimately had this to say about the possibility of resolving the constitutional dispute through literalist interpretation: "[The] discussion and our own investigation convince us that, although the sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive."[25]

Left with legal ambiguities, Chief Justice Warren used all of his powers of persuasion to convince his colleagues to employ a charitable and humane approach to determining what the Constitution contemplated—to recognize the devastating social ills that segregation promoted. Fortunately for America, he succeeded. Belatedly recognizing that racial apartheid was inconsistent with democracy, the Supreme Court unanimously held that segregated schools were unconstitutional, thereby changing the very nature of our society forever. While the legal issues were far from easy, in the end the interests of justice were clear.[26]

When controversial issues come before judges, it is not always easy for us to determine what it is that the interests of justice demand. On some issues, a consensus has developed. On others, a consensus has not yet formed. Let me note just two in the latter category and offer my predictions. I feel confident that just as the Supreme Court came to recognize the injustice of racial apartheid, it will eventually come to realize that state-imposed capital punishment, or as Justice Blackmun called it "the machinery of death,"[27] constitutes cruel and unusual punishment. I am equally confident the Court will someday hold that individuals have the right to end their own mortal existences peacefully and painlessly with the assistance of medication prescribed by their physicians and without interference by the state—that the right to live and die with dignity will inevitably be recognized as an essential part of the substantive due process of law guaranteed to all Americans by the Constitution. I might note that the right to physician-assisted suicide is one of the few issues on which Judge Noonan and I have written opposing opinions.[28]

There are other issues as to which legitimate differences may persist. Catholics who believe in social justice are divided, for instance, over abortion and undoubtedly will long remain so. Disagreements over what social justice demands in particular cases are understandable. Such disagreements

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24. Kluger, *supra* n. 23, at 829; *see also Brown v. Bd. of Educ.*, 348 U.S. 886 (1954) (postponing argument "[i]n view of the absence of a full Court").

25. *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954).

26. Even the majority of the present Supreme Court would now probably agree with that decision, although it is fascinating to speculate how today's members would have voted had they been on the Court in 1954.

27. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

28. *Compassion in Dying v. Wash.*, 49 F.3d 586 (9th Cir. 1995) (Noonan, J.), *rev'd*, 79 F.3d 790 (9th Cir. 1996) (en banc) (Reinhardt, J.), *rev'd*, *Wash. v. Glucksberg*, 521 U.S. 702 (1997).

do not, however, call into question the validity of the social justice approach any more than differences over determining the original meaning of a phrase, the intent of Congress in enacting a particular statutory provision, or the validity of the rules governing the counting of ballots in a presidential election call into question any other methodology of judging. Judges must simply do their best to determine the interests of justice by applying the same techniques of legal reasoning and analysis that we apply to all other legal problems.

Controversies between judges who view the law as an inflexible code and those who seek to achieve the just result are not confined to constitutional adjudication; they permeate every area of the law. Literalists use their methodology to proclaim narrow and limited constructions in disputes between insurance companies and accident victims; employers and employees; immigrants and the Department of Homeland Security; disabled claimants and the Social Security Administration—and the results frequently favor the more powerful at the expense of the less. In contrast, judges with a more expansive view of the judicial function will often reach an outcome in such cases that is more sympathetic to the injured party or the person in need.

Let me give you just one example from the court on which Judge Noonan and I sit. Arnulfo Gradilla, a laborer in a machine-shop, spoke little English. He was a hard-working and loyal employee, even though he had suffered a number of work-related injuries.[29]

One Wednesday in October 1999, Gradilla went to his supervisor's office to ask permission to see a doctor about a persistent pain in his shoulder. While Gradilla was in his supervisor's office, he received a phone call. His father-in-law had been killed in a car accident, and it was necessary for Gradilla to accompany and to provide care for his wife, who had a serious heart condition, during her brief trip to attend her father's funeral in a village in central Mexico. Gradilla left immediately for the airport. He told his supervisors that he would return on Monday.

While Gradilla was away, the company scheduled a mandatory overtime workday on Saturday. As a result, Gradilla missed three, rather than two, days of work. The company claimed that Gradilla violated its policy, which provides that a worker who does not call in or show up for work for three days will be dismissed. When Gradilla returned, he was fired.

Gradilla sued and asked to be restored to his job. He asserted that his termination was unlawful under the California Family Rights Act[30] because the Act afforded him the right to take family leave to care for his wife. Two judges on the three-judge panel disagreed. They held that California law does not require an employer to grant even the briefest leave to an em-

29. *Gradilla v. Ruskin Mfg.*, 320 F.3d 951 (9th Cir. 2003).
30. Cal. Govt. Code Ann. § 12945.2 (West 2004).

ployee who provides medical care for a spouse who travels away from home for reasons unrelated to her own medical treatment. Even though the overarching purpose of the statute is to afford humane treatment to working people, the majority interpreted the law as if it were a rigid code intended to limit their rights. I can assure you that nothing in the language or structure of the California law suggested the shallow and callous interpretation adopted by the panel majority. Rather, my colleagues' misreading of the statute was based on the fact that the implementing regulations offered several examples of circumstances in which leave must be granted. The two literalist judges misunderstood the regulations and read these examples as constituting an exhaustive list instead of—as they were intended to be—illustrations of the types of instances justifying family leave. As you may guess, I dissented. Had my colleagues paused to consider the unfairness of their result, they might have realized that the purposes and objectives of the statute as well as the interests of justice required a different answer.

After the panel opinion was issued but before the en banc process could take place, the parties settled the case, and the opinion was withdrawn.[31] Thus, the decision has no precedential effect. We are left to wonder, however, whether Gradilla was ever reinstated to his job or, indeed, whether he even succeeded in obtaining any other gainful employment in this economy of diminishing opportunities.

Cramped and uncharitable construction of constitutional and statutory provisions is not the only way in which literalists disregard social justice when they decide cases. While professing the virtues of strict construction, the current Supreme Court seems bent upon expanding technical procedural rules such as mootness, finality, ripeness, standing, procedural default, non-retroactivity, independent state grounds, and abuse of writ. Rather than promote fairness or justice, these artificial constructs shut the door of the courthouse to ordinary people. As to the few who manage to surmount the barriers, the Supreme Court restricts federal judges from using their equitable powers to ensure that their claims are fully and fairly heard.

The Supreme Court has become a strong proponent of strict adherence to inflexible rules of criminal procedure. Because Charles Carlisle's lawyer missed a deadline by one day, his conviction was upheld even though the district judge found that there was insufficient evidence to prove his guilt.[32] In the case of Thomas Thompson, although the court of appeals decided that he was the victim of unconstitutional prosecutorial misconduct and of his own lawyer's unconstitutional neglect and incompetence, he was executed because the Supreme Court deemed that the lower court had failed to recall the mandate at the proper time—a decision for which there was not even a remote precedent in the nation's two hundred years of jurispru-

31. *Gradilla v. Ruskin Mfg.*, 328 F.3d 1107 (9th Cir. 2003).

32. *Carlisle v. U.S.*, 517 U.S. 416 (1996).

dence.[33] In another example of the worship of procedure over substance, technicalities over justice, Roger Coleman was executed because his lawyer missed a Virginia filing deadline by three days. In denying Coleman's petition, the Supreme Court expressed more concern about the harm to "Virginia's dignity" than it did about whether the state was unconstitutionally executing a human being.[34]

I am puzzled by the reasons for judges' rigid textualism, their worship of procedure, and, even more, their lack of concern for justice.[35] To me, it seems that the gains made by literalist proceduralism are somewhat akin to the current trends toward religious fundamentalism. One aspect of fundamentalism is the worship of texts and the canonization of their authors. This idolatry seizes upon literal interpretations of words, phrases, and strictures. Such excessive preoccupation with formalism is dangerous. It takes particular passages out of context and often stultifies, or misinterprets, the richness of a text—whether it is the Koran, the Constitution, a Shakespeare play, or the New or Old Testament. Fundamentalists forget that texts merit rereading because they contain parables, analogies, and lessons that transcend the contexts in which they were created. Today's literalists resemble the medieval scholastics who discussed endlessly how many angels could dance on the head of a pin instead of putting into practice Christianity's social justice tenets. Fundamentalist interpretations, or misinterpretations, are usually religious in nature—perhaps the most egregious being that only those who share the narrow views of one's particular sect are eligible for eternal life—a view that leads to the dehumanization of persons of all other faiths. Such fundamentalism breeds intolerance that can only further destabilize a world already suffering from war, terrorism, poverty, and disease. And, unfortunately, it is not only fundamentalists who claim in every war that God is on their side. Usually, both sides do with equal passion and certitude—as do most sports teams and winning pitchers or home-run hitters. Athletes tend to thank God for their victories and blame their managers for their defeats, but that's a story for another day.

33. *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997) (en banc), *rev'd*, 523 U.S. 538 (1998); *see also* Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. "Process,"* 74 N.Y.U. L. Rev. 313 (1999).

34. *See Coleman v. Thompson*, 501 U.S. 722 (1991). This is just one example of the Supreme Court's emerging doctrine of federalism—yet another aspect of its abnegation of social justice in favor of technocratic proceduralism. Judge Noonan has eloquently critiqued the Supreme Court's insistent claims that states have feelings, too. *See* John T. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States* (U. of Cal. Press 2002).

35. I do not intend to suggest by this or any other statement that when judges arrive at unjust results they always do so willingly. Even judges who are most devoted to a just interpretation of the law find themselves compelled on occasion to affirm decisions with which they disagree philosophically or jurisprudentially. Judges are not free simply to substitute their personal desires for precedent. Immigration law is one area in which the hands of socially concerned judges are increasingly tied by restrictive higher court decisions as well as by harsh congressional actions and administrative regulations.

To return to fundamentalism, if fundamentalists and originalists had their way, their methodology would become the preferred approach to resolving questions of interpretation that arise from all texts, whether sacred or secular, legal or literary. For instance, some have argued, including a leading Catholic jurist, that the Catholic Church's opposition to the death penalty strays from the original understandings of the "Framers" of Christianity.[36]

I am not the best person to evaluate which view of the death penalty is a more appropriate interpretation of Catholic doctrine, but I have my suspicions that this literalist methodology will prove as flawed in interpreting Christian theology as it has been in parsing legal rules and codes. Moreover, I know that there are other robust traditions within Catholicism that draw upon a social justice perspective that is no less resilient than the commitments reflected in American Constitutionalism and our other humanitarian legal traditions.[37]

As an outsider, I am particularly impressed by the principles that the U.S. Conference of Bishops enunciated in its 1986 pastoral letter, *Economic Justice for All.* "As a community of believers," the bishops wrote, "we know that our faith is tested by the quality of justice among us, that we can best measure our life together by how the poor and the vulnerable are treated."[38] This visionary message reminds Catholics that their faith has implications for their lives as employers and workers: "The obligation to provide justice for all means that the poor have the single most urgent economic claim on the conscience of the nation."[39] These insights provide lessons for judges also, because how well we fulfill our national commitment is likewise measured by the quality of justice we provide to those most in need.

In short, the commitment to social justice found in great religious traditions such as Catholicism also exists—although independently and upon a more universally acceptable foundation—as a fundamental premise of legal institutions in the United States and other democratic nations. The law is, indeed, not separate and apart from justice. To the contrary, each generation revisits the paragraphs, sentences, and phrases of the Constitution and other legal texts in an effort to understand and implement the vision of social justice that lies at their roots.

Judges play a vital role in this process of discovery. Every day, we must struggle to apply our concepts of justice in cases ranging from the

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36. *See* Scalia, *supra* n. 9.

37. *See* John T. Noonan Jr., Erasmus Lectures, *Deepening the Doctrine: The Development of Catholic Moral Teaching* (U. Notre Dame, Sept. 23 - Oct. 16, 2003) (manuscript on file with the author).

38. Natl. Conf. of Catholic Bishops, *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy* ¶ 8 (Natl. Conf. of Catholic Bishops 1986).

39. *Id.* at ¶ 86.

most mundane individual disputes to great social and political controversies. This is the part of our job that we should embrace and take the greatest pleasure in performing. Above all, it makes being a judge a worthwhile and noble endeavor.