



AMERICAN  
CONSTITUTION  
SOCIETY FOR  
LAW AND POLICY

**KICK-OFF AND RECEPTION:  
NASHVILLE LAWYER CHAPTER**

**INTRODUCTIONS:**

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**VANDERBILT LAW SCHOOL**

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MS. LISA BROWN: I want to welcome everybody on behalf of the American Constitution Society. My name is Lisa Brown. I'm the executive director of ACS, and I couldn't be more excited to be here to help kick off the Nashville Chapter. Having served as counsel to Vice President Gore in the White House, there is a special place in my heart for Nashville and for Tennessee, and so I'm always looking for excuses to be able to come back. And we really are tremendously excited about kicking off this chapter and seeing all of you here gives me hope that we are going to get our country back on track.

So I want to start by thanking the terrific members of the board of directors and the board of advisors of the Nashville Lawyer Chapter. And if you look at your program, you'll understand why I'm not going to name all of them because it's a terrific and large group, and organizing this event tonight I understand has really been a tremendous effort of the board, so we're really appreciative of the effort you all have put into organizing this tonight. And I do have to say an extra thank you to Rebecca Brown, who's a professor at Vanderbilt, because she is the reason that we have this great forum this evening and she very generously coordinated this kick-off with the conference that she has been hosting today and tomorrow that ACS and Vanderbilt are co-sponsoring on constitutional interpretation, so thank you.

Most of all, I want to thank all of you for coming today because ACS is a grassroots organization and you all are the heart and soul of the organization and we – all of us here – from ACS are really – and I want to make sure Shelby Harper – where is Shelby? – is right there, is our director of lawyer chapters, so I want to make sure that everybody here knows who she is – and we're really looking forward to working with all of you.

I know it doesn't come as a surprise to, I think, probably anybody in this room that the Federalist Society and conservative ideology have reshaped major segments of our nation's legal landscape and not to mention the landscape here in Tennessee over the past 25 years.

And at the risk of reiterating what is becoming finally common knowledge, I just want to emphasize that the conservative advances are not the result of happenstance. They are the product of a concerted, coordinated effort by the Federalist Society and other conservative organizations, which have worked very methodically over the past 25 years to develop legal scholarship and theories that would support their ends, to disseminate those ideas around the country, to get them out to academics, to lawyers, to the press, so that they became part of not just legal dialogue, but also – (audio break).

And finally, they worked to build a network for the dissemination of their views: lawyers to make arguments in courts, elected officials to enact their agenda, and finally judges, of course, to adopt their legal theories. And until relatively recently, they largely had the playing field to themselves. The good news is that there a number of organizations that are now stepping up to the plate and it took us a little long to wake up, but ACS is now very much engaged and it's really exciting to see the reaction to the organization, which is in part because the hunger for it has been there for so long, that people are really jumping in and getting involved and what is very exciting, I think, too, is to feel the change in the air right now, and I know that you all are feeling it a little bit here in Tennessee, too.

And – but you know, the Federalist Society may – I don't know how many of you saw this *New York Times* article. They recently took a victory lap basically on the front page of the *New York Times* publicly crowing about their success and taking over the judiciary following the confirmation of Justices Roberts and Alito. But despite that, the rest of America is really, I think, waking up to the dangers of some of what's been going on in this country and the horrible price that our country is paying for straying from our founding values of liberty, justice, equality, and the rule of law. And the discovery of the administration's program of warrantless domestic surveillance, continuing revelations about the treatment and torture of enemy combatants have made us really aware of how many of our fundamental rights are really hanging in the balance today.

And you know, if you care about civil liberties, voting rights, religious freedom, the rule of law, GLBT rights, access to justice, the environment, or just the balance of powers at the heart of our constitutional system, you have to be worried right now and you've got to get involved in ACS because we're involved in the whole range of legal and policy issues. We are essentially a forum for the development, discussion, and dissemination of progressive ideas that are alluded in our founding values of liberty, justice, and equality. And we believe in the power of those ideas to generate positive change, especially when they're linked to a broad coalition of lawyers who are determined to make sure that those values are at the center of our laws and policies.

And the hunger for ACS is really reflected in the rapid growth of the organization over the last five years now, and we've gone from being a good idea to now really a nationally recognized organization. We have over 150 student chapters now, one of which is a terrific chapter here at Vanderbilt, and 25 lawyer chapters, red and blue states alike around the country, and a growing network of moderates and progressives. We host well over 700 programs a year all over the country, including a national convention in Washington, D.C., that draws about 1,000 people, was described as one speaker last year as a spa for the mind. (Laughter.)

And we have recently launched a national project called the Constitution in the 21<sup>st</sup> Century, the goal of which is to bring together academics and practitioners to articulate a progressive vision of the Constitution and law on a wide range of issues that are facing our country. The group is – the project is organized around issue groups; there are several working groups, one of which actually is hosting the conference here at

Vanderbilt on Constitutional Interpretation and Change. The issue groups are also sponsoring congressional briefings, holding conferences around the country, and publishing papers on the issues of the day.

We also have an increasing number of publications. We've just announced the establishment of an official ACS journal at Harvard, the *Harvard Law and Policy Review*. We'll publish our first volume of that early next year and also an issue groups journal – the *Journal of White Papers*. So you can see that we have a number of mechanisms now for getting out progressive ideas, which is really what we're trying to do. And we're an increasing resource for the media as well. When they are now trying to be balanced and trying to articulate progressive perspectives on issues, they call us for recommendations of people that they should talk to.

So all these is just the beginning. We want to be an ever-growing resource of ideas and person power for a progressive legal movement, but to be successful at that we need all of you to get involved in ACS. So please convince your friends and colleagues to join the organization, speak at a chapter, mentor a student, write a paper, write on our blog. Depending on how much time you have, we want to get you involved in the organization and use your skills in whatever way that we can. Our ultimate success is going to be dependent upon each and every one of you. So we really do hope that you get involved in the organization.

I want to leave you with the words of Judge Abner Mikva, who as many of you know, is former chief judge of the D.C. Circuit, White House counsel to President Clinton and former member of Congress from Illinois, and he recently wrote an article entitled “ACS versus Federalists” in *The Nation*, where he makes a compelling case for the critical importance of ACS and the work that all of you are doing, and he writes: “ACS’s goals are ambitious but attainable. Those who would despair of our success need only think of the small band of legal conservatives of 25 ago – their ideas then scorned by academics, ignored by judges, and unknown to the public – who persevered to build a powerful movement and reshape our world according to their notions. If you seek their works, look around you. Our work is just beginning. Don’t just stand there – join us.” And that’s exactly what I want to ask all of you to do.

And I want to now turn things over to someone who has joined us, Sharmila Murthy, who is the president of ACS’s national chapter. Sharmila is showing us that – showing us the power that each and every one of us, young and older alike, to bring about positive change. She is really a superstar in the making. She is a 2003 graduate of Harvard Law School where she was outreach director for the Harvard Legal Aid Bureau. She clerked for Judge Daughtrey on the 6<sup>th</sup> Circuit and I gathered just finished a Skadden Fellowship at the Legal Aid Society at Middle Tennessee, where she is now staying on, where she provides representation and education to recent immigrants and refugees in the Nashville area.

But if you think that’s – in case you think that’s not enough, she also has a Masters degree from the Kennedy School and was a Fulbright scholar in India, where she

studied economic self-sufficiency programs for rural women and she speaks Spanish, French, and some Hindi. (Unintelligible.) Welcome, Sharmila.

(Applause.)

MS. SHARMILA MURTHY: Thank you very much, Lisa. Well, first, I would like to ask all of you folks to just come and refill your beverages and have something to eat because, of course, a well-fed audience is a much more attentive audience. First, on behalf of the Nashville Lawyer Chapter, thank you for being here. We are here today because we share common beliefs. We believe that the rights that are in the Constitution are fundamental and should be protected, and this is really just the beginning. This is the beginning of starting a real community here in Nashville and we hope to have many more events where we'll have the chance to discuss and debate the real issues of the day.

I'd like to just briefly mention and recognize the members of our board of directors and of our board of advisors, and I'd like to ask – as I call your name, to just come to the front here so that we can recognize you. Thanks.

First, we'll start with our board of advisors. Many of them could not be here today, but those who are here – once again, please come forward. Clay Bailey, who's a retired attorney in Nashville; George Barrett of Barrett, Johnston & Parsley; the Honorable Adolpho Birch, who just retired from the Tennessee Supreme Court; Gordon Bonnyman of the Tennessee Justice Center; Rebecca Brown of Vanderbilt Law School; Bob Covington, also Vanderbilt Law School – (laughter) – please come forward – we're going to try to do a quick picture, so it actually would help if you come forward – (laughter) – Waverly Crenshaw of Waller, Lansden; Kathryn Edge of Miller & Martin; Harris Gilbert, who I believe was here – here, he's coming forward – of Wyatt, Tarrant; Charles Grant of Baker Donelson; Sue Kay, also of Vanderbilt Law School; Mary Jo Middlebrooks, who comes to us from Jackson, Tennessee, and has her own firm of Middlebrooks and Gray; Greg Ramos of North, Pursell, Ramos & Jameson; Marietta Shipley, who just stepped off the 2<sup>nd</sup> Circuit bench and is now with The Mediation Group; Bob Tuke of Trauger, Ney & Tuke, and also the chairman of the Tennessee Democratic Party; Ashley Wiltshire of the Legal Aid Society; and Larry Woods of Woods & Woods, who was here earlier, but just had to leave; and of course, last but not least is Margie Huff, who is the chair of our Steering Committee and practices with her own mediation group.

(Applause.)

And while they're working on the photo-op, I'd like to have our newly elected board of directors step forward. Kerry Daughtrey (sp), president-elect; Shauna Singh (sp), who is a law clerk to Judge Trauger of the U.S. Middle District; Juan Villasenor (ph) of the Tennessee Attorney General's Office; Manisha Desai of Waller, Lansden; Sarah Bookbinder, a law clerk to Judge Nixon of the U.S. Middle District; and Christopher Bulls (sp), who's our law school delegate. So they have actually all decided to congregate on this side. (Laughter and applause.)

And with that I would like to introduce Rebecca Brown, who will be introducing our keynote speaker for the night. Thanks very much.

MS. REBECCA BROWN: Thanks, Sharmila. This is a little bit of a tag-team project, I guess, to lead us up to the main event, which will be the speaker that I'm about to introduce, but I wanted to welcome everyone to Vanderbilt Law School. I'm so excited to be part of this new Nashville Chapter of the ACS, which is beginning and flourishing, and I think it's a sign that people here, as elsewhere – everywhere maybe – are really looking for a way to express our collective sense that the American spirit of liberty is facing some serious challenges today and it needs some help – some attention.

Over 60 years ago, our country faced another grave set of challenges, and in 1944, Judge Learned Hand spoke on an occasion that's called something like American Day or something to that effect in Central Park, and he spoke about what he called the spirit of liberty. And I wanted to repeat just a few of his words for you here tonight because I was so struck when I was remembering them and how aptly they describe what I think we're facing as a polity today. See whether you'll agree. Judge Hand said, "The spirit of liberty is the spirit which is not too sure that it is right. The spirit of liberty is the spirit which seeks to understand the minds of other men and women. The spirit of liberty is the spirit which weighs their interests alongside its own without bias. The spirit of liberty remembers that not even a sparrow falls to earth unheeded."

I think that the ACS gives us an opportunity to come together to commit to that idea – the view that Judge Hand, I think, expressed there; that is, in recognizing one's own place in relation to others, both individually and collectively, that project is at the heart of the spirit of liberty that we all cherish as Americans, and ACS gives us an opportunity to do that together, so I'm very proud to be part of it.

And with that, I'd like to turn to the introduction of our keynote speaker, Bill Marshall. Bill is the Kenan Distinguished Professor at the University of North Carolina's Law School. He writes widely in constitutional law, especially the First Amendment and separation of powers, but that is not the only career Bill has had. He confessed to me earlier this afternoon actually that the career he really wanted was one that my brother has: country musician – (laughter) – but unfortunately Bill had to settle for being deputy assistant to President Bill Clinton. I think he did okay for himself even if the musical world has lost a great talent, but there is still time, Bill. He has been extremely active in the ACS since its inception and I'm delighted to welcome him here to Nashville to speak to you tonight.

Bill Marshall.

(Applause.)

MR. WILLIAM MARSHALL: Thank you for having me. The highlight of my musical career is actually playing for \$15 a night and all I could drink – (laughter) – and those of you who has ever been drinking with me know what a cheap date that really was.

ACS is all about ideas. It really wasn't too long ago that there were the ideas out there that maybe the Constitution enshrined a right to a decent education or at least protected people against discrimination in education. It also had the quaint idea back then – and Frank Michelman (ph) was here earlier today – that maybe discrimination against the poor was prohibited by the Constitution; that perhaps various kinds of penalties might be unconstitutional if their effect was to unfairly single out the killers of white victims as opposed to the killers of minority victims. Those ideas are long gone. You don't even see them on the stage anymore. You don't see them even discussed.

There are other ideas out there, however, that are not only discussed, some of these or the law of the land. The idea, for example, that the federal government doesn't have the power to protect the aged or disabled against discrimination by the state; the idea that the federal government doesn't have the power to protect endangered species or to protect wetlands; the idea that local governments cannot zone to prohibit flooding or to promote public spaces without having to pay major damages to property owners; the idea that local communities cannot prohibit organizations from discriminating against people on the basis of their sexual orientation, and most recently that the president of the United States has the power unilaterally to reject domestic law and international prohibitions and torture people if he so desires.

These are the ideas that are currently debated in the legal debate. How did this happen? Well, Lisa alluded to it before. There was an idea, (factory tree?) on the conservative side. They didn't like the way the country was going and their idea was the country was taking a wrong turn and they came together and they started developing ideas and they started developing ways of communicating those ideas. In the late 1980s under the Reagan administration, Attorney General Ed Meese authored a series of papers talking about the Constitution and how it should be changed to meet certain conservative goals and how the appointing of favorable judges and the changing of the debate over these issues was the way to get there.

If you've got – if you're interested in reading about this, read an article by Dawn Johnsen, who I'm proud to say is one of the board members of the ACS, discussing and presenting with these documents and talking about them, and I think they are also accessible on the ACS website. But the argument wasn't done all just through the changing of the legal culture: the conservatives had it together to change the political culture. So you've heard all of this addressed in ideas of we are the strict constructionist; they – meaning the liberals – are the judicial activists, and then they liked to guise it in populist terms, suggesting that what the liberals were doing were the judicial elites imposing their values – the intellectual elites imposing their values on the poor working folks that formed the conservative populace.

Well, a little while ago, I decided what I'd do is I'd take a look at this great, strict constructionist, judicial record that the Republican politicians and the conservative politicians were pointing to as an example of this strict constructionism free from the kind of value implementation that you see on the left, and I tried to figure out how they were defining this judicial activism that they were so heavily criticizing. Well, first, they started off – and this was Judge Posner who called – this is what – that really what judicial activism is countermajoritarianism. When courts strike down the actions of elected officials, that's judicial activism, that's the kind of thing that good conservatives should reject.

The problem with that, however, was that the conservatives after they started taking over the judiciary, started striking down federal laws in record numbers. So they had to abandon the notion that the judicial activism would be defined on the basis of this countermajoritarianism and move on to a different rationale.

Now, in so doing, I think they lost a little bit of their populism claim because suddenly they were striking down popularly enacted laws, but they had to move on because after taking the reins of power, they start engaging in exactly this kind of activity. Now, it's not always wrong. If things are unconstitutional, they should be struck down. And there may be in circumstances that some of the laws that were struck down by a conservative court were corporately done so, but don't come back and say when the liberals do it, it's impermissible judicial activism.

Well, then they might define judicial activism as overturning precedent. That wouldn't be the conservative view because precedents are in the center of the bull's-eye of what the conservatives are trying to do. And if you read the newspapers, you make that clear and we all know *Roe v. Wade* or *Lemon v. Kurtzman*, the key Establishment Clause case are the kinds of target that are directly in the bull's-eye and that could give you a host of other areas where the conservatives have claimed that what they're trying to do is overturn precedent. Again, not in itself illegitimate. If precedents are wrong, they should be overturned, but you can't as a categorical matter say it's okay when we conservatives do it; it's judicial activism when you liberals do it.

Well, then they say, oh, no, what this is really all about is those liberals expanding jurisdiction and their power to be able to enact – to reach certain particular results. So they cut back seriously and they've been very successful on cutting back seriously on access to the courts by habeas, by people bringing habeas claims; by standing; by the rights of minorities, for example, to attack laws that they find to be stigmatic on racial grounds.

At the same time, however, interestingly enough, they expanded jurisdiction and notions of standing with respect to favored classes of plaintiffs. So it may be inappropriate for African-Americans to attack the way that the IRS is enforcing its regulations against schools that discriminate, but it's perfectly okay for the court to be worried about it. So I guess it's the stigmatic effect when white people are put into majority-minority voting districts.

Or the affirmative action cases, the court may clear a series of cases they weren't going to allow minorities to attack zoning kinds of concerns because it's too attenuated a relationship to say that if zoning was created to allow public housing in a community that particular minority might actually get into that community – too attenuated, no standing. Except in the affirmative action cases, the court came back and said that people who are trying to get government contracts could have standing to attack those programs even if they couldn't show that they would get the contract. Hmm.

And in *Lewis v. Casey*, one of my favorite ones, in denying standing if you are a prisoner, you couldn't attack the fact that you couldn't get access to library books to help you with your appeal unless you could show that if you had access to those books you'd prevail on your appeal. (Laughter.) A little bit of a double standard, maybe, okay. But you're all thinking, "Ah, he's missing the boat. What's he talking about jurisdiction? What's he talking about countermajoritarianism? The conservative movement is all about originalism."

Now, as an aside to this entire conference, today has been devoted in this, using a model of originalism has some problems, not the least of which is whether or not the framers themselves would have wanted later generations to be guided by their own particular view, and the indeterminacy that comes with originalism anyway. Patrick Henry and Thomas Jefferson and James Madison didn't agree on a hell of a lot, but leave that aside. Here we know the conservatives are on board. They're consistent; they're going to stick with originalism every step of the way, except, of course, when they don't. (Laughter.)

So in the affirmative action cases, they take a look at text because they know their anti-affirmative action position is not supported by history. In the 11<sup>th</sup> Amendment case, they take a look at history because they know what they're doing is not supported by text. In the takings cases, Scalia cites, quote, "constitutional culture" as supporting where he wants to go on property matters. And in another case – one of my favorites, the *Smith* case – he cites something called hybrid rights as just – now, that sounds a lot like penumbras to me, which I was criticized by the conservatives, but what it turns out is originalism seems to be a doctrine of convenience. They use it when they it helps them; they ignore it when they don't.

Now, I'm not suggesting that the conservatives are engaging in an unprecedented, unbridled activism compared to what liberals have done. There's been a lot of liberal decisions that can be seriously criticized and should, but what I am suggesting is that they are engaging in an unbridled hypocrisy about what it is that they're doing and it's about time they are held accountable and shown for engaging in that hypocrisy, and no greater one is with respect to their latest positions on presidential power.

Where is the originalism that suggests that the president of the United States should be completely unchecked in major actions taken in office? It seems to me that the Constitution was a result against one battle against a different King George and that that

might have influenced or have some role in the framers' views of executive power. Now, it's one thing to say it's hypocrisy.

The second question to ask, is hypocrisy toward what end? And here again, I am always charmed by the conservative notions that they are the populists fighting against a powerful, liberal elite. It's beautiful. It's great politics, by the way. And the politics – they're so good on politics. Ninety-six percent of Americans believe in God. What better thing to say is there than you're supporting God against the unbelievers, or that you're in favor of Christmas and they're not. (Laughter.) It's a pretty good political move. The idea is we characterize ourselves as the besieged minorities who are the victims of the powerful elite. The fact that they own three branches of government doesn't stand in the way of this claim that they are the besieged powerless fighting for truth against an overwhelming opposition.

And by the way, when they use the court as their punching bag – according to my – 11 of the last 13 justices to the United States Supreme Court were Republicans – are Republicans; 11 of the last 13 are Republicans. So what is that there is – what is it that they're really doing here? Well, let's take a look.

If you take a look at those cases I've just went through, you know, laws that help gays, we strike those down; laws that help the disabled, the aged, we strike those down. We protect whites against affirmative action or against majority-minority districts. We protect property owners.

There's a real pattern here, folks. It's a real pattern and it's a pattern of protecting the entrenched and the powerful against those who are disenfranchised and those who are not powerful. And one of my favorite cases in all of constitutional law bears this out. It's the Scalia opinion – thank God, it's a dissent – (laughter) – and it's a case that many of you probably haven't heard of. It's called *Brown v. Washington Legal Foundation*. You all, because you're lawyers, have to suffer the pains and slings of the IOLTA program. You know, the program that makes you put money in a lawyer's trust fund into an account so it can draw its interest and fund legal services. In every state, the way that these programs work is the only money that goes in there is that money that is too small or there for too fleeting of a time period to allow the clients who own that money to generate any interest.

The states managed to say, look, this money is in there; if we accumulate it, we will be able to fund – we will be able to create some money. And what are we going to do that? We're going to fund legal assistance for the poor. And I would think that all of us whether conservative or liberal should be in favor of allowing the poor to have access to justice. Challenged by the Washington Legal Foundation, a conservative think-tank, the United States Supreme Court upholds the program on the basis of the fact that if these clients couldn't really generate any income from this money, there was no just compensation required.

Justice Scalia responds by saying, “Hmm. Today the court upholds Robin Hood robbing from the rich to give to the poor.” If Justice Scalia represents the conservative movement and the conservative movement thinks that funding legal services is Robin Hood, we’ve got a problem because it seems to me the essence of what our commitment to the law should be would be to allow access to justice to everybody.

(Applause.)

Now, interestingly enough, we all know how this kind of decision complements what the conservatives want to do in Congress. You know, the argument against affirmative action was equal opportunity for all, right? So it’s not fair to help some as opposed to others. Well, maybe rich kids are okay. So let’s have some more rich kids and eliminate the estate tax because there we aren’t concerned about people making it on merit, we’re concerned on people making on their grandparents’ merit and that’s not even consistent in terms – inconsistent view according to the conservative on this idea of a fair playing field. The issue with property rights, the issue – I don’t know if you’ve read this new healthcare bill that the conservatives are pushing through, the healthcare accounts for the wealthy that really will improve healthcare for the wealthy while not helping the rest of us at all.

So so much for populism. They don’t have the populism angle either. Still, the right thinks it can make things true simply by the power of sloganeering and repetition. The inconvenient truth that they are activists and the inconvenient truth that they are not populists are not going to deter them in their claims. It’s time, however, for the charade to stop and that’s what we’re here to do.

Thanks for joining. It will be great working with you in ACS.

(Applause.)

MS. BROWN: That was fantastic. Really motivational, really inspirational. The formal program is over and now I guess the real work begins. Through working together, talking together, and building networks, we hope that we can really make some real changes to our world. Thanks for being here.

(Applause.)

(END)