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Millennium Speech

*Stephen Reinhardt**

March 4, 2000

I am grateful to have the opportunity to speak with you tonight about the recent history of civil rights and civil liberties, and the problems that will confront progressive lawyers in the new century. I'd like first to discuss the past briefly, and then turn to what lies ahead.

The federal courts have not been friendly to civil rights and civil liberties in recent years. Witness the successful assaults on affirmative action, the validation of new laws hostile to immigrants, the erosion of procedural and substantive rights of criminal defendants across-the-board – and, especially in the area of the Fourth Amendment – the severe new limitations on prisoners' access to the courts, the drastic restrictions placed, with the enthusiastic approval of the judiciary, on the right of habeas corpus, and the rush to execute capital defendants, regardless of serious errors that may have occurred along the way. We have even reached the point where some say, with a straight face, that innocence is not enough. There is an equally serious, if not less apparent problem, however, that I want to discuss with you briefly – the substantial weakening of the power of the federal government in the name of so-called “federalism.”

The current trajectory of the Court's federalism jurisprudence threatens to undo the very structure of our system of government. We are in the midst of what Bruce Ackerman might term a constitutional moment, but an awful moment at that. When Clarence Thomas replaced Thurgood Marshall in 1991, the conservative true-believers obtained their critical, and most dependable, fifth vote on the Court. Since then, the same five

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Justices have repeatedly banded together to limit the federal government's ability to perform its long-established role of securing the common good, and promoting the general welfare.

In the last few years, these five Justices have invalidated Congressional legislation in a manner unprecedented since the beginning of the New Deal. They have done so by severely curtailing the historic scope of the Commerce Clause,¹ by resurrecting the Tenth Amendment from judicial oblivion,² and by shedding their textualist clothing in order to arrive at a broad-sweeping goal-oriented misconstruction of the Eleventh Amendment.³ From the time that Franklin Roosevelt threatened to pack the Court in 1936, until 1992 – a period of fifty-six years – on only one occasion did the Supreme Court strike down a statute on the basis that Congress had exceeded its constitutional authority.⁴ That one occasion was in 1976 when Justice Rehnquist briefly assembled a temporary five-member majority for a decision that was later overruled.⁵ Between 1992 and February 2000, however, the Court has held nine congressional statutes unconstitutional, either in whole or in part, with seven of those nine cases decided by the same 5-4 split.⁶ By the end of the summer, the Supreme Court has

¹ *United States v. Morrison*, 120 S. Ct. 1740 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

² *See, e.g., Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

³ *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) [hereinafter *College Savings I*]; *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) [hereinafter *College Savings II*]; *Alden v. Maine*, 527 U.S. 706 (1999).

⁴ GERALD GUNTHER & KATHLEEN SULLIVAN, *CONSTITUTIONAL LAW* 142 (13th ed. 1997).

⁵ *National League of Cities v. Usery*, 426 U.S. 833 (1976) (holding that the Tenth Amendment barred Congress from making federal minimum wage and overtime rules applicable to state and municipal employees in the Fair Labor Standards Act), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (holding that where a regulation is valid as to a private party it is also valid as to the states).

⁶ *See College Savings I*, 527 U.S. at 648; *College Savings II*, 527 U.S. at 691; *Alden*, 527 U.S. at 760; *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Printz v. United States*, 521 U.S. 898 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Lopez*, 519 U.S. at 549; *New York v. United States*, 505

promised to tell us whether three other important statutes, including the Violence Against Women Act, can survive the acid bath of its federalism jurisprudence.⁷ My suggestion is: don't hold your breath – but do recognize that the crisis is real and that, if it continues unchecked, it will drastically alter the fundamental nature of the American government.

The razor-thin margin by which the federalism cases are being decided illustrates one essential point about the next century and, in particular, the next decade. The composition of the Supreme Court is of critical importance. The next President of the United States will likely have the opportunity to replace at least three of the members of the current Court. Accordingly, who occupies the White House after the next election may decide the fate of civil rights and civil liberties for generations to come. The leading candidate for the nomination of one of the two major parties has already announced that Justices Scalia and Thomas represent his concept of the ideal jurist, and has refused to comment about Justice Souter because he did not want to appear to be criticizing his own father, who appointed the Justice. That candidate's only serious rival for his party's nomination then proclaimed that Justices Scalia and Thomas met his ideals also, though he would add to the list two other Justices, Chief Justice Rehnquist and Justice O'Connor. That's not a good sign for civil rights and civil liberties, or for those who believe that it is the federal government's obligation to serve the interests of the people.

Now, I'd like to discuss some specific issues we are likely to face in the coming years.

Technological advances will determine, in large part, what the future will be like. The internet, encryption, storage of computer-generated information, DNA research, advances in automated surveillance devices, and cloning have already begun to transform our cultural understanding of ourselves and the relationship of citizens to government.

U.S. 149 (1992); see also Stuart Taylor, Jr., *The Tipping Point*, NAT'L L.J., June 10, 2000.

⁷ See *Morrison*, 120 S. Ct. at 1754.

The new century poses enormous concerns regarding the use of advancing technology by law enforcement agencies. This is a rapidly changing area, and our old methods of evaluating the abuse and limits of their power may no longer prove valid.

One of the primary issues we face lies in the realm of privacy rights. According to a recent Wall Street Journal survey, the number one concern Americans have about the coming century is the loss of personal privacy.⁸ Companies already have unprecedented access to information about our personal lives. And, the government will continue to have increased powers at its disposal due to advances in computerized record-keeping, remote listening and recording devices, and satellite surveillance.

As more and more aspects of our lives are involved with computers and captured on the internet, we are increasingly vulnerable to encroachments on our privacy. The government currently has the technology to create files containing more information about you than you'd care to have anyone know, to track your movements on the world-wide web, to access your email messages long after you thought they were deleted, and to scan your hard drive by remote. The government money subsidizing the development of voice recognition software that you may have thought was simply to help those of us with carpal tunnel syndrome – it is a dual-use technology. Voice recognition software, for example, facilitates the monitoring of telephone conversations by automatically transcribing them into scannable text. Moreover, under a multinational project called Echelon, the National Security Agency is reportedly involved in the most powerful communications surveillance program in history.⁹ Echelon is based on an

⁸ See Albert R. Hunt, *American Opinion (A Special Report): Bright Past Kindles America's Hope*, WALL ST. J., Sept. 16, 1999, at A9 (reporting that a "fear of loss of privacy tops other worries among all citizens . . . [reflecting] personal experiences with entities such as financial institutions or the health care system, as well as a general sense of a more invasive technology"); *American Opinion (A Special Report) Our Expectations: Medical Advances—And the Loss of Privacy*, WALL ST. J., Sept. 16, 1999, at A10.

⁹ Echelon is a technology developed by the National Security Agency whose capabilities allow it to intercept the satellite transmission of information and communications. See Elizabeth Becker, *Long History of Intercepting Keywords*, N.Y. TIMES, Feb. 24, 2000, at A6; Suzanne Daley, *Is U.S. a Global Snooper? No*,

automated global interception and relay system which monitors tens of millions of private communications per day, including phone calls, emails, and faxes. Through voice recognition software and other devices, all these communications are reduced to text and automatically scanned for certain key words. The European Parliament has recently commissioned studies on Echelon and the U.S. Congress is expected to hold hearings this term. These deliberations will provide us with a glimpse of the overwhelming problems we will confront in attempting to preserve zones of privacy in the twenty-first century, as well as the international dimensions of this issue.

Technological developments will also significantly reshape our criminal justice system, perhaps none more profoundly (at least as far as we know today) than the science of DNA. Guilt and innocence will be far more certain than before. This, of course, will help change certain of society's hostile attitudes toward some of today's criminal justice issues, will avoid some of the unjust convictions that presently stem from racial bias, and will likely lead to fewer innocent people being executed. At the post-conviction stage, DNA has already led to the release of a number of innocent people from prison including, of course, death row – although there is continuing resistance by some prosecutors and others to freeing innocent persons on the basis of DNA evidence, and even to permitting testing of persons who may have been unjustly convicted.

While the developments with respect to DNA are thus far generally positive, the greater certainty provided by DNA may also lead to less skeptical attitudes when the police level criminal charges, to fewer procedural safeguards for criminal defendants, and to excessive criminal punishments. Although DNA will help protect the rights of some innocent individuals, the precision it ordinarily brings to trials is already being used to support the relaxation of other important criminal protections. For example, this year, the legislatures of California and New York will consider bills eliminating the statute of limitations for sexual assault, on

account of the accuracy DNA purportedly brings to the prosecutor's table.¹⁰ Florida, New Jersey, and Nevada have recently abolished the statute of limitations in all cases of sexual assault.¹¹ If it's acceptable to drop the statute of limitations for crimes involving sexual violence, why should not a host of other crimes qualify for similar treatment?

Even when the DNA may be sufficient to exclude a particular suspect, there may be legitimate cause for concern over whether it can identify with certainty the actual perpetrator of a particular crime that occurred far in the past. The material from which DNA samples are collected or the DNA samples themselves may remain in storage, along with hundreds of other pieces of evidence from hundreds of other crimes. With a simple mislabeling or some other mix-up in the evidence, or, even with police tampering, an innocent person may be faced with nearly irrefutable DNA evidence against him. Those of you who are following the current events in Los Angeles will need no further explanation regarding the possibility of an erroneous verdict resulting from exclusive reliance on physical evidence produced by law enforcement. Especially in cases in which the regular statute of limitations has expired, how will an individual, after so many years, recollect where he was on the night or the hour of the crime, or assemble witnesses from that long ago for his defense?

Another concern is whether, in its efforts to combat crime, the government should be able to collect DNA from individuals against their will. Currently, all fifty states and the federal government have laws authorizing the collection of DNA samples from various classes of convicted felons. The genetic profile of these individuals is stored in government databanks for later use, ostensibly by law enforcement personnel only. Nationwide, government DNA collections have already grown so large that, as of 1999, the backlog of samples awaiting analysis was 600,000.

¹⁰ See S.B. 414, 2001 Leg. 224th Sess. (N.Y. 2001); H.R. No. 68 1995 Leg. Reg. Sess. (Cal. 1995).

¹¹ See N.J. STAT. ANN § 2C:14-2 (West 2000); N.J. STAT. ANN § 2C:1-6(a) (West 2000); NEV. REV. STAT. ANN. § 171.083 (Michie 1999); FLA. STAT. ANN. § 794.011 (West 2000); FLA. STAT. ANN § 775.15 (1)(a), (b) (West 2000).

Courts are not well prepared to evaluate the threats posed by the collection and use of DNA. Our old analogies don't fit that well and the subject matter is often shrouded in almost incomprehensible scientific terminology and procedures. Many of the court decisions upholding the forcible collection of DNA samples from felons have analogized DNA to fingerprinting. Even the term "genetic fingerprinting" has begun to enter the popular lexicon.

However, the comparison is deceptively simple. An individual's fingerprint is a two-dimensional representation of the end of his finger. An individual's DNA sample, on the other hand, contains a plethora of personal information not only about himself but also about his blood relatives. Perhaps most disturbing is the medical information contained in a DNA sample, such as information about predispositions to cancer, mental disabilities, and other genetic disorders. One need only imagine the problems raised if DNA could also indicate one's intelligence, sexual orientation, dangerousness, or proclivity toward certain addictions. Before we go too far, we must ask whether any individual should be forced to relinquish this sort of information to the government and whether the government should be allowed to store such information about any of us.

It doesn't take a Nostradamus to know that the collection of DNA from convicted felons is not the end of it. New York Governor George Pataki and New York City Police Commissioner Howard Safir recently proposed drawing DNA samples from every person who is convicted or arrested.¹² In New York City alone, where 345,000 arrests take place per year – thanks in part to the broken windows strategy – the civil rights and civil liberties implications would be enormous. Mayor Rudolph Guiliani has already suggested that DNA samples be taken from everyone at birth.¹³ He is not alone. Some have speculated that "in the not too distant future, every American could have their own, wallet-sized

¹² David Rohde, *DNA Trick Leads to Arrest in 3 Murders*, N.Y. TIMES, Mar. 3, 1999, at B4. Governor Pataki is in favor of collecting DNA samples from convicted felons, while former New York Police Commissioner Safir was in favor of collecting DNA samples for all those arrested. *Id.*

¹³ David Seifman, *Getting DNA Samples at Birth Fine With Rudy*, N.Y. POST, Dec. 17, 1998, at 34.

gene card bearing their personal DNA code.”¹⁴ It is incredible to think that the political debate over national ID cards has yet to be resolved, and issues such as mandatory genetic ID codes are already upon us.

DNA research will surely transform health, medicine, and our attitudes toward a range of moral issues as well. Genetic testing could eliminate medical insurance as we know it. According to Professor Larry Gostin, “As soon as we are able to predict genomically who will get sick it makes a mockery of insurance.”¹⁵ In the future, we will have to confront the question whether insurance companies should be able to screen applicants genetically, and how to respond when employers demand the right to do the same.

The results of genetic testing will be used by women deciding whether to carry to term, or even whether to conceive. Genetic profiles may also become a part of the information individuals rely on in choosing their spouses. The science of DNA will also pose unique questions concerning what we want to know about ourselves. Does a person necessarily want to know that he has a genetic trait that correlates with a 1 in 4 chance of developing cancer, if there is nothing he or his doctors can do about it? More simply, do we as individuals really want all the information DNA has to offer – even for ourselves? And, will we really have a choice if the government develops that information for all of us at birth and stores it in its files? Finally, can we really be sure that the information will not be made available to untold others in this new information age?

Technology, of course, will not be the only new factor in the twenty-first century. The landscape, legal and otherwise, will also be altered in fundamental ways by significant demographic changes. In California – the nation's largest state – we already live in a society in which there is no majority racial or ethnic group. In fact, there are already more Latinos than whites living in Los Angeles County – and Southern California is, in some respects,

¹⁴ Laurie Garrett, *Long Island: Our Future/Chapter 2: Health and Medicine/Protecting our Privacy/the Battle Has Begun Over Who Should Have Access to Genetic Secrets*, *NEWSDAY* (New York, N.Y.), Feb. 7, 1999, at A52.

¹⁵ *Id.*

effectively bilingual. The nation's population in general is undergoing dramatic change. According to the Census Bureau's projections, by 2050, nearly fifty percent of Americans will be Latino, African-American, Native-American or Asian-American/Pacific Islander.¹⁶

A multi-cultural population and changes in demographics are not without precedent in American history. Although "whiteness" as a racial marker has been employed in legal doctrine since the time of the Constitution, the concept of a "white" majority is itself a relatively new notion. At the beginning of the twentieth century, many "white" people thought of themselves first as German, English, Irish, or Italian. However, those demographic distinctions dissipated over time. Intermarriage between the different white groups, and corresponding social acceptance of the segments with a lesser social status, increased significantly. The same has occurred, though to a slightly lesser degree, among a variety of religious groups, including all the traditional Christian sects and at least the mainstream Jews. In the twenty-first century we will likely see similar sorts of integration among the various races, although the rate of intermarriage involving people of color is still lowest by far in the case of African-Americans.

Over the next few decades, the changing demographic boundaries will put pressure on existing legal doctrine in a variety of ways. Most obvious in this regard is affirmative action and anti-discrimination law. While the legal doctrines surrounding racial issues have been largely grounded in a black/white paradigm, the changes in our nation's demographics will exert pressure on us to develop new models for defining equality and achieving it.

The new color lines have already called into question old modes of remedying discrimination in education, as exemplified by the recent San Francisco lawsuit in which a group of Chinese-Americans successfully challenged a racial diversity program that

¹⁶ See United States Census Bureau, *Projections of the Resident Population By Race, Hispanic Origin, and Nativity: Middle Series, 1999 and 2000*, at <http://census.gov/population/projections/nation/summary/np-+15-a.pdf>. (Jan. 13, 2000); United States Census Bureau, *Projections of the Resident Population By Race, Hispanic Origin, and Nativity: Middle Series, 2050 to 2070*, at <http://census.gov/population/projections/nation/summary/np-+15-g.pdf>. (Jan. 13, 2000).

had been adopted pursuant to a consent decree in order to remedy the effects of systematic discrimination against blacks. That lawsuit, and the victory of the Chinese-Americans, indicates the complex ways in which racial politics will both change in the future and change our future.

While some of the demographic changes may have beneficial effects on the way our legal institutions and judicial doctrines respond to race-related issues, we cannot ignore the fact that African-Americans are likely to remain the most disadvantaged and isolated group. And we must bear in mind the criminal justice system's continuing, indeed intensifying, mistreatment of racial minorities, and of African-American males in particular. While the statistics regarding incarceration rates of minorities are familiar to all of us, it is worth reiterating that, as conservative economist Milton Friedman has pointed out, the rate of incarceration of black men in the United States is today four times higher than the rate of incarceration of black men in South Africa during the height of apartheid. Remedying this problem through the courts will continue to be difficult, if not impossible. Solutions are likely to require significant changes in the nature and administration of our drug laws, and in our view toward alternative forms of punishment, as well as substantial improvements in the economic and social conditions of the African-American and Hispanic communities. But do the American people have the will to make these changes? – to finally root out the vestiges of slavery and state-enforced segregation? And can we develop the political leadership that is necessary to bring this about? The signs are not encouraging.

As racial and ethnic demographics change alter the social field in which the law operates, structural changes in family relations will likewise occur. The structure of American families and, correspondingly, the substance of family rights will undoubtedly change significantly over the next century. The forthcoming Supreme Court decision concerning grandparents' visitation rights is only the tip of it all.¹⁷ Even if the Court strikes down the Washington statute as overbroad, that won't change the widespread

¹⁷ *Troxel v. Granville*, 530 U.S. 57 (2000) (finding the Washington statute unconstitutional).

sentiment that exists, namely, that grandparents have a special relationship to their grandchildren – a relationship that deserves some form of legal recognition and protection. The strength of that sentiment may be seen from the fact that all fifty states currently have a grandparents' visitation rights statute in one form or another. The current Supreme Court case also demonstrates that changes in the composition of extended families due to death, divorce, and remarriage will complicate questions regarding who has rights to the access and custody of children – whether it be a grandparent intimately involved in raising a child; a step-parent or a partner of a parent, who has, in practice, served as a parent; or a biological parent who reappears on the scene long after the time of the child's birth.

It is interesting that, in the pending visitation rights case, amicus briefs were filed on behalf of gay and lesbian parents in opposition to the visitation rights of the grandparents.¹⁸ Without sorting through the complex and paradoxical political alignments involved, it is worth noting the significant cultural and legal changes already underway. Consider the political impossibility of such “friends of the court” briefs being filed just twenty years ago. Indeed, social and legal progress in the arena of gay and lesbian rights has already laid the groundwork for a substantial reordering of alternative ways of living. Over the next century, diverse family structures will gain increasing legal recognition, most notably gay and lesbian couples; and the children born into such families, or adopted by them, will achieve complete legal and social acceptance.

Technological developments will also affect cultural and legal understandings of family structures and family rights. The breeding of children will be made available by science. What unforeseeable consequences will follow? Issues regarding rights to sperm and

¹⁸ See, e.g., Brief of Lambda Legal Defense and Educ. Fund & Gay and Lesbian Advocates and Defenders as *amici curiae* in support of Respondent, *Troxel v. Granville*, 530 U.S. 57 (2000) (No. 99-138); Brief of Northwest Women's Law Center, Connecticut Women's Education and Legal Fund, National Center for Lesbian Rights, and the Women's Law Center of Maryland, Inc., as *amici curiae* in support of Respondent, *Troxel v. Granville*, 530 U.S. 57 (2000) (No. 99-138).

fertilized embryos are already being resolved in the courts and the legislatures; and the determination of such disputes will eventually become as unremarkable or routine as today's child custody battles.

The structure of our families and associated family rights and responsibilities will also be affected by the so-called graying of America. The Census Bureau estimates that, by 2050, the U.S. population will increase by 50%, while the number of Americans 85 and older will increase by 400%.¹⁹ There are predictions that by that time, or before, Americans will be living to the age of 120. The civil rights of the elderly will involve new issues regarding medical insurance, job rights, and other forms of discrimination. Because the elderly will comprise so large a percentage of the population of voters, legislation and strategy of political campaigns will be affected dramatically. But what of the rights of young people coming into the job market at a time when openings due to attrition become rarer and rarer? Some day in the not so distant future, there may not be for example, an open seat on the Supreme Court for a period of 50 years.

The graying of America will also place unprecedented strains on limited medical resources. This will force us to confront, in an uncomfortably open fashion, some of society's most difficult legal and moral dilemmas. The government may well be placed in a decision-making role to which it is generally unaccustomed, namely, establishing rules governing who gets a lung, or a liver – or expensive cancer or other medical treatment. These are the sorts of decisions that are already being made, in some cases openly, in some *sub silentio*, by doctors, hospitals, and insurance companies.

¹⁹ United States Census Bureau, Projections of the Total Resident Population by Five Year Age Groups, Race and Hispanic Origin With Special Age Categories: Middle Series 2050 to 2070, at <http://www.census.gov/population/projections/nation/summary/np-+4-g.pdf>. (Jan. 13, 2000); United States Census Bureau, Projections of the Total Resident Population by Five Year Age Groups, Race and Hispanic Origin With Special Age Categories: Middle Series 1999 to 2000, at <http://www.census.gov/population/projections/nation/summary/np-+4-a.pdf>. (Jan. 13, 2000); United States Census Bureau, Components of Change for the Total Resident Population: Middle Series, 1999 to 2100, at <http://www.census.gov/population/projections/nation/summary/np-+6-a.pdf>. (Jan. 13, 2000).

But, by mid-century, these choices will occupy the public's mind and, in all likelihood, demand the government's direct intervention.

In other areas as well, calls for government intervention will be made, as crises, whether perceived or real, confront the nation. The threat of international and domestic terrorism will increasingly operate on our national psyche. Thus far, the United States, has been uniquely protected. Bordered by only two other countries, both friendly, and separated from the rest of the world by two vast oceans, we have enjoyed relative domestic tranquility. Our democracy has not been tested, like Israel's. When more bombs start exploding in populated buildings or on our city's streets, the mettle of our civil libertarian commitments will be put to the test. The enactment of the Antiterrorism and Effective Death Penalty Act,²⁰ at the urging of President Clinton, does not bode well for how measured the political response will be.

Other problems we may confront will come from more benign sources. It is possible that a human being will be cloned before we reach 2020. That event will probably first happen not in this country, but in a place where laws don't trouble scientists as much. The announcement of the first human clone will perhaps have its greatest impact in symbolic terms. The further cloning extends, however, the more the individual's sense of his own personhood and his metaphysical sensibilities will undergo reevaluation. Our interest in the legal and ethical regulation of the scientific community will also increase significantly, though far too late to control these and other developments for which we are psychologically unprepared.

While technology may introduce problems we have little experience dealing with, it can also render current issues that trouble us obsolete, or at least fundamentally change the terms of the present debate. The political and legal fight over abortion could be radically altered, if not ended entirely, in the very near future by the extensive availability and use of morning-after pills. When an AIDS vaccine is finally developed, an epidemic that has given rise

²⁰ Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2244 (Supp. II 1997)).

to a variety of serious legal and societal problems will be eliminated, and the world will indeed be a better place.

New techniques may affect the way we conduct our elections. Oregon has already experimented successfully with voting by mail ballot exclusively. Voting by the internet may become feasible, once concerns about verification and fraud are resolved. Campaigns may become far less expensive if they can be conducted through new forms of media. Internet campaigning may ultimately replace televised campaigns just as televised campaigns replaced whistle-stop tours. Paid advertisements, and the campaign contributions that fund them, may become far less important to the outcome of elections. All of these developments may change who can run for office and who will get elected. They could even result in a government that is far less under the domination of the monied interests and far more responsive to the people. *Buckley v. Valeo* may become a dim memory of a truly bizarre decision.²¹

I believe there will be at least a few other positive developments. I would predict the abolition of capital punishment by the middle of the twenty-first century. It is my guess, and it may just be wishful thinking, that the United States will finally join the consensus of liberal democracies on this issue. The only question in my mind is what events will precipitate the change.

Another cause for optimism – one to which I referred to earlier – is in the area of gay and lesbian rights. I have little hesitation predicting the overruling of *Bowers v. Hardwick* and the affording of full and equal rights to all regardless of sexual orientation.²² I believe that *Bowers* will eventually be recognized as being as contrary to our fundamental constitutional principles as *Plessy v. Ferguson*.²³

And I have also mentioned earlier other positive developments, including the substantial decrease in the number of innocent people who will be convicted, and the continuing trend in our society toward the blurring of racial lines.

²¹ 421 U.S. 1 (1976) (upholding contribution limitations and invalidating spending limitations).

²² 167 U.S. 537 (1986).

²³ 167 U.S. 537 (1896).

With all these changes on the horizon, what will be the ultimate fate of the more marginalized and powerless members of society in the twenty-first century? - of those who depend the most on the Bills of Rights and the Fourteenth Amendment? I believe that their welfare will depend, in large part, on whether today's young lawyers find a way to recapture the philosophical and moral initiative. To achieve this goal, they will probably need to create their own version of the Federalist Society, which is also meeting here this weekend, and to do open spiritual and ideological battle with the foe. Indeed, today's civil libertarians have a major job to do in order to win the fight for the hearts and minds of young people. They will first have to overcome the commonly accepted notion that occupying the middle of the political and judicial road is good, and that the most appropriate leaders for this country are those who are the best at compromise, and who lack a commitment to strong principles of any kind. Instead, our society must develop leaders who are firmly devoted to the interests of social justice and who are willing to articulate a noble vision for others to understand and to follow. There is no better place to start than here, and there is no better time than now.

Thank you.

