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Federalism and Judicial Mandates

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calls “common sense,” whose “death” he correctly lays at our feet.⁶³ And I’ll say this as well, Nadine. Once we conservatives fight for the high ground we have every right to claim, we’ll finally be heard by people who know how badly they and their dreams have been shattered by a rights revolution ironically fought in their names.

Thank you very much.

PROFESSOR NADINE STROSSEN:⁶⁴ Thank you very much. I’m delighted as I always am to appear before a Federalist Society Conference. I love the opportunity to exchange views with people with whom I have some very strong agreements and some very strong disagreements, and I commend the Federalist Society, as always, for bringing together a diversity of views.

I’m also particularly happy to be appearing under the aegis of the Goldwater Institute, since I consider former Senator Barry Goldwater a great libertarian. As a nice coincidence the Arizona affiliate of the American Civil Liberties Union less than a year ago honored Senator Goldwater as its Civil Libertarian of the Year. That was surprising to people who remembered George Bush’s false attacks on the ACLU as being a liberal organization; here we were honoring an icon of conservatism, who was very happy and proud to receive the award.

I have here an article about that award from a local newspaper, referring to one very important thing that Senator Goldwater and the ACLU have in common, as reflected by his acceptance speech. He was quoted as saying, “The Constitution, to me, is one of the most wonderful sacred documents that has ever been put together.” The executive director of the ACLU’s Arizona affiliate was quoted as saying, “It shows that civil liberties is a rights issue, it’s not a liberal issue; it’s not a conservative issue.”

Now I want to bring us back to that sacred document, sacred both to Barry Goldwater and to the ACLU, the Constitution. Because that is what is at stake in the so-called “due process revolution,” the so-called “rights revolution” that Mr. Horowitz assailed. He said, “it is nothing less than a revolution” and by “it,” he was referring to a series of Supreme Court decisions starting in 1970.

63. See PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994).

64. Professor of Law, New York Law School; President, American Civil Liberties Union. Professor Strossen has published more than one hundred works in law reviews and other periodicals, and also recently authored *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN’S RIGHTS* (1995), and co-authored *SPEAKING OF SEX, SPEAKING OF RACE: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES* (1994). Professor Strossen provided the editors with an edited version of her panel remarks.

I say, to the contrary, the revolution occurred back in the eighteenth century when we adopted the Declaration of Independence, the Constitution, and the Bill of Rights. It continued after the Civil War, when we amended the Constitution to make clear that its guarantees of individual freedom against government tyranny protected all individuals, including former slaves and others of African descent, against all government officials, including state and local officials. (By the way, what Mike Horowitz describes as government officials exercising their discretion, I view as government authorities at least potentially violating individual rights, and acting in a potentially authoritarian, tyrannical manner.)

In short, it was our nation's constitutive documents, as amended by the Bill of Rights and the post-Civil War amendments, that brought about a revolution in human rights. I am very proud to continue to support that revolution, and I'm also proud to be in the fine company of the Federalist Society in doing so. I have here my brochure for this conference, and I was pleased to read in it that the Federalist Society is founded on a number of principles, the first of which is that "the state exists to preserve freedom." That bears emphasis: The first founding principle of the Federalist Society, as well as the American Civil Liberties Union and the U.S. system of government, is that the state exists to preserve freedom.

The Supreme Court decisions that Mr. Horowitz is attacking simply gave voice to and enforced that shared fundamental principle in certain contexts where it had not previously been enforced.

Contrary to Mr. Horowitz's allegations, the ACLU has never advocated enforcing procedural due process rights in terms of some *noblesse oblige* to the poor. To us, procedural due process is something to which all individuals in this country are entitled, regardless of whether they are rich or poor. Mr. Horowitz is apparently particularly upset about Supreme Court decisions recognizing that these rights pertain to poor and politically powerless individuals. On the other hand, one of the many ways in which the ACLU often alienates liberals is our belief that these rights belong not only to individuals, poor and rich, but also to corporate entities and businesses. The very same rudimentary, elementary, fundamental procedural due process principles that were articulated and enforced in *Goldberg v. Kelly*—which happened to involve a poor person—those are the same principles that also apply in any other context, including where wealthy businesspersons or major corporations face having their property confiscated by government bureaucrats.

I ask each member of this audience to imagine yourself in a context where you would say a government official is abusing, or at least potentially

abusing, authority, and then ask yourself further whether this “Due Process Revolution” is such a terrible revolution. And is it, indeed, any revolution at all? Is it really deviating from our first principles to say that before the government may deprive you or your business of liberty or property, it must at least give you some minimal procedural protections?

I want to emphasize that that’s all that we’re talking about here: *procedural* due process. It was therefore confusing when Mr. Horowitz alluded to Robert Bork and his limited views of *substantive* due process. I happen to disagree with those views as well. But that is not what we are debating today.

We are discussing only procedural due process, and let me be very specific about precisely what that entails. We’re not talking here about elaborate procedures whereby everybody is entitled to a lawyer and a formal hearing and a transcript. To the contrary, the Supreme Court decisions that Mr. Horowitz condemns secure only minimal, basic procedural rights for individuals who face adverse government action. Therefore, these decisions impose only limited constraints on the discretion of government officials.

Let’s take the case of the public schools, about which Mr. Horowitz spent a lot of time talking. *Goss v. Lopez*⁶⁵ simply required the most elementary, informal steps before a school authority may finally suspend or expel a student. It should be noted that education experts have called expulsion the academic equivalent of capital punishment: it’s final, there’s no coming back, and it permanently ends your educational opportunities. In *Goss*, the Supreme Court merely said to school officials, before you take that irrevocable step, you must simply give the student some notice as to what your basis for doing so is. That notice may be informal and it may be oral; you don’t even have to put it in writing. What’s more, the notice may be after the fact. You may go ahead and suspend the student, or even expel the student, and only tell him or her what your reason was afterwards. The only additional right that the Court guaranteed in *Goss v. Lopez* is that the student has to be given an opportunity to respond to the stated reasons for suspension or expulsion. This may also be done after the fact, after the student has already been suspended or expelled.

Are these the kind of burdensome, complicated due process rights that Mr. Horowitz deplors? Can such bare-bones procedures really disrupt the functioning of the public schools, as he contends? And do we really want a society where a student can be denied all future educational opportunity, and the attendant opportunities to become a functioning, productive member of this society, without at least these rudimentary procedural protections—

65. 419 U.S. 565 (1975).

namely, the opportunity to respond after the fact to an informal statement of the charges against him or her?

I want to be concrete here because a lot of Mr. Horowitz's rhetoric probably gave you an exaggerated sense of the procedural due process rights at stake. Indeed, I think the problem is that our procedural due process rights are too minimal and too few, not the opposite. Shortly after *Goldberg v. Kelly*, the Supreme Court began a trend, which has been continuing since then, of radically shrinking back the concept of procedural due process in several ways.

First, the procedural due process guarantee is triggered only when you are being deprived of life, liberty, or property. In a series of cases that began in the late 1970s, the Supreme Court has greatly truncated the concepts of liberty rights and property rights that trigger the application of due process protections. Therefore, in many cases, the government has been allowed to deprive individuals of liberty and property without even according them any procedural safeguards whatsoever.

I would imagine that there are many audience members here who have a very robust—justifiably robust—sense of what your property rights are or should be. I warrant to you that the Supreme Court's notion is much more limited than your own. In fact, the Supreme Court has said that before something can be a property right, before the government's interference with it triggers even minimal procedural due process guarantees, it has to be explicitly laid out in a state statute; nothing else will suffice.

The Court has also sharply curtailed the notion of protected liberty interests. For example, in a case in the late 1970s, it ruled that we have no cognizable liberty interest in protecting our personal reputations.⁶⁶ In that case, the Court held that the procedural due process guarantee was not even implicated when the police publicly circulated a defamatory statement about an individual, falsely accusing him of having been a shoplifter.

Now let me turn to the second way in which the Court's notion of procedural due process has been radically reduced since the early 1970s. Even if you pass the very high threshold of showing that you have a protected liberty or property interest, the process that is due you, before the government may deprive you of that interest, is very limited. In case after case, the Court has said you're not even entitled to prior notice and a hearing, even the most minimal hearing. In numerous cases, the Court has said that the government may take away your property and invade your freedom, without even letting you know in advance what its asserted reason is for doing so. The Court has repeatedly held that if you want to contest the

66. *Paul v. Davis*, 424 U.S. 693 (1976).

government's action and show that it is wrongful, you may well have to settle for a tort lawsuit after your loss, seeking post hoc compensation.

So, we're hardly facing a major expansion of procedural due process rights, contrary to Mr. Horowitz's laments. If there is any recent "Due Process Revolution," sadly, it is the Court's allowing government officials to limit our liberty and seize our property without even the basic procedural protections necessary to ensure that the officials are not acting wrongly or arbitrarily.

Now, my timer indicates that, having been given two-thirds of the time that Mr. Horowitz had (speaking of procedural due process!), I have only about a minute left. And I'd like to use it by giving one more concrete illustration of what's at stake here. Mike Horowitz talked about public housing cases, and the ACLU recently had a widely publicized case in which we were representing some residents in a public housing project in Chicago. By the way, Mike, the ACLU doesn't operate the way your fantasized, demonized "liberals" do, going into poor neighborhoods, telling the people there what their rights should be, and then leaving for their own affluent neighborhoods, where they insist on different rights for themselves. Believe me, we in the ACLU have more than enough to do helping people who tell us what their rights are, and ask us to protect them. And they want the same rights for themselves that you and I want for ourselves.

Our clients who lived in the Chicago housing projects were no exception. They wanted the same thing that those of us who live in middle class neighborhoods want. Namely, they wanted to be free from crime. Like us, too, they preferred crime-control methods that respected their privacy and dignity over methods that treated them all like criminals, with the police ransacking through their entire homes and all their possessions.

On behalf of our clients in the Chicago housing projects, the ACLU had sued the city of Chicago decades ago, arguing that the city did not provide adequate police protection in the projects. Indeed, the Chicago Police Department admitted that it never did so-called "vertical patrols" inside the housing projects' high-rise buildings. The officers would simply stay in their cars outside the buildings.

In desperation, after years of trying unsuccessfully to get the same kind of police protection provided in middle class neighborhoods, some people who lived in the housing projects essentially gave up. They said, if we can't have regular law enforcement, then we'll settle for sweep searches. In these sweep searches, police officers came in in full force and searched literally through everybody's possessions, emptied drawers, emptied closets, turned all the apartments inside out. In contrast to the tenants who were willing to

submit to these sweep searches as better than nothing, the ACLU's clients were tenants who kept insisting that they were entitled to the same kind of law enforcement, and the same privacy rights, as people living in other neighborhoods. To add insult to injury, these sweep searches were just grandstanding, and didn't do anything meaningful to ferret out guns or prevent crimes. Even the former U.S. Attorney who represented the other group of tenants, advocating sweep searches, admitted precisely that. He said, these sweep searches are just for show.

In fact, the federal district court judge who ruled in our favor, Judge Wayne R. Andersen, agreed with us and our clients that these sweep searches were as ineffective as they were unprincipled. He held that they violated cherished Fourth Amendment rights and also noted that they didn't meaningfully redress the problems of crime and violence in the projects. (I have to note that Judge Andersen, a Bush appointee, was hardly a flaming liberal.)

I'm going to close by reading one of Judge Andersen's statements in support of his ruling in our favor. I think it really belies Mike Horowitz's point that there's some kind of liberal ACLU double standard toward, on the one hand, the rights that we want for ourselves, and on the other hand, the rights we want for the poor and the dispossessed. Exactly the opposite is true, as Judge Andersen's statement makes eloquently clear. He said:

Many tenants within the Chicago Housing Authority housing, apparently convinced by sad experience that the larger community will not provide normal law enforcement services to them, are prepared to forego their own constitutional rights. They apparently want this court to suspend their neighbors' rights as well. Many Americans are simply fed up with crime. Although they would not dream of allowing police to search their own homes without their consent or without warrants, they support police sweeps of inner city neighborhoods. All Americans are bound together in law and in fact. The erosion of the rights of people on the other side of town will ultimately undermine the rights of each of us.

Thank you.

MR. HOROWITZ: This is a nice debate.

First: Nadine's citation of Judge Andersen's decision makes the very point I've tried to make about the Due Process Revolution. The Chicago Housing Authority, knowing the difficulty of evicting disruptive tenants without truly hard evidence of actual wrongdoing, felt compelled to institute its troublesome search waiver policies in order to achieve post-*Goldberg* evictions. In other words, the embedded character of a judicially

manufactured no-evictions-without-full-adversarial-hearings regime caused a desperate Housing Authority to tamper with the real, textually explicit constitutional protections of the Fourth Amendment. The case *Nadine* cites and the conduct it understandably condemned thus merely echoes the principals' Cabinet Room applause.

Next, *Nadine's* notion that what we are talking about is “merely” procedural in character—just us lawyers holding hearings, that’s all—seems to me inaccurate in the extreme, a disingenuous evasion of truths about power that we lawyers understand from our first days at law school: that process is substance, that control of the former determines the nature of the latter. To speak of “mere hearings” is to profoundly understate the revolutionary significance of the rights revolution.

Justice Brennan, honest and above-board as ever, did not violate his truth-in-labeling obligations when he wrote *Goldberg v. Kelly*. When he mandated due process hearings, he didn’t hide behind a bogus claim that he was merely allowing “just us lawyers” to do our limited thing. Process is critical, as all lawyers know—and the *Goldberg* decision makes that explicitly clear.

Let’s read from the decision itself, both to see its deliberate, open, honest focus on *substantive* welfare policy, and to see how naive, how tragically wrong Justice Brennan was in enshrining his view of substantive welfare policy into the Constitution. Talking about welfare policy, not hearings, Justice Brennan began writing as follows in *Goldberg's* critical portion:

From its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders.

So far, so good. But the opinion continues:

We have come to recognize that forces not within the control of the poor contribute to their poverty.

Starting to get a bit dicey with its constitutionally mandated finding of fact that the poor are passive victims of their fates. But the opinion gets worse, really bad, in its tragically romantic vision of welfare and its effects:

Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to “promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.” The same

governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it

Even Bill Clinton doesn't say this any more. Even Mrs. Clinton doesn't say it—at least publicly. Yet, in Justice Brennan's finest moment as he saw it, he made his monumentally fallacious policy views beyond the reach of democratic debate.

Goldberg v. Kelly enshrines the welfare trap as an organic part of the Constitution. The reality, Nadine, is that the due process revolution is not about mere hearings. Or, as you say, mere "notice." I've talked to policemen on the beat, and they say that the rights revolution decisions cannot be explained away as the motherhood and apple pie "notice" mandates you've tried to picture them to be, Nadine. In the real world, the risk of becoming the target of hearings causes the policeman's supervisor to tell him that he best be sure of not "making waves" as a result of his interactions in the streets. In the real world, as I know from conversations with trade associations of teachers, principals and school board officials, people will do almost anything to avoid being sued for personal liability, to avoid becoming the target of depositions, cross-examinations, hearings and the like.

When we opened the door to us, Nadine, it wasn't quite so benign for everyone else. We lawyers are two-edged swords, to say the least, and a little more modesty about our power to harass and intimidate, a little more realism about the effect of our interventions, would be fairer and more becoming. Justice Brennan wasn't at all stealthy about his intentions or about the action-forcing significance of his decision, and neither should you be, Nadine. One of the reasons I want communities to have the freedom to make their own mistakes is that, though it is generally unacknowledged by us, really big mistakes, really large injustices often occur when we become involved.

A last point: When Nadine says that the rights have been established for the rich and the poor, she's again being disingenuous. The reality is that we elites live under *contract*, not constitutional regimes, and thus define the norms under which we choose to live. The ACLU doesn't do it for us, nor would most charter members of the ACLU allow it to happen to or "for" them. We define the levels of deviance that we wish to tolerate because we depend on private institutions, where the constitutional writ of the courts generally does not reach. As I've noted, the last thing in the world we would live with are the regimes we have established for the poor. That's why we have abandoned the public schools, why we've moved to the suburbs, why

we don't live in public housing—so that we can define how we live and the deviancies we wish to tolerate, rather than having the courts do it for us.

To the extent that courts get involved in the lives of elites like ourselves, they generally do so in the grand common law tradition of the law at its best—the administration and construction of contracts. It is this tradition, in which courts but modestly try to figure out what we've decided to do for ourselves that, as Maitland and Karl Llewellyn have eloquently written, allowed the West to become truly democratic, allowed us to escape the bonds of feudal, “status” societies. Judicial enforcement of the intent of parties and communities has been essential to the growth of social mobility in Western civilization—precisely what our poorest people now most badly need. Elevating the role of contract, which to many rights revolutionary elites “merely” enforces the intentions of those less enlightened than themselves, will allow people and communities to make their own mistakes, to learn from those mistakes, to serve less as pawns and covers for the needs and desires of others, to take charge of their lives and institutions.

PROFESSOR STROSSEN: I'm going to take one minute.

I am very modest by your standards, Mike. You keep trying to give me credit for the Constitution; you keep trying to give me credit for the Bill of Rights, and for the Fourteenth Amendment. It was our framers who are responsible for those liberties, and I do take great pride in helping to enforce them.

Because there are questions, and I believe in audience free speech, I'm just going to respond to one other point. But this really is the heart of the difference between us. Mike wants to allow “communities” to make “mistakes.” What are we talking about here? When we talk about communities, that's the latest euphemism for majorities. What does a community consist of but individuals, and if we are talking about the elected or appointed officials of those communities, we are talking about the majority of such individuals acting through their chosen representatives. So, when Mike says he “wants communities to have the freedom to make their own mistakes,” he's sanctioning majoritarian power to violate the rights of minority groups or individuals. What he celebrates as the majority's “freedom” therefore comes at the cost of the individual's freedom.

And while Mike touts the value of contractual arrangements, he thus flouts the essence of our social contract, our Constitution. It secures fundamental rights that no majority may take away from any minority, no matter how small that minority is, no matter how rich or poor that minority

is, and no matter how inconvenient the majority and their elected or appointed officials might find it to respect the rights of all individuals.

QUESTION: I normally dislike people who make comments rather than ask questions, but I'm going to take advantage of the opportunity and point out that *Goldberg v. Kelly* couldn't have been decided any other way, given the concession that was made by the government entities in the beginning that this is a right and that due process therefore has to follow. You have to shift the debate to whether you have a right to health care, whether you have a right to public housing, whether you have a right to welfare benefits. Until you get there, Nadine's right. If you recognize it as a right, you have to provide due process and that's avoiding the big issue. I think we need to get back to that big issue.

PROFESSOR STROSSEN: I want to take this opportunity to say that the American Civil Liberties Union has never, and I believe will never, take the position that there is a right to welfare, that there is a right to housing, and so forth. We simply say that if the government chooses to be involved in the business of having a welfare program, then it may not run it in a way that's inconsistent with people's fundamental rights, including procedural due process rights.

Although Mike has described Justice Brennan's statement that he read as being the heart of the *Goldberg* decision, I agree with you, it was not. Brennan simply had to show that the interest at stake was important, that it would have a dramatic effect on individuals and, he says, the crucial factor in this context is that basically somebody who is on welfare is, by definition, destitute. Therefore, there's an urgent need to make sure that an erroneous decision to withdraw welfare is not made.

This doesn't amount to any purported substantive right to welfare; rather, the significant adverse impact of wrongfully denying welfare benefits simply triggers procedural guarantees. Again, the government may choose not to provide such benefits to anyone, but having made the choice to provide them, the government may not deny them to particular individuals absent procedural safeguards.

QUESTION: I don't buy that last part.

MR. HOROWITZ: I take issue with the implicit assumption of your questioner that due process rights in all their trappings have to follow if there is a right to a public benefit. Due process, as we all know, is not a

self-defining phenomena, and my point is that the *Goldberg* decision did not need to, indeed had no constitutional basis for placing the legal system in so commanding a relationship with the executive branches of federal, state, and local governments. I disagree with the question's assumption that *Goldberg* "couldn't have been decided any other way" as, I believe, would Justice Brennan. He would have hardly deemed *Goldberg* as important as he did had that decision not been utterly path-breaking in its scope and significance.

I believe that public as well as private institutions have the capacity to engage in self-correcting conduct capable of protecting their minorities as well as their majorities, and that their informal, discretionary decision-making processes often serve the purposes of justice far more than do the systems that we lawyers define and control. Courts are so remote from real situations, in terms of time, distance, and relevant experience that when our lawyer-driven decisions get made, they are often so arbitrary as to be literally antithetical to due process. My point is precisely that the rights revolution's real-world "due process" is often as far from Nadine's glowing descriptions of it as I now am from Mars. I don't want us intervening every single time a public official is involved in a critical decision, precisely for the reason that I do not believe that due process is thereby served.

QUESTION: This a question for Michael Horowitz.

I share a sense that AFDC is not a right, that public housing is not a right. Those are public programs which we try to run in such a way as to deliver the largest benefit or the biggest benefit to the largest number, whatever that is. The social evidence—social times evidence—shows that *Goldberg v. Kelly* ain't it. Right. So, on that I'm with you.

And then I see situations where I say, I don't care about that anymore. I want to play Nadine's game now. There are, as you may know, on the liberal side now, a lot of people who want to at some point subordinate due process to larger interests. I'll give you one example: the official feminist line everywhere you go is that due process is a misogynist conspiracy. There can be no right to confront your accusers, we'll have to keep secret files on you, we won't tell you exactly what you're guilty of, we'll just brand you and nail you.

You see the same thing in environmental disputes. You see the same thing in these child abuse prosecutions, and on and on and on. People's lives are really on the line. Am I missing something here, or is there some difference between the two cases?

MR. HOROWITZ: A few responses.

First, my remarks are directed at the due process revolution's effects on civil proceedings, and should at most have indirect and hortatory effect on criminal prosecutions. Confronted with criminal allegations that can lead to jail, there really needs to be a battery of safeguards, some of which are explicitly guaranteed by the Constitution, while others often oblige us to construe constitutional language on the basis of practices in effect when the Bill of Rights and succeeding amendments were adopted.

Next, while I'm enormously sympathetic to the depredations caused by "official feminist lines" at politically correct universities, I'd be very wary of turning Nadine's due process guns on weak-kneed university administrators. My most basic point is the need to strengthen internal debate within university as well as ghetto communities, thereby freeing them to make mistakes, to learn from those mistakes, and to pay real prices when they fail to do so. On the whole, I believe that communities have good faith strengths and powerful battlers for decency within them, and further believe that institutional failures on this score cause people to vote with their feet and abandon them. To be sure, there will be individual victims of injustice under the regime I broadly propose, but the sorry, tragic record of the rights revolution shows that even greater injustices can result from giving courts and cross-examiners and deposition-takers and hearing officers the last word on intra-community disputes. A utopian quest for perfect justice through the medium of United States district courts is a folly that neither serves the ultimate purposes of the courts or anyone else. Before adopting this fantasy, we'd better make very, very sure, after a very careful examination of our record as lawyers, that we will not be causing more harm than good. We should also understand that the law of contracts—judicial construction of student bulletins, employment contracts, tenure provisions—has had a far better record of curbing the politically correct brownshirts who run many universities.

The record of our due process revolution interventions "on behalf of" ghetto residents in ghetto communities is about as sorry and tragic as you can get. Let's of course never say that courts ought never come in, that we lawyers don't ever serve justice. Of course we have and do and can and must, and of course a strong legal-judicial system is central to a rule of law regime vital to us all. But let's be far more modest and honest about what we can do and have done, let's learn from that, and let's not defend ourselves as lawyers in the romantic, inaccurate, indeed tragic ways that Nadine does.

PROFESSOR STROSSEN: I disagree with everything that Michael has said in his last two speeches (a word I use advisedly), but I don't have time to fully

respond to them. I'll just note that he's engaging in a couple of logical fallacies, one of which is confusing *correlation* with *causation*. We have some procedural due process rights now that we didn't have thirty years ago; our public institutions are now in a worse state than they were thirty years ago; *ergo*, one must have caused the other. Even if Michael's premises were correct, his conclusion would still be logically fallacious.

This kind of argument typifies a scapegoating I see going on in this society now, across the political spectrum. People are scapegoating individual rights, especially of groups that are particularly unpopular, particularly powerless. School children and welfare mothers are certainly among those groups. The suggestion is that, somehow, if they didn't have the same rights that the rest of us do, all of our social problems would be solved, or at least ameliorated.

I want to associate myself very strongly with the ruling of the federal district court in the Chicago housing projects case that I described earlier. It underscores that sacrificing individual rights of some people, in the hope that we're going to solve some frustratingly difficult societal problem, is as ineffective as it is unprincipled. As Thomas Jefferson said to James Madison more than two hundred years ago, any society that will give up a little liberty to gain a little order, will deserve neither and lose both.

Thank you.

IV. LUNCHEON ADDRESS: GOVERNOR FIFE SYMINGTON

GOVERNOR FIFE SYMINGTON:⁶⁷ Good afternoon.

It is certainly an honor to take part in this conference, which includes a good number of the nation's leading constitutional thinkers and practitioners. My sincere appreciation goes to the Goldwater Institute and the Federalist Society for putting this gathering together. The topic is critically important.

As I have looked at your names and the subjects you are treating, I confess to wondering whether a nonlawyer can add much to the proceedings. My training is quite limited. Art history was my discipline at Harvard, and I never set foot in the law school.

So far, I have observed mainly that many Supreme Court opinions, were they works of art, would fall squarely in the impressionist school, if not the *avant garde*. In a discipline which seems to call for Norman Rockwells, we seem to be overrun by Pablo Picassos and Salvador Dalis.

67. Governor, State of Arizona. Governor Symington provided the editors with a written version of his remarks.