

University of San Diego

Digital USD

University of San Diego Public Law and Legal
Theory Research Paper Series

Law Faculty Scholarship

June 2005

Justice Douglas, Justice O'Connor, and George Orwell: Does the Constitution Compel Us to Disown Our Past

Steven D. Smith

University of San Diego, smiths@sandiego.edu

Follow this and additional works at: https://digital.sandiego.edu/lwps_public



Part of the [Constitutional Law Commons](#), [Public Law and Legal Theory Commons](#), and the [Religion Law Commons](#)

Digital USD Citation

Smith, Steven D., "Justice Douglas, Justice O'Connor, and George Orwell: Does the Constitution Compel Us to Disown Our Past" (2005). *University of San Diego Public Law and Legal Theory Research Paper Series*. 34.

https://digital.sandiego.edu/lwps_public/art34

This Article is brought to you for free and open access by the Law Faculty Scholarship at Digital USD. It has been accepted for inclusion in University of San Diego Public Law and Legal Theory Research Paper Series by an authorized administrator of Digital USD. For more information, please contact digital@sandiego.edu.

JUSTICE DOUGLAS, JUSTICE O'CONNOR, AND GEORGE ORWELL:
DOES THE CONSTITUTION COMPEL US TO DISOWN OUR PAST?

Steven D. Smith¹ – draft

Assessments of Justice William O. Douglas vary wildly, but I think it is one measure of the man to say that placed alongside of Douglas, most of the current Justices look just a bit tame, or timid, or perhaps small. In that gaunt company, Douglas seems almost like a force of nature— a larger than life figure (for better or worse). And I would suggest that his distinctive stature owes something to his somewhat precarious relationship to truth.

A recent biography indicates (and in a lecture instituted in his honor I should put this gently) that Douglas was not in one hundred per cent agreement with thinkers like Kant, or St. Augustine, who taught that we are categorically required to be honest in everything we say . Douglas may have departed farther from that requirement than most of us do or find acceptable, particularly in reporting on his own life.²

But if Douglas sometimes took liberties with the facts, there seems to be a sort of imaginative energy and recklessness and even courage in his ostensible fabrications: we wouldn't say that Douglas was too *timid* to tell the truth, or that he refrained from saying what he believed

¹ Warren Distinguished Professor of Law, University of San Diego. I thank Rosemary Getty, Larry Alexander, Michael Perry, Bob Nagle, and Merina Smith for helpful comments on an earlier draft. This essay was presented as the William O. Douglas Lecture at Gonzaga University Law School on March 22, 2005. Comments from the audience raised a number of interesting (and difficult) questions, but I have left the lecture in the form in which it was delivered.

² Bruce Allen Murphy, *Wild Bill: The Legend and Life of William O. Douglas* (2003). For a rebuttal, see William Alsup, *Accurately Remembering Justice Douglas*, 50 *Fed. Law.* 21 (2003).

(or ruling as he thought right) for fear of offending someone. And perhaps owing to that same recklessness or courage, I think Douglas also had an unusual, almost oracular capacity to grasp large, momentous truths— and to proclaim them with the eloquence that their gravity called for.

Whatever you may think about the result or the legal reasoning in *Griswold v. Connecticut*, for example, and however ironic the words may seem given Douglas's own marital adventures, his paean to marriage in the case seems moving and true.³ We can understand why some couples have incorporated Douglas's language into their wedding ceremonies. And we may even wish that some scholars currently writing in a deflationary way about marriage could grasp the sense of Douglas's pronouncement.

My theme in this lecture, however, arises out of another of Douglas's celebrated utterances— his assertion in *Zorach v. Clauson* that “we are a religious people whose institutions presuppose a Supreme Being.”⁴ The statement has two parts. The first is sociological in nature: “We are a religious people.” This seems to be basically an empirical proposition and, granting that it is a generalization subject to significant exceptions, most research seems to confirm it⁵: there is no reason why an atheist could not accept that conclusion, regretfully perhaps, as a purely

³ *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965):

We deal with a right of privacy older than the Bill of Rights--older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

⁴ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

⁵ See generally George Gallup, Jr. and D. Michael Lindsay, *Surveying the Religious Landscape: Trends in U. S. Beliefs* (1999).

empirical matter.

Justice Douglas's second claim is more political or perhaps theoretical in nature: our institutions presuppose a Supreme Being. For convenience, let's call this "the presupposition claim." To be sure, Douglas did not elaborate on exactly *how* our institutions presuppose a Supreme Being, nor did he offer evidence or argument in support of the presupposition claim. It is not surprising that he did not do these things: that would not have been Douglas's style. He tended to proclaim, or to declaim— to issue sweeping, majestic utterances. An uncommonly intelligent man, he surely had the capacity to offer close argument for his views if so inclined, but usually he was *not* so inclined; he seemed to lack the patience, or the motivation.

In this case, though, and writing in the early 1950s— the period in which "under God" was added to the Pledge and Ten Commandments monuments proliferated across the country— even a more fastidious justice might have thought that argumentation for Douglas's claim was superfluous. Douglas was merely reciting what millions of Americans took for granted-- and what authoritative, prophetic interpreters of America from Jefferson to Lincoln to the President who had appointed Douglas to the bench (FDR) had said over and over and over again.⁶ Perhaps it would have seemed frivolous to support the assertion with argument or evidence: after all, even the most obsessive law review editors typically do not demand that an author provide supporting citations for sentences reporting that George Washington was the first President or that Thomas Jefferson came from Virginia.

That was a half-century ago, though, and things have changed— drastically. The proposition that our institutions presuppose a Supreme Being cannot be taken for granted *now*.

⁶ See *infra* notes

On the contrary, what may be the most influential understanding of our constitutional order (at least in the academy)—namely, the sort of “political liberalism” or secularist neutrality associated in various versions with people like John Rawls, Stephen Macedo, Amy Gutman, and Bruce Ackerman—insistently *denies* that our institutions presuppose any such thing. On the Court itself, an occasional justice—Justice Scalia, perhaps, or Justice Thomas—might still affirm Douglas’s claim. And other justices conceivably might *quote* Douglas for historical or rhetorical purposes. But we would be shocked to find any similar outright declaration in a current Supreme Court majority opinion.⁷ The Court today tries to be assiduously inoffensive— inoffensive to the people who count, anyway⁸— and to prevent other public officials from doing or saying things that might offend those people or cause them to feel like “outsiders”⁹; and it is obvious that official statements proclaiming that “we are a religious people whose institutions presuppose a Supreme Being” might easily have those undesired effects.

Thus, a public figure who tries to stand up in a conspicuous way for the conception of America that Douglas tersely asserted should be prepared to be reviled, perhaps sued, possibly (at

⁷ A quick Westlaw search indicates that Douglas’s statement was last quoted by a Justice in a dissenting opinion by Chief Justice Burger in *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 554 (1986). The last majority opinion to quote the statement was *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984).

⁸ The Court has not appeared greatly concerned about the exclusionary or alienating effects of its decisions on, say, Christian fundamentalists. For a thoughtful exploration of the problem, see Nomi Maya Stolzenberg, “He Drew a Circle that Shut Me Out”: Assimilation, Indoctrination, and the Paradoxes of Liberal Education, 106 Harv. L. Rev. 581 (1993).

⁹ See, e.g., *Allegheny County v. ACLU*, 492 U.S. at 595 (plurality opinion by Blackmun, J.); *Lynch v. Donnelly*, 465 U.S. at 688 (O’Connor, J., concurring).

least if he is, say, a state court judge in Alabama and stubborn) even removed from office.¹⁰ And a public school teacher who actively taught students— in a civics lesson, perhaps— that “we are a religious people whose institutions presuppose a Supreme Being” would risk being disciplined for violating the constitutional doctrine forbidding governmental endorsement of religion.¹¹

This reversal in the constitutional climate provokes questions. How exactly should we understand Justice Douglas’s presupposition claim? Is the claim plausible? And what has happened in the half-century since he asserted it? Could Douglas’s claim have been true and appropriate when he made it but no longer true and appropriate now? If so, how does a true theoretical or historical statement become untrue? More generally, given the change from Douglas’s time to ours, how should we regard our political and constitutional heritage— a heritage that until relatively recently routinely generated statements like Douglas’s? Those are the questions I want not to answer, unfortunately, but at least to think about in this lecture.

HOW DO OUR INSTITUTIONS “PRESUPPOSE A SUPREME BEING”?

We can start by trying to understand what Douglas’s assertion might mean. The presupposition claim itself is familiar enough. The Pledge of Allegiance (at least for now) affirms succinctly that we are a nation “under God,” and that phrase, though formally added to the Pledge in 1954, derives from Lincoln’s Gettysburg Address,¹² which is by consensus

¹⁰ See, e.g., *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003).

¹¹ See *Williams v. Vidmar*, Case No. 5:04-CV-4946 JW PVT (U. S. Dist. Ct., N. Dist. Cal., pending).

¹² For discussion, see Michael J. Perry, *Under God? Religious Faith and Liberal Democracy* 124-25 (2003).

acknowledged as one of the classic statements of the essential meaning of America. Historians collect mountains of similar statements from Americans both famous and forgotten over the centuries.¹³ But in what sense might such statements be true? Exactly *how* might our institutions “presuppose a Supreme Being”?

I think there are two different kinds of answers to that question: we might call them the “providential” and the “philosophical” answers. These answers reflect different conceptions of the Supreme Being: the providential answer appeals to the kind of God portrayed in the Bible— to the God of Abraham, Isaac, and Jacob— while the philosophical answer is more reflective of what is sometimes called the God of the philosophers. But although these conceptions of deity are different, I do not believe they are incompatible (any more than it is incompatible to say that someone is a professor and also a parent). Many people surely have believed— and continue to believe— in both.

The providential answer maintains that a mindful, personal God works actively in history to bring about His purposes— it will be most convenient here to follow traditional usage in adopting the masculine pronoun— and that He blesses and causes to prosper not only individuals but also nations who acknowledge and reverence Him. This faith can sometimes support triumphalism and smugness, but it need not: it can also express and inspire hope and humility and a struggle for justice on behalf of the poor and oppressed.

The providential view has obvious scriptural roots— particularly in the Hebrew scripture that Christians call the Old Testament but also emphatically (for those who accept it) in that

¹³ See, e.g., Michael Novak, *On Two Wings: Humble Faith and Common Sense at the American Founding* (2002); James H. Hutson, *Religion and the Founding of the American Republic* (1998).

distinctively American scripture, *The Book of Mormon*— and it has been affirmed in this country from the early days of the Republic to the present in millions of speeches and sermons and prayers and by figures small and great, from Washington and Adams to Lincoln to the second Bush. Lincoln’s stunningly powerful Second Inaugural Address, engraved on one wall of the Lincoln Memorial, is probably the most profound statement of a providential interpretation of our experience by an American political leader.¹⁴ But as a more characteristic expression we might recall a speech given by Benjamin Franklin in the Philadelphia convention. “In this situation of this Assembly,” Franklin reasoned,

groping as it were in the dark to find political truth, and scarce able to distinguish it when presented to us, how has it happened, Sir, that we have not hitherto once thought of humbly applying to the Father of lights to illuminate our understandings? In the beginning of the Contest with G. Britain, when we were sensible of danger we had daily prayer in this room for the divine protection.— Our prayers, Sir, were heard, & they were graciously answered. All of us who were engaged in the struggle must have observed frequent instances of a superintending providence in our favor. To that kind providence we owe this happy opportunity of consulting in peace on the means of establishing our future national felicity. And have we now forgotten that powerful friend? or do we imagine that we no longer need his assistance? I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth— *that God Governs in the affairs of men*. And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without his aid? We have been assured, Sir, in the sacred writings, that “except the Lord build the House they labour in vain that build it.” I firmly believe this; and I also believe that without his concurring aid we shall succeed in this political building no better, than the Builders of Babel: We shall be divided by our little partial local interests; our projects will be confounded; and

¹⁴ See Mark Noll, *America’s God: From Jonathan Edwards to Abraham Lincoln* 426 (2002):

[N]one of America’s respected religious leaders— a defined by contemporaries or later scholars— mustered the theological power so economically expressed in Lincoln’s Second Inaugural. None probed so profoundly the ways of God or the response of humans to the divine constitution of the world. None penetrated as deeply into the nature of providence. And none described the fate of humanity before God with the humility or the sagacity of the president.

we ourselves shall become a reproach and bye word down to future ages.¹⁵

The more philosophical version of Justice Douglas's presupposition claim holds that our defining constitutional commitments can be explained and justified best— perhaps only— on theistic premises. As the Declaration of Independence explains, our rights to liberty and equality are themselves the gifts of the Almighty: they are rights with which we are “endowed by [our] Creator.” “And can the liberties of a nation be thought secure,” Thomas Jefferson asked, ““when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God. . . ?”¹⁶

In recent years, scholars like Jeremy Waldron, George Fletcher, and Louis Pojman¹⁷ have raised essentially the same question with respect to our constitutional commitment to equality. Waldron observes that “[i]t may seem to us now that we can make do with a purely secular notion of human equality; but as a matter of ethical history, that notion has been shaped and fashioned on the basis of religion. That is where all the hard work was done.” And Waldron adds that “I actually don't think it is clear that we— now-- *can* shape and defend an adequate conception of basic human equality apart from some religious foundation.”¹⁸

¹⁵ Notes of Debates in the Federal Convention of 1787 Reported by James Madison 209-10 (Adrienne Koch ed. 1966).

¹⁶ Thomas Jefferson, Notes on Virginia, Qu. XVIII, in *The Portable Thomas Jefferson* 215 (Merrill D. Peterson ed.1975).

¹⁷ See Jeremy Waldron, *God, Locke, and Equality* (2002); George Fletcher, *In God's Image: The Religious Imperative of Equality Under Law*, 99 *Colum L Rev* 1608 (1999); Louis Pojman, *On Equal Human Worth: A Critique of Contemporary Egalitarianism*, in *Equality: Selected Readings* 295 (Louis P. Pojman and Robert Westmoreland eds, 1997).

¹⁸ Waldron, *supra* note At 242, 13.

In a similar vein, Michael Perry has argued that the justification for human rights is “ineliminably religious.”¹⁹ In a different way, I have argued for the same conclusion.²⁰

I have been talking about commitments to *equality* and to *rights*. But more generally, it is arguable that an even more basic and constitutive commitment— to *rule of law*— rests on theistic assumptions. Though that suggestion will seem exotic today, it would not have seemed especially provocative to leading figures in the Anglo-American legal tradition from Alfred to Bracton to Fortescue to Coke to Blackstone— all of whom affirmed the basic idea that human law derives from the law of God. As Coke put it, a common law decision “agrees with the judicial law of god, on which our law is in every point founded.”²¹ In nineteenth century America, likewise, judges and scholars routinely recited that “Christianity is part of the common law,” and in a fascinating and illuminating article Stuart Banner shows that this maxim was significant not so much for any consequences it had for specific legal cases or controversies, but rather because it expressed “not a doctrine so much as a meta-doctrine.” This meta-doctrine helped support a “non-positivist” view of the common law “as having an existence independent of the statements of judges,”²² and hence as something that was there to be “discovered,”²³ not made.

¹⁹ Michael J. Perry, *The Idea of Human Rights: Four Inquiries* 11-41 (1998).

²⁰ Steven D. Smith, *Nonsense and Natural Law*, in Paul F. Campos et al., *Against the Law* 100 (1996).

²¹ Quoted in Jonathan Rose, *Doctrinal Development: Legal History, Law, and Legal Theory*, in 22 *Oxford J. Legal Studies* 323, 334 (2002). For a brief discussion of similar views by leading figures in the common law tradition, see Steven D. Smith, *Law’s Quandary* 46-47 (2004).

²² Stuart Banner, *When Christianity Was Part of the Common Law*, 16 *Law & Hist. Rev.* 27, 61, 50 (1998). See also Stephen M. Feldman, *American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage* 159 (2000) (discussing Joseph Story’s view that a

Today, of course, we have been educated to follow Holmes in rejecting this older notion—held by the best legal minds over centuries— of law as (in Holmes’s mocking description) a “brooding omnipresence in the sky.”²⁴ Thus, for generations now lawyers and scholars have been taught and have recited that law can be and has been established quite nicely on a purely human and positivistic footing. I am skeptical: though I cannot try even to summarize the analysis here, in a recent book I argue that the modern project of freeing law from its classical metaphysical commitments has failed.²⁵ If I am right, it might be a permissible simplification to assert, echoing Douglas, that our *legal* institutions “presuppose a Supreme Being.”

The philosophical rationale for the presupposition claim can be offered in stronger or weaker versions. In the strongest version the rationale would assert that our commitments to equality, rights, and rule of law *can* be justified on theistic assumptions and *cannot* be justified in any other way. Though in the past I have sometimes made that sort of strong claim with respect to rights,²⁶ today I would be more cautious, about both the positive and negative components. The theistic arguments for rights, equality, and law are complicated and subject to criticism, I think. And it is very hard to prove a negative: you might knock down one or several nontheistic rationales for rights or equality, for example, but how can you be sure that someone will not devise a better one? So a more modest version of the philosophical claim would assert that at

natural law closely associated with Christianity undergirds all law).

²³ Banner, *supra* note at 60.

²⁴ *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

²⁵ Smith, *supra* note

²⁶ See *supra* note

least plausible theistic rationales for our constitutional commitments can be and have been offered, that as a historical matter these rationales have been powerfully influential in American thinking on the subject, and that it is not at all clear that nontheistic rationales can do as well.

That modest version seems to me wholly compelling, but before moving on, it is probably necessary to say something about— who else?— Mr. Jefferson. Jefferson was and remains a controversial character; but as author of the Declaration of Independence, statesman and President, and theorist and spokesman for American democracy, in our self-understanding Jefferson deservedly counts for a lot. And it is often said that Jefferson was a secular thinker, an Enlightenment figure, that he believed in rights and equality not on religious but rather on Lockean natural rights/social contract grounds, that if he believed in God at all it was in the detached, distant god of deism, that if he sometimes included religious references in his public pronouncements (and in the Declaration of Independence itself) this was only for public consumption.²⁷ If this interpretation of Jefferson is right, then it is fair to say that the presupposition claim is at least somewhat undermined.

But I think it is clear that the interpretation is misleading. Jefferson was to be sure a “secular” and “Enlightenment” thinker— but not in the sense that modern secularists want those terms to carry.²⁸ The subject warrants lengthy discussion that I have neither the time nor the competence to provide, but fortunately some able historians have already supplied it. An

²⁷ For a sophisticated presentation of this view, see Michael P. Zuckert, *The Natural Rights Republic* 56-61, 87-89 (1996).

²⁸ For a discussion of the important differences between eighteenth-century and twentieth-century interpretations of “the Enlightenment,” see Steven D. Smith, *Recovering (from) Enlightenment?*,

overwhelming case for the theistic core of Jeffersonian thought is offered in Daniel Boorstin's *The Lost World of Thomas Jefferson*.²⁹ Or you could look at one of the best histories of the period— Henry May's *The Enlightenment in America*.³⁰ Boorstin observes that “Jefferson on more than one occasion declared ‘the eternal pre-existence of God, and his creation of the world,’ to be the foundation of his philosophy,”³¹ and his book shows how Jefferson's declaration was correct. This theistic foundation was especially essential and conspicuous in Jefferson's thinking about politics, law, and rights: “no claim [of rights] could be validated except by the Creator's plan.”³² Henry May notes that “[a] benign God, a purposeful universe, and a universal moral sense are necessary at all points to Jefferson's political system.”³³

But wasn't Jefferson a “deist,” a term which today may be taken to mean something like being 99 percent of the way to agnosticism? Well, though the label seems a bit slippery, it is accurate to call Jefferson a deist. But for Jefferson and his circle, deism in the sense of rational religion was wholly compatible not only with belief in God, but with belief in a God who actively guides history— and in particular the history of this nation. Thus, Boorstin reports that Jefferson “read in the peculiar physical conditions of America the Creator's designation of a special role.” He “in his own terms ascribed to the American republic a . . . providential

²⁹ Daniel J. Boorstin, *The Lost World of Thomas Jefferson* (1948; 1993).

³⁰ Henry F. May, *The Enlightenment in America* (1976).

³¹ Boorstin, at 30.

³² *Id.* at 196.

³³ May, *supra* note at 302.

destiny.”³⁴ It was Jefferson, after all, who proposed that the Great Seal of the United States should depict “[t]he Children of Israel in the Wilderness, led by a Cloud by day, and a Pillar of Fire by night.”³⁵

Might Jefferson have been merely pretending to be religious for public or political purposes?³⁶ That interpretation seems implausible, not only because the religious references are so pervasive in his thinking and writing but, more importantly, because theistic premises are essential to the very logic of his arguments and views.

But suppose that the darkest suspicions (or, depending on your point of view, the most sanguine hopes) somehow turned out to be vindicated: some researcher discovers decisive evidence showing that privately, deep down, Jefferson was an out-and-out, not-in-front-of-the-maids atheist, and that all of his religious references— in the Declaration, in his presidential speeches, in his writings and letters to colleagues and friends in the American Philosophical Society— were purely for political and rhetorical purposes . The discovery would surely be of interest to historians and biographers, and to any of us insofar as we take an interest in Jefferson for his own sake, but how exactly would it be significant for our assessment of Justice Douglas’s presupposition claim? A successful politician— and Jefferson surely was one— might be viewed as someone with a good sense of what the electorate believes, and of what the electorate will accept as a good reason for supporting the politician and his projects. Even if what the politician

³⁴ Boorstin, at 223-27.

³⁵ Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B. U. L. Rev. 455, 524 n. 71 (1991).

³⁶ See *supra* note

says is not ultimately persuasive evidence of what *he personally believes*, it is still good evidence of *the beliefs that the political community accepted and acted on*.

After all is said and done, of course, historians of the period will surely continue to research and interpret and debate.³⁷ But I think it would be hard for anyone to deny that the providential view or the philosophical view or both have been held by millions upon millions of Americans from the early days of the Republic through the present day. And taken together, they seem more than sufficient to justify Douglas's assertion that "we are a religious people whose institutions presuppose a Supreme Being."

So then how did that understanding of America come to be the disfavored target of lawsuits and constitutional doctrines in recent decades? What has happened to change the constitutional climate since Justice Douglas made his famous assertion?

THE WORLD TURNED UPSIDE DOWN?

A full explanation would surely be complex, but for present purposes we can limit ourselves to changes at the level of constitutional doctrine and, more specifically, to two crucial developments in the Supreme Court's interpretation of the First Amendment's establishment clause. The first crucial event occurred in 1971 when, drawing upon language from earlier decisions, the Supreme Court codified what (collapsing for present purposes the first and second prongs of the so-called *Lemon* test) we can call a "secularity" requirement. Government would be restricted to acting for secular purposes and in ways that have primarily secular effects.

³⁷ For an excellent collection of competing interpretations on the issue, see *Protestantism and the American Founding* (Thomas S. Engman & Michael P. Zuckert, eds. 2004).

In announcing this doctrine, the Court does not seem to have thought that it was saying anything especially momentous or controversial. Does anyone doubt that government is supposed to confine itself to the realm of the secular? The Court's assumption is understandable, because "secular" is an ambiguous term, and there are senses in which hardly anyone *does* doubt that American government is supposed to be secular.³⁸ I am a religious believer, and I have numerous friends and acquaintances who are religious believers, both conservative and liberal, and so far as I know I am not acquainted with a single person who wants government to get into the business of promoting baptism for the purpose of saving souls. Because the term is ambiguous, however, the secularity requirement also created the possibility of equivocation, controversy, and unanticipated extension. For example, the *Lemon* Court does not seem to have anticipated that its doctrine might have the effect of excluding religious arguments and justifications from the "public square," as we say: it was not even until a decade-and-a-half later that the "religion in the public square" debate really got going. But it was not long before lawyers and advocates began to realize— and promote— more restrictive versions of the secularity requirement.

One such extension occurred in the second crucial development I need to notice here. In 1984, Justice Sandra Day O'Connor proposed that the secularity requirement be extended to governmental *expressions* by means of a doctrine prohibiting government from endorsing religion.³⁹ Paradoxically, O'Connor offered this proposal as a rationale for *upholding* the

³⁸ For further discussion, see Steven D. Smith, Nonestablishment Under God? The Nonsectarian Principle, 50 Vill. L. Rev. 1, 4-6 (2005).

³⁹ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). Actually, O'Connor suggested that government be prohibited from either endorsing or disapproving

inclusion of a creche in a municipal display. Since the objection to the creche was precisely that it endorsed religion—Christianity in particular—this was a very odd (or at least oddly-timed) proposal; the insouciance of picking the creche case as the occasion for introducing the “no endorsement” test provokes doubts about how much thought O’Connor had actually given to her own proposal. Suspicions of confused thinking may be reenforced if we recall that it was at about this same time that Justice O’Connor briefly made headlines by appearing to endorse a “Christian nation” interpretation of the country.⁴⁰

But perhaps appreciating the implications of O’Connor’s proposal more clearly than she herself did, her opponents who dissented in the creche case immediately embraced her suggestion. The “no endorsement” test was beguiling to nearly all commentators as well. (Including, I blush to admit, to me: I promptly wrote up an article praising O’Connor’s proposal as the remedy for our establishment clause woes, but in the providential scheme of things none of the numerous law reviews to which I submitted the article wanted to publish it. There but for the grace of God) In any case, within a few years the “no endorsement” doctrine had firmly entrenched itself in First Amendment jurisprudence.

It did not take long for people to realize, however, that a prohibition on governmental endorsements of religion would jeopardize or flat out condemn a host of longstanding practices and celebrated documents and pronouncements— the national motto (“In God We Trust”), the

religion. But it seems appropriate to relegate the “disapproving” part to a footnote because, like the “inhibiting” part of the second prong of the *Lemon* test, that part of the doctrine seems to have had no real influence in the actual caselaw.

⁴⁰ For a brief account of the incident, see Christopher E. Smith & Linda Fry, *Vigilance or Accommodation: The Changing Supreme Court and Religious Freedom*, 42 *Syracuse L. Rev.* 892, 937-38 (1991).

Pledge of Allegiance (“under God”), a whole host of state and municipal seals and displays and practices, maybe even the names of half of the cities in California and Texas. That last item may seem facetious, but Douglas Laycock does not seem to have been joking when he asserted in a law review article that *in principle* the names of Los Angeles and Corpus Christi *are* unconstitutional.⁴¹ Looking backward, we can quickly see that even if we are charitable enough to excuse Lincoln and Washington and Jefferson and the signatories of the Declaration of Independence for violating a constitutional precept that had not yet been announced, those luminaries *did* contradict and transgress the “no endorsement” principle, over and over again.

Indeed, they did so deliberately and flagrantly and on the most solemn of public occasions, such as official proclamations and Presidential inaugurations. In a proclamation Washington declared that “it is the duty of all nations”—notice that the duty applies to *nations*, not just to private individuals—“to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor” Washington’s successor, John Adams, issued a similar proclamation declaring that “the safety and prosperity of nations ultimately and essentially depend on the protection and the blessing of Almighty God, and the national acknowledgement of this truth is . . . an indispensable duty which the people owe to Him”⁴² Jefferson’s Second Inaugural implored the favor of “that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life, who has covered

⁴¹ Douglas Laycock, Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers, 81 Nw. U. L. Rev. 1, 8 (1986).

⁴² Reprinted in John T. Noonan, Jr. and Edward McGlynn Gaffney, Jr., Religious Freedom 202-03 (2001).

our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me”⁴³ Or consider the preamble to Jefferson’s famous Virginia Bill for Religious Freedom: “Almighty God hath created the mind free,” such that compulsion in matters of religion represents “a departure from the plan of the Holy Author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do”⁴⁴ Do you detect any endorsement of religion there?

Jumping ahead closer to the present, Franklin D. Roosevelt declared in his 1939 State of the Union Address that “[s]torms from abroad directly challenge three institutions indispensable to Americans, now as always. The first is religion. It is the source of the other two— democracy and international good faith.”⁴⁵ Indeed, every single President from Washington to Bush has alluded or appealed to God in an Inaugural Address,⁴⁶ and every state constitution acknowledges God.⁴⁷

Or, to return to the statement with which we started: Justice Douglas asserted that “we are a religious people whose institutions presuppose a Supreme Being.” Is there any plausible way to read that statement by which it does not endorse religion, or give non-believers cause to feel

⁴³ Noonan & Gaffney, *supra* note at 206.

⁴⁴ Reprinted in *The Supreme Court on Church and State* 25 (Robert S. Alley ed. 1988).

⁴⁵ Franklin D. Roosevelt, *The Public Papers and Addresses of Franklin D. Roosevelt*, 1939, 1 (1941).

⁴⁶ William J. Federer, *The Ten Commandments and Their Influence on American Law* 49-51 (2003).

⁴⁷ *Id.* at 52-55.

like “outsiders” in the political community? Remember that Douglas made the statement not as a private individual, not even in one of his flamboyant dissents, but rather officially, as part of a majority opinion speaking for the highest court in the land. If the Constitution forbids endorsement of religion, then surely Douglas and the Court were violating the Constitution when they made this famous assertion.

So, how are we as citizens today to regard our pervasively tainted history—tainted, that is, under the current “no endorsement” prohibition?

DISOWNING OUR PAST?

There are several possible responses to that question, I think: all of them entail a certain disavowal of our constitutional and political heritage. The starkest response would be straightforward repudiation of the offending portions of our heritage. Just as we have done with other regrettable parts of our past—slavery, for example—we could condemn past endorsements of religion and strive to eliminate persisting vestiges of those endorsements. That is of course what the Ninth Circuit tried to do in the *Newdow*, Pledge of Allegiance case,⁴⁸ and what a number of legal scholars think we should do with the Pledge and a few other such expressions, such as the national motto.⁴⁹

⁴⁸ 328 F.3d 597 (9th Cir. 2002), revised, 328 F.3d 466, reversed sub. nom. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. ___ (2004).

⁴⁹ See, e.g., Douglas Laycock, Comment: Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty, 118 Harv. L. Rev. 155, 223-31 (2004); . Steven H. Shiffrin, The Pluralistic Foundations of the Religion Clauses, 90 Cornell L. Rev. 9, 65-73 (2004); Steven G. Gey, “Under God,” The Pledge of Allegiance, and Other Constitutional Trivia, 81 N.C. L. Rev. 1865 (2003). See generally Steven B. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 Colum. L. Rev. 2083

But repudiation is not a politically viable response to the overall problem. We might be willing to eliminate a phrase here, a minor symbol there. But not many Americans— including law professors, and Justices— will cheerfully denounce all or significant parts of Jefferson’s Virginia Statute, the Declaration of Independence, Lincoln’s Second Inaugural, and on and on. The strategy would amount to a massive repudiation of much in our history that we have thought to be the most inspiring and praiseworthy.

So what other responses are available? One tempting possibility is denial or repression, in the psychological sense. We might just try to avoid thinking about the discrepancy— to put the offending past out of mind. The Supreme Court’s majority opinion in the *Newdow* case could be taken as a technical instance of this response. The dilemma facing the Court was apparent: on any honest view, the words “under God” in the Pledge *do* send a message endorsing religion, but it would also have been extremely inexpedient as a political matter for the Court to order that the words be stricken. So the Court understandably might have wished that the problem would just go away, and it used standing doctrine to achieve that happy evasion— at least for a year or so.⁵⁰

But again, the strategy of ignoring or forgetting is not promising as an overall response to the problem. The Pledge of Allegiance case will come up again: indeed, it is already pending. More generally, it is very hard just to forget our history, and hard to remember it while studiously neglecting to notice the discrepancies between what revered figures like Jefferson and Lincoln

(1996).

⁵⁰ Actually, the Court conceded that Michael Newdow satisfied constitutional standing requirements. But there is a separate “prudential” standing component, the majority hastened to explain, that can be invoked to avoid deciding cases that there is good reason not to decide, and the majority grasped at this doctrine to avoid addressing the question on the merits.

did and said and what current doctrine says public officials must *not* do. So perhaps we might try to rewrite our history so that the basic facts are acknowledged but the incongruities are removed. I have already suggested that Jefferson is often subject to this sort of secularizing revisionism. Some commentators take the Rehnquist concurring opinion in *Newdow* as an example of this strategy: they read Rehnquist as saying that the addition of “under God” to the Pledge was a *patriotic* expression and therefore *not* a religious one.⁵¹ I happen to think that this is a misreading of Rehnquist’s opinion,⁵² but for present purposes it doesn’t really matter: if Rehnquist didn’t make this argument, other people and Justices surely *have* made arguments of this kind.⁵³

Critics usually find this sort of revisionism unsatisfying, with good reason. The revisionism involves a deliberate distortion of the historical record. In addition, the particular

⁵¹ See, e.g., Laycock, *supra* note at 224.

⁵² Rehnquist did assert unequivocally that recitation of the Pledge is “a patriotic exercise,” but this assertion can be taken as a denial that the Pledge affirms a religious idea only if “patriotic” exercises and religious affirmations are somehow mutually exclusive or incompatible. Nothing in Rehnquist’s opinion suggests that he perceives any such incompatibility. Rehnquist also asserted that recitation of the Pledge is not a “religious exercise” in the sense that prayer is, and is not an “establishment” of religion. But his assumption seems to be that it is possible to affirm a religious idea without actually engaging in a religious or devotional exercise and without “establishing” religion. And this assumption seems eminently plausible. Suppose a public official is asked, “Do you believe in God?” and she replies, with apparent sincerity, “Yes, I do.” She has thereby made a religious affirmation, but it would be odd to say that she has either engaged in a “religious exercise” or that she has “established” religion.

⁵³ . For example, Justice O’Connor has explained that the reason why expressions like the national motto “In God We Trust” or the announcement “God save the United States and this Honorable Court” are not unconstitutional is that those expressions serve to solemnize public occasions, or to express confidence in the future, or to encourage recognition of what is worthy in society. See, e.g., *Lynch*, 465 U.S. at 693 (O’Connor, J., concurring). The claim seems to be that because these expressions serve those secular purposes, they are therefore not religious.

version of the argument ascribed by critics to Rehnquist— and plainly discernible, I would say, in some of Justice O’Connor’s explanations— insults our intelligence, because it tries to get us to accept a blatant *non sequitur*. Patriotic expressions and religious expressions are not mutually exclusive— far from it— so the argument “patriotic, therefore *not* religious” seems an error that even a child would spot. It brings to mind the Dilbert cartoon in which Dogbert is speaking to Dilbert: “I was wondering, Dilbert, whether you were stupid or just incredibly ignorant. But then I thought to myself, ‘Whoa, Dogbert, you’re being narrow-minded. He could easily be both.’”⁵⁴

Despite these embarrassments, the revisionist strategy *is* a way to avoid repudiating a vast portion of our political heritage. Or perhaps not: because if we formally preserve our past only by fundamentally transforming its meaning— its substance-- haven’t we thereby repudiated our heritage *as it actually was* and as we have heretofore accepted it?

There might be a way to avoid these problems: perhaps we could acknowledge that the expressions of Jefferson and Washington and Lincoln, and the 1954 Congress, were in fact religious *at the time they were made*, so that they would be constitutionally objectionable if made in the same sense and spirit today: but in fact we do not have to disavow them because *by now*, for us— for us *as a people*, that is— they have lost their religious character (though they may still have that character for some citizens *as individuals*). This is essentially the tactic adopted by Justice O’Connor in her *Newdow* concurrence.⁵⁵

⁵⁴ Dilbert’s response is “It only looks easy.”

⁵⁵ See slip op. at 9-10: Whatever sectarian ends its authors may have had in mind, our continued repetition of the reference to “one Nation under God” in an exclusively patriotic context has shaped the cultural significance of that phrase to conform to that context. Any religious freight the words may have been meant to carry originally has long since

The appeal of this approach is apparent, I think: it lets us keep the Pledge intact without either trying to avoid the problem (as the majority did) or falsifying history and offending logic (as in the view of some critics Rehnquist did). But there are still problems, and they are not small ones. The first is probably the most obvious: what Justice O'Connor says about even the current meaning of the Pledge is manifestly implausible. It simply is not true that today the words "under God" in the Pledge have lost their religious significance for anyone who pays any attention to them. Thus, Douglas Laycock observes that "[t]his rationale is unconvincing both to serious nonbelievers and to serious believers."⁵⁶ Steven Shiffrin concurs. "I am sure," Shiffrin reports, "that a pledge identifying the United States as subject to divine authority is asserting the existence and authority of the divine." And he adds that "pretending [that this and similar expressions] are not religious is simply insulting."⁵⁷

I tried an unscientific test of these observations by giving a multiple choice test regarding the *Newdow* case to my law and religion seminar. I asked the students to choose among four options:

- A. The words "under God" in the Pledge are constitutional because they do not actually endorse religion.
- B. The words are *unconstitutional* because they *do* endorse religion.
- C. The words are constitutional because although they endorse religion, the endorsement is *de minimus*.
- D. The whole approach to this issue needs to be rethought.

Options B, C, and D each received some support from the class. Not a single student voted for

been lost.

⁵⁶ Laycock, *supra* note at 235.

⁵⁷ Shiffrin, *supra* note at 70-71

option A— which is in fact Justice O'Connor's rationale.

It is worth pausing to appreciate this situation. Justice O'Connor has all along been the major sponsor of the “no endorsement” doctrine, and her account of why the Pledge of Allegiance does not violate that doctrine probably comes as close as any interpretation can to being the official explication of the doctrine. By that interpretation, we can and will save portions of our national heritage by clenching our teeth and making representations about that heritage that, even as we make them, we have to know are simply not believable— not true.

And it is not just Justice O'Connor who finds herself in this position. Other Justices will do the same. Public officials who want to defend traditional, revered practices and expressions are forced to resort to the same sorts of transparent misdescriptions. There is no time here to discuss the details, but we will see— we have already seen— a similar phenomenon in recent controversies about the Ten Commandments.⁵⁸ We see it in establishment clause controversies of various types, around the nation. It is a troubling jurisprudence, I think, that places citizens and officials in the position of routinely having to make affirmations that they cannot seriously

⁵⁸ Cf. Dahlia Lithwick, *The High Court Should Stop Its Disingenuous Sidestep of the Church-State Debate*, 26 *American Lawyer* 122 (Dec. 2004):

This same duality will be apparent in the arguments advanced by each side of the Decalogue Debate. Next winter, we will witness oral advocates arguing before the high court—with a straight face, mind you—that the commandments possess absolutely no spiritual significance for anyone; they are purely 'historical artifacts.' And precisely as they intone this constitutional equivalent of the philanderer's mantra ('She means nothing to me, honest! '), angry citizens on the marble plaza before the Court will be waving signs saying, 'Put God back into Government' and 'Yaweh or the Highway.'

By the same token, atheists and civil libertarians on the other side—folks who have survived decades of Sunday school and reruns of CBS's *Touched by an Angel*—will insist, in Court and out on the plaza, that even a passing glance at 'Honor Thy Father and Mother' will either turn their children into mad evangelicals, or open the door to a lifetime of religious persecution and ostracizing.

believe to be true. Or, to put the point more crudely, of *lying*.

But suppose I am wrong about this— along with Laycock and Shiffrin and all of the students in my seminar. Suppose that Justice O'Connor is right in saying that the words “under God” in the Pledge originally had religious significance but that for us as a people (as distilled into an “objective observer”) they no longer have that significance and hence are constitutionally permissible. The implication is that if Congress were to reenact the 1954 provision today, or were to enact it for the first time today, the exact same words would in that case be unconstitutional. That seems curious. And it provokes questions.

For example, does O'Connor's view entail that the words “under God” in the Pledge actually were unconstitutional at the time they were added, so that in theory if they had been challenged in a lawsuit at that time they should have been declared unconstitutional by a prescient court? So was it only thanks to a fortuity— that no one sued, that the courts did not yet adequately understand the First Amendment-- that the words survived long enough to achieve constitutional status? The words were unconstitutional *then*, in 1954, and they would also be unconstitutional *now*, if freshly enacted, but under some sort of constitutional laches notion words that both *were* and *would be* unconstitutional somehow are not?

Or should we rather say that the constitutional principle itself changed, so that it was alright for government to endorse religion in 1954 but it became unacceptable later on? So the words were constitutional then *and* now-- though only because their meaning has fortuitously changed in beautiful parallel with changes in the governing constitutional principle?

Either way, I can't help thinking that there is something very odd about this position.⁵⁹ Suppose we try to apply the same logic to some other classic statement from our history. Can a public school teacher, for example, display the national motto— “In God We Trust”— in class? Can she recite the Declaration of Independence to students— in particular the part about “Nature and Nature’s God” or the affirmation that we are “endowed by our Creator with certain unalienable rights”? The answer is contested, no doubt, and the issues are just beginning to surface in actual disputes⁶⁰: thus far the litigation has mostly focused on more conspicuous expressions, such as prayers and reproductions of the Ten Commandments.

But the essence of the precedents and of Justice O'Connor's explanations is this, I think: it is alright for the public schools to read from the Declaration of Independence so long as they are engaged in an objective teaching of the facts of our history. Conversely, if a public school teacher reads from the Declaration as a way of promoting the theistic beliefs expressed in that document, she endorses religion and thereby violates the First Amendment as the Court currently construes it. On television I recently heard a civil rights attorney give exactly this explanation in connection with a recent case in which a Cupertino, California public school teacher had been disciplined for his use of the Declaration of Independence and similar documents in class. And as an interpretation of existing doctrine and precedents, I think the attorney's explanation was persuasive.

⁵⁹ Cf. Perry, *supra* note at 125 (“How strange that the citizens of a nation whose rebirth was rooted in a God whose ‘judgments . . . are true and righteous altogether’ should now be told that it is uncivil or impolite, if not constitutionally or morally illegitimate, to bring their religion to bear as they participate in politics.”).

⁶⁰ See *supra* note

And yet this seems to me a very peculiar instruction to give to teachers or other public officials and employees: “You are permitted to talk about and even read from the document which more than any other has been thought to express this nation’s most fundamental commitments-- but only so long as you do not actually mean to affirm and promote the rationale for those commitments that is explicitly asserted in that document.” How can it be that the government of a country and its officials are permitted to *report* but not actually to *affirm* the beliefs on which the country was founded?

GEORGE ORWELL AND THE DISAVOWAL OF HISTORY

In contemplating this state of affairs, an adjective that naturally comes to mind is “Orwellian,” and though it is probably overused, in this case I believe that the adjective comes close to being apt. The term is understood, of course, as an allusion to George Orwell’s chilling dystopian novel⁶¹ about a society that is horrible in many respects: but one of them is that the government— Big Brother— is engaged in a massive, ongoing effort (implemented in the Ministry of Truth) to reshape history to fit current political needs and enhance the power of the Party. If the nation, Oceania, is currently at war with Eurasia, then citizens must and do believe that the nation was *always* at war with Eurasia. If tomorrow foreign policy shifts so that Oceania is at peace with Eurasia but at war with Eastasia, then citizens must and will believe that the nation has always been at peace with Eurasia and at war with Eastasia.⁶² History is what the nation, or at least the Party, needs it to be.

⁶¹ George Orwell, 1984 (1949) (Signet Classic ed. 1961).

⁶² Id. at 31-32m 150m 212,

This manipulation of history is possible only through the cultivation of a technique known as “doublethink.” The master of doublethink must be able “[t]o tell deliberate lies while genuinely believing in them, to forget any fact that has become inconvenient, and then, when it becomes necessary again, to draw it back from oblivion for just so long as it is needed. . . .”⁶³

The protagonist in the story, Winston Smith, quietly resists the government in various respects, but perhaps above all he resists its efforts to manipulate history. In a struggle to remember the past as it was, he clings to memories (even painful ones) of his own childhood⁶⁴; he questions people who lived before the present tyranny⁶⁵; he finds and treasures objects from an earlier time.⁶⁶ At great risk to himself he saves, in his memory, a document that he once held in his hand and that, while inconsequential in itself, proves that at least one event in the past did not happen in the way Big Brother currently represents it.⁶⁷ When he undertakes the almost suicidally dangerous task of meeting and speaking openly with O’Brien, whom at that point Winston believes to be part of the resistance, his last toast upon parting emphasizes the importance of truthfully remembering the past.

“What shall it be this time?” [O’Brien] said, still with the same faint suggestion of irony. “To the confusion of the Thought Police. To the death of Big Brother? To humanity? To the future?”

“To the past,” said Winston.

⁶³ Id. at 177.

⁶⁴ E.g., id. at 132-36.

⁶⁵ Id. at 75-79.

⁶⁶ Id. at 81, 128.

⁶⁷ Id. at 64-67, 128-29.

“The past is more important,” agreed O’Brien gravely.⁶⁸

In the end, Winston’s efforts come to naught: the Party’s power to rewrite— and thus, in effect, destroy— history overwhelms him. Today we have nothing quite like the Ministry of Truth; cynics might propose analogues but the differences, fortunately, are large. (Even in the novel, one difficulty is that it is hard to imagine how such a massive effort in manipulation could succeed.) But although this is not *1984*, it is arguable that similar processes (and a large measure of doublethink) are at work in the Court-directed effort to avoid the embarrassment that so much in our history— so much that we have previously revered and celebrated and regarded as foundational for our political community— is at odds with what currently articulated constitutional doctrine prescribes. So it was a fitting fortuity, perhaps, that it was in 1984 that the “no endorsement” doctrine entered constitutional jurisprudence.

As I have suggested, that doctrine has in some unmeasurable proportion reflected or brought about a sort of constitutional revolution. As a result, in 1952 a constitutional decision could be based on the truism (as it then seemed) that “we are a religious people whose institutions presuppose a Supreme Being,” whereas a half-century later not only is that truism no longer deemed true: its utterance as an official matter by public officials is at least in principle forbidden by prevailing constitutional doctrine. What *was* true then *now* cannot even be said— not officially, at any rate, not if current doctrine is faithfully followed.

As I have tried to argue, this transformation entails a disowning of our history in one way or another. To summarize: current constitutional doctrine would seem to require that we repudiate the official vestiges of the religious aspects of our past. Or, if we find that prescription

⁶⁸ Id. at 145-46.

unacceptable, we may try to ignore or forget about the past. Insofar as we are unable or unwilling to adopt one of these measures— insofar, that is, as we are determined to remember and maintain our history— it seems we must choose between rewriting that history to eliminate its religious character, or else acknowledging the religious character of our past but insisting that this religious quality has dissipated with the passage of time. Either of these alternatives is likely to require an effort in falsification or doublethink: the first alternative involves falsifying the past (as in the secularist interpretation of Jefferson), while the second will usually involve falsifying the present (as in Justice O'Connor's *Newdow* opinion). And either alternative deprives us of the privilege and possibility of actually affirming our past— of celebrating it for *what and how it actually was* and ascribing to it a continuing validity and authority.⁶⁹

So, what is so regrettable about this disowning of actual history and this fabrication of a newer, more acceptable history? From some points of view— from a darkly cynical perspective, for instance, or conversely from a highly sanguine and secular progressive perspective— the answer is probably “nothing.”⁷⁰ Holmes said it: “Continuity with the past is only a necessity and not a duty.”⁷¹ So to the extent we can escape from a questionable past, we should do so. It is

⁶⁹ It is perhaps a symptom of the contempt for historical truth that the current doctrinal regime promotes that the one opinion in *Newdow* that tried honestly to face up to historical fact that modern establishment doctrine and decisions are based on demonstrable misreadings of the past caused its author— Justice Thomas— to be promptly denounced as being on the “lunatic fringe.” See Brian Leiter, *The U.S. Supreme Court Dodges a Bullet*, in *The Leiter Reports*, posted June 15, 2004, at <http://leiterreports.typepad.com/blog/2004/06/index.html>.

⁷⁰ In Orwell's novel, not everyone who acknowledges the falsification cares: Winston's lover Julia sees nothing especially troubling in the fact that the government routinely tells lies, including lies about history. *Id.* at 127-29.

⁷¹ O. W. Holmes, *Collected Legal Papers* 211 (1920).

lamentable that our governments, by endorsing religion in a variety of ways, have often caused some citizens to feel like outsiders; but that is no excuse for causing such offense in the future.

In response, I would very quickly offer three observations. First, it seems to me that we are sometimes unjustifiably complacent in taking national continuity for granted. What is it that holds a diverse group of people with different languages, backgrounds, and interests together as a political community? The matter is surely complex and even, I think, mysterious. Nations, we are plausibly told, are “imagined communities”⁷²— it is perceived or imagined bonds that cause us to think of ourselves as constituting a nation called “The United States of America”— and a common revered history is surely one of the most important bases of such imaginings. Insofar as we treat our history as something to be forgotten or disowned or overcome, these bonds are broken and cast off, and the question “Why are we a nation?” becomes more urgent, and more troubling. We might have learned from the twentieth century that even nations that appeared formidable and secure can unexpectedly come apart, sometimes with devastating consequences. In this situation, I would suggest that complacency toward the historical foundations of our community is reckless and irresponsible.

Second, the progressive rejection of history depends on the assumption that things are getting better, not worse. And most of us probably believe that in many important respects, our current constitutional self-understanding *is* an improvement over past versions: slavery is again the most salient case in point. But at least for myself, I would not place the affirmations in the Declaration of Independence— neither the conclusions nor the premises-- in the same category as slavery. More generally, if we have to choose between the providential understanding of

⁷² Benedict Anderson, *Imagined Communities* (rev. ed. 1991).

America articulated in different ways by people like Jefferson and Lincoln, and the secularized understanding advanced by the likes of Professor Rawls, Professor Ackerman, and Justice O'Connor, choices may differ; but I will only say that for myself, I do not think this is a close call.

Orwell's novel suggests a third reason why we might regret the disavowal and/or falsification of the past. Why after all does Winston place so much importance on remembering the past? In part his reason is just that the memory gives him hope that things have been, and hence could be, better than they are now.⁷³ And he regrets the loss of a past that included "Chaucer, Shakespeare, Milton, Byron."⁷⁴ (An American version of this list might include the Declaration of Independence and Lincoln's Second Inaugural.) Winston knows that the Party's ability to manipulate the past is also a central source of its power over people, so that remembering the past may be a way of resisting that power.⁷⁵

But it seems to me that something more is at work. Winston is fighting to maintain the possibility of being actually human. He is not sanguine about the possibility: his last words before being arrested are "We are the dead"—an assertion immediately echoed by Julia and then by the agent of the Thought Police.⁷⁶ But Winston senses that part of being human is an ability to believe things because they seem to be true, and this commitment to truth seems to have special force for him with respect to the past. Why?

⁷³ Orwell, *supra* note at 52, 63, 76-78, 141, 175.

⁷⁴ *Id.* at 47.

⁷⁵ *Id.* at 175.

⁷⁶ *Id.* at 182.

Perhaps the answer is something like this: We humans are finite creatures situated in place and time, in history, and we maintain our identity and continuity—our mortal reality, really—by maintaining our connection to a history. Conversely, if we are cut off from our history, or if we degrade our history into a mutable fabrication fashioned not according to truth but rather by present perceived needs, then we lose our identity and become merely transitory phantoms of shifting consciousness and conversation, without continuity or substance. One of Winston's colleagues, Syme, is at one point a character in the story, but then his name and identity are blotted out and he becomes an “unperson.”⁷⁷ In this way, a person can be “lifted clean out of the stream of history,”⁷⁸ as Orwell puts it, as if he never existed. Our reality is inextricably tied, we might say, to our historicity.

I am not sure whether this is a valid account of personal identity. But the account seems worth entertaining, and it seems even more cogent for *a people*, or a community or nation, than for individuals. For a nation, history is not merely what holds it together: it is only as a historical entity that a nation enjoys reality in the first place.

After all, does anyone believe that a political community has anything like an immaterial soul that might give it identity independent of its temporal history? And in this view, it seems that whether this nation exist and can “long endure,” as Lincoln put it, depends among other things on having leaders who are bold enough, or at least reckless enough, to proclaim the large, enduring truths that constitute it. Truths like “we are a religious people whose institutions presuppose a Supreme Being.”

⁷⁷ Id. at 130.

⁷⁸ Id. at 136.

