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# The Admirable Republican Constitutional Heroism of Ronald Rotunda

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# The Admirable Republican Constitutional Heroism of Ronald Rotunda

*Stephen B. Presser\**

In our time, law professors are not commonly regarded as heroic warriors. Indeed, when Leon Panetta, former Secretary of Defense, former Congressman, and former head of the CIA, wanted to disparage his boss, Barack Obama, he accused him of relying more on the “logic of a law professor,” than the apparently requisite “passion of a leader.”<sup>1</sup> I will argue, however, that Ronald Rotunda, in whose honor this *Chapman Law Review* symposium is held, was, in fact, a hero,<sup>2</sup> and that we are at a point in history when an academic such as Professor Rotunda can actually be a warrior, a warrior for social justice, but a social justice warrior of the right, rather than the more commonly observed species from the left.<sup>3</sup>

Ronald Rotunda’s scholarly output and activities could quite properly be the stuff of heroic legend. Few legal academics can match what is contained in his fifty-five-page curriculum vitae (“CV”).<sup>4</sup> More importantly for our purposes here, however, Ronald bravely stood against the politically correct tide<sup>5</sup> that has

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<sup>1</sup> LEON PANETTA WITH JIM NEWTON, *WORTHY FIGHTS: A MEMOIR OF LEADERSHIP IN WAR AND PEACE* 442 (2014).

<sup>2</sup> For a stimulating argument that part of what is great in Western Culture is the recurrence of the search for and the celebration of the “heroic,” that is to say those engaged in the never-ending battle between good and evil, see MICHAEL WALSH, *THE DEVIL’S PLEASURE PALACE: THE CULT OF CRITICAL THEORY AND THE SUBVERSION OF THE WEST* 3 (2015).

<sup>3</sup> There is a contemporary disparaging definition of a social justice warrior of the left, to wit, “A person who uses the fight for civil rights as an excuse to be rude, condescending, and sometimes violent for the purpose of relieving their frustrations or validating their sense of unwarranted moral superiority.” *Social Justice Warrior*, URB. DICTIONARY, <https://www.urbandictionary.com/define.php?term=Social%20Justice%20Warrior> [<http://perma.cc/SXU4-YYCG>].

<sup>4</sup> Curriculum Vitae of Ronald D. Rotunda (last updated Dec. 18, 2017) (on file with Chapman University Dale E. Fowler School of Law), <https://www.chapman.edu/our-faculty/files/curriculum-vita/Rotunda-Ronald-CV.pdf> [<http://perma.cc/K33X-T88D>] (illustrating the staggering details of Ron Rotunda’s academic history).

<sup>5</sup> As an example, take Professor Rotunda’s learned mockery of an English professor who required her students to use the term “humankind” instead of “mankind,” usage that Ron Rotunda maintained wrongly and implicitly denigrated Shakespeare and the drafters of the Constitution. Ronald D. Rotunda, *An English Teacher Corrects Shakespeare*, VERDICT (Apr. 10, 2017), <https://verdict.justia.com/2017/04/10/english-teacher-corrects-shakespeare> [<http://perma.cc/F378-DCYY>]. For those so imbued with the dictates of political

drenched our universities,<sup>6</sup> our courts, and our media. Instead of embracing the now dominant (and politically correct) view of the Constitution as a “living document,” Ronald Rotunda championed “originalism,” and the traditional view of the rule of law.<sup>7</sup>

In law schools now, the favored judges are those who change the law, from the purportedly authentic “only sage” of American law, Justice Oliver Wendell Holmes, Jr.<sup>8</sup> (whose famous aphorism “The Life of the Law . . . is not logic, but experience” did more than almost anything else to undermine the basis of our law and legal institutions)<sup>9</sup> through the famous Warren Court (whose bench remade the Fourteenth Amendment into a tool to undermine the constitutional scheme of federalism and separation of powers),<sup>10</sup> and finally to Justices Sandra Day O’Connor and Anthony Kennedy (whose notorious and

correctness, a step back to gain some perspective might be necessary. The effect of the insistence on the politically correct was nicely summed up by Michael Walsh:

The stifling of debate and the outlawing of basic concepts of right and wrong, of social propriety, is the purpose of political correctness; and dissent, once the highest form of patriotism, is no longer to be tolerated. Like “tolerance,” “dissent” was only a virtue when it was useful to the Left.

WALSH, *supra* note 2, at 153.

<sup>6</sup> See the description of the situation in our universities recently posted on the Heritage Foundation website:

Our universities are now overwhelmingly dominated by a radical identity-based grievance culture in which a growing number of victim groups, whose priorities and assertions are rarely challenged, are given free rein to disparage, drown out, and silence views they deem offensive. As a result, our universities no longer value fearless inquiry, but rather seek to impose a reigning orthodoxy that offers an ungracious and tendentious view of our intellectual traditions and politics.

*The Perilous Quest for Equal Results*, HERITAGE FOUND. (Nov. 8, 2018), <https://www.heritage.org/event/the-perilous-quest-equal-results> [<http://perma.cc/LRJ9-YSKJ>] (regarding an upcoming lecture by Professor Amy Wax).

<sup>7</sup> See, e.g., Hans A. von Spakovsky & Elizabeth Slattery, *Heritage Mourns the Passing of Legal Scholar Ronald Rotunda*, HERITAGE FOUND. (Mar. 15, 2018), <https://www.heritage.org/the-constitution/commentary/heritage-mourns-the-passing-legal-scholar-ronald-rotunda> [<http://perma.cc/GF5F-DNJJ>] (“Ron had long been a leader in the fight to reestablish the rule of law and reinvigorate our adherence to the Constitution and an originalist understanding of constitutional interpretation.”). For a piece of commentary in which Professor Rotunda indicated that the right thing to do was “follow the law, not the law professor,” see Ronald D. Rotunda, *Ignoring the Supreme Court When You Don’t Like the Result*, VERDICT (Apr. 13, 2015), <https://verdict.justia.com/2015/04/13/ignoring-the-supreme-court-when-you-dont-like-the-result> [<http://perma.cc/S7Z9-GEAJ>] (criticizing the advice of a law professor from the University of Chicago to President Obama to ignore a possible adverse decision from the United States Supreme Court).

<sup>8</sup> For a typical hagiographic portrayal of Justice Holmes, see generally G. EDWARD WHITE, *OLIVER WENDELL HOLMES: SAGE OF THE SUPREME COURT* (1999).

<sup>9</sup> For the argument that what went wrong in American law schools started with Justice Holmes and his aphorism, see generally STEPHEN B. PRESSER, *LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW 77–94* (2017).

<sup>10</sup> For that story, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 407–08* (2nd ed. 1997) and STEPHEN B. PRESSER, *RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED 290* (1994).

idiosyncratic “balancing jurisprudence” did so much to erode any remaining difference between judging and legislating).<sup>11</sup>

When a Supreme Court led, in effect, by the “swing Justice” Anthony Kennedy, can decide, for example, that millennia of experience can be overthrown, and marriage can no longer be limited to one man and one woman, by virtue of a creative reading of the Constitution’s Equal Protection and Due Process Clauses,<sup>12</sup> we are witnessing not the rule of law, but rule by ideologues wearing robes.<sup>13</sup>

Justice Kennedy was the most famous victim of the “Greenhouse effect”<sup>14</sup>—the tendency to try to earn the praise of the left-leaning *New York Times* Courtwatch reporter, Linda Greenhouse<sup>15</sup>—but he was not alone. Nor was Linda Greenhouse the only commentator who bestowed her blessing on Justice Kennedy. When Justice Kennedy came to be honored at his and Ron Rotunda’s alma mater, Harvard,<sup>16</sup> the then Dean, now Justice Elena Kagan, lauded him for his independence and his refusal to adhere to either the conservative or liberal strands of jurisprudence.<sup>17</sup> Judicial independence, of course, may be a worthy constitutional goal insofar as it insulates judges from popular pressure, but it was never intended to shield

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11 For a sadly typical paean to judges, like Justices Oliver Wendell Holmes, Jr., Earl Warren, and Anthony Kennedy, who make, rather than interpret the law, see, for example, RONALD K. L. COLLINS & DAVID M. SKOVER, *THE JUDGE: 26 MACHIAVELLIAN LESSONS* (2017), which argues that Justices, while going about their law-making task, ought to employ the same techniques of deception and cunning as Machiavelli recommended to Italian autocrats.

12 See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

13 The problem is not a new one. For Learned Hand’s complaint that rule by judicial ephors is not the democratic government we are supposed to have, see *LEARNED HAND, THE BILL OF RIGHTS* (1958), reprinted in *THE SPIRIT OF LIBERTY PAPERS AND ADDRESSES OF LEARNED HAND*, 108–09 (Irving Dilliard ed., 3rd ed. 1974).

14 On the “Greenhouse Effect,” see, for example, Martin Tolchin, *Press Is Condemned By a Federal Judge For Court Coverage*, N.Y. TIMES (June 15, 1992), <https://www.nytimes.com/1992/06/15/us/press-is-condemned-by-a-federal-judge-for-court-coverage.html> [http://perma.cc/5RZ5-NJME].

15 On the activist nature of her jurisprudence, see Greenhouse’s autobiography, *LINDA GREENHOUSE, JUST A JOURNALIST: ON THE PRESS, LIFE, AND THE SPACES BETWEEN* 4–5 (2017).

16 Justice Kennedy graduated from Harvard Law School. *Anthony Kennedy, BIOGRAPHY* (last updated June 28, 2018), <https://www.biography.com/people/anthony-kennedy-9362868> [http://perma.cc/Q4R8-EZBV]. Professor Rotunda was a magna cum laude graduate of both Harvard Law School and Harvard College. For a fine, brief biography of Ron Rotunda, see *Ronald D. Rotunda, VERDICT*, <https://verdict.justia.com/author/rotunda> [http://perma.cc/5DUF-AGDJ] (including pieces written by Ronald Rotunda, and from which much of what appears in this Article is derived).

17 See *Justice Kennedy comes back to HLS to mark 20 Years on the Supreme Court*, HARV. L. TODAY (Mar. 12, 2008), <https://today.law.harvard.edu/justice-kennedy-comes-back-to-hls-to-mark-20-years-on-the-supreme-court/> [http://perma.cc/8KAR-2J4R]. It is notable that both Ronald Rotunda and I appeared at the invitation of Republican members of the Senate to testify against the confirmation of Elena Kagan as a Supreme Court Justice. *Continuation of The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States*, COMMITTEE ON THE JUDICIARY (July 1, 2010), <https://www.judiciary.senate.gov/meetings/continuation-of-the-nomination-of-elena-kagan-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states-2010-07-01> [http://perma.cc/87GX-4UET].

Justices from their obligation to restrain from the temptation to ignore the law. This was a temptation, unfortunately, to which Justice Kennedy frequently succumbed.

Ron Rotunda, thankfully, properly abhorred the impenetrable, arbitrary, and opaque jurisprudence of Justice Anthony Kennedy, and others like him. He could do that with gentle mocking, as he did once, when he wrote, “Let us be blunt: Reading about law is not often fun.”<sup>18</sup> In a heroic act that took much more courage, however, Ron Rotunda could demonstrate his disdain for those who cared little for the rule of law by being only one of eight law professors willing to publicly support candidate Donald Trump,<sup>19</sup> who expressly ran on a platform of promising to appoint judges and Justices “in the mold of Justice Scalia.”<sup>20</sup> Donald Trump promised to appoint jurists that would be faithful to the original understanding of the Constitution and the traditional separation of powers notion that judges should not be legislators. The few of us from the legal academy who endorsed the Republican nominee

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18 Ronald Rotunda, *Book Review*, 65 J. LEGAL EDUC. 434, 438 (2015) (reviewing F.H. BUCKLEY, *THE ONCE AND FUTURE KING: THE RISE OF CROWN GOVERNMENT IN AMERICA* (2014)).

19 The eight individuals teaching in law schools who went on record as “Scholars and Writers” for Trump, according to my count, were F.H. Buckley, George Mason University, Thomas E. Brennan, former Dean at Cooley Law School, and former Chief Justice of the Supreme Court of Michigan, John C. Eastman, Chapman University Fowler School of Law, Bruce Frohnen, Ohio Northern University School of Law, Lino Graglia, University of Texas School of Law, Allen Mendenhall, Faulkner University School of Law, Stephen B. Presser, Northwestern Pritzker School of Law, and Ronald Rotunda, Chapman University Fowler School of Law. See Chris Buskirk, *Scholars and Writers for Trump*, AM. GREATNESS (Sept. 28, 2016), <https://amgreatness.com/2016/09/28/writes-scholars-for-trump/> [http://perma.cc/P2PC-EPTB]. To put this into proper perspective, there are approximately 10,000 individuals holding full-time positions in American law schools, presumably teaching law. Eugene Kuznetsov, *How many law professors are There in the USA?*, QUORA (Oct. 7, 2018), <https://www.quora.com/How-many-law-professors-are-there-in-the-USA> [http://perma.cc/6CNJ-78BR] (“As of the fall of 2017, U.S. law schools employed 10,232 full-time faculty . . .”). More than 1400 of such individuals signed a letter opposing the traditionalist Jeff Sessions’ appointment as attorney general. See Marjorie Corman Aaron et al., *Statement From Law School Faculty Opposing Nomination of Jeff Sessions for the Position of Attorney General* (Jan. 9, 2017) (unpublished manuscript), [https://docs.google.com/document/d/167Ci3pVqwzOUe7\\_e7itlpew1qGcTo0ZD5dNICbLQWA/pub](https://docs.google.com/document/d/167Ci3pVqwzOUe7_e7itlpew1qGcTo0ZD5dNICbLQWA/pub) [http://perma.cc/VZF3-Q776]. And more than 2400 of them signed a letter opposing the confirmation of Brett Kavanaugh to the Supreme Court. See Mark N. Aaronson et al., *Open Letter to the United States Senate from Law Professors Around the Country* (Oct. 4, 2018) (unpublished manuscript), [https://www.scribd.com/document/390196814/Open-Letter-to-the-U-S-Senate?secret\\_password=IoF5vZqqJ5zO5QjtuuTk](https://www.scribd.com/document/390196814/Open-Letter-to-the-U-S-Senate?secret_password=IoF5vZqqJ5zO5QjtuuTk) [http://perma.cc/B5U7-T7PU]. The empirical studies appear to indicate that the vast majority of law professors are not Republicans or conservatives. See, e.g., Adam Bonica, Adam Chilton, Kyle Rozema & Maya Sen, *The Legal Academy’s Ideological Uniformity* 4 (Nw. Pub. Law Research, Working Paper No. 17-12, 2017), <https://ssrn.com/abstract=2953087> [http://perma.cc/4KEH-X8MH].

20 Indeed, it was that pledge that Donald Trump believes was instrumental in his election victory. See Jess Bravin, *Justice Scalia Spoke Favorably of Trump’s Presidential Run*, *Author Bryan Garner Says*, WALL ST. J. (Jan. 15, 2018, 8:03 AM), <https://www.wsj.com/articles/justice-scalia-spoke-favorably-of-trumps-presidential-run-author-bryan-garner-says-1516031467>. For Ron Rotunda’s praise for Justice Scalia’s humanity and his humor, see Ronald D. Rotunda, *Nino Scalia, R.I.P.*, VERDICT (Feb. 22, 2016), <https://verdict.justia.com/2016/02/22/nino-scalia-r-i-p> [http://perma.cc/8MU8-32AU].

were ridiculed by our colleagues,<sup>21</sup> but, of course, the President's judicial nominees have been just as he promised, and have been selected in consultation with the Federalist Society for Law and Public Policy and the Heritage Foundation.<sup>22</sup>

In a statement that he wrote published on the *American Greatness* website, a site unabashedly supportive of Donald Trump, Ron Rotunda explained why he favored Trump and was against Mrs. Hillary Clinton. That stand flowed from the unvarying commitment to reality and truth that characterized all of Ronald Rotunda's writing:

Shortly before the first Presidential debate, former Secretary of State Hillary Clinton said that half of those who opposed her candidacy and supported Donald Trump were "Racist, sexist, homophobic, xenophobic, Islamophobic, you name it"—they were a "basket of deplorables." The other half suffered from "economic anxiety," what one might call losers. They are, in fact, neither. They are people who see the need for change, appreciate the importance of economic growth, and who cannot trust Clinton, who (the FBI Director told us) repeatedly lied to the American people about the emails she destroyed and the computer server she created.<sup>23</sup>

A subtler respect for Constitutionalism,<sup>24</sup> as we now have come to call the jurisprudence that relies on the original understanding of the document,<sup>25</sup> was demonstrated by Ronald Rotunda when he undertook, as one of his last projects, an abridgement of the greatest judicial biography of all time, Albert Beveridge's four volume work, *Life of John Marshall*.<sup>26</sup> This project<sup>27</sup> is not as

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<sup>21</sup> For example, see the comments of the highly-respected Brian Leiter, a philosopher and law professor at the University of Chicago, who observed that "it is embarrassing that educated people would vote for Trump," whom he disparaged as "Dopey Donald Chump." See Brian Leiter, *There are about 10,000 philosophy professors in the U.S. . . .*, LEITER REPORTS, PHIL. BLOG (Sept. 30, 2016, 6:14 AM), <http://leiterreports.typepad.com/blog/2016/09/there-are-about-10000-philosophy-professors-in-the-us.html> [<http://perma.cc/82K8-AA42>]. Leiter further elaborated, pulling no punches, "Every educated person not in the grips of a religious or political ideology--or, in any case, not pathetically naïve--realizes that the guy [Trump] is both incompetent and mentally unstable, facts that have been obscured only by the fortune he inherited and lots of lawyers." *Id.*

<sup>22</sup> For one of the first mainstream media reports of such consultation, see Alan Rappeport & Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, N.Y. TIMES (May 18, 2016), <https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html> [<http://perma.cc/9P27-WPJF>].

<sup>23</sup> *Conservatives For Trump: A Symposium Featuring Scholars & Writers For Trump*, AM. GREATNESS (Sept. 28, 2016), <https://amgreatness.com/2016/09/28/conservatives-for-trump-a-symposium-featuring-writers-and-scholars-for-trump/> [<http://perma.cc/49MK-EFTC>].

<sup>24</sup> On the notion of "Constitutionalism" as a means of containing arbitrary power, see SCOTT GORDON, CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY 5 (1999).

<sup>25</sup> For one important articulation of the concept of "Constitutionalism" as adherence to an original understanding of liberty as the core of republicanism, see RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE 62–63 (2016).

<sup>26</sup> See generally ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL (1919).

original an accomplishment, obviously, as Ron Rotunda's wonderful multi-volume treatise with John Nowak on Constitutional Law<sup>28</sup> or his seminal work on professional responsibility.<sup>29</sup> Nevertheless, in that obvious labor of love, the revision of *Beveridge*, Ron Rotunda gave a new generation of lawyers and law students easy access to the formative era and formative struggles, as Chief Justice Marshall and the earliest occupants of the Supreme Court bench sought to implement popular sovereignty in the manner Alexander Hamilton had promised they would.<sup>30</sup>

While the effort to revise *Beveridge's* work came near the end of Ron Rotunda's life, quite a bit earlier in his career, he had striven mightily to keep politicians bounded by their constitutional oaths and true to the rule of law. This aim was evident when he served as assistant majority counsel on the Senate Watergate Committee (1973–1974),<sup>31</sup> and when he drafted his May 13, 1998 memorandum to Independent Counsel Kenneth Starr,<sup>32</sup> explaining that it was possible to indict a sitting President, because, as the Supreme Court has repeatedly affirmed, no one is above the law.<sup>33</sup>

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<sup>27</sup> See generally RONALD D. ROTUNDA, JOHN MARSHALL AND THE CASES THAT UNITED THE STATES OF AMERICA (2018).

<sup>28</sup> RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE (5th ed. 2012).

<sup>29</sup> See, e.g., RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE (2013); see also RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY (2017–2018 ed. 2017).

<sup>30</sup> For that promise, see THE FEDERALIST NO. 78, at 498–99 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (1961) (arguing that when the Justices exercised judicial review they would simply be implementing the will of the people expressed in the Constitution, and that thus the Justices would be restraining the agents of the people, the legislatures, pursuant to the directions of their principals, the people themselves).

<sup>31</sup> For some basic biographical data on Ron Rotunda, see Debra Cassens Weiss, *Constitutional and legal ethics scholar Ronald Rotunda dies at 73*, ABA J. (Mar. 20, 2018, 7:00 AM), [http://www.abajournal.com/news/article/constitutional\\_and\\_legal\\_ethics\\_scholar\\_ronald\\_rotunda\\_dies\\_at\\_age\\_73](http://www.abajournal.com/news/article/constitutional_and_legal_ethics_scholar_ronald_rotunda_dies_at_age_73) [<http://perma.cc/7U2D-BRYH>].

<sup>32</sup> Letter from Ronald D. Rotunda, The Albert E. Jenner, Jr. Professor of Law, to Kenneth W. Starr, Indep. Counsel, Office of the Indep. Counsel 3–4 (May 13, 1998) (on file with the *N.Y. Times*), <https://www.nytimes.com/interactive/2017/07/22/us/document-Savage-NYT-FOIA-Starr-memo-presidential.html?module=inline>. See also *id.* at 3 n.6 for the listing of Supreme Court authority on the point.

<sup>33</sup> For the most famous recent determination that no President is above the law, see *Clinton v. Jones*, 520 U.S. 681, 708–10 (1997). For Ron Rotunda's pithy summation of the point, see Ronald D. Rotunda, *Indicting the President: President Clinton's Justice Department Says No*, VERDICT (Aug. 14, 2017), <https://verdict.justia.com/2017/08/14/indicting-president-president-clintons-justice-department-says-no> [<http://perma.cc/6VZ8-6G7N>] (“Some argue that criminal prosecution would distract the president and make him unable to perform his duties. The 25th Amendment answers that objection, by offering a mechanism to keep the Executive Branch running if the president is temporarily unable to discharge his powers. In this country, no one is above the law.”).



The work on the Watergate committee, of course, was an effort to restrain a Republican President, but Ron Rotunda's 1998 memorandum was targeted at a Democrat. Thus, these professional episodes could be taken as a demonstration that for Ronald Rotunda, what we might describe as a heroic fidelity to the Constitution and to the rule of law was more important than partisan politics. It is a further indication that Ron Rotunda's professionalism and honesty were unusual and laudable, in the term used here, "heroic," that a heartfelt encomium to Ron Rotunda was published, shortly after his untimely death, by John Dean, the counsel to the President who exposed the foibles of the Nixon Administration,<sup>34</sup> and who wrote touchingly of his valued friendship with Rotunda.<sup>35</sup> Dean emphasized, quite properly, not just that Ron Rotunda was a "brilliant dynamo of legal scholarship," but that he also possessed "wonderful erudition, and wily wit . . ."<sup>36</sup> Similarly, one of Professor Rotunda's former students, Josh Blackman, reported that Ron Rotunda "was able to seamlessly blend probing questions, compelling lectures, and uproarious humor."<sup>37</sup>

Ron Rotunda's fidelity to the rule of law in general, and to the Constitution in particular, marks him as an "originalist," or what, as I indicated earlier, we are now popularly calling a "Constitutionalist." But heroic or otherwise, can that view be seriously defended these days? It is, again, as I have suggested, ridiculed in the academy, where it is said that "we really are all legal realists now,"<sup>38</sup> meaning that we are more sophisticated than simply to believe naively that adherence to precedent does in fact govern what happens in our courts, particularly the Supreme Court. The implication is that only a fool or a naïf could seriously embrace the rule of law.

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<sup>34</sup> See generally JOHN W. DEAN, *BLIND AMBITION: THE WHITE HOUSE YEARS* (1976); see also JOHN W. DEAN, *THE NIXON DEFENSE: WHAT HE KNEW AND WHEN HE KNEW IT* (2014).

<sup>35</sup> John Dean, *R.I.P. Ron Rotunda—A Man Responsible for Watergate's Most Lasting Positive Impact*, VERDICT (Mar. 16, 2018), <https://verdict.justia.com/2018/03/16/r-p-ron-rotunda-man-responsible-watergates-lasting-positive-impact> [<http://perma.cc/QMB6-GK7C>].

<sup>36</sup> *Id.* Indeed, Ron Rotunda's anonymous reviewer name for Amazon.com was "Wily Reader." For his graceful review of my law professors' book, see *Review of Law Professors: Three Centuries of Shaping American Law* by Stephen Presser, AMAZON (Feb. 23, 2018), [https://www.amazon.com/gp/customer-reviews/R22QNGQ5I2DJXH?ref=pf\\_vv\\_at\\_pdctrvw\\_srp](https://www.amazon.com/gp/customer-reviews/R22QNGQ5I2DJXH?ref=pf_vv_at_pdctrvw_srp) [<http://perma.cc/7VQE-JFR4>].

<sup>37</sup> Josh Blackman, *Remembering Professor Ronald Rotunda*, JOSH BLACKMAN'S BLOG (Mar. 18, 2018), <http://joshblackman.com/blog/2018/03/18/remembering-professor-ronald-rotunda/> [<http://perma.cc/PY6Q-RRD2?type=image>]. For an example of Ron Rotunda's splendid dry wit, note his observation that, "One might think of the individual [J]ustices of the Court as a group of prima donnas united only by a common parking lot." Ronald D. Rotunda, *The Fall of Seriatim Opinions and the Rise of the Supreme Court*, VERDICT (Oct. 9, 2017), <https://verdict.justia.com/2017/10/09/fall-seriatim-opinions-rise-supreme-court> [<http://perma.cc/6LG5-AWKW>].

<sup>38</sup> See Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 503 (1988) ("To a great extent, we really are all legal realists now.").

That cannot be correct, but if Constitutionalism is, in fact, the belief that adherence to precedent is how we ought to operate, how then can one still venerate and subscribe to the principles, rules, and structures of a prescription for government composed by fifty-five white men, many of whom were slaveholders, in Philadelphia more than two centuries ago? For most modern law professors, Democrats, and media practitioners, the question answers itself. For them, the 1789 document is the product of racism, classism, sexism, homophobia, and other despised forms of bigotry, and thus, the original understanding deserves little or no deference. This appears to be the view of titans such as Supreme Court Justice Thurgood Marshall<sup>39</sup> and Harvard Law Professor and founder of Critical Legal Studies, Mark Tushnet.<sup>40</sup> Is there any convincing reply to such an argument?

There must surely be, or Ron Rotunda got it wrong, and the legal profession is composed of hypocrites greater than we have yet imagined. The problem, obviously, as already mentioned, is that even *Federalist* No. 78, Alexander Hamilton's famous defense of judicial review, is bottomed on the notion of popular sovereignty, of the ultimate constitutional power as vested in the people,<sup>41</sup> so that Justices who nullify Congressional or Executive Acts that go beyond what the Constitution authorizes are only carrying out the will of the people expressed in the Constitution. If this is true, then Constitutionalism is the only appropriate judicial and political philosophy since it is the only one consistent with the principle of popular sovereignty, which is the foundation of our democratic republic. But if the Constitution is not the product of the people—and how can it be, if it was drafted by a tiny all-white male minority, and ratified by a process that excluded women, blacks, and the relatively property-less from participation—why should it be given contemporary binding authority? Could it be that Ronald Rotunda and the Originalists and Constitutionalists like him are basing their theories on a fundamental, dangerous, pernicious, and chimerical misconception?

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<sup>39</sup> For Justice Marshall's view see Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 1–5 (1987).

<sup>40</sup> There are many works on the Constitution in which Mr. Tushnet has elaborated his views, but for a recent monograph arguing that the Constitution is best understood simply as the product of our politics at any given time, see generally MARK TUSHNET, *WHY THE CONSTITUTION MATTERS* 1 (2010).

<sup>41</sup> *Federalist* No. 78 provides, in pertinent part, "that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority." THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (1961).

When our politics appear to be as shifting and evanescent as what Burke called “the flies of a summer,”<sup>42</sup> this is a poignant question. When all that seems to matter is the redress of racial, ethnic, or economic grievances, accumulated over centuries of slavery, misogyny, and a myriad of other oppressions, of what moment is that old 1789 parchment?

In an earlier time, one could simply subscribe to Benjamin Franklin and George Washington’s notion that the hand of Providence itself was guiding the Philadelphia Framers, and that it was divine inspiration, ultimately, that dictated the content of the Constitution.<sup>43</sup> Those of us still inclined to understand that a spiritual power does indeed dwell within us<sup>44</sup> might be able to accept this notion. This will not satisfy all, because ours is an increasingly secular age, and given the current tendency to reject the formerly well-known precept that the United States was a self-consciously Christian nation—a precept even acknowledged and apparently accepted by the Supreme Court itself<sup>45</sup>—a religious basis for the Constitution would not be welcomed by all. There are those who try—unsuccessfully in my view—to claim that ours is a Godless Constitution.<sup>46</sup> That atheistic assertion would clearly not have been acceptable to those like Supreme Court Justice Samuel Chase, who frankly declared in the beginning of the nineteenth century that there could be no order without law, no law without morality, and no morality without

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42 Ron Rotunda is probably best understood as a Burkean conservative, who, like Burke, saw society in general, and our English common law tradition in particular, as a compact among those who came before us, us, and those who are to follow. *See, e.g.*, EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 99 (1987). For example, Mr. Burke explains:

By this unprincipled facility of changing the state as often, and as much, and in as many ways, as there are floating fancies or fashions, the whole chain and continuity of the commonwealth would be broken. No one generation could link with the other. Men would become little better than the flies of a summer.

*Id.*

43 For one of the most notable and popular efforts implicitly suggesting the influence of supernatural forces in the forming of the Constitution, see generally CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787 (1966).

44 For that argument from a traditional Christian perspective, see generally C.S. LEWIS, MERE CHRISTIANITY 225 (1952), and for an intriguingly similar argument made by one of most important thinkers of what became the critical legal studies movement, see generally ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 290 (1975).

45 *See* Holy Trinity Church v. United States, 143 U.S. 457, 471 (1892) (“These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.”).

46 *See generally* Stephen B. Presser, *Some Realism About Atheism: Responses to The Godless Constitution*, 1 TEX. REV. L. & POL. 87, 89–91 (1997).

religion.<sup>47</sup> Something like that spiritual foundation appears also to have rested at the core of Ronald Rotunda's beliefs.<sup>48</sup>

Perhaps one could still argue for a natural law basis for the Constitution, even if one were inclined to reject the explicitly Christian view of the matter. The animating force of Thomas Jefferson's Declaration of Independence, that there are certain inalienable rights conferred on us by nature and nature's God, is, after all, thought to undergird the Constitution itself.<sup>49</sup> Surely there are some timeless principles of good government, as Hamilton, Madison, and Jay believed, and that what the authors of the *Federalist Papers* described as the emerging late eighteenth century "science of politics," as described in the work of such authors as the Baron de Montesquieu, Hugo Grotius, William Blackstone, and other European thinkers, could have pointed the way and was, in effect, incorporated in our charter of fundamental law.

Thus, as the *Federalist Papers* explained,<sup>50</sup> the constitutional structure sought, by employing checks and balances, the separation of governmental powers, and dual state and federal sovereignty, to provide a means by which arbitrary power would be restrained. As Madison put it in the famous *Federalist* No. 51, men not being angels, some sort of government was necessary, and, indeed, "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."<sup>51</sup> The principles of self-government and

47 For the details of Justice Chase's views, see generally STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS, AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* 141–49 (1991) and PRESSER, *supra* note 10, at 84–91.

48 Thus, in a learned meditation on Dante, and the question whether it is possible for lawyers to get to heaven, Ron Rotunda observes:

What empire meant to Justinian, Dante tells us, is not personal glory or family riches but peace under a rule of law that is just. Just laws are the earthly symbols of the divine. The great truths of the world are found in the great literature of the world. If modern day politicians and lawgivers seek Paradise, they should give us peace and just laws.

Ronald D. Rotunda, *Can Lawyers, Politicians, and Lawgivers Go to Heaven?*, VERDICT (July 17, 2017), <https://verdict.justia.com/2017/07/17/can-lawyers-politicians-lawgivers-go-heaven> [<http://perma.cc/8p2x-AZBU>].

49 See SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 2–3 (1995) (reflecting on the Constitution as simply securing the rights enumerated in the Declaration).

50 The *Federalist Papers* are not easy reading, but fortunately there is an inexpensive, readily available edition from Signet books that contains a fine introduction by Charles Kesler and the topical summaries for each essay. See generally Charles R. Kesler, *Introduction and Notes* to ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST PAPERS* (Clinton Rossiter ed., 2003) (1961) (Introduction and Notes 1999). For interpretive assistance, see also ANTHONY A. PEACOCK, *HOW TO READ THE FEDERALIST PAPERS* (2010), a guide published by the Heritage Foundation. A reading of the *Federalist Papers* suggests the profound influence of European thinkers.

51 THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003) (1961).

self-restraint contained in the Constitution were designed to solve these problems, and did so using the latest and most sophisticated political theory available.

But still, those theories are now centuries old, and, so the argument of those who would champion a “Living Constitution” goes, our society is different, our needs are different, and the elite aristocracy of government by one’s betters, the idea in which such as Alexander Hamilton surely believed,<sup>52</sup> is now generally regarded as completely unsuitable. It’s no surprise, then, that the “Living Constitution” view, the set of beliefs that maintains that it is the job of Justices, aided by academics, perhaps, to alter the meaning of the Constitution, according to the evolving modern standards of decency, equity, dignity, and fairness, to fit the needs of the times is in the ascendance, and is so dominant that one risks ridicule to champion Originalism.<sup>53</sup>

How then to account for the fact that someone like Ronald Rotunda was willing heroically to risk that ridicule, and to defy the conventional “Living Constitution” platitudes of the academy and the times? One explanation is that Ron Rotunda, who was taken from us too early, still lived long enough to remember a different set of assumptions and behaviors that allowed him to question the “politically correct” manifestations of our age. He was a critic, for example, of the contemporary condemning of “microaggressions,” and the concomitant attempt to silence proponents of views unpopular on the ideologically-driven campuses and left-dominated cities of our time.<sup>54</sup> Another explanation is that Ron Rotunda was deeply steeped in the wisdom available in the Western Canon,<sup>55</sup> and was able to deploy, in support of the arguments he made, examples furnished from such as Virgil, Justinian, and Dante.<sup>56</sup> A third explanation, already alluded to, is that the same moral and

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52 For the best introduction to Alexander Hamilton’s beliefs, see the magisterial RONALD CHERNOW, *ALEXANDER HAMILTON* 4 (2004), the inspiration for the popular Broadway play.

53 For a fine study of the notion of a “Living Constitution,” and its defects, see generally BRADLEY C.S. WATSON, *LIVING CONSTITUTION, DYING FAITH: PROGRESSIVISM AND THE NEW SCIENCE OF JURISPRUDENCE* (2009).

54 See, e.g., Ronald D. Rotunda, *George Wallace at Harvard – The Good Old Days of Campus Free Speech*, VERDICT (May 8, 2017), <https://verdict.justia.com/2017/05/08/george-wallace-harvard-good-old-days-campus-free-speech> [<http://perma.cc/UK7D-VGLC>] (pointing out that when Ron Rotunda was in college speakers such as George Wallace could be heard on campus and their thoughts freely evaluated, and, where appropriate, ridiculed and condemned, and criticizing the modern tendency to silence speakers whose ideology or views one finds distasteful); see also Ronald D. Rotunda, *Higher Education and Teaching English*, VERDICT (Aug. 3 2015), <https://verdict.justia.com/2015/08/03/higher-education-and-teaching-english> [<http://perma.cc/VD3M-S5QV>] (criticizing the trend in higher education to avoid “microaggressions” and issue “trigger warnings”).

55 See generally HAROLD BLOOM, *THE WESTERN CANON: THE BOOKS AND SCHOOL OF THE AGES* (1994).

56 See Rotunda, *supra* note 48.

spiritual understanding that served as a source of reinforcement of the beliefs of our Framers must have moved Ron Rotunda, who, for example, lamented what he saw as a pernicious trend on the part of state and federal governments to weaken religion,<sup>57</sup> and warned against the movement to legalize assisted suicide and promote euthanasia.<sup>58</sup> A fourth and final reason is that Ronald Rotunda had a healthy distaste for “experts” who thought they knew better than the American people, and, indeed, he understood the value of the “wisdom of crowds,” the basic principle of popular sovereignty that is the essence of our Republic.<sup>59</sup>

There are, then, some hints of what sustained Ron Rotunda in his views, and perhaps it is appropriate, since my views are basically the same as his, to suggest why I, too, have chosen to resist the dominant legal academic consensus and cling to the earlier Constitutional ethos. Ron Rotunda and I shared the idea that in the 2016 Presidential election we were making a choice between continuing with a political party, the Democrats, that increasingly seemed to be straying from the rule of law in general and Constitutionalism in particular, and, instead, going with a Republican candidate, Donald Trump, who pledged that he would return the courts and the polity to an earlier traditional view. It was not clear that then-candidate Trump was deeply influenced by, much less had ever read the *Federalist Papers*, but the fact that he was influenced by the Federalist Society in his picks for the judiciary was comforting. And it wasn't just a change in our politics that Donald Trump represented for us.

At some level, it seemed that then-candidate Trump was expressing the increasingly evident understanding that our culture made a disastrously wrong turn, in the late sixties and early seventies, and that the molders of our public opinion, probably unduly influenced by trendy European Marxist theories,<sup>60</sup> simply embarked on a program of wildly misperceiving reality. In our own time, this difficulty has become so acute that what formerly seemed obvious to virtually all, one or two generations ago, is now anything but accepted in the academy, in the media, and in at least one of our

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<sup>57</sup> Ronald D. Rotunda, *The Government Campaign to Weaken Religion*, VERDICT (June 9, 2015), <https://verdict.justia.com/2015/06/09/the-government-campaign-to-weaken-religion> [<http://perma.cc/92M2-YVLT>].

<sup>58</sup> Ronald D. Rotunda, *The Way of Death in the Netherlands, Oregon, and, Perhaps, California*, VERDICT (Apr. 27, 2015), <https://verdict.justia.com/2015/04/27/the-way-of-death-in-the-netherlands-oregon-and-perhaps-california> [<http://perma.cc/UM4A-R6GT>].

<sup>59</sup> On Ron Rotunda's embrace of the wisdom of crowds and the rejection of experts, see his wonderful blast at Jonathan Gruber, the Obamacare architect who denigrated the wisdom of the American people. Ronald D. Rotunda, *Jonathan Gruber and the Wisdom of Crowds*, VERDICT (Dec. 29, 2014), <https://verdict.justia.com/2014/12/29/jonathan-gruber-wisdom-crowds> [<http://perma.cc/X3DX-9SRS>].

<sup>60</sup> For that story, see WALSH, *supra* note 2.

political parties. And yet, as Michael Walsh recently wrote, attempting to invoke some much-needed common sense, in the manner Ron Rotunda often did:

[W]e need not argue that traditional norms, maintained across centuries, are the product of “oppression” or conspiracy: we can experience their fundamental truths in everything from *The Epic of Gilgamesh*, which dates from before 2500 B.C., to the literature, poetry, films, and stage works of our own time. What we find is a remarkable consensus about basic principles of right and wrong; of the proper, if imperfect, relations between the sexes; of the importance of children to the health and future of a culture; of the nature, meaning, and need for heroism.<sup>61</sup>

It is that kind of common sense, then, that kind of simple recognition of the obvious, that kind of acknowledgement of the consensus expressed by our literary, cultural, and legal traditions, and that innate sense of the heroic, that was so important to Ron Rotunda’s beliefs, and I think he got it right. There is more. One can find in Ron Rotunda’s writing, particularly the short essays he did for the *Verdict* website, an echo of the views stumbled upon by Old Etonian and former Marxist David Goodhart, who, as a mature man, came to understand:

The belief, for example, that men and women are equal but not identical and that some sort of gender division of labour in the home and the broader society remains popular. That order and legitimate authority in families, schools and the wider society are a necessary condition of human flourishing, not a means of crushing it. That religion, loyalty and the wisdom of tradition deserve greater respect than is common among “blank sheet” liberals who tend to focus narrowly on issues of justice and harm. As [Jonathan] Haidt points out — contrary to the old claim that the right is the stupid party — conservatives can appreciate a wider range of political emotions than liberals: “It’s as though conservatives can hear five octaves of music, but liberals respond to just two, within which they have become particularly discerning.”<sup>62</sup>

I think Goodhart could have been channeling Ronald Rotunda.

What then, might one conclude about the future of our polity, influenced by what I have here described as Ron Rotunda’s Constitutionalist heroism? I think one would be led to ruminate not only what conservatives understand that liberals do not with

<sup>61</sup> MICHAEL WALSH, *THE FIERY ANGEL: ART, CULTURE, SEX, POLITICS, AND THE STRUGGLE FOR THE SOUL OF THE WEST* 14 (2018).

<sup>62</sup> David Goodhart, *Why I left my Liberal London Tribe*, *FIN. TIMES* (Mar. 17, 2017), <https://www.ft.com/content/39a0867a-0974-11e7-ac5a-903b21361b43>. The reference to Jonathan Haidt is to his book, *JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 153–54 (2012), in which he argues that Conservatives function along five moral dimensions: (1) care/harm, (2) fairness/cheating, (3) loyalty/betrayal, (4) authority/subversion and (5) sacredness/degradation, while Liberals function only pursuant to the first two. *Id.*

regard to human flourishing, but also on how best to preserve our form of government, and to recognize the enduring meaning of the fact that ours is a republic and not a democracy.

Thus, underlying much of our recent debate over the law and the proper constitutional perspective is a deeper anxiety over just what form of government we actually have or ought to have in this country. Democrats, as the name of their party implies, favor democratic government, and there has even been an op-ed in the *New York Times* claiming that the Supreme Court is now illegitimate because the President who nominated them, and the senators who confirmed Justice Brett Kavanaugh and Justice Neil Gorsuch actually represent less of the popular vote than their opponents.<sup>63</sup> The obvious difficulty with this argument, of course, is that we are not now, nor have we ever been a democracy where only the numerical majority of voters prevail.

Ours, as the pledge of allegiance, recited by so many school children and new citizens for so long, makes clear, is a republic, and not a democracy.<sup>64</sup> Bearing in mind the obvious impossibility of conducting a direct democracy in a nation of millions of people, there are positive features in a republic which dictated its choice to our Framers and still sustains it. The most obvious and popular meaning of “republic” is representative government, which solves the difficulty of direct democracy by creating an indirect method of rule which can reduce the required participation in government to manageable levels.

There is a second, older meaning of the word “republic,” however, often forgotten these days, but which ought to be borne more in mind in these fraught and dangerous times, when demagoguery rises to a fever pitch. That second meaning flows directly from the Latin derivation of the term, *Res publica*, which we might freely translate as “public thing,” or “what is in the best interests of all of us,” or, perhaps, “what is natural and best for any government,” or, in the manner that Rousseau<sup>65</sup> and others

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<sup>63</sup> This is the argument made in Michael Tomasky, *The Supreme Court's Legitimacy Crisis*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html>. For the *New York Times* editorial board's continuing belief in the inappropriateness of Justice Kavanaugh, see The Editorial Board, *The High Court Brought Low*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/opinion/brett-kavanaugh-supreme-court-trump.html>.

<sup>64</sup> “I pledge Allegiance to the flag of the United States of America and to the Republic for which it stands, one nation under God, indivisible, with Liberty and Justice for all.” *The Pledge of Allegiance*, US HISTORY.ORG, <http://www.ushistory.org/documents/pledge.htm> [<http://perma.cc/8Q3J-F7A7>].

<sup>65</sup> See JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 19 (Jonathan Bennett ed., 2017) (1762), <https://www.earlymoderntexts.com/assets/pdfs/rousseau1762.pdf> [<http://perma.cc/38YG-F4F9>] (“So I give the name ‘republic’ to any state governed by laws, whatever form its



understood the term, as a government *that adheres to the rule of law*. That is what John Adams meant when he wrote into the Massachusetts Constitution of 1780 that its aim was to secure a “government of laws and not of men.”<sup>66</sup> That is what republican government is supposed to be all about, that’s why so many Americans appear to have reacted adversely in 2016 to a government that seemed to be favoring redistribution and regulation in the interests of favored causes and cronies, and that’s why the Constitutionalist Ronald Rotunda found himself a happy and heroic partisan of the Republican party and its candidate.

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administration takes; for only when the laws govern does the public interest govern, and the public thing is something real.”)

<sup>66</sup> See MASS. CONST. art. XXX, drafted by John Adams in 1780:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

*Id.*

