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CLEARING AWAY THE CARICATURE A REVIEW OF *THE ATTORNEY GENERAL'S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT*

by Douglas W. Kmiec, New York:
Praeger Publishers, 1992. Pp 220. $45.95 hardcover.

As a Deputy and, later, as Assistant Attorney General for the Office of Legal Counsel,[1] Douglas W. Kmiec played a critical role at the Department of Justice. In *The Attorney General's Lawyer: Inside the Meese Justice Department*,[2] Professor Kmiec candidly recounts the operations at the Meese Department of Justice,[3] focusing on the substance behind the Meese agenda and record.

Rather than a "kiss-and-tell" book of personal scandal, *The Attorney General's Lawyer* examines segments of Kmiec's work at OLC, offering his criticism of Congress, the judiciary and his own executive branch colleagues. Following the course of the book, this review seeks to illuminate Kmiec's appraisal of the Meese jurisprudence of original intent, the missing natural law component of that doctrine, and the Reagan Administration's attempt to apply it.

The Attorney General's Lawyer also presents a balance to the image the media and political opponents created of Meese's tenure against his record and legacy.[4] To America, the Department's policies and achievements became inconsequential, obscured by a caricature. Through *The Attorney General's Lawyer*, Professor Kmiec clears away the accusations and exaggerations about the man and presents his record.

I. THE MEESE DEPARTMENT OF JUSTICE

A. Original Intent and the Reagan Administration

President Ronald Reagan believed that government was too large and too intrusive into the lives and business of America. Sharing Reagan's beliefs, Kmiec identifies the "judicial attitudes that either lost sight of, or whole-heartedly

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1. The Office of Legal Counsel [hereinafter OLC] maintains a low profile as an apolitical "elite corps" of attorneys who advise the Attorney General on constitutional issues and settle legal and ethics disputes within the executive branch. From the ranks of OLC heads have come two Supreme Court Justices, Rehnquist and Scalia.

2. DOUGLAS E. KMIEC, THE ATTORNEY GENERAL'S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT (1992) [hereinafter THE ATTORNEY GENERAL'S LAWYER]. Douglas Kmiec is a Professor of Law, University of Notre Dame Law School.

3. Edwin Meese III succeeded William French Smith as the United States Attorney General in February of 1985 and served at that post until his resignation in July of 1988.

4. Accusations of media bias, resurfacing during the recent 1992 presidential election, plagued press coverage of Meese. *See* THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 198. *See also* Elizabeth Kolbert, *Maybe the Media DID Treat Bush A Bit Harshly*, N.Y. TIMES, Nov. 22, 1992, § 4, at 3.

disregarded, the limits placed on the federal government by the Constitution"[5] as formidable obstacles to a philosophy of limited government. To counteract the judicial activism of the two previous decades, the Reagan Administration adopted the jurisprudential doctrine of "original intent."[6]

Crucial to Kmiec's task at OLC was the commitment to the jurisprudence of an "original understanding" of the Constitution, supplemented by an appreciation of that document's natural law foundation. *The Attorney General's Lawyer* describes the original intent philosophy as a "return to 'first principles.'"[7] These principles, expressed by Meese, are found in the words and text of the Constitution. "The words of the Constitution matter because they are written and they are law," writes Kmiec.[8] According to original intent theory, the words of the Constitution create and enumerate a carefully chosen form of government. When interpreting the Constitution, the judiciary must therefore follow the specific words of the Constitution. If the words are ambiguous, judges must "interpret[ ] and appl[y] [them] in a manner so as to at least not contradict the Constitution itself."[9]

Professor Kmiec addresses some of the common objections voiced against Meese's call for a return to the "original understanding."[10] While conceding some difficulty in using an "original intent" approach, Kmiec responds that none of these "excuses" is sufficient or justified when employing original intent doctrine properly.[11] They are easily dismissed as efforts to avoid difficult decisions.

Kmiec similarly raises three alternative theories offered by contemporary critics of "original intent."[12] According to Kmiec these theories generally seek to disregard the Constitution's meaning and lend themselves to judicial activism through the creation of new rights.

The first of the three alternatives cited in *The Attorney General's Lawyer*, is "neutral principles."[13] Rather than choosing a particular interpretation when confronting a hard case, a judge should supplant the meaning of the words in favor of neutral principles that "transcend the case before them."[14] Kmiec, critical of the judicial law-making, terms the "neutral principles" approach a divergence from the Constitution without justification, despite its goals of equality and removing the "result-oriented judge."[15]

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5. *Id.* at 17. In fairness, the judicial activists would also claim the high ground of freeing citizens from government intrusion by protecting and expanding civil liberties enumerated in the Constitution.

6. For an alternative source on the original intent philosophy, *see* ROBERT H. BORK, THE TEMPTING OF AMERICA (1990).

7. *See* THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 18-21.

8. *Id.*

9. *See id.* at 19. In this way Kmiec styles Meese as a "direct descendant" of Chief Justice John Marshall, who established the power of judicial review by the federal judiciary. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

10. Respectively, the objections are: 1) the original intent is too difficult to determine; 2) some terms are intentionally ambiguous; 3) that the words are without specific meaning, and perhaps most critically 4) interpretation based on "original intent" may produce "undesired outcomes." THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 21-24.

11. *Id.* at 25.

12. *See id.* at 25-29.

13. THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 25 (citing Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959)).

14. *Id.*

15. *Id.*

Kmiec raises and criticizes a second alternative, "balancing."[16] Balancing requires the Court to search for varying interests, weigh them, and then arrive at a reasoned conclusion. Although the method appears acceptable and "conjures up the statue of Justice," Kmiec dismisses this formula as "non-constitutional and fanciful."[17] Recognizing the numerous instances of Supreme Court balancing tests and multi-pronged analyses, Kmiec reconciles them by suggesting that the tests hide the true source of these outcomes, the Court and not the law. As such, balancing is "delusive" and serves only to justify reaching a desired outcome.[18]

The third and, for Kmiec, most unpalatable alternative to original intent is "noninterpretivism." This jurisprudence completely disregards "traditional sources of interpretation altogether."[19] Within this method of decision-making different standards may replace the traditional constitutional interpretation methods.[20]

Kmiec berates Professor Laurence Tribe, in particular, for his assertion that the Court's role in making law is not limited by the Constitution. Tribe claims the Constitution is "an intentionally incomplete, often indeterminate structure for the participatory evolution of political ideals and governmental practices."[21] Justifying broad judicial power because of the difficulty in constitutional interpretation would, for Kmiec, permit the Court to "achieve political victories not forthcoming from the democratic process."[22] Kmiec's indulgence hits a critical mass where Tribe's reliance on judicial activism to nudge on constitutional development is fully extrapolated. This reliance would destroy a rule of law in favor of a rule by "elite judges constrained only by their social and cultural positions in making decisions."[23]

Ironically, Kmiec finds the writings of Michael Perry, another noninterpretivist, "useful not for their creation of yet another standard to substitute for original intent," but rather to illustrate the major weakness in the original intent theory expounded by Meese.[24] Namely, Perry queries what happens when the positive law, even the Constitution, conflicts with morality. This question introduces the missing element of the original understanding doctrine, natural law rights and precepts. Recognition of the Framers' belief in the natural law and pre-existing natural rights resolves the potential conflict in the original understanding doctrine.[25]

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16. *Id.* at 26 (citing T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 988 (1987)).

17. *Id.*

18. *Id.*

19. *Id.* at 27.

20. These standards, raising the ire of Kmiec, include those advanced most prominently by Dean Paul Brest of the Stanford Law School and Harvard Law Professor Laurence Tribe. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); LAURENCE TRIBE, *Preface to the First Edition, reprinted in* AMERICAN CONSTITUTIONAL LAW vii-viii (2d ed. 1988).

21. THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 28 (quoting Tribe, *supra* note 20, at vii).

22. *Id.*

23. *Id.*

24. *Id.* at 29 (citing Michael Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U.L. REV. 278 (1981)).

25. Without an absolute belief in natural law morality, which presumably remains unchanged from the time of the Framers, Kmiec's argument appears circular.

B. Original Intent and the Natural Law

While natural law has fallen into the dustbin of American legal scholarship over the course of this century, Professor Kmiec finds it the answer to the weaknesses of interpretation by original understanding. Kmiec, and other legal scholars[26] secure the Constitution and the jurisprudence of its Framers squarely to a natural law heritage. From Thomas Jefferson's oft quoted Declaration of Independence to the Ninth Amendment to the Constitution, Kmiec finds clear evidence of natural rights and natural law reasoning in the Founders' discourse.[27]

Natural law, as explained by Kmiec, "assumes that every person and every thing has been created with an inherent or intrinsic nature and that no human or positive law can supersede this nature."[28] Kmiec attributes this basis to the Founders and suggests that the natural law forms an integral part of the original intent method, grounding the Constitution to the understanding of rights derived from objective truths of nature.

Significantly, for Kmiec, natural law objectivity restricts the function of the judiciary and the "finding" of new rights through judge-made law.[29] If employing natural law reasoning, a judge would be unable to introduce her own morality. The court cannot second-guess the legislature, unless the enacted laws contradict the Constitution or natural law precepts.[30] The objectivity of natural law principles proscribes such judicial activism.[31] Importantly, for Kmiec, this proscription precludes the discovery of rights in "penumbra" and "emanations," argued as sources of the abortion and other "privacy" rights.[32] Such rights could not exist, since they conflict directly with the natural law principle of human preservation.

Despite Kmiec's persuasive discussion, the natural law failed to win many supporters in the original intent camp, specifically Bork and Meese. Additionally, Kmiec faults his colleagues at the Department for refusing to include natural law in their originalist approach.[33] Politics and an aversion to natural law's religious undertone may have precipitated this omission. Opponents of natural law also

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26. Terry Brennan counters objections to the assertion of pre-existing natural rights with evidence taken from the debates for the ratification of the Constitution. *See* Terry Brennan, *Natural Rights and the Constitution: The Original "Original Intent"*, 15 HARV. J.L. & PUB. POL'Y 965 (1992).

27. *See* THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 34-38.

28. *See id.* at 30. While not disclaiming his own religious beliefs, Kmiec maintains that the natural law does not require religious convictions, but simply a recognition of the patterns and truths inherent in nature.

29. *Id.* at 31 (citing Charles E. Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence*, 24 WAKE FOREST L. REV. 539, 568 (1989)).

30. Kmiec does not hold that the natural law must completely displace adherence to positive law. To the contrary, positive law is vital to the operations of society and puts flesh on the bones of the natural law framework. As Kmiec quotes, "[F]acts change, and therefore laws must change to form a reasonable relation to facts." THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 33 (quoting Harold R. McKinnon, *The Doctrine of Natural Law Philosophy*, 1 NATURAL LAW INSTITUTE PROCEEDINGS 85, 98 (A. Scanlan ed. 1947)).

31. Since truths of nature can be perceived and through reason can form principles, natural law becomes an ultimate backstop or default reasoning mechanism when the text of positive law, Constitutional or statutory, conflicts or is ambiguous. *See id.* at 32-34.

32. *Id.* at 32 (citing Roe v. Wade, 410 U.S. 113 (1973) (recognizing a woman's right to terminate pregnancy qualified by state restrictions permitted during the second and third trimesters) and Bowers v. Hardwick, 478 U.S. 186 (1986)(refusing to create a privacy right for homosexual sodomy)).

33. THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 38.

often cite the use of natural law to affirm slavery in *Dred Scott v. Sanford*.[34] Kmiec easily counters the objection and finds the reason why this decision was wrongly decided. The Court ignored a natural law principle that "[a]ll men are created equal," announced in the Declaration of Independence, which provided the superior right to guide the Constitution.[35] In their treatment of *Dred Scott*, Bork and Meese, as originalists critical of natural law, maneuvered to avoid the Constitution's clear references to the ownership of slaves, in order to show why slavery is unconstitutional.[36] Without natural law they faltered and injured their case for original intent.[37]

II. APPLYING ORIGINAL UNDERSTANDING ACROSS THE BOARD

Armed with the original intent jurisprudence of the Meese Justice Department, the Reagan Administration set out to execute its agenda throughout its enforcement matters. As matters of constitutional conflict fall to the work of the OLC, Professor Kmiec often participated first-hand in the formulation of controversial departmental positions. *The Attorney General's Lawyer* recounts significant battles in the areas of governmental structure, social issues and ethics.

A. Governmental Structure

The Constitution provides for a tripartite form of federal government with a system of checks and balances, and a reservation of power to the several states. Asserting the system had changed from that envisioned by the Founders,[38] any believer in the original intent finds correction of the constitutional distortions necessary.

The Reagan Administration's mission began with control of its own domain. The Executive branch, as Kmiec writes, has powers "largely undefined by constitutional text."[39] The jurisdictional scope, sheer size and number of agencies and departments within the executive branch permit diffusion of policy and vulnerability to special interest pressure.

The return of control to the President started with Office of Management and Budget (OMB) oversight of agency rule-making proposals.[40] The fight continued with the elimination of "legislative vetoes" in thousands of statutes through successful arguments in a Supreme Court challenge,[41] the President's use of

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34. 60 U.S. (19 How.) 393 (1857)(In this famous case, Chief Justice Roger B. Taney affirmed the Constitutional right to own slaves as property.).

35. THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 39.

36. *Id.* at 39 (citing U.S. CONST. art. IV, § 2 & art. I, § 9).

37. In fact, despite Kmiec's urging, Meese criticized natural law as "mysterious and uncertain." Kmiec attributes this misguided statement to the natural law gap in Meese's legal education and to political concerns of his staff to avoid religious connotations. *Id.* at 40. For a detailed examination of Robert Bork's natural law criticism, *see* Kevin V. Parsons, Essay, *Borkian Jurisprudence: A Heresy of Omission*, 17 J. LEGIS. 207 (1991).

38. Through the Vietnam War, the Watergate Scandal, and the weakness of the Carter Administration, the power and stature of the Presidency waned relative to its constitutionally co-equal branches. Likewise, the regulatory powers of the states had shifted to the federal government through preemption, the Commerce Clause and the Supremacy Clause, U.S. CONST. art. VI, § 2.

39. THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 47.

40. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1982)(establishing OMB oversight). Particularly, the Environmental Protection Agency resisted OMB oversight with the assistance of Congress.

41. *See* I.N.S. v. Chadha, 462 U.S. 919 (1983) (invalidating as *ultra vires* the power of the House of Representatives to override a decision by the Attorney General regarding deportation of aliens).

signing statements to tighten direction and interpretation of new laws,[42] and the assertion of executive privilege for internal workings of the executive branch.[43]

While Kmiec notes the words "separation of powers" cannot be found in the text of the Constitution, the concept has become a cornerstone of constitutional jurisprudence.[44] The battle over the separation of powers occurred over the Independent Counsel law[45] and the formulation of foreign policy. Regarding the former, Kmiec disparages the political role of the independent counsel and the unprosecutorial nature of the investigations conducted during the Reagan Administration.[46]

The Attorney General's Lawyer also explores the tug-of-war between the President and Congress over foreign policy powers which Kmiec finds at the root of the Iran-Contra affair.[47] Whether an overt conflict with the President's power, as in the War Powers Act, or a battle over the interpretation on the ambiguities of the "Boland Amendment,"[48] Kmiec finds the congressional intrusion and subsequent vindictive prosecution by the independent counsel deplorable.

The Reagan Presidency similarly pursued a return to the traditional concept of federalism under an original intent view.[49] *The Attorney General's Lawyer* demonstrates that restoring power to the states became a test of the OLC's legal integrity in the face of intra-party pressures on the issues of South African divestment by state agencies and California's Proposition 65 requiring extensive warnings on food labels.[50] Although lobbied by conservative allies to preempt these state actions, the Reagan Administration remained committed to its federalism goal.[51]

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42. While not given the force of law, Kmiec asserts that the signing statements drafted by the OLC offered publication of the President's interpretation of a law. THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 52.

43. *Id.* at 63.

44. The structure of the Constitution evidences the Founders' intent for vivid delineation of governmental branches. *See* United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936)(recognizing the constitutional power of Executive in the area of foreign policy).

45. *See* Morrison v. Olson, 487 U.S. 654 (1988)(rejecting a challenge to the constitutionality of the independent counsel law, the Court upheld the law as not an *ultra vires* usurpation of executive control). *See generally*, TERRY EASTLAND, ETHICS, POLITICS, AND THE INDEPENDENT COUNSEL (1989).

46. Specifically, the two investigations of Meese by Independent Counsels Stein and McKay resulted in much publicity but no charges were proffered. THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 13, 57-60, 197. The independent counsel would later haunt the Reagan and Bush Administrations in the form of Judge Lawrence Walsh and the Iran-Contra probe. Kmiec's fear may well have played out in the November 1992 when Walsh brought the indictment of former Defense Secretary Caspar Weinberger, who was subsequently pardoned by President George Bush. *See* Walter Pincus, *Bush Pardons Weinberger in Iran-Contra Affair; Five Others also Cleared*, WASH. POST, Dec. 25, 1992, at A1.

47. *Curtiss-Wright*, *supra* note 44, seemed to have settled this issue, but Kmiec cites the Boland Amendment as a typical Congressional intrusion into the President's foreign affairs powers. The Walsh prosecution of Iran-Contra indictees became the "criminalization of separation of powers." THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 185, 187.

48. Continuing Resolution, Department of Defense Appropriations Act, Sec. 8066(a), Pub. L. No. 98-473; 98 Stat. 1837 (1984).

49. Specifically, "[w]henever possible, the President wanted his departments to '[r]efrain . . . from establishing uniform, national standards for programs.'" Exec. Order No. 12,612, § 3(d)(2), 52 Fed. Reg. 41685 (1987); THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 137.

50. THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 137.

51. *See id.* at 146. On the OLC's advice, though politically favoring the policy of constructive engagement with the South African government and less federal regulation of commerce, the Administration refused to preempt the states' actions.

B. Social Issues

From the beginning of the Reagan Administration, the application of original intent principles to government involvement assumed a central role in the Justice Department's agenda on social issues. *The Attorney General's Lawyer* considers the attempts by the Justice Department to "correct" legal distortions in the area of family values, economic and civil rights.

Perhaps no single issue divides America along moral lines more than the abortion right created in *Roe v. Wade*.[52] As amicus curiae, the Justice Department of the early eighties sought to assist in the retrenchment of the rights found in *Roe*.[53] Particularly critical of the judicial activism used to "find" the right, the OLC sought to argue an original understanding of the Constitution.

Despite equivocation by the Solicitors General, the cases following *Roe*, Kmiec suggests, show a trend away from the rigid trimester system of *Roe*, but a continued confusion over the source and nature of the right.[54] For Kmiec the answer is simple, an abortion right conflicts with natural law principles and therefore could never be considered as arising from the Constitution.

The legal campaign over abortion spilled over into the area of family planning counseling as well. When the controversy came to the attention of the OLC, Kmiec's research revealed that the statute, Title X of the Family Planning Act of 1970,[55] had been misapplied for the previous seventeen years. Kmiec and his colleagues concluded, "the legislative history makes clear that any activity that promotes abortion as a method of family planning is prohibited . . . ."[56] The Supreme Court has since affirmed this reading of the act,[57] but the issue has reappeared in the new Clinton Administration.[58]

The Meese Justice Department also battled to restore family values by attacking pornography. The Attorney General's Commission reported several conclusions about the primary and secondary effects of pornography on crime and child abuse. Unexpectedly, the Commission's report revealed that the U.S. Government at its leased property, stores and military bases was the country's largest distributor of pornography.

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52. *See supra* note 32.

53. THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 73,77. This argument did not, however, find automatic support from the nation's top litigators, the Solicitors General. Choosing a more neutral path for the amici arguments, Rex Lee and later Charles Fried both skirted a true originalist interpretation which would have completely read out the abortion right.

54. *See, e.g.*, Thornburgh v. American Coll. of Obst. & Gyn., 476 U.S. 747 (1986)(invalidating regulations requiring physicians to provide information on non-abortion alternatives and risks as well as record their bases for non-viability); Webster v. Reproductive Health Services, 492 U.S. 490 (1989)(refusing to overturn *Roe* but permitting regulations prohibiting uses of state facilities for abortions as not an undue burden); and later Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992)(retaining the essential holding of *Roe*, but adopting in plurality an undue burden standard in the place of the rigid trimester system).

55. Family Planning Services Act, 42 U.S.C. § 300a-6 (1992).

56. THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 87.

57. *See* Rust v. Sullivan, 111 S.Ct. 1759 (1991). The immediate impact of this interpretation and the corresponding regulation restricting funds to family planning clinics generated a storm of protest against the "gagging" of doctors and counselors who advise on abortion options.

58. The new President has drawn fire from pro-life forces and conservatives for openly refusing enforcement of the rule. *See generally Clinton Revokes Abortion Curbs*, L.A. TIMES, Jan. 23, 1993, at A1.

The OLC accepted the task of drafting an order to end this embarrassing predicament. Faced with the desire to limit pornography while not infringing freedom of speech rights, the OLC working group moved quickly to find an acceptable middle ground, despite conservative pressure to go farther.[59] The final draft order, which Kmiec regrets winning, was an executive order which "rid federal establishments of obscenity and child pornography and prohibit the display or dissemination to minors of sexually explicit material."[60]

Similarly, *The Attorney General's Lawyer* considers the issue of improving education. Believing strongly that the improvement of student performance begins at home, the Reagan Administration took up the cause of the voucher system to give parents the opportunity to choose where to send their tax dollars to support their children's education.[61]

Kmiec offered two reasons to explain why this system failed. First, perhaps too convenient and too cynically, he asserts the political strength of the teachers' unions blocked extensive consideration of the plan. Kmiec refutes out-of-hand the unions' argument that public schools would be left as a "'dumping ground' for problem children," casting this as "highly insulting to public school teachers."[62] He maintains instead, that localizing school management through a voucher system is an "empower[ing]" tool for inner-city parents and will improve public schools.[63]

The second hurdle to the Reagan voucher system lay in the inevitable fact that sectarian schools may end up receiving the vouchers. The separation of church and state under the Establishment Clause of the First Amendment creates a large judicial hurdle. When presented with this dilemma, Kmiec decided to abandon the previous OLC positions opposing a voucher system and to "start from the ground up."[64] Although facially a blatant exercise in revisionism by Kmiec, he offers credibly that the confused direction of the Court on the Establishment Clause required a fresh look.

The new inquiry considered by the OLC examined the often misused three pronged test of *Lemon v. Kurtzman*.[65] Kmiec submits evidence that the original intent of the clause, particularly in light of its sister Free Exercise Clause, is to ban governmental religious coercion, not to force governmental neutrality on religion.[66] Under this interpretation, a tuition voucher system could pass a "no coercion" test.[67]

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59. THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 90. While Kmiec personally agreed with the conservatives' arguments for including soft-porn, the confused nature of the case law defining obscenity required the less restrictive order.

60. THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 90.

61. THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 100. By creating a choice, the parent would presumably become more interested and involved.

62. *Id.*

63. *Id.* at 101.

64. *Id.*

65. 403 U.S. 602 (1971)(the test's three prongs are: 1) government assistance must have a secular purpose; 2) the assistance must be completely neutral as to religion; and 3) it does not foster excessive government entanglement with religion). Kmiec criticizes heavily this "mechanical" balancing act for failing to draw a consistent line.

66. THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 104.

67. Although the Court did not clear matters in Lee v. Weisman, 112 S.Ct. 2649 (1992), it does appear to be moving away from the *Lemon* test for religious neutrality. However, the final voice on

Also at the center of natural law theory, economic rights appear prominently in the Constitution. The right to own property and freedom to contract were given special protection by the Framers.[68] These rights, eroded by years of expanded Congressional and state regulation, found ready allies in the originalist camp of the Meese Justice Department.

Kmiec finds the right to own property at the forefront of natural rights. As an essential element of "life, liberty and the pursuit of happiness," the property right, like other economic rights, had been relegated to a second tier of constitutionally protected rights, below political and civil freedoms.[69] In the name of the environment, zoning and regulation of interstate commerce, court decisions have diminished the property rights guaranteed by the Constitution.

The protection of property interests, found specifically in the Takings Clause of the Fifth Amendment,[70] strengthened this "natural" right by creating a Constitutional remedy of just compensation for governmental intrusion. However, the effect of judicial lawmaking had reduced this remedy repeatedly until, as Kmiec charges, the clause rarely applied to less than actual physical occupation of the property.[71]

Nollan v. California Coastal Commission,[72] the test case for the Takings Clause during Kmiec's term at OLC, became the vehicle for rehabilitating the Takings Clause.[73] The Court's decision that the requirement of a public beach access was clearly a "taking" of the Nollan's property deserving just compensation as authorized by the Fifth Amendment shows a clear departure from the preceding years of lower standards of review for property and other economic rights, such as the freedom of contract.[74]

Finally, the Meese Justice Department received heavy criticism for its application of original intent in the area of civil rights. To Attorney General Meese and his Assistant Attorney General for Civil Rights, William Bradford Reynolds, the Constitution is "colorblind." Although sidetracked early on,[75] this application of the original intent saw prominence in the OLC's advice on race and employment issues.[76]

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the voucher system was that of Congress, and it died a quiet death. *See* THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 106.

68. THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 115.

69. *Id.*

70. U.S. CONST. art. V.

71. *See, e.g.*, Penn Central Transportation Co. v. New York, 438 U.S. 104 (1978)(holding that the "landmarking" of plaintiff's building did not constitute a taking) and Yee v. Escondido, 112 S. Ct. 1522 (1992)(holding city's rent control ordinance did not constitute a taking of the owner's mobile home park).

72. 483 U.S. 825 (1987).

73. Largely, Scalia adopted the same arguments as Kmiec's OLC advice. *See* THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 125.

74. The return to original understanding of the contracts clause, urged by Kmiec, was only partially confirmed by a more recent decision in General Motors v. Romein, 112 S.Ct. 1105 (1992)(holding that a retroactive provision of the Michigan workers compensation law did not violate the contracts or due process clauses under a rational basis test).

75. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (the Department lost its opposition to Internal Revenue's elimination of the tax-exempt status for Bob Jones University based on the school's rules against inter-racial dating, under the Free Exercise Clause).

76. THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 155.

Carrying out the color-blind argument, which is arguably supported by natural law,[77] Kmiec favored Court scrutiny that focused on the intent to discriminate over discriminatory effects.[78] Turning the criticism of *Plessy* on its head, Kmiec deplores the firmly entrenched judicial activism of affirmative action,[79] as he would any intentionally disparate treatment under the Fourteenth Amendment's Due Process and Equal Protection clauses.[80]

Although not categorized as a civil rights issue by Kmiec, the treatment of AIDS patients under Section 504 of the Rehabilitation Act of 1973 also arrived at the OLC's doorstep.[81] Taking up the issue, Kmiec, through consultations with the Surgeon General, found the scientific evidence of transmission of the disease through casual contact inconclusive, but tending to imply strong medical impairment from the contagion.[82] Kmiec's opinion letter ultimately permitted extension of the Act's protection for people with AIDS.[83]

C. Ethics and Resignation

The report of Independent Counsel McKay and its publicized conclusions on the "Wedtech" affair[84] resulted in a bitter ending to the years of striving for a consistent jurisprudence at the Department of Justice. Injured by the press and in-house defections, a loss of public confidence finally forced Meese to resign.[85]

The lame-duck Attorney General sought unsuccessfully in the interim to turn the Independent Counsel law on Congress itself, with the OLC's help.[86] After

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77. And notably supported by the Senior Mr. Justice Harlan in his Plessy v. Ferguson dissent, 163 U.S. 537 (1896)(the dissent argued for a "color-blind" Constitution which guarantees civil liberties to all citizens, black or white as the only reading of the Constitution).

78. The Supreme Court seemed to temper its prior discriminatory effects language in Wards Cove Packing v. Atonio, 490 U.S. 642 (1989), by requiring complainants to specifically identify a non-business purpose for discrimination. The passage of the Civil Rights Act of 1991 overturned that retrenchment, however.

79. Opposing the "quota" systems, which later plagued the Bush Administration, Kmiec similarly disapproved of "affirmative action" programs. THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 167.

80. Criticism of the "benign" discrimination encouraged by Justices Brennan and Marshall found a voice in the Court's clarification in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)(rejecting general societal discrimination as the basis for racial preferences in city contract awards).

81. THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 92.

82. Drawing from the test of School Board v. Arline, 480 U.S. 273 (1987), requiring the complainant to be both handicapped and contagious, Kmiec sought the Surgeon General's opinion on whether the contagiousness of the AIDS infection was a medical impairment even though the HIV positive carrier displays no outward signs of the disease. The answer was effectively, "yes." *See* THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 97.

83. Kmiec leaves himself open to criticism for choosing not to recuse himself from the issue. Although morally opposed to extending such protection to a distinction based largely on "life-style" choices, Kmiec concluded that protecting homosexuals from government employment discrimination did not promote homosexuality, therefore avoiding a moral conflict. *See id.* at 98.

84. At its root the Wedtech scandal accused the Attorney General of influence peddling in the award of contracts to his friend, E. Robert Wallach, and investment conflicts. *See* THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 195.

85. For a less "loyal" account, see Ruth Marcus, *Meese Announces Resignation, Says Probe 'Vindicated' Him*, WASH. POST, July 6, 1988, at A1. *See also* EASTLAND, *supra* note 45.

86. The proposal, later shelved by the Bush White House, created a modified independent counsel within the Justice Department to investigate congressional wrong-doing, but within the limits of the Department's strict prosecutorial policies and the Attorney General's supervision. *See* THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 199.

Meese's departure and the election of George Bush, the White House continued the call for fairness in ethics and convened a Commission on Federal Ethics Law Reform.[87] After receiving the Commission's findings, Bush assigned Kmiec and the OLC the task of drafting the reform legislation.[88]

III. CONCLUSION

As a story of the warfare waged by the Meese Justice Department against the "arbitrary" judicial activism of previous decades, *The Attorney General's Lawyer* is admittedly a biased view. As a friend and loyal lieutenant of the Attorney General, Douglas Kmiec offers this side of story because it was never told before. As Kmiec describes, the book is the "Meese footnote."[89]

Though few are spared Kmiec's legal criticism, including Meese, a commitment to a singular jurisprudence emerges as the clear theme of *The Attorney General's Lawyer*. Kmiec manages a constructive approach in selling the jurisprudence with good-natured humor, even including faint praise for a nemesis, retired Justice William Brennan.[90] Kmiec carries this personal tone as if giving a friendly interview in his office at Notre Dame Law School.

Ultimately, *The Attorney General's Lawyer* provides a timely lesson on the office of U.S. Attorney General. In the early months of a Clinton Presidency, the Justice Department has been without leadership.[91] Ethics charges and scandalous rumors have plagued early nominees and candidates alike. In addition, confronted by pugnacious issues of abortion counseling and homosexuals in the military, the Clinton Administration's Attorney General would do well to learn the benefits of a consistent jurisprudential program, even in the face of intense political and media attacks.

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87. *Id.* at 211, *citing* THE PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM, TO SERVE WITH HONOR (1989).

88. THE ATTORNEY GENERAL'S LAWYER, *supra* note 2, at 214. While George Bush signed some of these reforms into law, Congress managed to evade scrutiny by independent counsel and restrictions on that office.

89. *Id.* at 220.

90. *E.g.* "[I]t is surely anti-intellectual to believe that every opinion issued above a Brennan signature is automatically incorrect." THE ATTORNEY GENERAL'S LAWYER, *supra* note 1, at 122.

91. *See* John W. Mashek, *Clinton Chooses Florida Prosecutor for Justice Post*, BOST. GLOBE, Feb. 12, 1993, at 1.

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