

**Guido Calabresi: What About the Establishment Clause?**  
**February 27, 2014**  
**Washington University in St. Louis**

**Marie Griffith**

Well good afternoon. I think we'll go ahead and get started. There is a class, a law school class, meeting in this room at six o'clock, so we will be ending this afternoon around 5:45 so I don't want to delay any further. We'll go ahead and get started. On behalf of the John C. Danforth Center on Religion and Politics at Washington University in St. Louis, I am delighted to welcome you all to this distinguished public lecture featuring Judge Guido Calabresi, who will shortly be properly introduced by Senator Danforth. It's been a joy and a delight for all of us at the Center to get to know Judge Calabresi just a little bit today and we had a wonderful lunch today with faculty from the law school and the Danforth Center, so it's been a real pleasure today. And we have, of course, the culmination here. I am Marie Griffith, I'm the Center Director, and we're so very pleased to have this opportunity to collaborate with the Washington University Law School, which is of course co-sponsoring today's event. And I hope that we have the chance in the future for many more collaborations. Here at the outset I'd just like to remind everyone to turn off your cell phones and to silence any other buzzing electronic devices that may be nearby. The John C. Danforth Center on Religion and Politics owes its existence to the tremendous generosity of the Danforth Foundation, which was founded in 1927 by Mr. and Mrs. William H. Danforth. We are most fortunate that Senator Danforth and the larger Danforth family, many of whom are here today, have continued their involvement with the Center and with Washington University more broadly. It is now my honor to introduce Senator John C. Danforth who will introduce Judge Calabresi. Senator Danforth is a partner with the law firm of Bryan Cave. He graduated with honors from Princeton University, where he majored in Religion, and he received a Bachelor of Divinity degree from Yale Divinity School, and a Bachelor of Laws degree from Yale Law School, where he first met then professor Guido Calabresi. He practiced law for some years and then began his political career in 1968, when he was elected Attorney General of Missouri, his first race for public office. He was reelected to that post in 1972, and then Missouri voters elected him to the U.S. Senate in 1976, 1982, and 1988, so that he served a total of eighteen years in the Senate, and initiated major legislation in areas including international trade, telecommunications, healthcare, research and development, transportation, and civil rights, to name a few. He was later appointed Special Council by Attorney General Janet Reno to investigate the federal raid on the Branch Davidian Compound in Waco, Texas, and he later represented the United States as U.S. Ambassador to the United Nations, and served as Special Envoy to Sudan. Since that time, in addition to practicing law, Jack Danforth has been an active and generous patron to numerous public leaders and organizations, including the Center on Religion and Politics that bears his name, and the John C. Danforth Distinguished Professorship within that Center. He's been a great friend to Missouri, to St. Louis, and to Wash U. Please join me in welcoming him now.

## **Senator Danforth**

Thank you Marie. Our speaker has spent most of his life at Yale, as an undergraduate, and law student, and for more than a half century as a professor of law, serving a decade as the Law School's Dean. For the last twenty years, he has been both a professor and a judge in the U.S. Court of Appeals for the Second Circuit. His reputation is legendary. A law professor friend of mine said this: "Guido Calabresi is widely regarded as one of the most influential legal scholars of the last half century." He added, "it's hard to imagine another appellate judge in the nation who has exerted more influence in the last twenty years." Judge Calabresi's longtime interest has been the relationship between law and economics, especially the potential of designing tort law to prevent accidents. A person with wide-ranging intellect whose opinion on the Establishment Clause in *Town of Greece v. Galloway*, is now before the U.S. Supreme Court. With that biographical information let me add a personal word. I first knew Guido Calabresi when he was a second-year law professor and I was a student in his first semester small section on torts. I was so taken by him that I signed up for every elective he taught. We've stayed in close contact since my graduation, and I have always considered him my mentor. But please don't hold that against him. Some years ago, Attorney General Reno appointed me Special Council to investigate the FBI's assault on a religious compound in Waco, Texas, where sixty or so people died. Public confidence in our government was so shaken that I thought it important to write a preface to my report that put the tragedy in context. To deepen my thinking, I went to Connecticut and spent a morning with our speaker discussing the report. Such is my regard for his intellect. And it's much more than his intellect. It's his values, his character, his genuine love of people, especially students. His students reciprocate that love. Not long ago I asked a reluctant classmate to support our reunion campaign. After giving me a very hard time, he finally relented, saying, "oh, alright. I'll do it. If I don't say yes to you you'll just get Guido to call me." After all these years, I still recall a few odd facts I picked up from his torts class. If you're standing on the platform of the Long Island railroad, a scale might fall on you. If you happen to hit someone on the head who has an abnormally thin skull, you have a problem. But his emphasis was never on what we should remember. He wanted to teach us how to think like lawyers, and that he did. He taught us how the law relates to the world around us, and how we might be part of that world. As for me, he taught me a lot about the kind of person I would like to be. It's a great pleasure to introduce one of the most influential people in American law, and one of the most influential people in my life, Guido Calabresi.

## **Guido Calabresi**

Hi. I can't tell you what a joy it is for me to be here, and for many different reasons. First, because Jack Danforth epitomizes why teaching is such a joy. When you have students who are idealistic, intelligent, and want to make the world better, and you can become close to them, and reach them, and first teach them, and then learn from them – what could be better? What could be better? I tell my students that they have a duty to find something in their lives to do that is fun and useful. And if they do that, and find someone to spend their lives with, they will be happy

people. Because I have had the joy of teaching people like Jack (and none as good as Jack, but many who try), I have never done a days work in my life. I still do teaching, I still judge, and I'm still with the same person I married 50 years ago (who would be here with me, but she got the flu and so is not here), and that makes me a happy person, and I want to say that in honor of Jack. And that's quite apart from all the great things that Jack has done, as a lawyer, as a politician in the best sense of the word, and as an Episcopal priest.

The other reason is because the topic, law and religion, what this Center is about, is at the core of a free society, and a society that wants to be both good and knows that good is something that different people will have fundamentally different views of. And the question of how you combine those views, are respectful of those views, and allow people to express those views, was a problem at the beginning, and has been a problem ever since, and is a problem today. This Center focuses on that directly, and doing so, in a great University mixed with a great Law School is crucial to our world, and crucial to this place. I hope that this Center gets people from the Law School to teach about law and religion to undergraduates, and undergraduates to think about that, and I hope that some of those undergraduates may even come to Yale and study law with me.

So, I'm talking today about "What About The Establishment Cause?", and I want to talk about that in a very broad sense, because I want to talk about it both as a Judge, as an academic (because I'm still teaching as well as judging), and also, inevitably, influenced by the fact that I'm a person of faith. I am a religious person, and I let my students know it. I even began one opinion by quoting the Bible, which is an opinion that took a very dangerously liberal position, but used the Bible for that, which made everybody mad. Not me. I begin this with some, almost personal notions:

At the end of the eighteenth century, James Hillhouse was a senator from Connecticut, who was one of the first abolitionists, was treasurer of Yale University, decided that a cemetery was needed. The green, the central green in New Haven, was being filled with graves, and he thought there should be a cemetery. And so he bought a farm, which is right across the street from the Law School, so that I can look out and see where my office will be moved to in a few years, and, built a cemetery. And he wanted that cemetery, even in congregational established New Haven, to be open to everybody, that no one would feel left out. And yet, he wanted it to have a symbol of immortality. And the way he did it, was to have both the entrance gate and the symbol over it, be Egypton. Neo-Egyptian gate, and a symbol of Egyptian immortality. Because, he said, 'There are no Egyptians in New Haven at this time, so no one can claim it as their own. Everyone is welcome, because no one can say, this is ours.' On the other hand, he wanted individuals then to be able to express their own views. And so this cemetery was the first cemetery that had the grave plots be family plots owned in fee, owned totally by the family. So that each family could decide what they wanted to show themselves to be, without excluding anybody else. And so the cemetery is filled with, from the beginning, stars of David (the Pintos, a Jewish family that was in New Haven at the very beginning), and one particular family the Trollbridges, with cross of enormous size, and everything else, all over the place. And there are even some quite undressed sphinxes in one plot, of

somebody who wanted to express, I don't know what! Now, today it still is owned that way. There is a standing committee (which my wife is on and thinks is something of a joke, because all the people is so old, that they're pretty soon going to be lying), but the standing committee of the cemetery is worried that some of these may be too different. And one of the things my wife is fighting against, is having the standing committee say, 'You may not, in your own plot, express who you are! Because we have to be all somehow the same.' Well, that is what, in a way, makes me approach issues of establishment.

The First Amendment was, in its time, an extraordinary declaration of equality. The great issue of equality, in the eighteenth Century, was religion. And people's attitudes about religion were extraordinarily vicious. What people said to each other make what people say today, about different groups and so on, look like nothing! And yet the First Amendment said that there are no 'we religions', there are no 'they religions,' all are the same, there will be no affirmative action, because there are no outsiders that need to be brought in. We are all the same, and Congress keep out, make no law. Contrast that declaration of equality with the Fourteenth Amendment declaration of equality, which said, 'there are people whom we haven't treated as people, and they are people. And not only are they people, but they are equal and we will not only treat them as equal, but Congress shall have the power to enforce equality!' Very different in attitude. A level of equality, which is very hard to reach, and which we strive for, but in many other areas we haven't reached. But, it was only at a national level. At the level of the nation as a whole. Madison lost out. He wanted the First Amendment, and this declaration of religious equality and non-establishment, to apply at the state level, and who knows how far beyond. But it didn't happen. So, in the states, there could be established religions, and were, as we'll see in a moment – there were state religions until well into the nineteenth century in many states, including in Connecticut.

Now, I want to ask whether there really is each of these things: One, was there really no affirmative action for anybody? And two, what happens when we get beyond the state level? Well, okay, religion, everybody's the same (so long as you're a religion, some danger if you're a cult) and that's always a problem when you give tremendous protection, what don't you give protection to? Absolute protection to speech, but what's not speech? So there's always been a problem about those things which we don't recognize as religion, and that's always going to be a problem, and a terrible problem, because to the extent that you exclude some people from your Constitution, and say 'you are outside,' you are doing something that is very dangerous. Something I've much thought about, and can talk about in questions, I don't have time now. But there was something else that was oddly treated. At the time, virtually everybody, not everybody but almost everybody, was to some extent, religious. They may have been theists, they may have been this, or that, but they almost all believed in some kind of God. A few were not, there were a few secularists, Tom Paine, but not many. And one of the odd things that happened, in our Constitution, is that because there were a few people who did not believe in God, and were outsiders, we developed a kind of affirmative action towards them. Sometimes that's put in terms of separation of church and state, but what it actually was, was that it was alright for much of the nineteenth century, and well into the

twentieth century, to give advantages to non-religion, to secularism, over religion. Because, all the 'we's, were religious.

What has happened more recently, is as we have become a much more secular society, people have become uncomfortable with that. Why should non-believers, seculars, be treated better than religion when today, there are many of them? As many as powerful, as little-in-need of affirmative action, as any religion. And one of the things that has been happening in law, in the last years, has been an increasing tendency to say, 'you may not treat secularism better than religion, and you may not treat them better than religion because you have no reason for it.' Now we haven't actually gotten all the way with that. The square in front of my courthouse in New York, is called Tom Paine Square, right in front of the courthouse. Nobody fusses. If it were called Aquinas Square, or Calvin Square, or Maimonides Square, you can be sure that there would be some people saying you can't do that! We still follow a bit from that. But the unfortunate thing is that some of the people who are pushing for this, for this equality between religion and non-religion, instead of doing it because we are no longer most-all believers, argue, (which is a winning argument, secularism doesn't need affirmative action), argue instead, this should be done because we ARE a Christian nation, or we ARE a Judeo-Christian nation, or we are an Abrahamic nation, or something of that sort. In other words, they are arguing this should be done because we are 'this' religion. And that is an argument that in my view, is a loser, and must be a loser in our society, because it is an establishment. It says the cemetery belongs to us, and not to you. And you see this argument by groups who are religious, and in a way you understand why they are worried when they're saying 'why should secularism be treated better?', but they're making an argument which has to lose.

Okay, and this leads me to the second point. At the beginning, this non-establishment was at the national level only. And at the national level, we were not Christian, we were not Judeo-Christian, we were not Abrahamic, we were a nation. But at the local level, established religions continued. In Connecticut, Congregationalism was the established religion until the 1830s. It wasn't until around 1835, I don't have the exact date, that Congregationalism was disestablished and, lo and behold, they allowed a non-Congregational University College, Trinity, to be built in the second town, Hartford, Yale and Congregationalism being in the biggest city, New Haven, and then a few years later, a Methodist one, Wesleyan, in the third town. It was disestablished as a formal, coercive kind of establishment—"we are this and you may not teach these other things," which is what formal establishment was—but it remained as an attitude. Connecticut, and many other states, remained what they had been, and others might teach, might be there, but you know, you are outsiders. You are here, but you don't fully belong. Christmas was not a holiday in Connecticut until 1885. Why, Christ's Mass. It sounds awfully Pope-ish. We don't want anything like that. And, after the Civil War, this local, non-establishment became a matter of Constitutional law with the 14<sup>th</sup> Amendment and the corporation and all that. But this attitude continued to remain, even at the state level, diminishing. And when I say it remained, all sorts of things. There were no Jewish or Catholic full professors at Yale, which represented this Congregational place. They finally allowed a few Episcopalians, but no Catholics until 1946. The law

school was different, this was Yale College. The law school was always different. In the 1880s we had a senior member of faculty who was Catholic, we had Jewish full professors. But the law school was always quirky. It didn't matter. Every president of Yale until 1903 was an ordained Congregational minister. Some had to be ordained the night before. But they were. And as late as when I came to New Haven in the 1940s as a seven-year-old and went to a public school in an area which was then, as it is now, where all the children of the professors go, it's called the Graduate Students' Ghetto today still. All the teachers were nice plump Irish ladies who began every morning with the Lord's Prayer, Congregational style. They knew what the establishment was, and that's what it was.

Now, I came from a family that felt very self-important, no one was going to coerce us. We thought we knew what we were doing when these people in America were painting themselves blue in England and so on, and so I didn't feel the least bit coerced. But I thought it was kind of funny to see these Irish-Catholic teachers believing that they were part of an establishment, not in a coercive sense maybe, but that is what the "we" in this town was. Now, in these state, really, was, we have gone a long way from that. And now, that is no longer so at a state level. But the question I want to ask is, what happens when we move from the state to a municipality? And what happens when we move from a municipality to a neighborhood, to something else? To what extent can a municipality define itself in a way that says, we are what we are, you others no we don't coerce you—you can teach, you can preach, you can do what you want. But understand that you are part of a town, or a city, that is Christian or, as in my jurisdiction, Kiryas Joel, Satmar sect of Hasidic Jews, that wants to say, this is what we are, you can be here. And there's from a purely technical point of view, the level of the 14<sup>th</sup> Amendment since this is state action you can say, no they can't do it now anymore than a state can. But I'm not terribly interested in state action in terms of this lecture because a lot of this is still a matter of what statutes can be written in order to acquire equality. State action is still a part of a game, and a game for lawyers and this, but it isn't ultimately what will tell on this.

And it's that which came up dramatically in this case, Town of Greece, that is now before the Supreme Court, in which I wrote the opinion. Here was a town that wanted to begin its town meetings with prayers. Could they do so? Well, to say that you cannot begin a town meeting with prayers, and to say that you can ask people to think seriously about all sorts of important things, because we want people to evoke their values, is, in effect, giving a favoritism to secularism over religion. There are people who'd like to start with prayers and there are people who'd like to start not with prayers. So we weren't prepared, and by the way the Supreme Court's decisions made that clear, to say at all that the town could not start with prayers. But then, how can you do that and not exclude others? How can you do that and not say, Town of Greece is a Christian or Judeo-Christian or Abrahamic or something town, and the rest of you are here on sufferance. That was the question. Well Judge Harvey Wilkinson in the fourth circuit faced the same thing and struck down the prayers that were being said in some town in Maryland or Virginia, and said you cannot have sectarian prayers. You can only have non-sectarian prayers to begin something, to begin your town meeting. Well my reaction to that was that's absurd.

First, what is a non-sectarian prayer? What's it mean? It either means nothing, or it means a prayer that is okay for a group of religions that are okay religions. Non-sectarian prayers is an establishment is saying we are this group of religions that have said we aren't offended by these references. I call them banquet religions. When you have a public banquet and some priest or minister or rabbi gets up and says two or three words that don't offend anybody. That is our establishment if we say that is what you can do and say what this town is. We weren't prepared to do it.

Now it's kind of interesting that no one got excited. The Christian right did not get angry at Harvey Wilkinson's decision because it in fact was an establishment, it said we are whatever this grouping is. What we said was you can start with prayers and you can do it with prayers that are highly sectarian. They're prayers that represent your religion. You can't do it in a way that is insulting of other religions, that's specifically saying if you don't believe this you're going to Hell or this or that, but you can make a prayer that is profoundly Jewish, profoundly Christian, whatever, so long as you are open to everyone and go out of your way to have people begin this with views that are not just of one religion or non-religion. And not only by doing what this town did, which was to say anybody who has a church or synagogue, but there didn't happen to be any synagogues within the town, can volunteer and we'll let them start the prayer. Because what that said was this is what we are and you who are outsiders, are outsiders. So what we said is you must not only be representative of what is there, but do enough of going and bringing outsiders, religious and non-religious if they want from time to time, to start their meeting so that everyone can be part of this town and say, yes prayer, or non-prayer, Christian or non-Christian or even Pagan. It doesn't define the town, and yet each of you are a part of it. Think again of the cemetery.

Now that made people, some people, very unhappy. And the case is up before the Supreme Court. And I think the Supreme Court is going to reverse this. I think they are going to say, how they're going to say, I don't know, because as the oral argument in the case demonstrated, it's very hard to come up with a line that works. One thing they could do, is say, any state can do anything so long as it isn't coercive. That is go back to a notion of establishment which says so long as you don't keep somebody from teaching or preaching, you can say we are a Christian nation, a Judeo-Christian nation, a Christian town, a Judeo-Christian town, or something of that sort. I think that would be very much too bad. I think that would be going back on where we have come. That is, establishment isn't only an establishment in the sense of saying that you can't compel people. It is a prohibition on defining, at least the governmental unit, as being the "we," and the others being the "they," the out. The cemetery is open to everybody. And then the individual plot you can say who you are.

But what happens when one moves beyond municipalities? To neighborhoods? To clubs? To businesses? Can they define themselves by their religion, and exclude others? Or say others are not as good? That's the question that we are increasingly facing today. We have gone from no establishment at the national level, state level, I hope at the municipal level, how much further? And here I think we want to take a step back and realize that this, with respect to race, was one of the issues that was troubling to people, like later Justice and Chief Justice

Rehnquist, at the time of *Brown v. Board of Education*. You know, he kind of denied it, but he wrote a memo telling Justice Jackson not to support the end of segregation. One of the reasons was he was worried, most of the people in the National Review, indeed they put out what was meant to be a parody, looking back on it it's kind of funny, which was called the Case of the Burning Tree. But some country club which, because of *Brown*, twenty years later, this was horrible, that this country club was no longer able to exclude Jews or Blacks. That's what will happen if you destroy state-sponsored segregation. And of course it did. Chief Justice Rehnquist wanted to establish the principal that individuals, at least, had the right to discriminate. A Constitutional right to discriminate. And that this was a right of free association. He never got there. He got nearer to it in the Boy Scout Case but there were other things, he never got there.

That same notion, an analogous notion, has been reborn, come back, but not in terms of discrimination generally, but in terms of religions. Religions having a right for religious reasons to say, we discriminate. And that is much, much harder to deal with, much more problematic, than the position Rehnquist would have taken which was properly defeated. And it is much more difficult to deal with because the Constitution does also say free exercise. That is, you do have a right to define yourself in religious terms. And that is there just as the establishment is. Now what does it mean when I want to define myself in religious terms with my neighbors in a way that excludes others? Are we going to say that this has no value, or not? And that is where we are today. In a way, that's what this law in Arizona that the governor just vetoed is about. That is much of the discussion that is going on.

Now, let me suggest some things about this. There are three different values at stake and in contrast with each other. One is how much does this capacity to say, "this is what we are even though this in some sense degrades you, because we say we are this and you are not," how important is this for different categories of organizations? It is crucial to a church itself. We are this and this is our belief. How crucial is it to an individual? Maybe not as much as to the church itself. How crucial is it to a church organization? A church-sponsored hospital? How crucial is it to a corporation that is owned by people who as individuals have that belief? It matters to all of them, you know, it matters to all of them, it's wrong to act as though it doesn't. On the other hand, how important that value is will be different depending on which of these four, and I could go on with many nuances of that, we're talking about. So that's one factor we have to deal with.

The second factor we have to deal with is, in defining themselves this way, whom do they degrade? Do they degrade categories of people who in this country have been discriminated against classically, or not? If the Arizona law said, any person of any religion who thinks that African-Americans are inferior need not deal with African-Americans, we would surely say that's unconstitutional. And we would surely say that because of what the 14<sup>th</sup> Amendment tells us about that, but because, more importantly, because of how this group of people were treated here. We would not let a religion, or at least, maybe the church itself, but not anybody in these other groups, use religion, even if the religion they belonged to which had that belief, we would not let that be part of public life. So the second factor, first factor is how important it is for this individual, group, church itself, so to define itself, the second



factor is in defining itself, whom does it degrade. Does it degrade groups that we have an obligation, whether Constitutional or otherwise, to keep from being degraded?

The third factor is, how much does it degrade? It is one thing to say, this is who I am and, you know, that means that we do certain things together and so on. It's another thing to say you shall not come here. Take the Kiryas Joel there, when that town attempted to make a school district which was Satmar, that was struck down. When that town says we'd like to draw a line within this town which is a line that has a religious significance because it is an area within which people on the Sabbath can do certain things, that didn't really, in some ways it was saying it is "we," but it wasn't that important. It wasn't doing that much degrading. And many of the things that we are doing don't have that effect. There are other things, like saying you can refuse to sell to people, or housing, you can refuse to have housing. And it's no accident that *Shelley v. Kraemer*, about housing, did away with state action long before there were any civil rights laws.

In deciding these issues today, we cannot be too mechanical. We have to look both to the category of organization, individual and how much it means to them to have this faith, how negative this thing is to whom, and how much it says "we are different, and we think we are we, but okay," and how much instead does it say, "no, you are in some sense inferior." If we do that, we may be able to maintain a notion that we are an egalitarian society and yet allow people to have, in a true sense, in their plots, the Star of David, the cross, sphinxes, or whatever else there may be. And if we do that, I tend myself to go very far in tending to limit things which discriminate. That's my own take on it. But I think that if we do this, and put it in the context of a country that has gone from no establishment at the national level and has come down more and more to the point that people feel worried at the individual level, we can understand, whether we agree with them or not, those who take different positions. And in a funny way, we're right back to what it is about: being able to understand and value those who take different positions. Which is the essence of a democracy that works, even as to those issues which we care most about and even as to those issues which ultimately we have to have a strong moral sense about. And that brings me full circle, because that is the history of Senator Danforth, and his view of what one does in politics. Thank you.