I am honored to be here, and I thank you for the most gracious introduction.

I first met Father Dailey when I sat with him at the Lehigh County Bar Association’s annual dinner last November. It was a wonderful night, with much great conversation. Little did I know that he was going to “put the arm” on me to come to DeSales University — but I am delighted to speak to you tonight.

I will say preliminarily that I noted that Harry Kalas, the great Phillies broadcaster, follows me tomorrow night. I’m a big Phillies fan, and I love Harry and the way that he calls baseball games. So I am glad that I am preceding him and not following his talk, which would indeed be tough.

When Fr. Dailey asked me to speak, he noted that this was “Heritage Week”, with events that focused on the legacy of your patron, St. Francis DeSales. Now, I knew something about St. Francis, but I admittedly felt the need to brush up a bit in preparation for my visit. I learned, among other things, that St. Francis was schooled in the law; in fact, he received a doctorate, at the same time he learned theology. He then chose a career path that obviously emphasized the latter, but it seems fairly clear that his legal education impacted his thinking and logic throughout his life.

I will venture a guess that St. Francis would have enjoyed the debate and the famous case of *Kitzmiller v. Dover*, which has given me some temporary notoriety and led to this invitation. That case involved the intersection of law, science, and theology. It lends itself to a myriad of analysis from all quarters, and will likely be the subject of debate and opinions, both pro and con, that will extend beyond my lifetime.
Tonight we are talking broadly about law and society, so I thought it apt to use what I refer to as my “Dover Experience” to talk about the role that judges play in our democracy. One lesson has become very clear to me in the two years since I decided this case: most Americans do not understand our legal system, and in particular do not comprehend how judges go about doing their work!

This became clear to me in the immediate aftermath of my decision in the Dover case. Sequentially, I was taken to task by Bill O’Reilly, Pat Robertson, Phyliss Schlafley, Ann Coulter, and other “pundits”. The criticisms shared a notable feature—all implied that judges operate by making things up as we go along. That we are at bottom biased, and that we should rule according to the desires of political benefactors or the public will at any given moment.

This astonished me, and propelled me out on to the speaking circuit.

Contrary to what these pundits, and others directly state or imply, the judges are not accountable to their benefactors or some political benefactor or political philosophy. Judges ARE accountable. But to what?

Judges are accountable to the Constitution and the Bill of Rights. To understand that, let’s revisit the Constitution.

My experiences as a federal judge have informed me that the wise men who assembled not far from here, in Philadelphia, during that hot summer nearly two hundred and twenty years ago, were veritable geniuses. Why do I say that?

Let’s look at the guts, if you will, of the Constitution. There are three “core” Articles that create our democracy, and the system of checks and balances among the various branches of our government.

Article I creates the US Congress. Article II creates the Executive, the President of the United States. These officers are subject to direct election. To that extent, they are majoritarian; that is, they are to be responsive to and reflect the public will of the public at any given time.

But contrast now Article III, which creates the branch of government in which I serve, the federal judiciary. Article III allows for the life appointment of federal judges by the President, with the consent of the Senate. As such, it means to put federal judges beyond the reach of political exigencies, and free them to interpret the law as according to the other provisions of the Constitution and Bill of Rights without political influence, fear of retribution, or bias of any kind. As such, then, Article III created a branch of government as a check on the other two that is distinctly non-majoritarian.
Now let’s put this in the context of the Dover case. Recall that there, the majority of a school board passed a policy that injected the concept of intelligent design into a ninth grade science class. It was of course intended to be interjected as a viable scientific alternative to the theory of evolution.

Then and now, if you polled in the US you’d find that over forty percent of all Americans are either so-called creationists who reject the theory of evolution wholesale, or believe that intelligent design ought to be taught alongside of or in place of the evolution in science classes.

So back to the critics of my decision. They directly implied that I had an obligation to “get with the program”, and respond to the public will.

However, here is what they omitted in their analysis: Courts decide cases according to the law, and in particular the interpretations of law handed down by higher courts. That is called legal precedent. And I was bound by that precedent in the Dover case. The Constitution, and the existing precedent, together with the facts of the Dover case, led me to a very clear conclusion, as evidenced by my opinion, that the school board in Dover had violated the Establishment Clause of the First Amendment to the Constitution. I did not, I COULD NOT, base my decision on public opinion polls, or the popular will, or how individuals who had previously been political benefactors of mine felt about the issue. Those things were simply irrelevant.

I fully recognize that reasonable people will continue to disagree with my holding in the Dover case, and I’m cognizant that there are undoubtedly some in this room who believe that I got it wrong. But that isn’t the point, and I am not here, fundamentally, to offer some sort of apologia for what I did. It’s all history now.

But I am here to make this point—the Third Branch is designed as a bulwark against popular opinion at any given time. Put another way, judges protect against the tyranny of the majority. And this is as it has always been, and should be.

I know that as good students you know your history. You know that in 1954 a unanimous Supreme Court of the United States decided Brown v. Board of Education, striking down the concept of separate schools for blacks and whites. This in its time was a desperately unpopular decision in many quarters of this country. In fact, many people argued that the then-Chief Justice, Earl Warren, should be impeached because of it. And there is no question that if you had polled in the US in 1954, a clear majority of Americans would have favored segregation and disfavored Brown’s result.
While this is all ancient history to us now, and it’s difficult to imagine a the world pre-
Brown, let me submit to you that this in another example of judges acting in accordance 
with the Constitution, against the public will, rendering a decision that viewed through 
the prism of history was unquestionable correct.

And before I close, let me address something that is intertwined with all of what I have 
just discussed.

In addition to the aforesaid punditry, who I think systematically “dumb down” the 
American public about these things, we have to do a better job of educating our citizens 
about how our democracy operates. Now, I am not talking about what you do at this 
marvelous institution—you obviously get it.

But I am talking about what takes place in our public schools. Let me opine that we are 
 failing badly when it comes to rendering a good, bedrock civics education. And I do not 
mean to lay this at the feet of our teachers. It is those who develop the curricula that 
need to pay some attention here.

When I see polls that indicated that only 15% of Americans can identify John Roberts as 
our Chief Justice, but 66% can identify one of the American Idol judges … well, you get 
the point. As my friend former Justice Sandra Day O’Connor says, this stuff, that is 
knowledge of our history and form of government, is not stamped on our genetic 
material. It must be learned and re-learned. If we fail to understand this magnificent 
system that our Founding Fathers gave to us, if we do not understand our fundamental 
rights, do you see how easy it will be to lose them.

And finally, a personal note. I stand before you humbled by the fact that I am speaking 
at a University that has as its mission providing an education to men and women 
according to the philosophy of Christian humanism as developed by your namesake 
and patron. I alluded earlier to the fact that St. Francis DeSales might have enjoyed the 
debate about my famous case. I also suspect that he would be fascinated by many of the 
other controversies that are present in the most complex and dangerous world that we 
live in today.

But I also believe this. Here in this wonderful place, where there is appropriately so 
much emphasis on theology, we should give some thought to how St. Francis might 
react to all of this. My educated guess is this: In this world, which again is far more 
complex than anyone in St. Francis time could have rationally contemplated, we must 
recognize that theology must deal with concepts, both scientific and otherwise, to make 
sense of its faith. Charles Darwin’s theory is of course but one of these concepts.
John Haught, who is a Roman Catholic theologian at Georgetown University, and who was a superb witness for the Plaintiffs in the Dover case, said recently in an interview that, “Darwin’s thought is a gift to theology.” And what he meant of course is that as people of faith we should not disregard these unfolding discoveries, as many tend to do, but look them squarely in the face and integrate them into a suitable explanation that is robust enough to account for our universe. And I’m just guessing, that as a jurist and a theologian, our friend St. Francis DeSales would tend to agree with Mr. Haught.

Thanks you for allowing me the privilege of speaking to you tonight.