

# EVOLUTION, THE SUPREME COURT, AND THE DESTRUCTION OF CONSTITUTIONAL JURISPRUDENCE

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*"In questions of power then let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."<sup>1</sup>*

## I. INTRODUCTION

In 1953, members of East Germany's working class rioted in East Berlin against the Communist regime in classic revolutionary style.<sup>2</sup> The embarrassed Communist regime, which justified its dictatorship in the name of that same working class, reacted by distributing leaflets saying that the German people had forfeited the government's confidence and could only win it back by working harder.<sup>3</sup> This move struck even leftist playwright Bertolt Brecht as being extreme; he expressed his disgust in his now famous poem, *The Solution*:

Wouldn't it  
Be simpler in that case if the Government  
Dissolved the people and  
Elected another?<sup>4</sup>

Unfortunately, today in America it seems that the federal judiciary believes the American people have forfeited the judiciary's confidence. Now, instead of following the Constitution, the judiciary ignores this great document authored by the people of the United States in favor of its own living, constantly evolving constitution—a constitution that means essentially whatever the judiciary wants it to mean. This judicial usurpation is exactly what the Framers wanted to guard against when they established our written, immutable<sup>5</sup> Constitution, which George

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<sup>1</sup> Thomas Jefferson, *The Kentucky Resolutions of 1798*, reprinted in 4 ANNALS OF AMERICA 65-66 (1968).

<sup>2</sup> PETER BRIMELOW, ALIEN NATION 72 (1995).

<sup>3</sup> *Id.* at 72-73.

<sup>4</sup> *Id.* at 58 (quoting Bertolt Brecht, *The Solution*).

<sup>5</sup> That is, it was to be immutable, except by amendment.

Washington said was to be “sacredly obligatory upon *all*.”<sup>6</sup> This establishment of a flexible, living, evolutionary constitution is tantamount to dissolving the people and “electing” another.

Thomas Jefferson viewed the federal judiciary as “the subtle corps of sappers and miners constantly working under the ground to undermine the foundations of our confederated fabric.”<sup>7</sup> Of all the Presidents, he saw most clearly the danger of a federal judiciary not faithfully and strictly wedded to the principles of the written Constitution and prophetically warned against judicial supremacy: “To consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us *under the despotism of an oligarchy*.”<sup>8</sup> If Jefferson thought the federal judiciary in his day was out of hand, he would be spinning in his grave at what it has done and is doing in modern times.

This article examines the impact of evolutionary theory on the Supreme Court’s jurisprudence in social areas. Section II begins the evaluation by looking at how the work of Charles Darwin spread through America and how evolution infiltrated American law. Section III revisits the moral and religious foundations that are the basis of the American legal system. Section IV looks at the 1787 Constitutional Convention, where the place of the judiciary in the new American system was hotly debated. Section V reviews the early evolution of judicial interpretation in constitutional law, covering the Court’s rejection of the Common Law to its acceptance of New Deal social programs, which turned out to be a major catalyst in the judicial revolution that gave social Darwinism constitutional status.

Section VI moves into a discussion of the judgments of the Warren Court, arguably the most activist Court in history, and discusses how it solidified the place of sociology in constitutional law. Section VII dissects the evolution of the First Amendment’s Establishment Clause, reflecting on how its interpretation has moved drastically away from supporting Christian morality to now being hostile toward all religion. Section VIII expands on this thought by focusing on three hot-button topics in today’s jurisprudence—the right to privacy, abortion, and homosexuality—and considers how the law has evolved from America’s moral foundations in these areas. Finally, Sections IX and X call for a return to the Biblical foundations upon which the Founders built America and suggests how

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<sup>6</sup> George Washington, Farewell Address (Sept. 19, 1796), reprinted in AMERICAN HISTORICAL DOCUMENTS 233, 239 (Charles W. Eliot ed., 1910) (emphasis added).

<sup>7</sup> Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), in THOMAS JEFFERSON ON DEMOCRACY 152 (Saul K. Padover, ed., 1939).

<sup>8</sup> Letter from Thomas Jefferson to W.C. Jarvis (1820), in THOMAS JEFFERSON ON DEMOCRACY, *supra* note 7, at 152 (emphasis added).

the American people may reclaim their republic from the hands of the judicial oligarchy known as the United States Supreme Court.

The major goal of this article is to demonstrate how evolution has influenced the constitutional jurisprudence of the Supreme Court in areas that impact our lives directly and significantly. Evolution, in the name of progress, promotes constant, inevitable change divorced from any conception of God. In contrast to the assumption of Darwin's theory, however, evolution in the law has resulted not in progress but rather the destruction of the principled foundations of our laws. The grand religious character in our law has been usurped in the name of progressive ideas; only by recounting and restoring that religious heritage can we return constitutional law to the proper intentions of the Founders.

## II. THE ORIGINS OF DARWINIAN JURISPRUDENCE IN AMERICA

### A. *The Influence of Darwin's Origin of Species on America*

In 1859, Charles Darwin published his now-famous *Origin of Species by Means of Natural Selection or the Preservation of Favoured Races in the Struggle for Life*.<sup>9</sup> In his work, Darwin asserts that man and the rest of the universe were not products of a Creator who made man in His image but were merely products of evolutionary chance.<sup>10</sup> Following the publication of *Origin of Species*, Darwinism began exerting its influence in virtually all major areas of life—science, education, business, religion, and, most importantly for the purposes of this article, the law.<sup>11</sup>

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<sup>9</sup> The book's title is racist. Even prominent evolutionists have acknowledged that it is the basis of modern racism. 3 HENRY M. MORRIS & JOHN D. MORRIS, *THE MODERN CREATION TRILOGY* 99 (1996). The Bible states that "[God] hath made of one blood all nations of men for to dwell on all the face of the earth." *Acts* 17:26 (King James). Thus, the Morrisses conclude that "[t]he very idea of 'race' . . . was an evolutionary concept, not a biblical or Christian concept." MORRIS & MORRIS, *supra*, at 94.

<sup>10</sup> JOHN WHITEHEAD, *THE SECOND AMERICAN REVOLUTION: THE FAITH OF OUR FOUNDING FATHERS* 36 (1982).

<sup>11</sup> Evolutionists should pause to consider the fact that the Twentieth Century's most bloody and totalitarian political movements were inspired by leaders who were evolutionary in their thinking. Karl Marx, whose philosophy has brought economic hardship and misery to untold millions, wanted to dedicate *Das Capital* to Charles Darwin because Darwin's *Origin* "serves me as a basis in natural science for the class struggle in history." CLARENCE B. CARSON, *A BASIC HISTORY OF THE UNITED STATES: THE GROWTH OF AMERICA, 1878-1928*, at 68 (1985). Darwin declined the honor. JOHN EIDSMOE, *THE CHRISTIAN LEGAL ADVISOR* 70 (1984).

The German militarists who led their country into the First World War had been inspired by Darwinism as the key to national struggle and supremacy. MORRIS & MORRIS, *supra* note 9, at 88. And, not surprisingly, the basis of Adolf Hitler's philosophy and the Nazi regime was evolutionary, and Higher Law was replaced by legal positivism. *Id.* at 87 (quoting SIR ARTHUR KEITH, *EVOLUTION AND ETHICS* 28 (1947)) ("The German Führer, as I have consistently maintained, is an evolutionist; he has consciously sought to make the

Despite Darwinism's severe flaws,<sup>12</sup> "the world jumped at Darwin"<sup>13</sup> because it saw *Origin of Species* as sinful man's liberation from the God of Christianity and His laws.<sup>14</sup> Although Darwinism was unable to release man from God's laws of physics, those in rebellion against God believed Darwinism released them from His laws of morality and justice, the cornerstones of American law. Being led by this belief, Darwin's disciples have used Darwinism to make a powerful impact on law. Fred Cahill, a political science professor at Yale, wrote in 1952 that evolution's appearance "was an event of transcending importance to the development of American jurisprudence. . . . This involved . . . a shift . . . from the rationalistic, deductive pattern, characteristic of the pre-

practice of Germany conform to the theory of evolution."). Hitler's decree in Nazi Germany was the law and could not be scrutinized by judges.

<sup>12</sup> Karl Popper, the world-renowned philosopher of science, concludes "that [Darwinism] is not a testable scientific theory but a metaphysical research programme." KARL POPPER, UNENDED QUEST 151 (1976). Henry Morris states that evolution, which holds that things are being constantly created, contradicts the First Law of Thermodynamics (or Energy Conservation), which holds that energy may be transformed but neither created or destroyed. HENRY M. MORRIS, THE TWILIGHT OF EVOLUTION 32 (1963). Scripture supports the First Law. See *Genesis* 2:1-3; *Exodus* 20:11, 31:17; *Psalms* 33:6, 9; *Nehemiah* 9:6; *II Peter* 3:5; *Hebrews* 4:3, 10. Morris also writes that evolution, through which over billions of years disordered and simple molecules are supposed to have changed into the complex, highly ordered, energy-rich structures of living things, contradicts the Second Law of Thermodynamics, or entropy, which holds that things degenerate. MORRIS, *supra*, at 33. Scripture also supports the Second Law of Thermodynamics. See *Psalms* 102:25, 26; *Isaiah* 51:6; *Romans* 8:20, 22; *I Peter* 1:24; *Ecclesiastes* 3:20; *Matthew* 24:35. Dr. Francis Crick, the co-discoverer of DNA, also discovered that there is no possibility that the DNA molecule could ever in the entire history of the earth have originated by chance. D. JAMES KENNEDY, CHARACTER & DESTINY: A NATION IN SEARCH OF ITS SOUL 176 (1994). "Thus," the Morris states, "the key 'proof' of evolution is based on the assumption of evolution." MORRIS & MORRIS, *supra* note 9, at 59.

In fact, Dr. W.R. Thompson, an entomologist of international repute, states in his Introduction to the centennial edition of Darwin's *Origin* that Darwin did not prove his theory of evolution. W.R. Thompson, Introduction to CHARLES DARWIN, THE ORIGIN OF SPECIES vi, xi-xii (E.P. Dutton & Co. 1956) (1859). Darwin "merely showed, on the basis of certain facts and assumptions, how this might have happened." *Id.* at vii. "Personal convictions" were "presented as if they were proofs." *Id.* at xi-xii. Today, with the long hoped for "missing links" having never been found and with no mechanism for evolution ever identified, Darwinism is in disarray. HENRY M. MORRIS, THE BIBLICAL BASIS OF MODERN SCIENCE 336-64 (1984); see also MICHAEL DENTON, EVOLUTION: A THEORY IN CRISIS (1986).

<sup>13</sup> WHITEHEAD, *supra* note 10, at 36 (quoting DOUGLAS DEWAR & H.S. SHELTON, IS EVOLUTION PROVED? 4 (1947)).

<sup>14</sup> *Id.* at 36. Biologist Sir Julian Huxley, who was asked on a British television show why the theory of evolution was so readily accepted by the scientific community, said, "I suppose the reason we leaped at *The Origin of Species* was because the idea of God interfered with our sexual mores." KENNEDY, *supra* note 12, at 46.

Darwinian period, to the empirical, evolutionary approach that is followed . . . today."<sup>15</sup>

In the 1870s, Christopher Langdell, Dean of Harvard Law School, began to apply Darwinian thought to legal education through the "case method" of teaching law rather than using the traditional Blackstonian method.<sup>16</sup> This change was revolutionary.<sup>17</sup> Through Langdell's approach, Harvard students learned that law was ever-changing and evolves through the written opinions of appellate judges.<sup>18</sup> Author John Whitehead states that "Langdell's system was effective in attacking Blackstone's belief that the judges' opinions in appellate cases were not sources of law, but merely 'evidence' of law."<sup>19</sup> Thus, Blackstone's jurisprudential principles of Higher Law were replaced by legal positivism,<sup>20</sup> which is totally divorced from Higher Law moral concepts.<sup>21</sup> With the evolutionary approach, the Constitution became, as Chief Justice Charles Evans Hughes said, "what the judges say it is,"<sup>22</sup> and Blackstone and the Common Law were ushered out.

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<sup>15</sup> WHITEHEAD, *supra* note 10, at 46.

<sup>16</sup> *Id.*

<sup>17</sup> Later, Roscoe Pound, another Dean of Harvard Law School, introduced the concept of sociological law by which constitutional cases would be decided on the latest teachings in sociology. *Id.* at 48. This too has had a great impact in law.

<sup>18</sup> *Id.* at 47.

<sup>19</sup> *Id.*

<sup>20</sup> Under legal positivism, the State is the ultimate source of law. As a result, truth has become a moving target in a relativistic system of evolving law. Justice is no longer the priority of law. Now, whatever is legal is just. Law is nothing more than the dictates of courts, legislatures, bureaucracies, and other human authorities, "regardless of its wisdom or foolishness as a matter of policy, its soundness or unsoundness as a matter of logic, its justice or injustice as a matter of ethics." EDWARD DUMBAULD, *THE DECLARATION OF INDEPENDENCE AND WHAT IT MEANS TODAY*, 38 (1950).

<sup>21</sup> John Eidsmoe states that legal positivism "could perhaps be best described as the belief, commonly held by legal scholars today, that law consists of nothing more than the dictates of legislatures, courts, and other human authorities and is utterly devoid of any absolute principles of 'higher law.'" EIDSMOE, *supra* note 11, at 33. Positive law, Eidsmoe asserts, has five basic premises: (1) "Law is a denial of divine absolutes"; (2) "Law is what the lawmaker says it is— nothing more, nothing less"; (3) "Law is constantly changing or evolving"; (4) "Law is judge-made"; and (5) "Law is learned through the case law method of legal education." *Id.* at 75-84.

Whitehead says modern legal scholars rejected Blackstone because "they have rejected his faith in God and his reliance upon the Genesis account of creation and the origin of man and the universe." WHITEHEAD, *supra* note 10, at 47.

<sup>22</sup> CHARLES EVANS HUGHES, Speech in Elmira, New York (May 3, 1907), *reprinted in ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES, GOVERNOR OF NEW YORK, 1906-1908*, at 139 (1908).

*B. Wilson, Holmes, and Brennan Impact America  
by Embracing Darwinism*

In 1918, President Woodrow Wilson, who was extremely critical of the Founders' Constitution, best stated the objective of legal evolutionists:

The trouble with [Newton's] theory is that government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton. It is modified by its environment, necessitated by its tasks, shaped to its functions by the sheer pressure of life. . . . Living political constitutions must be Darwinian in structure and in practice.

All that progressives ask . . . is permission—in an era when “development,” “evolution,” is the scientific word—to interpret the Constitution according to the Darwinian principle; all they ask is recognition of the fact that the nation is a living thing and not a machine.<sup>23</sup>

In Wilson's view, the antiquated Founders' Constitution was blocking progress. All that Progressives, like Wilson, were asking is that the written Constitution, with its restrictions on the use of governmental power, be ignored in favor of an elastic constitution which would mean literally anything Progressives wanted it to mean—no matter how opposed their views are to the written text. It is akin to a man telling his wife, “Marital faithfulness is antiquated. All that I am asking for is flexibility in the marriage and permission to sleep around with impunity; after all I am a living thing—not a machine.”<sup>24</sup> How could any progressive, reasonable wife object? As such an attitude is a betrayal of and treasonous to marriage, the Langdell/Wilson concept is equally so to the law and government.

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<sup>23</sup> WOODROW WILSON, *THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE* 47-48 (1918).

<sup>24</sup> In 1908, Wilson confessed his adultery to his first wife, but he continued in it. MARVIN OLASKY, *THE AMERICAN LEADERSHIP TRADITION: MORAL VISION FROM WASHINGTON TO CLINTON* 193 (1999). Purportedly a Christian, he eliminated Bible classes at Princeton, told his daughter that hell was only “a state of mind,” *id.* at 191, and suggested to his students that they “grow up and out of a strict Ten Commandments understanding and realize that ethical situations [perhaps including his own] are complicated by a thousand circumstances.” *Id.* at 193. Wilson told the leaders at the Versailles Peace Conference that “Jesus Christ so far [has] not succeeded in inducing the world to follow His teaching because He taught the ideal without devising any practical scheme to carry out His aims.” *Id.* at 205. In British Prime Minister Lloyd George's account of the Conference, he said French Prime Minister Georges Clemenceau, on hearing Wilson's remarks, “slowly opened his dark eyes to their widest dimension and swept them around the assembly to see how the Christians gathered around the table enjoyed this exposure of the futility of their Master.” *Id.*

The Darwinist approach to American jurisprudence, however, had a very influential voice on the Supreme Court bench in the person of Justice Oliver Wendell Holmes, Jr. Appointed to the Court in 1902 by President Theodore Roosevelt, in his twenty-nine years on the Court, Holmes "exercise[d] virtually unparalleled influence over modern constitutional theory."<sup>25</sup> Holmes had a great knowledge of law and brilliantly articulated his views. However, if to read Holmes is "to string pearls," as Justice Felix Frankfurter once said,<sup>26</sup> it is also true that to read Holmes is to string stumbling blocks in front of the moral and just constitutional vision of the Founding Fathers.<sup>27</sup>

Holmes was not the founder of American legal positivism, but he was its intellectual force. In fact, historian R.J. Rushdoony maintains that American law since Holmes "is simply a product, a logical working-out of Holmes's legal revolution."<sup>28</sup> Rejecting *a priori* knowledge, Holmes states, "The life of the law has not been logic: it has been experience. . . . The substance of the law at any given time pretty nearly corresponds . . . with what is then understood to be convenient."<sup>29</sup> His opposition to "logic" has been interpreted to mean "the formalistic, religion-based logic that reasoned . . . from assumed truths about the universe."<sup>30</sup> Thus, the "logic of Christian Theism," basic to the Common Law, was "anathema to Holmes," who saw the latter as "basically governed by the motive of revenge."<sup>31</sup>

Where the Founders believed man was a creation of God,<sup>32</sup> Holmes, a social Darwinian,<sup>33</sup> could not attribute "to man a significance different

<sup>25</sup> GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* lxxxiv (3d ed. 1996).

<sup>26</sup> Walter Berns, *Oliver Wendell Holmes, Jr.*, in *AMERICAN POLITICAL THOUGHT* 295, 301 (M.J. Frisch & R.G. Stevens eds., 1983).

<sup>27</sup> For example, the Constitution's Framers stated in the Preamble that one of their purposes was to "establish justice." U.S. CONST. pmb. Although Chief Justice Marshall wrote that "[t]here are certain great principles of justice, whose authority is universally acknowledged," *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810), Holmes once told a colleague that doing justice "is not my job. It is my job to apply the law." ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 6 (1990) (citing E. Sargeant, *Justice Touched with Fire*, in MR. JUSTICE HOLMES 206-07 (Felix Frankfurter ed., 1931). This is an incredible statement by a man who carried the title "Mr. Justice."

<sup>28</sup> ROUSAS J. RUSHDOONY, *LAW AND LIBERTY* 22 (1984).

<sup>29</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

<sup>30</sup> WHITEHEAD, *supra* note 10, at 50 (quoting G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 157 (1976)).

<sup>31</sup> *Id.* at 50, 193. Holmes's book *The Common Law* actually "laid the basis" for undermining the Common Law. *Id.* at 193. See *infra* Section III for the Common Law's traditional place in American jurisprudence.

<sup>32</sup> See *infra* Section III.

<sup>33</sup> RENÉ WORMSER, *THE LAW* 487-88 (1949). Holmes blatantly engaged in social Darwinism on the bench in the infamous case *Buck v. Bell*, 274 U.S. 200 (1927), where the Supreme Court upheld a state law authorizing sterilization of a feeble-minded woman.

in kind from that which belongs to a baboon or a grain of sand."<sup>34</sup> He thought it would "be a gain if every word of moral significance could be banished from the law."<sup>35</sup> A "sound body of law," Holmes wrote, "should correspond with the actual feelings and demands of the community, whether right or wrong."<sup>36</sup>

There were no "rights," according to Holmes, "except what the crowd will fight for," the way a "dog will fight for his bone."<sup>37</sup> To Holmes, laws were at most "beliefs that have triumphed"<sup>38</sup> or "the command of the dominant social group."<sup>39</sup> One author writes that Holmes seemed to believe that "the Constitution rests on nothing at all—or rather on no principle immune from the whims of transient majorities"<sup>40</sup>—a contention that would surely have been astounding to the Founders.

The late Justice William Brennan, the United States Supreme Court's foremost proponent of evolving law, was just as candid and defiant of the written text of the Constitution. In a speech he gave at Georgetown University in 1985, Brennan said about the Constitution:

[It] is a sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law. . . .

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The vision of human dignity embodied [in the Constitution] is timeless. It has inspired Americans for two centuries and it will continue to inspire as it continues to evolve. That evolutionary process

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Writing for the Court, he justified the decision with these famous words: "Three generations of imbeciles are enough." *Id.* at 207. Holmes thereby delighted many readers "who," as one author writes, "overlooked the monstrous thing accomplished with these words." WALTER BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 163 (1976). Thus, Holmes could say, "if my country wants to go to Hell, I am here to help it." FRANCIS BIDDLE, *JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT* 9 (1961).

<sup>34</sup> BERNS, *supra* note 33, at 163.

<sup>35</sup> EIDSMOE, *supra* note 11, at 85.

<sup>36</sup> HOLMES, *supra* note 29, at 36. It is no wonder that the Nazi War criminals based their defenses in part on Holmes's doctrine of legal positivism. 3 NUREMBERG MILITARY TRIBUNALS, *TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10*, at 142 (1951). This Holmes quote was cited: "The real reason for a decision are [sic] consideration of a political or social nature. It is erroneous to believe that a solution can be found solely with the aid of logic or general legal doctrines which no one contests." *Id.* at 149.

<sup>37</sup> BERNS, *supra* note 33, at 162 (quoting OLIVER WENDELL HOLMES, *Natural Law*, in *COLLECTED LEGAL PAPERS* 310, 314 (1920)).

<sup>38</sup> WHITEHEAD, *supra* note 10, at 50 (citing *THE MIND AND FAITH OF JUSTICE HOLMES: HIS BOOK NOTICES & UNCOLLECTED LETTERS & PAPERS* 336-41, 377, 389 (Max Lerner ed., 1954)).

<sup>39</sup> EIDSMOE, *supra* note 11, at 85 (quoting JOHN HALLOWELL, *MAIN CURRENTS IN MODERN POLITICAL THOUGHT* 362-63 (1950)); *see also* WHITEHEAD, *supra* note 10, at 51.

<sup>40</sup> BERNS, *supra* note 33, at 146 (citing *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting)).



is inevitable and, indeed, it is the true interpretative genius of the text.<sup>41</sup>

Brennan's views are not only an assault on past views of the Constitution and the meaning of "dignity,"<sup>42</sup> but his emphasis on the "dignity of man" is also a subtle, blasphemous assertion that man, not God, is the highest being.<sup>43</sup> Moreover, the Framers no doubt would be shocked to learn that the overriding theme of their Constitution is the "dignity of man" and would be even more shocked to learn that the great

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<sup>41</sup> William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, Address Before the Georgetown University Text and Teaching Symposium (Oct. 12, 1985), reprinted in *THE FEDERALIST SOC'Y, THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 11, 18, 24-25 (1986).

<sup>42</sup> To Brennan, the meaning of the word "dignity" evolved as well. To the Founders, however, "dignity" meant an office of high rank in society or was something that was earned through merit. This understanding of merit-based dignity can be traced back all the way to Shakespeare. In 1600, he wrote, "Let none presume/To wear an undeserved *dignity*/O that estates, degrees and offices/Were not derived corruptly, and that clear honor/Were purchased by the *merit* of the/wearer!" WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act II, sc. 9, lines 40-44 (Louis B. Wright ed., Wash. Square Press 1957) (1600) (emphasis added).

*Webster's Dictionary* of 1828 defined "dignity" as

1. True honor; nobleness or elevation of mind, consistency in a high sense of propriety, truth and justice, *with an abhorrence of mean and sinful actions; opposed to meanness*. In this sense, we speak of the *dignity* of mind, and *dignity* of sentiments. This dignity is based on moral rectitude; all vice as incompatible with true *dignity* of mind. *The man who deliberately injures another, whether male or female, has no true dignity of soul*. 2. Elevation; honorable place or rank of elevation; degree of excellence, either in estimation, or in the order of nature. Man is superior in *dignity* to brutes. . . . 5. An elevated office, civil or ecclesiastical, giving a high rank in society. . . . 6. The rank or title of nobleman.

NOAH WEBSTER, *NOAH WEBSTER'S FIRST EDITION OF AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* (1828) (emphasis added). Thus, to the Founders, dignity did not include those who would intentionally harm others. Nevertheless, Brennan held that "[t]he most vile murder does not release the State from constitutional restraints on the destruction of human dignity." William J. Brennan, Jr., *In Defense of Dissents*, 37 *HASTINGS L.J.* 427, 436 (1986). Thus, to Brennan, murderers must be accorded human dignity, but innocent, unborn children may achieve that dignity only after they have survived the gauntlet of a woman's choice as to abortion—a choice which Brennan helped create and consistently championed. See *infra* Section VIII.

<sup>43</sup> Concerning the phrase "dignity of man," author Allan Bloom wrote that [t]he very expression *dignity of man*, even when Pico della Mirandola coined it in the fifteenth century, had a blasphemous ring to it. Man as man had not been understood to be particularly dignified. God had dignity, and whatever dignity man had was because he was made in God's image (as well as from dust) or because he was the rational animal whose reason could grasp the whole of nature and hence was akin to that whole. But now the dignity of man has neither of those supports; and the phrase means that man is the highest of the beings, an assertion emphatically denied by both Aristotle and the Bible.

ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 180 (1987).

principles they fought for, and which they sought to maintain with a written Constitution, are constantly evolving.<sup>44</sup> Nevertheless, Brennan obviously believed that “the evolutionary process”—“the true interpretative genius of the text,” as he put it—gives judges license to alter or ignore the meaning of the Constitution’s text consistent with a judge’s own personal “constitutional ideal of human dignity.”<sup>45</sup>

The Founders did not pledge their lives, fortunes and sacred honor for changing ideals, but for the permanent things which Alexander Hamilton called “certain primary truths or first principles . . . upon which all . . . reasonings must depend.”<sup>46</sup> The Founders believed that these primary truths or first principles came not from an evolutionary process but directly from God.

### III. THE MORAL AND RELIGIOUS BASIS OF AMERICAN LAW

A study of history clearly reveals that American law was not founded on evolving concepts of human dignity or the whims of transient majorities; rather, it was founded on God’s law.

#### *A. Blackstone and Montesquieu*

In regards to law and government, America’s Founding Fathers subscribed to the views of two great men, both of whom believed that law came from directly from God. The first was Sir William Blackstone, a Christian, who firmly believed in God as Creator *ex nihilo* of mankind and the Universe and that the fear of Him was the beginning of wisdom.<sup>47</sup> To Blackstone, God was the Source of all laws.<sup>48</sup> The doctrines

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<sup>44</sup> Author William Eaton states that in writing the Constitution, the Framers’ “master intent was to *control* and *restrain* power.” WILLIAM EATON, WHO KILLED THE CONSTITUTION: THE JUDGES V. THE LAW 215 (1988). Thus, the Framers designed the Constitution to be a great bulwark of liberty from tyrannical rule—not to artificially elevate by fiat “the dignity of man.”

<sup>45</sup> Brennan, *supra* note 41, at 25. For example, even though the text expressly and implicitly contemplates the death penalty in the Fifth Amendment, Brennan nevertheless insisted that capital punishment was “utterly and irreversibly degrading to the very essence of human dignity.” *Id.* at 23. Professor Arthur Selwyn Miller urged that the Supreme Court be changed into a “Council of Elders” which would discard the Constitution as well as the idea that judges are not to make but to interpret law. ARTHUR SELWYN MILLER, TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT 271 (1982). Members of this Council would be limited to those who “openly pursue a concept of *human dignity*.” *Id.* at 305 (emphasis added).

<sup>46</sup> THE FEDERALIST NO. 31 (Alexander Hamilton) (emphasis added).

<sup>47</sup> GARY T. AMOS, DEFENDING THE DECLARATION: HOW THE BIBLE AND CHRISTIANITY INFLUENCED THE WRITING OF THE DECLARATION OF INDEPENDENCE 42 (1989).

<sup>48</sup> *Id.*

of law were unchanging and based on the moral absolutes of the Bible.<sup>49</sup> Blackstone “played a leading role in forming a Christian presuppositional base to early American law.”<sup>50</sup> Practicing lawyers taught law students from Blackstone’s *Commentaries on the Laws of England*, the most famous treatise on the Common Law and found in every lawyer’s office in America.<sup>51</sup> Candidates for the bar were routinely examined on Blackstone, who was authoritatively cited in the courts.<sup>52</sup>

The second great man whose views the Founders subscribed to was Montesquieu, who said that “God is related to the universe, as Creator and Preserver; the laws by which he created all things are those by which he preserves them.”<sup>53</sup> The Founders based the Constitution in part on his doctrines of separation of powers and of checks and balances.<sup>54</sup>

Blackstone’s and Montesquieu’s views guided the Founders of the United States, who wrote and ratified the Constitution to, among other goals, “establish Justice” and “secure the Blessings of Liberty.”<sup>55</sup> Their views were also shared by those who governed America at both the state and federal levels for decades after America gained its independence.

### B. *The Impact of Calvin*

It may come as a surprise to many that some historians believe that John Calvin of Geneva, a theologian, had more impact on America’s founding than any other man.<sup>56</sup> George Bancroft, the premier American historian of the Nineteenth Century, although far from being a Calvinist, called Calvin “the father of America.”<sup>57</sup> One study shows that

<sup>49</sup> *Id.*

<sup>50</sup> WHITEHEAD, *supra* note 10, at 30.

<sup>51</sup> JOHN EIDSMOE, *CHRISTIANITY AND THE CONSTITUTION: THE FAITH OF OUR FOUNDING FATHERS* 57 (1987). More copies of Blackstone’s *Commentaries* were sold in America than in England. WHITEHEAD, *supra* note 10, at 31. Historian Daniel Boorstin wrote, “In the first century of American independence, the Commentaries were not merely an approach to the study of law; for most lawyers they constituted all there was of the law.” *Id.* (quoting DANIEL BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 3 (1941)).

<sup>52</sup> EIDSMOE, *supra* note 51, at 57.

<sup>53</sup> CHARLES LOUIS JOSEPH DE SECONDAT, *THE BARON DE MONTESQUIEU OF FRANCE, THE SPIRIT OF THE LAWS* 99 (David Wallace Carrithers ed., Univ. of Cal. Press 1977) (1748) [hereinafter *MONTESQUIEU*].

<sup>54</sup> *See id.*

<sup>55</sup> U.S. CONST. pmbl.

<sup>56</sup> EIDSMOE, *supra* note 51, at 18. Leopold von Ranke, the famed German historian and one of the most profound scholars of modern times, called Calvin “the virtual founder of America.” *Id.*

<sup>57</sup> *Id.* (quoting LORAINÉ BOETTNER, *THE REFORMED DOCTRINE OF PREDESTINATION* 382 (1972)). “He who will not honor the memory and respect the influence of Calvin knows but little of the origin of American liberty.” *Id.* Merle D’Aubigne called Calvin “the founder of the greatest of republics.” *Id.* Thus, America was a product of the Protestant Reformation.

“two-thirds of the American Colonial population had been trained in the school of Calvin.”<sup>58</sup> Calvin, as a part of the covenant theology he preached,<sup>59</sup> saw both church and civil government as being ministries of God and bound by His law as enumerated in the Bible.<sup>60</sup> He also believed in the dominion of Christ over all the world, as did his followers.<sup>61</sup> The laws of the Colonies reflected this fact.<sup>62</sup>

### *C. Religion: A Fundamental Cause of American Revolution*

Equally surprising to many is the fact that the American Revolution was fought over much more than just taxation without representation. Historian Carl Bridenbaugh documents that “the most enduring and absorbing public question [in America] from 1689 to 1776 was religion.”<sup>63</sup> Religion exceeded any other topic, including politics, in the newspaper stories of this era because the Colonists’ hard-earned religious liberties were being threatened.<sup>64</sup> Among other things, the Colonists feared that an American Episcopate—or worse—that the Church of England would be established in the Colonies.<sup>65</sup> John Adams cited the latter as

<sup>58</sup> *Id.* at 19 (quoting BOETTNER, *supra* note 57, at 382).

<sup>59</sup> Covenant theology held that God made two covenants with man, one of law, which included the Ten Commandments, and one of grace, or redemption through faith in Jesus Christ. See WHITEHEAD, *supra* note 10, at 202; ROUSAS J. RUSHDOONY, THIS INDEPENDENT REPUBLIC 96 (1978).

<sup>60</sup> Archie P. Jones, *The Christian Roots of the War for Independence*, 3 J. CHRISTIAN RECONSTRUCTION 6, 20-21 (Summer 1976).

<sup>61</sup> See *id.*

<sup>62</sup> For example, the Massachusetts General Court resolved in 1636 to make a code of laws “agreeable to the word of God.” EIDSMOE, *supra* note 51, at 32. Its 1780 Constitution required all public officials to take an oath of their belief “in the Christian religion.” James McClellan, *The Making and Unmaking of the Establishment Clause*, in A BLUEPRINT FOR JUDICIAL REFORM 295, 302 (1981). John Cotton’s *Abstract of the Law of New England* revealed that those laws were based upon Old Testament Biblical law. Greg L. Bahnsen, *Introduction to John Cotton’s Abstract of the Laws of New England*, 5 J. CHRISTIAN RECONSTRUCTION 75 (Winter 1978-79). The Fundamental Orders of Connecticut (1638-39) provided for a “Government established according to God.” *Church of the Holy Trinity v. United States*, 143 U.S. 457, 467 (1892). William Penn’s Charter of Pennsylvania (1701) recited that “God [was] the only Lord of Conscience.” *Id.* The Constitutions of five Colonies from 1771 to 1784 required legislative members to be of the Protestant religion. McClellan, *supra*, at 302. Five constitutions required such members to swear their belief in the divine authority of the Old and New Testaments. *Id.* Maryland’s 1867 and Mississippi’s 1832 Constitutions required public office-holders to believe in God. *Church of the Holy Trinity*, 153 U.S. at 468-69. Delaware’s Constitution required all officeholders to take an oath professing “faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost.” *Id.* at 469-70.

<sup>63</sup> CARL BRIDENBAUGH, MITRE AND SCEPTRE: TRANSATLANTIC FAITHS, PERSONALITIES AND POLITICS 1689-1775, at xi (1962).

<sup>64</sup> Jones, *supra* note 60, at 41.

<sup>65</sup> ALICE M. BALDWIN, THE NEW ENGLAND CLERGY AND THE AMERICAN REVOLUTION 70 (1928); BRIDENBAUGH, *supra* note 63, at 337.

responsible for “as much as any other cause” the War for Independence.<sup>66</sup> Thus, “[i]t is indeed high-time that we repossess the important historical truth that religion was a fundamental cause of the American Revolution.”<sup>67</sup>

#### D. The Clergy and Law and the Revolution

Professor Edward S. Corwin, in a celebrated *Harvard Law Review* essay, shows a Higher Law connection interrelated with the English Common Law, *Magna Carta*, and the law of Moses, and demonstrates its great impact on American law.<sup>68</sup> One source Corwin cites approvingly is Alice Baldwin’s *The New England Clergy and the American Revolution*.<sup>69</sup>

Baldwin shows that for eighty-five years prior to the War for Independence, the clergy instilled into the minds of the Colonists the vital connection between the law of God as revealed in the Bible and the Law of Nature, which were virtually one and the same in the minds of the people.<sup>70</sup> According to Baldwin, the clergy preached in election sermon after election sermon that God and Christ’s laws did not concern religious matters alone but affected politics as well; they were “a part of every constitution and no ruler is permitted by God to violate them.”<sup>71</sup> Preachers stressed that the Constitution and the laws “must be consonant with the divine law” as found in the Bible, which contains “the maxims and rules of government.”<sup>72</sup>

The clergy also preached that “[l]aw . . . is the very basis of civil liberty”<sup>73</sup> and that the “perfect law of liberty” could be found in the Gospel of Jesus Christ.<sup>74</sup> In this context, the ministers believed it “was to be America’s task and joy to reinterpret liberty and to embody it in her institutions.”<sup>75</sup> “Liberty” was the enjoyment of civil, religious, and

<sup>66</sup> WHITEHEAD, *supra* note 10, at 94.

<sup>67</sup> BRIDENBAUGH, *supra* note 63, at xiv.

<sup>68</sup> Edward S. Corwin, *Origins of Judicial Review: The ‘Higher Law’ Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365 (1928-29). Corwin discusses the great impact on American law of the ideas of Aristotle, Cicero, John of Salisbury, Henry of Bracton, Lord Coke, Blackstone, Hugo Grotius, Sir Isaac Newton, John Calvin and John Locke, all of whom believed in a Higher Law. *Id.*

<sup>69</sup> BALDWIN, *supra* note 65.

<sup>70</sup> *See id.* at xx-xiii, 3-12, 90-92.

<sup>71</sup> *Id.* at 35; *see also id.* at 12, 170.

<sup>72</sup> *Id.* at 35. The clergy got help from Congress, which imported 20,000 Bibles for distribution among the people. DAVID BARTON, *THE MYTH OF SEPARATION* 104 (1992). Congress later ordered the printing of Bibles and recommended the Bible’s use “to the inhabitants of the United States.” *Id.* at 106.

<sup>73</sup> BALDWIN, *supra* note 65, at 14.

<sup>74</sup> *Id.* at 16. The Bible itself states that “whoso looketh into the perfect law of liberty, and continueth therein, he being not a forgetful hearer, but a doer of the work, this man shall be blessed in his deed.” *James* 1:25 (King James) (first emphasis added).

<sup>75</sup> *Id.* at 133.

property rights, freedom from excessive taxes, and freedom from having their religious immunities at the mercy of tyrants.<sup>76</sup>

"There is not a right asserted in the *Declaration of Independence*," Baldwin declares, "which had not been discussed by the New England clergy before 1763."<sup>77</sup> Sunday after Sunday the clergy preached resistance as they related constitutional government to the Bible.<sup>78</sup> "When our Religion is in danger," one preacher said, "it will warrant our Engaging in War."<sup>79</sup> As historian Perry Miller asserts, "[P]ure rationalism' might have declared the independence of the American people, 'but it could never have inspired them to fight for it."<sup>80</sup> To have won the clergy's support, so said their enemies, was "the 'master-stroke' of the politicians."<sup>81</sup>

### *E. The Laws of Nature and of Nature's God*

All of this Godly influence culminated in the creation of America's founding document—the *Declaration of Independence*. The *Declaration of Independence* bases the Colonies' separation from England and the founding of America upon the "Laws of Nature and of Nature's God."<sup>82</sup> Moreover, the *Declaration* asserts that there are "self-evident" truths—"that all Men are created equal and endowed by their Creator with certain unalienable Rights."<sup>83</sup> Governments were instituted not to create rights but to secure these God-given "unalienable Rights."<sup>84</sup> Rights were built on the law of nature, the British Constitution, the charters of the several Colonies, and the Bible.<sup>85</sup> But, what did the writers of the *Declaration* mean by the "Laws of Nature and of Nature's God"?

Sir Edward Coke, the English jurist and first great expositor of the Common Law, wrote this about the law of nature 150 years before Blackstone:

The law of nature is that which God at . . . creation of the nature of man infused into his heart, for his preservation and direction; and this is *lex aeterna*, the moral law, called also the law of nature . . . written

<sup>76</sup> *Id.* at 69.

<sup>77</sup> *Id.* at 170.

<sup>78</sup> *Id.* at 159; *see also id.* at 12.

<sup>79</sup> *Id.* at 87.

<sup>80</sup> Jones, *supra* note 60, at 19 (quoting Perry Miller, *From the Covenant to the Revival*, in *THE SHAPING OF AMERICAN RELIGION: RELIGION IN AMERICAN LIFE* 343 (James W. Smith & A. Leland Jamison eds., 1961)).

<sup>81</sup> BALDWIN, *supra* note 65, at 171.

<sup>82</sup> THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *See* FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 57 (1985).

with the finger of God in the heart of man . . . before the law was written by Moses.<sup>86</sup>

Coke then makes reference to Paul's Epistle to the Romans as evidence of the moral law being written on men's hearts.<sup>87</sup> This moral law came "before any judicial or municipal laws."<sup>88</sup> Thus, Coke based his understanding of the law of nature on the Bible and mainstream Christian theology.

Blackstone declares that natural law, or the law of nature, was "dictated by God himself."<sup>89</sup> The "revealed or divine law," Blackstone stated, was "to be found only in the holy scriptures" and was "of infinitely more authenticity than . . . natural law" because it had been "expressly declared so to be by God."<sup>90</sup> "Upon these two foundations," Blackstone continued, "the law of nature and the law of revelation, depend all human laws; that is to say, *no human law should be suffered to contradict these.*"<sup>91</sup>

The Colonists also looked to John Locke as an authority concerning the Law of Nature.<sup>92</sup> Locke based his social contract on "that Paction God made with Noah after the Deluge,"<sup>93</sup> and clearly identified the law of nature with Scripture. Referring to Genesis 9:26, he stated, "and upon this is grounded the great Law of Nature, 'whoso sheddeth Man's blood by man shall his blood be shed.'"<sup>94</sup> "Laws human," Locke continued, "must be according to the general Laws of Nature, *and without contradiction to any positive Law of Scripture, otherwise they are ill made.*"<sup>95</sup>

Professor Gary Amos documents that the writers of the *Declaration* understood the law of nature the same as Coke, Locke, and Blackstone.<sup>96</sup> In the 1770s, the "Law of Nature," Amos maintains, meant the

<sup>86</sup> Calvin's Case, 77 Eng. Rep. 377, 392 (K.B. 1608).

<sup>87</sup> AMOS, *supra* note 47, at 43. Concerning moral law, the Apostle Paul states,

For when the Gentiles, which have not the law, do by nature the things contained in the law, these, having not the law, are a law, unto themselves: Which shew the work of the law written in their hearts, their conscience also bearing witness, and *their* thoughts the mean while accusing or else excusing one another . . .

*Romans* 2:14-15 (King James).

<sup>88</sup> AMOS, *supra* note 47, at 43.

<sup>89</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES 41 (reprint of 1783 Strahan & Cadell ed., Garland Publ'g 1978) (1765).

<sup>90</sup> 1 *id.* at 42.

<sup>91</sup> 1 *id.* (emphasis added).

<sup>92</sup> AMOS, *supra* note 47, at 35-37.

<sup>93</sup> EIDSMOE, *supra* note 11, at 40 (quoting 2 JOHN LOCKE, OF CIVIL GOVERNMENT § 200 (1698), in 1 VERNA M. HALL, A CHRISTIAN HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 112 (Joseph A. Montgomery ed., Am. Revolution Bicentennial ed. 1975)).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* (emphasis added).

<sup>96</sup> AMOS, *supra* note 47, at 41-61.

objectively revealed moral law of God, first in nature, then in the positive moral law of Scripture.<sup>97</sup> “Natural law” denoted the fallen understanding or mental perception in man’s mind of the laws of nature.<sup>98</sup> Some Deists used the term “natural law” to speak of man’s ability to reason his way to a perfect understanding of natural justice.

Amos shows that the phrase “Laws of Nature and of Nature’s God” used in the *Declaration* was not the creation of the European Enlightenment but was in fact a legal phrase “for God’s law revealed through Nature and His moral law revealed in the Bible.”<sup>99</sup> “If Jefferson,” Amos says, “had wished to equivocate, or to promote deism, he could have used the phrase ‘natural law.’ He did not.”<sup>100</sup> Jefferson, who viewed the law of nature and divine law as a single concept, embraced a Christian theory of law that had been part of the Common Law for centuries before the Enlightenment and Deism arose.<sup>101</sup>

For example, Amos shows that the Puritans repeatedly wrote about the “law of nature.”<sup>102</sup> It was central to Puritan thinking,<sup>103</sup> and is a Christian concept based, as Lord Coke demonstrated, on the teachings of the Apostle Paul.<sup>104</sup> The longer phrase “law of nature or God” was used, according to Amos, in the early 1300s in a debate between rival Catholic monastic orders.<sup>105</sup> Thomas Aquinas used it repeatedly in *Summa Theologica* in the Thirteenth Century.<sup>106</sup> Thus, the term “law of nature” was a part of Christian legal language at least 500 years before the rise of Deism as a movement.<sup>107</sup> From the canon law of the Roman Catholic church, the term “Law of Nature” made its way into the Common Law of England.<sup>108</sup> From Bracton to Blackstone, the term meant the eternal moral law of God the Creator established over his created universe.<sup>109</sup>

In his essay on natural law, Justice Joseph Story wrote that “[t]he whole duty of man” is to ascertain and obey the will of God.<sup>110</sup> To the Creator was owed “supreme worship and reverence” and, as “our Lawgiver and Judge, we owe an unreserved obedience to his

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<sup>97</sup> *Id.* at 35.

<sup>98</sup> *Id.* at 48-50.

<sup>99</sup> *Id.* at 35.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 36.

<sup>102</sup> *Id.* at 38.

<sup>103</sup> *Id.*

<sup>104</sup> See *supra* note 87 and accompanying text.

<sup>105</sup> AMOS, *supra* note 47, at 41.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 313 (1971).



commands."<sup>111</sup> With Isaiah 10:1 in mind,<sup>112</sup> Story wrote, "All magistrates are responsible to God for the due and honest discharge of their duty"<sup>113</sup> and have "the duty of exercising power with moderation and mercy as well as justice."<sup>114</sup>

Story believed the law of nature of the Founders flowed from reason and revelation.<sup>115</sup> To Story, the law of nature

is nothing more than those rules which human reason deduces from the various relations of man, to form his character, and regulate his conduct, and thereby insure his permanent happiness. . . . Christianity becomes not merely an auxiliary, but a guide, to the *law of nature*; establishing its conclusions, removing its doubts, and evaluating its precepts.<sup>116</sup>

#### *F. Summary: America's Moral and Religious Basis*

Clearly, the preservation of Christian religious freedom was a fundamental cause of the American Revolution. When the Founders spoke of the "Law of Nature and of Nature's God," they did not speak in abstract, deistic terms, but related those laws to Biblical revelation on which Coke, Blackstone, and Locke said they were based. American law and liberties, as spoken of by the Founders, cannot be properly understood without this understanding.<sup>117</sup> It is why John Adams could write, "The general principles, on which the Fathers achieved Independence, were . . . the general principles of Christianity."<sup>118</sup> It was with these general principles of Christianity that the Framers came together to create the Constitution at the Constitutional Convention.

### IV. THE CONSTITUTIONAL CONVENTION

#### *A. The Constitution and Moral Order*

The Framers believed maintenance of a strong moral order and public virtue were more vital to public polity than individual rights.

<sup>111</sup> *Id.* at 314.

<sup>112</sup> *Isaiah* 10:1 (King James) reads, "Woe unto them that decree unrighteous decrees, and that write grievousness *which* they have prescribed."

<sup>113</sup> MCCLELLAN, *supra* note 110, at 315.

<sup>114</sup> *Id.* at 323.

<sup>115</sup> *Id.* at 65-66.

<sup>116</sup> *Id.* at 66 (emphasis added).

<sup>117</sup> In this connection, one study of over 17,000 writings between 1760-1805 in America shows that the source most often cited by the Founding Fathers was the Bible, accounting for 34% of all citations. EIDSMOE, *supra* note 51, at 51-52. *Deuteronomy*, because of its great emphasis on Biblical law, was the book of the Bible most cited by the Founders. *Id.* at 52 tbl. 2. The same study showed that the most cited individuals were Montesquieu (8.3% of all citations), Blackstone (7.9%), and Locke (2.9%). *Id.*

<sup>118</sup> Letter from John Adams to Thomas Jefferson (June 28, 1813), in 2 THE ADAMS-JEFFERSON LETTERS 339-40 (Lester J. Cappon ed., 1959).

George Washington said that “[o]f all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports.”<sup>119</sup> “[N]ational morality,” Washington continued, could not “prevail in exclusion of religious principle.”<sup>120</sup> Anyone who would subvert “these great pillars of human happiness,” according to Washington, could not “claim the tribute of patriotism.”<sup>121</sup> James Madison asked the Virginia Ratification Convention, “Is there no virtue among us? If there be not we are in a wretched situation . . . to suppose that any form of government will secure liberty or happiness without any virtue in the people is a chimerical idea.”<sup>122</sup>

“Liberty” to the Framers was a term of distinction, to be contrasted with “license,” or abuse of liberty. It meant not license for self-indulgence, but to do that “which is good, just and honest” and included civil, religious and property rights, and freedom from excessive taxation.<sup>123</sup> The Framers believed that “to be possessed liberty must be limited”<sup>124</sup> because, as Jefferson said, it is a “gift of God” which is not to be violated “but with His wrath.”<sup>125</sup>

The Constitution’s purpose is to protect the peoples’ liberties from the tyranny of men and government. This tyranny is what the Framers feared the most. They adhered to Christian principles because they had been taught by Montesquieu that “[t]he Christian religion is a stranger to mere despotic power.”<sup>126</sup> Thus, as Alice Baldwin asserts, “[t]he constitutional convention and the written constitution were the children of the pulpit.”<sup>127</sup>

Madison, defending the Constitution in the *Federalist Papers*, affirms that the Constitution was “a compact among the States” that stands on “the great principle of self-preservation; to the transcendent law of nature and of nature’s God.”<sup>128</sup> In fact, Madison stated the “first” of the “best guides” in determining the meaning of the Constitution was “the *Declaration of Independence* as the fundamental act of union of

<sup>119</sup> Washington, *supra* note 6, at 242.

<sup>120</sup> *Id.* at 243.

<sup>121</sup> When Washington spoke of “religion,” he obviously meant Christianity. He told the Delaware chiefs: “You do well . . . to learn our arts and ways of life, and above all, *the religion of Jesus Christ*.” George Washington, Address to Delaware Chiefs (1797), *reprinted in THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES: 1749-1799*, at 55 (John C. Fitzpatrick ed., 1936).

<sup>122</sup> 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 536-37 (Jonathan Eliot ed., 1901) [hereinafter THE DEBATES].

<sup>123</sup> WALTER BERNS, FREEDOM, VIRTUE AND THE FIRST AMENDMENT 228 (1957); *see also* McDONALD, *supra* note 85, at 70; BALDWIN, *supra* note 65, at 69.

<sup>124</sup> RUSSELL KIRK, THE CONSERVATIVE MIND 31 (1990) (quoting Edmund Burke).

<sup>125</sup> DUMBAULD, *supra* note 20, at 59.

<sup>126</sup> MONTESQUIEU, *supra* note 53, at 322.

<sup>127</sup> BALDWIN, *supra* note 65, at 134.

<sup>128</sup> THE FEDERALIST NO. 44 (James Madison).

these states."<sup>129</sup> All of this, no doubt, is a major factor in why Madison could say that the Convention had surmounted so many difficulties with an almost unprecedented unanimity of opinion. "It is impossible for the man of pious reflection," Madison said, "not to perceive in it a finger of that Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the revolution."<sup>130</sup>

It seems God had blessed their efforts for adhering to His laws. Founding Father John Jay, a *Federalist* co-author and our first Chief Justice, said that God had given Americans the choice of their rulers, "and it is the duty . . . of our Christian nation to select and prefer Christians for their rulers."<sup>131</sup> The enlightened Frenchman Alexis de Tocqueville, after visiting the America established by the Founding Fathers in the 1830s, wrote this about Christianity and America:

There is no country in the world where the Christian religion retains a greater influence over the souls of men than in America. . . . Religion in America takes no direct part in the government of society, but it must be regarded as the first of their political institutions; for if it does not impart a taste for freedom, it facilitates the use of it. . . . I do not know whether all Americans have a sincere faith in their religion—for who can search the human heart?—but I am certain that *they hold it indispensable to the maintenance of republican institutions.*<sup>132</sup>

It is with this faith that the Founders designed a Constitution that was meant to keep the new American federal government, including the federal judiciary, in check.

### *B. A Federal Government of Enumerated Powers: The Victory of the Federalists*

George Washington, like Jefferson, saw civil government as an explosive power that must be bound down by the Constitution's chains. He said government is not reason or eloquence—"it is force! Like fire, it is a dangerous servant and a fearful master."<sup>133</sup> It is important to

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<sup>129</sup> Harry V. Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States?*, 10 UNIV. PUGET SOUND L. REV. 363 (Spring 1987) (quoting 9 THE WRITINGS OF JAMES MADISON 219-22 (Gaillard Hunt ed., 1910)) (emphasis added).

<sup>130</sup> THE FEDERALIST NO. 37 (James Madison). America's first Constitution, the Articles of Confederation, is also dated "in the year of our Lord" and makes reference to "the Great Governor of the world." ARTICLES OF CONFEDERATION art. XIII, para. 2.

<sup>131</sup> BARTON, *supra* note 72, at 35.

<sup>132</sup> 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 316 (Vintage Books 1955) (1835).

<sup>133</sup> W. CLEON SKOUSEN, THE FIVE THOUSAND YEAR LEAP: TWENTY-EIGHT IDEAS THAT CHANGED THE WORLD 165 (1981) (quoting 1 JACOB M. BRUADE, LIFETIME SPEAKERS ENCYCLOPEDIA 326 (1962)).

remember that at its founding the United States in the beginning consisted of thirteen different Colonies, all of which were independent of the others in their laws, civil governments, and political systems. That they eschewed a powerful central government and wanted to retain their independence to the greatest extent possible is confirmed by the basic documents relating to America's founding.<sup>134</sup>

The Constitution delegated certain enumerated powers to the federal government while reserving the states' control over all others. Thus, each state maintained its political sovereignty,<sup>135</sup> as opposed to legal sovereignty,<sup>136</sup> as well as its independence from the other states. Alexander Hamilton and James Madison repeatedly acknowledged this in the *Federalist Papers*, long recognized as a great authority on the Constitution.<sup>137</sup> Madison wrote that "[e]ach State in ratifying the Constitution, is considered as a sovereign body, independent of all others"<sup>138</sup>—a sovereignty not to be violated by the federal government. He also asserted that the federal government's jurisdiction "extends to

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<sup>134</sup> See RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* 29 (1987). In 1776, both Richard Henry Lee's Resolution for Independence from Great Britain (which Congress approved) and the *Declaration of Independence* declared "that these United Colonies are free and independent States." *Id.* The Treaty of Paris of 1783, which contained the official declaration of America's independence from Great Britain after America's victory in the Revolutionary War, acknowledged the States to be free, "sovereign and independent." *Id.* America's first Constitution, the Articles of Confederation adopted in 1777, declared that "each State retains its sovereignty, freedom and independence, and every power . . . which is not by this Confederation expressly delegated . . . to the United States. ARTICLES OF CONFEDERATION art. II.

<sup>135</sup> This principle was upheld by the United States Supreme Court in *Ware v. Holton*, 3 U.S. (3 Dall.) 199 (1796).

<sup>136</sup> The Founders distinguished between political and legal sovereignty, the latter of which in their view belonged to God. For example, Justice James Wilson, a delegate to the Constitutional Convention, stated in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454 (1793), "To the Constitution of the United States the term sovereign, is totally unknown." John Quincy Adams declared, as despotic state sovereignty began to threaten the Union:

There is the Declaration of Independence, and there is the Constitution of the United States—let them speak for themselves. The grossly immoral and dishonest doctrine of state sovereignty, the exclusive judge of its own obligations, and responsible to no power on earth or in heaven, for the violation of them, is not there. The Declaration says it is not in me. The Constitution says it is not in me.

RUSHDOONY, *supra* note 59, at 38 (quoting AMERICAN PATRIOTISM: SPEECHES, LETTERS, AND OTHER PAPERS WHICH ILLUSTRATE THE FOUNDATION, THE DEVELOPMENT, THE PRESERVATION OF THE UNITED STATES OF AMERICA 321 (Selim H. Peabody ed., 1880)).

<sup>137</sup> See THE FEDERALIST NOS. 31, 32, 81, 82 (Alexander Hamilton); NOS. 39, 40, 42, 44, 62 (James Madison). Chief Justice John Marshall commented that the *Federalist* by Hamilton, Madison and John Jay "has always been considered as of great authority. It is a complete commentary on our constitution . . . Its intrinsic merit entitles it to this high rank." *Cohens v. Virginia*, 19 U.S. 264, 418 (1821).

<sup>138</sup> THE FEDERALIST NO. 39 (James Madison).

certain *enumerated* objects only, and leaves to the several States a residuary and inviolable sovereignty over *all other objects*.<sup>139</sup>

In addition, Founding Father James Wilson, who later became a Supreme Court justice, told the Pennsylvania Convention that, consistent with the Latin maxim *expressio unius est exclusio alterius*,<sup>140</sup> “everything not expressly mentioned will be presumed to be purposely omitted.”<sup>141</sup> And, Chief Justice John Marshall himself held that “[i]n America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.”<sup>142</sup>

Madison also stated the powers delegated by the Constitution through Article I, section 8 to the federal government are “few and defined,” while those retained by the state governments “are numerous and indefinite.”<sup>143</sup> The Framers, who devoutly subscribed to Montesquieu’s doctrine of the separation of powers,<sup>144</sup> divided the powers of the federal government into three separate branches: the legislative, the executive, and the judicial.<sup>145</sup> In the words of Chief Justice Marshall,

<sup>139</sup> *Id.* (emphasis added).

<sup>140</sup> The English translation of this Latin phrase is “the expression of one thing is the exclusion of another.” BLACK’S LAW DICTIONARY 581 (6th ed. 1990).

<sup>141</sup> BERGER, *supra* note 134, at 65.

<sup>142</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819). This sovereignty is complete. THE FEDERALIST NO. 31 (Alexander Hamilton). The Tenth Amendment removes all doubt in this respect. The Tenth Amendment to the Constitution provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. Based on the Constitution’s limited enumeration of powers of the federal government and the Tenth Amendment, President Thomas Jefferson believed it unconstitutional for the Federal Government to spend money for “public education, roads, rivers, canals, and . . . other objects of improvements.” CLARENCE CARSON, THE BEGINNING OF THE REPUBLIC 1775-1824, at 173 (1984). Presidents James Madison and James Monroe both vetoed such legislation based on the Tenth Amendment. *Id.*

<sup>143</sup> THE FEDERALIST NO. 45 (James Madison). Madison wrote that federal powers “will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which . . . the power of taxation will for the most part be connected.” *Id.* The states’ powers “will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State.” *Id.*

<sup>144</sup> THE FEDERALIST NO. 47 (James Madison). Montesquieu’s separation of powers doctrine is similar to the legislative, executive, and judicial powers of God. For example, *Isaiah* 33:22 states: “For the Lord is our judge, the Lord is our lawgiver, the Lord is our king. He will save us.” *Romans* 13 states that civil government is “ordained of God,” *Romans* 13:1, and that public officials are “minister(s) of God.” *Romans* 13:4 (N.I.V.).

<sup>145</sup> The Constitution provides that “[a]ll legislative Powers herein granted shall be vested in” Congress. U.S. CONST. art. I, § 1. In addition to the procedural, organizational and electoral powers identified in the Constitution, *see id.* art. I, §§ 2-7; *see also id.* arts. II-V, the Constitution enumerates Congress’ approximately twenty-three legislative powers. *Id.* art. I, § 8. The Constitution vests the Executive power in the President, *id.* art. II, §§ 1-

"[T]he legislature *makes*, the executive *executes* and the judiciary *construes* the law."<sup>146</sup>

### C. The Supremacy Clause

The Federalists proposed Article VI, clause 2, the Supremacy Clause, which passed unanimously.<sup>147</sup> It states, in pertinent part, "*This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.*"<sup>148</sup> According to Professor Raoul Berger, "in Pursuance thereof" means "consistent with" and "not repugnant to" the Constitution.<sup>149</sup> Hamilton stated that acts by the federal authorities not in pursuance of Constitutional powers "but which are invasions of the residuary authorities," the states, are not supreme law.<sup>150</sup> "These will be," Hamilton maintained, "merely acts of usurpation and will deserve to be treated as such."<sup>151</sup> Hamilton told the New York Ratification Convention that "[t]he acts of the United States, therefore, will be absolutely obligatory as to all the proper objects and powers of the general government. . . . In the same manner the states have certain independent powers, in which their laws are supreme."<sup>152</sup> He also stated that "[t]he laws of the United States are supreme, as to all their proper constitutional objects; *the laws of the states are supreme in the same way.*"<sup>153</sup>

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3, and expressly gives the President veto power over legislation. *Id.* art. I, §7. Finally, the Contitution vests the judicial power in the Supreme Court and "in such inferior Courts" established by Congress. *Id.* art. III. Article III, section 2 limits the judicial power to those cases mentioned therein.

<sup>146</sup> *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 47 (1825).

<sup>147</sup> L. BRENT BOZELL, *THE WARREN REVOLUTION* 226 (1966).

<sup>148</sup> U.S. CONST. art. VI, cl. 2 (emphasis added). The complete text reads as follows: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.*

<sup>149</sup> RAOUL BERGER, *CONGRESS VS. THE SUPREME COURT* 232-33 (1969). Professor William Crosskey asserted that "in Pursuance thereof" meant "prosecution" or "process." 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 990-1002 (1953). However, Bozell showed that when the words were used at the Convention, it meant "in accord with" or "in keeping with." BOZELL, *supra* note 147, at 254. That Berger and Bozell are correct and Crosskey is wrong is confirmed by Hamilton's use of the phrase in THE FEDERALIST NO. 33. See *infra* note 168 and accompanying text. Thus, a congressional act invading a residuary authority would not be consistent with or in accord with the Constitution.

<sup>150</sup> THE FEDERALIST NO. 33 (Alexander Hamilton).

<sup>151</sup> *Id.*

<sup>152</sup> Speech by Alexander Hamilton Before the New York Ratification Convention, reprinted in 2 THE DEBATES, *supra* note 122, at 362.

<sup>153</sup> *Id.* at 355.

The Supremacy Clause does have explicit addressees, but they do not include the Supreme Court—it is not mentioned. The addressees are identified in the phrase “and *the Judges in every State* shall be bound thereby.”<sup>154</sup> The Supremacy Clause also does not mention anything about appealing any state judge’s ruling to the U.S. Supreme Court. Having rejected both a legislative and judicial federal supremacy over the states, the Framers designated state judges, not the Supreme Court, as guardians of the Constitution at the state level. Significantly, the only “supreme Laws” mentioned are “[t]his Constitution” and laws of the United States made in pursuance thereof. Not even by remote implication are Supreme Court decisions listed among what makes up supreme law.<sup>155</sup>

## V. THE EARLY EVOLUTION OF CONSTITUTIONAL LAW: FROM REJECTING THE COMMON LAW TO ACCEPTING THE NEW DEAL

### A. *The Rejection of the Common Law for Constitutional Cases*

#### 1. The Common Law’s Place in American Law

Justice Story, who subscribed to Cicero’s doctrine of a law above laws,<sup>156</sup> believed that the Constitution was “predicated on the existence of the Common Law.”<sup>157</sup> One legal scholar said the Common Law was

<sup>154</sup> U.S. CONST. art. VI, cl. 2 (emphasis added).

<sup>155</sup> Brinton Coxe says this provision of the Supremacy Clause “*liberates* [state judges] from the rule of [national supremacy] whenever U.S. laws are not made in pursuance of the U.S. Constitution.” BOZELL, *supra* note 147, at 256.

<sup>156</sup> MCCLELLAN, *supra* note 110, at 182.

<sup>157</sup> *Id.* at 178. Moreover, in *Vidal v. Girard*, 2 U.S. (2 How.) 127, 198 (1844), the Supreme Court acknowledged that the Common Law had its foundation in Christianity. “Attorney J.W. Erlich . . . cites an 1836 New Hampshire case where a judge decided a case in terms of the Bible, because the common law made such a procedure not only legitimate but basic.” WHITEHEAD, *supra* note 10, at 196 (citing JACOB W. ERLICH, *THE HOLY BIBLE AND THE LAW* (1962)).

“The very term *common law* was derived from the *jus commune* of the canonists of the Roman Catholic Church.” *Id.* at 194; see also HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 456 (1983). Eugen Rosenstock-Huessy maintains that the “Common Law was Christian law” and was, he says, “a union between universal Christian laws and custom” and had no national origin “but was the dowry of Christian baptism.” WHITEHEAD, *supra* note 10, at 194 (quoting EUGEN ROSENSTOCK-HUESSY, *OUT OF REVOLUTION* 271 (1969)).

Justice Story asserted that “[t]here never has been a period of history in which the Common Law did not recognize Christianity as lying at its foundation.” WHITEHEAD, *supra* note 10, at 197. “It is,” he said, “the law of liberty, and the watchful and inflexible guardian of private property and public rights.” *THE WISDOM OF THE SUPREME COURT* 34 (Percival E. Jackson ed., 1962).

properly described as one of “the Laws of the United States.”<sup>158</sup> Certainly, Madison admitted “that particular parts of the common law may have a sanction from the Constitution, so far as they are necessarily comprehended in the technical phrases which express the powers delegated to the government.”<sup>159</sup> In fact, it was held in *United States v. Smith*<sup>160</sup> that when terms defined at Common Law are included in the Constitution, the definitions “are necessarily included . . . as if they stood in the text.”<sup>161</sup> Chief Justice Marshall resorted to the Common Law to determine the meaning of the constitutional terms *habeas corpus* and *treason*.<sup>162</sup>

## 2. Recognition of Federal Common Law—*Swift v. Tyson*

Although it had been held in *United States v. Hudson*<sup>163</sup> that the federal government could not punish offenses not defined by statute (i.e., the Common Law),<sup>164</sup> Justice Story sought to correct the ruling in *Swift v. Tyson*,<sup>165</sup> a diversity of citizenship case involving commercial law.<sup>166</sup> Story held, writing for the Court, that the word “laws” in the Judiciary Act did not include court decisions because they were not laws “[i]n the ordinary use of language.”<sup>167</sup> According to Story, only state statutes “or long established local customs having the force of laws” were “laws.”<sup>168</sup> Where there was no controlling state statute, Story held that federal courts, in diversity cases, were free to make judgments independent of state court

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<sup>158</sup> MCCLELLAN, *supra* note 110, at 188 (citing 2 CROSSKEY, *supra* note 149, at 902)). Crosskey said the Common Law was generally regarded as a single, ascertainable body of law and was properly described as one of “the Laws of the United States.” *Id.*

<sup>159</sup> BERGER, *supra* note 149, at 195 n.5.

<sup>160</sup> 18 U.S. 153 (1820).

<sup>161</sup> *Id.* at 160.

<sup>162</sup> *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807) (finding that “for the meaning of the term *habeas corpus*, resort may be had unquestionably to the common law”); *United States v. Burr*, 25 F. Cas. 30, 159 (C.C. Va. 1807) (No. 14,193) (citing Coke, Hale, Foster, and Blackstone to justify defining treason to common meaning and finding it “scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it”).

<sup>163</sup> 11 U.S. (7 Cranch) 32 (1812).

<sup>164</sup> *Id.*

<sup>165</sup> 41 U.S. (16 Pet.) 1 (1842). Before *Swift*, Story had sought to correct *Hudson* in *United States v. Coolidge*, 25 F. Cas. 619 (C.C. Mass. 1813) (No. 14,857), *rev'd*, 14 U.S. (1 Wheat.) 415 (1816), by holding there is a federal Common Law, but he was reversed on appeal.

<sup>166</sup> *Swift*, 41 U.S. (16 Pet.) at 1.

<sup>167</sup> *Id.* at 18.

<sup>168</sup> *Id.* Chapter 20, section 34 of the 1789 Judiciary Act provided “that the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.” MCCLELLAN, *supra* note 110, at 181.



decisions based on Common Law.<sup>169</sup> Thus, *Swift* became the basis of a federal Common Law.<sup>170</sup>

### 3. The Rejection of Federal Common Law—*Erie Railroad Co. Tompkins*

Ninety-five years later, *Swift's* opponents finally gained a Court majority and overruled *Swift* through *Erie Railroad Co. v. Tompkins*.<sup>171</sup> Justice Louis Brandeis, writing for the Court in *Erie*, declared, "There is no federal general common law" and denied that the Common Law could be an aid to or basis in deciding federal questions.<sup>172</sup> He also held that state high court rulings, as well as state statutes, were "laws" that bound federal courts in diversity cases.<sup>173</sup> This decision violated Blackstone's principle that court decisions are not laws but merely evidence of what the laws are.<sup>174</sup>

Brandeis's first assertion is irreconcilable with the Court's own practice. For example, writer James McClellan says that although the rule of *stare decisis* is not found in the Constitution, it is a general principle of the Common Law and is, nevertheless, a rule of decision acknowledged by the Court.<sup>175</sup> Justice Robert Jackson could not understand Brandeis's denial that the Common Law could be an aid to or the basis of deciding federal questions.<sup>176</sup> He noted that Article I,

<sup>169</sup> MCCLELLAN, *supra* note 110, at 182.

<sup>170</sup> McClellan writes that the *Swift* doctrine was applied to wills in *Lane v. Vick*, 44 U.S. (3 How.) 464 (1845); to torts in *Chicago City v. Robbins*, 67 U.S. (2 Black) 497 (1862); to real property (titles) in *Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497 (1870); to mineral conveyances in *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349 (1910); to contracts in *Rowan v. Runnels*, 46 U.S. (5 How.) 134 (1847); and to damages in *Lake Shore & M.S.R. Co. v. Prentice*, 147 U.S. 101 (1893). MCCLELLAN, *supra* note 110, at 183.

<sup>171</sup> 304 U.S. 64 (1937).

<sup>172</sup> *Id.* at 78. Justice Holmes, an enemy of the Common Law, said *Swift* was "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." *Id.* at 79. Holmes said *Swift* rested on the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute." MCCLELLAN, *supra* note 110, at 184 (quoting *Black & White Taxicab Co. v. Brown & White Taxicab Co.*, 276 U.S. 518, 532-36 (1928) (Holmes, J., dissenting)). Some contended that *Swift* violated the Tenth Amendment. *Id.*

<sup>173</sup> MCCLELLAN, *supra* note 110, at 184-85.

<sup>174</sup> *Id.* at 188; see also 1 BLACKSTONE, *supra* note 89, at 61. In *Swift*, Justice Story asserted this rule of Blackstone without specifically mentioning Blackstone's name. See *Swift*, 41 U.S. (16 Pet.) at 18.

<sup>175</sup> MCCLELLAN, *supra* note 110, at 186.

<sup>176</sup> *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 469-71 (1942) (Jackson, J., dissenting). Justice Story himself said some provisions in the Constitution can take effect only by recourse to the Common Law (i.e., cases in law and equity as to admiralty and maritime jurisdiction). MCCLELLAN, *supra* note 110, at 188. Jackson, based on the research of Supreme Court historian Charles Warren, concluded that both *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812), and *United States v. Coolidge*, 25 F. Cas. 619 (C.C. Mass. 1813) (No. 14,857), *rev'd*, 14 U.S. (1 Wheat.) 415 (1816), had been wrongly decided.

section 10, the Contracts Clause, prohibits laws impairing the obligation of contracts.<sup>177</sup> Since the Constitution does not say what a contract is, the Court, Jackson said, “has not hesitated to read the common-law doctrine of consideration into the contract clause.”<sup>178</sup> Chancellor James Kent said that without the Common Law, “the courts would be left to roam at large in the trackless field of their own imaginations.”<sup>179</sup> Thus, assuming federal court jurisdiction was restricted to that enumerated in Article III, section 2, a federal Common Law made good sense and would not violate states’ rights.<sup>180</sup>

Story was impeccably correct in *Swift*. Evidence abounds that absence of any mention of the Common Law in the Constitution caused great concern among the people.<sup>181</sup> John Adams described the Common Law as “that most excellent monument of human art”<sup>182</sup> and as Vice President told the U.S. Senate that had he “ever imagined that the Common Law had not by the Revolution become the law of the United States under its new government, he never would have drawn his sword in the contest.”<sup>183</sup>

Direct reference to the Common Law was actually included in the Seventh Amendment and thus is even a part of the Constitution.<sup>184</sup> But, having ruled as it did in *Erie*, the Supreme Court has in effect rendered federal general common law a dead letter and with it dealt a major blow to the foundation of American law, as well as its Christian base. That development had long range ramifications, particularly as to religion. *Erie’s* assumption that court decisions are laws greatly enhanced judicial power.

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MCCLELLAN, *supra* note 110, at 176 (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 38 HARV. L. REV. 49 (1923)). Warren, in his essay, explained that through section 10 of the original draft of the 1789 Judiciary Act, federal courts were given “cognizance of all crimes and offences that shall be cognizable under the authority of the United States *and defined by the laws of the same.*” *Id.* (emphasis added). This indicated such crimes must be defined by Congress. *Id.* However, the Senate struck out the words “*and defined by the laws of the same.*” *Id.* (emphasis added). One scholar concluded that striking out those words “strongly indicates intent to extend jurisdiction to crimes at Common Law and under the law of nations.” *Id.* (citing JOSEPH M. SMITH, DEVELOPMENT OF LEGAL INSTITUTIONS 551-52 (1965)).

<sup>177</sup> MCCLELLAN, *supra* note 110, at 186.

<sup>178</sup> *Id.*

<sup>179</sup> 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 373 (9th ed. 1858).

<sup>180</sup> See U.S. CONST. art. III, § 2.

<sup>181</sup> Jones, *supra* note 60, at 29 (citing ROBERT A. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1701(1955)).

<sup>182</sup> Corwin, *supra* note 68, at 18.

<sup>183</sup> MCCLELLAN, *supra* note 110, at 177.

<sup>184</sup> The Seventh Amendment provides: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” U.S. CONST. amend VII.

## B. Evolution of the Meaning of Due Process

### 1. The Original Meaning of Due Process

The phrase “due process of law” is derived from *Magna Carta*’s “by the law of the land,” which, according to Lord Coke, meant “by the due course and process of law” in judicial proceedings.<sup>185</sup> The First Continental Congress declared that “Due Process” was shorthand for Coke’s definition,<sup>186</sup> which is exactly what the Supreme Court held in *Murray’s Lessee v. Hoboken Land & Improvement Co.*<sup>187</sup> In fact, Hamilton told the New York Assembly in 1787 that “the words ‘Due Process’ have a precise technical import, and are only applicable to the process and proceedings of the Courts of justice; *they can never be referred to an act of the legislature.*”<sup>188</sup> Lord Coke, Justice Story, and Chancellor Kent all held that the phrase relates to procedural process and criminal proceedings only.<sup>189</sup> It was never meant to be used in a substantive sense which would allow Courts to strike down legislative acts.

The Supreme Court held in *Hurtado v. California*<sup>190</sup> that the Fourteenth Amendment’s Due Process Clause “was used in the same sense and with no greater extent” than in the Fifth Amendment. As Justice Frankfurter said, “It ought not to require argument to reject the notion that due process of law meant one thing in the [Fifth] Amendment and another in the [Fourteenth].”<sup>191</sup>

### 2. *Dred Scott* and Substantive Due Process

However, the Supreme Court used the Due Process Clause to strike down legislative acts in *Dred Scott v. Sandford*,<sup>192</sup> which Justice Antonin Scalia classifies as the first *substantive* due process case.<sup>193</sup> In the 1857

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<sup>185</sup> BERGER, *supra* note 149, at 195. The Fifth Amendment’s due process clause provides: “No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .” U.S. CONST. amend V. The Fourteenth Amendment’s due process clause states: “No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .” *Id.* amend. XIV.

<sup>186</sup> BERGER, *supra* note 149, at 225-26.

<sup>187</sup> 59 U.S. (18 How.) 272 (1855).

<sup>188</sup> BERGER, *supra* note 149, at 222.

<sup>189</sup> *Id.* at 226-27. Charles Warren says the word “liberty” as used in the due process clauses of the Fifth and Fourteenth Amendments had the same meaning as it did at Common Law, which was simply “liberty of the person”, or, in other words, “the right to have one’s person free from physical restraint.” MCCLELLAN, *supra* note 110, at 156 (quoting Charles Warren, *The New Liberty Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 440 (1926)).

<sup>190</sup> 110 U.S. 516, 535 (1884).

<sup>191</sup> *Adamson v. California*, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring).

<sup>192</sup> 60 U.S. (19 How.) 393 (1857).

<sup>193</sup> ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 24 (1997).

case, Chief Justice Roger Taney, writing for the Court, held that owning slaves was a Constitutional right and declared the Missouri Compromise unconstitutional, thereby denying the federal government the power to prevent slavery in any territory or state and the power to permit a state to bar slavery within its territory.<sup>194</sup>

The crux of Taney's ruling was that when the federal government takes possession of a territory "[i]t has no power of any kind beyond [the Constitution]; and it cannot . . . assume discretionary or despotic powers which the Constitution has denied to it."<sup>195</sup> Judge Bork called the ruling a "blatant distortion of the original understanding of the Constitution" since there is no "constitutional provision that can be read with any semblance of plausibility to confer a right to own slaves."<sup>196</sup> "How then," Bork asked, "can there be a constitutional right to own slaves where a statute forbids it?"<sup>197</sup> Taney created this right by changing the plain meaning of the Fifth Amendment's due process component by saying that

*an act of Congress* which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.<sup>198</sup>

Thus, Taney utilized the Fifth Amendment's due process component, which simply requires that tribunals applying laws to persons do so through fair procedures,<sup>199</sup> to transform this requirement into a rule concerning the allowable *substance* of a statute—hence the name *substantive* due process<sup>200</sup>—a concept that has since "been used

<sup>194</sup> Bork said the Missouri Compromise was repealed in 1854, but that "Taney's ruling was not entirely gratuitous, because Scott had been in free territory while the Compromise was in effect." BORK, *supra* note 27, at 30.

<sup>195</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 449 (1856).

<sup>196</sup> BORK, *supra* note 27, at 30. Bork continued:

It may well have been the case that the federal government could not then have freed slaves in states where the law allowed slavery without committing a taking of property for which the fifth amendment . . . would have required compensation. But that is a far different matter from saying that the Constitution requires the federal government or a state government to permit and protect slavery in areas under its control.

*Id.*

<sup>197</sup> *Id.* at 31.

<sup>198</sup> *Dred Scott*, 60 U.S. (19 How.) at 450 (emphasis added).

<sup>199</sup> See U.S. CONST. amend V (stating "nor shall any person . . . be deprived of life, liberty, or property, without due process of law").

<sup>200</sup> Professor John Hart Ely said there is "no avoiding the fact that the word that follows 'due' is 'process.'" BORK, *supra* note 27, at 32 (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST* 18 (1980)). "[S]ubstantive due process," Ely said, "is a contradiction in terms— sort of like 'green pastel redness.'" *Id.*

countless times by judges . . . to write their personal beliefs into a document that . . . does not contain those beliefs.<sup>201</sup>

For many years substantive due process was utilized to protect economic liberties.<sup>202</sup> Among cases employing substantive due process was *Lochner v. New York*,<sup>203</sup> which invalidated a state law limiting bakery employees' hours and created a right to contract not mentioned in the Constitution.<sup>204</sup> Economic substantive due process came to an end in 1937 in *West Coast Hotel Co. v. Parrish*,<sup>205</sup> where the Court upheld a state law setting minimum wages for women.<sup>206</sup>

### *C. The Evolution of the Fourteenth Amendment: The Bill of Rights Is Applied to the States*

#### 1. Early Rejection of the Incorporation Doctrine

Chief Justice Marshall, writing for the Court in *Barron v. Baltimore*,<sup>207</sup> held early on that the provisions of the Bill of Rights did not apply to state governments but restricted the federal government only.<sup>208</sup> Madison, in the first Congress, had proposed that portions of the Bill of Rights be applied to the states, but this was rejected.<sup>209</sup> Upon enactment of the Fourteenth Amendment in 1868,<sup>210</sup> some contended that the Bill of Rights had been incorporated in the Amendment's "privilege and immunities" clause and thus was applicable to the states as well as the federal government. This logic was quickly rejected by the Supreme Court in the *Slaughter House Cases*.<sup>211</sup> Other cases decided immediately

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<sup>201</sup> *Id.* at 31.

<sup>202</sup> Economic substantive due process is no more justifiable than any other kind. One excellent book on economic due process is BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980).

<sup>203</sup> 198 U.S. 45 (1905).

<sup>204</sup> *Id.* at 54.

<sup>205</sup> 300 U.S. 379 (1937).

<sup>206</sup> *Id.* at 389.

<sup>207</sup> 32 U.S. (7 Pet.) 243 (1833).

<sup>208</sup> *Id.* at 250-51.

<sup>209</sup> LEONARD LEVY, *FREEDOM OF SPEECH AND PRESS* 222 (1963).

<sup>210</sup> Examination of the origins of the Fourteenth Amendment reveals that it was not legally enacted. See *Dyett v. Turner*, 439 P.2d 266, 269 (Utah 1968). For a more detailed analysis, see Pinckney G. McElwee, *The Fourteenth Amendment to the Constitution of the United States and the Threat It Poses to Our Democratic Government*, 11 S.C. L. Q. 484 (1959) and Walter J. Suthon, Jr., *The Dubious Origin of the Fourteenth Amendment*, 28 TUL. L. REV. 22 (1953).

<sup>211</sup> 83 U.S. 36, 78-79 (1872). A reading of the Fourteenth Amendment reveals that the only Bill of Rights provision incorporated in it is the Fifth Amendment's due process component. See U.S. CONST. amend. XIV, § 1, the pertinent part of the Fourteenth Amendment, provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

after the Fourteenth Amendment's adoption also rejected "incorporation."<sup>212</sup>

## 2. The Incorporation Doctrine Adopted in Part

For fifty-seven years following the Fourteenth Amendment's adoption, the Supreme Court, in numerous other precedents, consistently rejected, except in one instance,<sup>213</sup> arguments that the Fourteenth Amendment caused the provisions of the first eight amendments to apply to state governments.<sup>214</sup> Only one of the forty-three justices who had ruled on the Fourteenth Amendment's scope after its enactment believed in this "incorporation" of those amendments.<sup>215</sup> Suddenly, however, without explanation, the Supreme Court assumed in *Gitlow v. New York*<sup>216</sup> that "the freedom of speech and of the press" were among the "liberties" protected by the Fourteenth Amendment's Due

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Id.* amend. XIV, § 1.

<sup>212</sup> See, e.g., *Twitchell v. Pennsylvania*, 74 U.S. (7 Wall.) 321 (1869) (holding that the Fifth and Sixth Amendments did not apply to the states).

<sup>213</sup> See *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897). The Fifth Amendment provides that "private property" shall not "be taken for public use without just compensation." U.S. CONST. amend. X. In *Chicago*, it was held that the Fourteenth Amendment's due process clause prohibits a taking by a State the same as the Fifth Amendment does—even though the Fourteenth Amendment's authoring Congress rejected an attempt to attach a "just compensation" clause to it. HERMINE H. MEYER, *THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT* 101 (1977).

<sup>214</sup> See, e.g., *Walker v. Sauvinet*, 92 U.S. 90 (1875) (rejecting the theory that the privileges and immunities clause incorporates the Seventh Amendment's right to trial by jury); *United States v. Cruikshank*, 92 U.S. 542 (1875) (holding that the right to bear arms does not apply to the states); *Hurtado v. California*, 110 U.S. 516 (1884) (holding the Fourteenth Amendment's Due Process Clause does not require the states to seek an indictment by a grand jury); *In re Kemmler*, 136 U.S. 436 (1890) (stating the Fourteenth Amendment does not prevent a state from using the death penalty); *McElvaine v. Brush*, 142 U.S. 155 (1895) (holding same); *Maxwell v. Dow*, 176 U.S. 581 (1900) (holding that "due process" does not require an indictment by a grand jury in a state prosecution for murder); *Twining v. New Jersey*, 211 U.S. 78 (1908) (holding that defendant's failure to testify being used as self-incrimination does not violate due process); *Prudential Ins. Co. v. Cheek*, 259 U.S. 530 (1922) (stating that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about freedom of speech . . . ; nor . . . does it confer any right of privacy to persons or corporations").

<sup>215</sup> *Adamson v. California*, 332 U.S. 46, 62 (1947) (Frankfurter, J., concurring). Justices who rejected the incorporation doctrine included Justices Miller, Davis, Bradley, Waite, Matthews, Gray, Fuller, Holmes, Brandeis, Stone, and Cardozo. *Id.* The exception was John Marshall Harlan. See *Twining v. New Jersey*, 211 U.S. 78 (1908).

<sup>216</sup> 265 U.S. 652 (1925).

Process Clause from impairment by the states.<sup>217</sup> Historian Charles Warren wrote that the Court “by one short sentence” and “without even mentioning these previous cases, assumes, without argument, that this right of free speech . . . is protected by the Fourteenth Amendment.”<sup>218</sup>

Subsequently, Justice Hugo Black, dissenting in *Adamson v. California*,<sup>219</sup> argued that all of the first eight amendments to the Constitution had been incorporated into the Fourteenth Amendment and were binding on the states and the federal government. In response, Professor Charles Fairman, in a famous law review essay, contrasted the “mountain of evidence” against the Incorporation Doctrine with “the few stones and pebbles” in support<sup>220</sup> and “conclusively disproved” Black’s contention.<sup>221</sup>

### 3. The Case Against the Incorporation Doctrine

Fairman said the objective of the Fourteenth Amendment’s framers was to insure the constitutionality of the 1866 Civil Rights Act, the sole purpose of which was to guarantee black men certain civil rights then being denied (i.e., the rights to contract, sue, testify, travel, and own property).<sup>222</sup> Virtually every speaker gave this explanation in the Congressional debates; no mention was made of the Bill of Rights.<sup>223</sup> Moreover, the Court held early on during the Fourteenth Amendment’s existence in *Ex parte Virginia*<sup>224</sup> that the amendment’s enforcement power *resided only in Congress and not the federal courts*.<sup>225</sup> Had incorporation occurred, wholesale changes would have been required in state laws.<sup>226</sup> Congress even admitted new states into the Union with constitutions incompatible with the federal Bill of Rights.<sup>227</sup>

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<sup>217</sup> *Id.* at 666.

<sup>218</sup> Warren, *supra* note 189, at 433.

<sup>219</sup> *Adamson*, 332 U.S. at 74-75 (Black, J., dissenting).

<sup>220</sup> Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 134 (1949); see also RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989); William D. Graves, *The Bill of Rights, Its Purpose and Meaning and Fourteenth Amendment Incorporation: Original and Current Understandings*, 13 J. CHRISTIAN RECONSTRUCTION 163 (1994).

<sup>221</sup> ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 102 (1962) (discussing Professor Fairman’s law review article).

<sup>222</sup> Fairman, *supra* note 220, at 7.

<sup>223</sup> RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 23 (1977).

<sup>224</sup> 100 U.S. 339 (1879).

<sup>225</sup> *Id.* at 345-46 (emphasis added). Section 5 of the Fourteenth Amendment states, “The Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XIV, § 5.

<sup>226</sup> See Fairman, *supra* note 220, at 84-132 (giving examples of the changes that would be required in state laws). Had the Fourteenth Amendment applied the Bill of Rights to the States, immediate changes would have been required in states laws (1) that allowed an accused to be charged with an “infamous crime” upon information rather than

Perhaps the most compelling evidence against the Incorporation Doctrine was the "ill-fated"<sup>228</sup> Blaine Amendment,<sup>229</sup> first introduced in Congress in 1875, seven years after the Fourteenth Amendment's adoption.<sup>230</sup> Except for substituting the word "State" for "Congress," the Blaine Amendment contained language virtually identical to the First Amendment, providing that "[n]o State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof."<sup>231</sup> It failed passage twenty different times.<sup>232</sup> In the Congress of 1875-76, which considered the Blaine Amendment, were twenty-three members of the Congress that wrote the Fourteenth Amendment.<sup>233</sup> Not one ever suggested that the Bill of Rights was incorporated into the Fourteenth.<sup>234</sup>

So convincing was Fairman's essay that the Supreme Court in *Bartkus v. Illinois*<sup>235</sup> held that the Fourteenth Amendment's Due Process Clause did not apply the Fifth Amendment's double jeopardy clause or "any of the provisions of the first eight amendments" to the States.<sup>236</sup> The Court declared that "the relevant historical materials . . . demonstrate conclusively that Congress [and the ratifying state legislatures] did not contemplate that the [Fourteenth] Amendment was a short-hand incorporation of the first eight amendments making them applicable as explicit restrictions upon the States."<sup>237</sup> Nevertheless, the Court, utilizing substantive due process, has long since abandoned *Bartkus* and again assumed incorporation, turning the Bill of Rights on its head by bringing within the Court's purview virtually all the objects that had been thought left to the states by the Tenth Amendment.

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"indictment" by a Grand Jury, (2) that permitted some criminal prosecutions to be tried without a full twelve-man jury as required by the Fifth Amendment, and (3) that denied jury trial in an Common Law action where the value in controversy exceeds \$20 as required by the Seventh Amendment. *Id.* at 82. Moreover, a hotly debated proposal in an Illinois State Constitutional Convention in 1869-70 was abolishment of the grand jury. *Id.* at 98-99. Yet, grand jury supporters "never so much as suggested that the Fourteenth Amendment incorporated the Bill of Rights." *Id.* at 99.

<sup>227</sup> Graves, *supra* note 220, at 190.

<sup>228</sup> Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939, 941 (1951).

<sup>229</sup> 4 CONG. REC. 175 (1875).

<sup>230</sup> Fairman, *supra* note 220, at 91; *see also* Meyer, *supra* note 228, at 941.

<sup>231</sup> 4 CONG. REC. 175; Meyer, *supra* note 228, at 941.

<sup>232</sup> *See* Michael A. Musmanno, PROPOSED AMENDMENTS TO THE CONSTITUTION 182 (1929).

<sup>233</sup> *Id.* at 941.

<sup>234</sup> *See* Fairman, *supra* note 220, at 101. If the 14th Amendment had incorporated the Bill of Rights, Blaine's amendment would have been superfluous.

<sup>235</sup> 359 U.S. 121 (1959).

<sup>236</sup> *Id.* at 125 n.3.

<sup>237</sup> *Id.*



*D. The New Deal and the Court:  
Social Darwinism Enters Constitutional Law*

1. FDR Shakes the Independence of the Court

The Great Depression of 1929 brought President Franklin Roosevelt, his New Deal, and a multitude of new and expensive proposals and federal programs,<sup>238</sup> most of which were inconsistent with Article I, section 8 and initially were held to be so by the Supreme Court.<sup>239</sup> These Court rulings infuriated FDR, who said that “[w]e must find a way to take an appeal from the Supreme Court to the Constitution.”<sup>240</sup> One way he wanted to do this was to pack the Court by appointing additional justices who were sympathetic to his views to the bench, but he backed off due to popular outcry against his scheme.<sup>241</sup> However, as aging justices gradually retired, FDR appointed justices favorable to the New Deal.<sup>242</sup> Moreover, Justice Owen Roberts, for no apparent reason, began to rule more favorably on FDR’s programs in what has been called “the switch in time that saved nine.”<sup>243</sup> Roosevelt finally succeeded in remaking the Court, thus giving his New Deal programs Court-proclaimed constitutional validity.<sup>244</sup> One writer said the Court’s jurisprudence after 1937 “came to

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<sup>238</sup> H.L. Mencken, a New Deal opponent, said it was a “political racket,” a “series of stupendous bogus miracles,” with “constant appeals to class envy and hatred,” treating government as “a milch-cow with 125 million teats.” PAUL JOHNSON, *A HISTORY OF THE AMERICAN PEOPLE* 762 (1997).

<sup>239</sup> *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935) (striking down the Railroad Retirement Act of 1934); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down the Bituminous Coal Conservation Act of 1935); *United States v. Butler*, 297 U.S. 1 (1936) (striking down the Agricultural Adjustment Act of 1933).

One such program was the National Recovery Act (NRA) of 1932. In *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), commonly known as the “sick chicken case,” the NRA was declared an unconstitutional delegation of power to the President under Article I, § 8.

<sup>240</sup> BORK, *supra* note 27, at 54.

<sup>241</sup> *Id.* at 54.

<sup>242</sup> *Id.* at 55-56.

<sup>243</sup> *Id.* at 55.

<sup>244</sup> Even before completely succumbing to FDR, the Court began to move toward expanding the powers of the federal government. In *United States v. Butler*, 297 U.S. 1, 66 (1935), the Court, while invalidating the New Deal’s Agricultural Adjustment Act, adopted a broad view of the General Welfare Clause, basing this on Justice Story’s view. See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Ironically, Story apparently later narrowed his views after reading Madison’s notes on the Constitutional Convention. *Id.* at 305 n.132. Nevertheless, the broad view prevails and federal government spending and programs not authorized by Article I, section 8 abound. See U.S. CONST. art. I, § 8. Newspaper columnist James J. Kilpatrick reported several years ago that there were 975 federal assistance programs administered by fifty-two agencies costing more than \$50 billion annually. CLARENCE B. CARSON, *BASIC AMERICAN GOVERNMENT* 455 (1993).

be viewed almost uniformly as social Darwinism in legal garb and as a prime example of antidemocratic judicial activism.<sup>7245</sup>

## 2. The Beginnings of a Constitutional Revolution: Discrete and Insular Minorities

The Court's new-found commitment to social Darwinism made a huge impact in 1938, when the Court issued a decision that would prove to be one of the foundation cases of modern judicial activism. In *United States v. Carolene Products Co.*,<sup>246</sup> the Court upheld a congressional prohibition of interstate shipment of milk mixed with any fat or oil other than milk fat.<sup>247</sup> The Court rejected an attack on the statute, "saying that the judicial inquiry must be limited to . . . whether any state of facts either known or which could be *reasonably assumed* provided any support for the statute."<sup>248</sup> "This," Bork writes, "was to become a deadly formula" as the Court was ready "to engage in the most extended and improbable conjectures" as to why legislatures might have thought legislation was rational.<sup>249</sup> "The result," Bork asserts, "was the appearance of judicial review without the reality."<sup>250</sup>

However, the *Carolene Products* Court went even further in its famous footnote four, where, incredibly, Justice Harlan Stone maintained that a much narrower operational scope existed for the presumption of constitutionality when legislation appears on its face "to be within a specific prohibition of the Constitution."<sup>251</sup> Justice Stone then suggested that legislation restricting the political processes that ordinarily are expected to cause undesirable legislation to be repealed may be "subjected to more exacting judicial scrutiny" under the Fourteenth Amendment's general prohibitions "than are most other types of legislation."<sup>252</sup> Then came the apparent point of the footnote: "whether prejudice against *discrete and insular minorities* may be a special condition, which tends seriously to curtail the operation of those

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<sup>245</sup> MICHAEL S. GREVE, *REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN* 14 (1999).

<sup>246</sup> 304 U.S. 144 (1938).

<sup>247</sup> *Id.*

<sup>248</sup> BORK, *supra* note 27, at 58.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Carolene Products*, 304 U.S. at 152 n.4. This presumption was one, Bork said, that "seems decidedly odd" for legislation that is constitutionally prohibited; if no prohibition appears in the Constitution, the constitutionality "would seem indisputable." BORK, *supra* note 27, at 59.

<sup>252</sup> *Carolene Products*, 304 U.S. at 152 n.4. Bork says suggesting that this legislation "might not be subjected to more exacting scrutiny seems almost disingenuous" since the Court had already shown it was prepared to enforce that level of scrutiny against state legislation. BORK, *supra* note 27, at 59.

political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judiciary inquiry.<sup>7253</sup>

Bork concludes that since the Constitution protects religious, national, and racial minorities, “discrete and insular minorities” apparently refers to minorities that cannot prevail in the political process because of “prejudice” which, except for governmental discrimination, is not prohibited by the Constitution *per se*.<sup>7254</sup> How, Bork pointedly asks, is the Court to know if a minority lost in the legislature “because of ‘prejudice,’ as opposed to morality, prudence, or any other legitimate reason?”<sup>7255</sup>

Bork continues: “The Court . . . can ‘know’ whether prejudice or morality is in play only by deciding whether it thinks the reason for the legislative action is good.”<sup>7256</sup> Thus, Bork contends the “discrete and insular minority” formula “means nothing more than that the Justices will read into the Constitution their own subjective sympathies and social prejudices.”<sup>7257</sup> Footnote four, Bork maintains, laid “the doctrinal foundation of the Warren Court” and “adumbrated a constitutional revolution.”<sup>7258</sup>

### 3. Planting the Seeds of Judicial Veto Power over Legislation with Substantive Equal Protection

Four years later, the Court continued its Darwinistic judicial activism in *Skinner v. Oklahoma*,<sup>259</sup> where the Court struck down a law providing for sterilization of habitual criminals, a law some regard as shocking, cruel, and uncivilized.<sup>260</sup> The Court held that the statute was unconstitutional because stealing and embezzling identical amounts of money were treated differently.<sup>261</sup> A three-time larcenist was subject to sterilization while a three-time embezzler was not<sup>262</sup>—an invidious discrimination which Justice William O. Douglas claimed, writing for the Court, was a violation of the Fourteenth Amendment’s Equal Protection Clause.<sup>263</sup>

The *Skinner* ruling, Bork states, “remade the Equal Protection Clause in such a way that it soon became not the last but the first resort

<sup>253</sup> *Carolene Products*, 304 U.S. at 152 n.4.

<sup>254</sup> BORK, *supra* note 27, at 60.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 61.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> 316 U.S. 535 (1942).

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 538-39.

<sup>263</sup> *Id.* at 541.

to constitutional argument<sup>2264</sup> and “was the beginning of . . . ‘substantive equal protection.’”<sup>2265</sup> The ruling, Bork writes, “gave judges a new power to read their likes and dislikes into the Constitution”—a power that “did not come to its full fruition . . . until the appearance of the Warren Court.”<sup>2266</sup> Bork warns: “When a judge assumes the power to decide which distinctions made in a statute are legitimate and which are not, he assumes the power to disapprove of any and all legislation, because all legislation makes distinctions.”<sup>2267</sup>

## VI. THE WARREN COURT AND JUDICIAL REVOLUTION

### A. *Evolving Law Comes Out of the Closet*

As we have seen, the protections the Founders built into the Constitution against judicial activism gradually began to wear away over the first 160 years of the Constitution’s existence. That erosion process has dramatically escalated over the last fifty years. Starting in 1954, judicial activism and social Darwinism came out of the closet and to the forefront of Constitutional jurisprudence thanks to Chief Justice Earl Warren and his Court.

#### 1. Sociological Law and the Constitution: *Brown v. Board of Education*

In 1944, Gunnar Myrdal published *An American Dilemma*, in which he asserted that America was too deeply racist a country for the wrongs against blacks to be corrected by congressional action.<sup>268</sup> Believing “the masses are impervious to rational argument” and that the enlightened elite ought to make decisions on behalf of the people for their own good, Myrdal exhorted the Supreme Court to step in where democracy had failed and end segregation of public schools which the Court had previously held did not violate the Fourteenth Amendment’s Equal Protection Clause.<sup>269</sup>

Writer Paul Johnson notes that Myrdal’s book became the bible of Thurgood Marshall, head of the NAACP, and was studied by liberal Supreme Court justices, who were enthusiastic about the Myrdal

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<sup>264</sup> BORK, *supra* note 27, at 63.

<sup>265</sup> *Id.* at 64.

<sup>266</sup> *Id.* at 67.

<sup>267</sup> *Id.* at 65.

<sup>268</sup> JOHNSON, *supra* note 238, at 952. According to Johnson, Myrdal was a Swedish politician who was “a disciple of Nietzsche and his theory of the Superman.” *Id.* Myrdal believed “[d]emocratic politics are stupid,” which led him to utilize social engineering in Swedish politics. *Id.*

<sup>269</sup> *Id.* The Court had previously held that “separate, but equal” black public schools were not unequal. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

approach.<sup>270</sup> This enthusiasm resulted in the landmark case of *Brown v. Board of Education*<sup>271</sup> in 1954, the most momentous case of the Warren Court era,<sup>272</sup> in which the Court unanimously ruled that segregated public schools violated the Fourteenth Amendment's Equal Protection Clause.<sup>273</sup> While some feel that this decision was simply correcting the monstrous injustice of *Plessy*,<sup>274</sup> a look at the historical record indicates that the Court's attempt at constitutional interpretation was actually an experiment in social engineering.

When one examines the Congressional debates, the original drafts of the Fourteenth Amendment, and the actions of the ratifying states, there is absolutely no evidence of an intent to desegregate schools. Instead, one finds a great deal of evidence that the framers intended not to.

Prior to debating the Fourteenth Amendment, Congress had debated the Freedman's Bureau Bill and the Civil Rights Act of 1866.<sup>275</sup> The issue of desegregated schools arose on several occasions during these debates and, on each such occasion, it was resolved that the proposed legislation would not require desegregated schools.<sup>276</sup> With passage of the Civil Rights Act, its proponents sought to permanently guarantee its protections of blacks.<sup>277</sup> The Fourteenth Amendment followed relatively quickly to insure the constitutionality of the Civil Rights Act. At the time of its adoption, nineteen of the thirty-seven states had segregated schools.<sup>278</sup> None were abolished due to ratification, and within two years, two other states segregated schools.<sup>279</sup> During the debates on the amendment, Congress even passed legislation perpetuating segregated schools in the District of Columbia.<sup>280</sup> Yet, despite this evidence, the Court concluded that the intent of the framers was at best "inconclusive."<sup>281</sup>

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<sup>270</sup> JOHNSON, *supra* note 238, at 952.

<sup>271</sup> 347 U.S. 483 (1954).

<sup>272</sup> JOHNSON, *supra* note 238, at 953.

<sup>273</sup> *Brown*, 347 U.S. at 495. Justice Robert H. Jackson said during arguments that the case was before the Court because "action couldn't be obtained by Congress." JOHNSON, *supra* note 238, at 953. Thus, the Court had stepped in due to what it saw as a failure of Congress.

<sup>274</sup> *Plessy*, 163 U.S. 537 (1896).

<sup>275</sup> See CONG. GLOBE, 39th Cong., 1st Sess. 2869 (1866).

<sup>276</sup> *Id.* at 211, 474, 500, 1117.

<sup>277</sup> *Id.* at 211, 475, 2467, 2498.

<sup>278</sup> JAMES J. KILPATRICK, *THE SOVEREIGN STATES* 270 (1957).

<sup>279</sup> *Id.*

<sup>280</sup> Graves, *supra* note 220, at 191-92 (citing Act of July 28, 1866, ch. 308, 14 Stat. 343).

<sup>281</sup> *Brown*, 347 U.S. at 489. Of course, none of this is to say that desegregation in itself is a bad thing; it is the method of policy change that is objected to here.

Professor Alexander Bickel concludes that the Fourteenth Amendment carried out the relatively narrow objectives of the moderates and hence "was meant to apply neither to jury service, nor suffrage, nor anti-miscegenation statutes, nor segregation."<sup>282</sup> The evidence is clear that the sole reason for the Fourteenth Amendment was the very limited objective of guaranteeing blacks certain civil rights then being denied, such as the right to contract, sue, and own property.<sup>283</sup>

But, Chief Justice Earl Warren rejected the validity of this historical analysis and instead substituted his and the other Justices' views for the views of the Amendment's framers. In his opinion in *Brown*, Warren declared that, "we cannot turn the clock back to 1868 . . . . We must consider public education in the light of its full development and its present place in American life. . . . *Only in this way*," he said, "can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."<sup>284</sup> Thus, the historical study was a facade. What really mattered was not what the framers thought but the opinions of "experts" in sociology and psychology, and ultimately, the social beliefs of the nine men who decided the case.<sup>285</sup>

The Court, a part of the enlightened elite, had made a decision on behalf of the people for their own good in the first big *substantive* equal protection case. It was "substantive" because the Fourteenth Amendment simply and only forbids any state to deny "any person within its jurisdiction the equal protection of the law."<sup>286</sup> The Court in *Brown* construed this language to mean the laws must be equal, despite the fact that by the clause's own wording the laws themselves need not

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<sup>282</sup> Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955) (emphasis added).

<sup>283</sup> JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 163, 167, 180 (1956).

<sup>284</sup> *Brown*, 347 U.S. at 492-93 (emphasis added).

<sup>285</sup> *Id.* at 494 n.11. Citing a Kansas state court case as its legal authority, the Court concluded that segregated schools have a detrimental effect on black children. *Id.* This conclusion was reinforced by citation in the footnote referring to "modern authority" meaning studies in psychology and sociology. *Id.*

<sup>286</sup> U.S. CONST. amend. XIV, § 1.

be equal.<sup>287</sup> The Court expanded substantive equal protection even further in later cases.<sup>288</sup>

## 2. Setting the Stage for Major Changes in Constitutional Law

For many years, the Court concealed the fact that its jurisprudence was not anchored in the Founders' written Constitution but was anchored in the Court's made-up constitution and disguised in phrases like "fundamental rights,"<sup>289</sup> "substantive due process,"<sup>290</sup> or "the concept of ordered liberty."<sup>291</sup> Four years after its revolutionary decision in *Brown*, however, the Warren Court staked a claim that had never been overtly made before by a Court. In *Cooper v. Aaron*,<sup>292</sup> the Warren Court arrogantly claimed that its interpretation of the Fourteenth Amendment "is the *supreme law of the land*, and Article VI of the Constitution makes it of binding effect on the States." Such an interpretation elevates the Court's decisions to a status equal to the letter of the Constitution itself.<sup>293</sup> That same year, in *Tropp v. Dulles*,<sup>294</sup> the Court brazenly held

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<sup>287</sup> See U.S. CONST. amend. XIV, § 1 (stating "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws," not equality under the law). As the text indicates, only the protection must be equal. *Id.* Every person is entitled only to the same protection under the existing laws. *Id.*

Professor Alfred Avins posits that under the Court's distortion of the Equal Protection Clause, a French tourist on vacation in America would be entitled to vote since he is a "person" within the State's jurisdiction. Alfred Avins, *The Equal "Protection" of the Laws: The Original Understanding*, 12 N.Y. L. F. 385, 385-86 (1967).

<sup>288</sup> In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Court held that the Fifth Amendment's due process component has an "equal protection" component, which, of course, cannot be found in the actual text of that provision. Compare U.S. CONST. amend. XIV, § 1, with *id.* amend. V. In *Green v. Sch. Bd. of New Kent County*, 391 U.S. 430 (1968), the Court held that the Fourteenth Amendment required not just desegregation but integration of schools. In *Swann v. Charlotte-Mecklenberg Bd. of Ed.*, 402 U.S. 1 (1971), the Court held that the Fourteenth Amendment required busing of students to achieve racial balance.

<sup>289</sup> See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

<sup>290</sup> See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 324 (1937).

<sup>291</sup> See, e.g., *Shaughnessy v. United States*, 345 U.S. 206, 222 (1953).

<sup>292</sup> 358 U.S. 1 (1958).

<sup>293</sup> *Id.* at 18. If one is to accept such sophistry on its face, it would mean that the Court's own precedents, being the authentic Constitution, could not be overturned except through the Article V amending process. Article V of the Constitution provides in pertinent part:

The Congress, whenever two thirds of both House shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

U.S. CONST. art. V.

<sup>294</sup> 356 U.S. 86 (1958).

that refusal of a passport due to a military desertion conviction was “cruel and unusual” punishment based not on the historic meaning of those words in the Eighth Amendment (which was not even discussed), but rather on “*the evolving standards of decency that mark the progress of a maturing society.*”<sup>295</sup> Evolving law had finally come out of the closet—but only after first receiving a status that could not easily be defeated by its opponents! The stage was now set for the Court to make some major changes in the fabric of American society.

## B. *Evolving Standards of Crime and Capital Punishment*

### 1. Attacking the Death Penalty

It was through these “evolving standards” that the Court decided in *Furman v. Georgia*<sup>296</sup> that a state death penalty law was unconstitutional under the Eighth Amendment, which prohibits “cruel and unusual” punishments.<sup>297</sup> It mattered not to the Court that the Constitution’s Fifth Amendment makes express reference to “capital” crimes and provides that no person may be deprived of “life” without due process of law—implying that a person’s life *can* be taken with due process.<sup>298</sup> It also did not matter to the Court that the Eighth Amendment’s history supported the idea that administering the death penalty was not “cruel and unusual” in-and-of itself.

The phrase “cruel and unusual punishment” was derived from the Common Law and the 1689 English Bill of Rights, which authorized the death penalty for a great many offenses.<sup>299</sup> The Colonies had imposed the death sentence for murder, treason, piracy, arson, rape, robbery, burglary, sodomy, and other crimes.<sup>300</sup> In 1892, the Supreme Court stated that the Eighth Amendment merely proscribed those punishments viewed as cruel and unusual in 1789.<sup>301</sup>

However, the *Furman* Court found an evolving law basis for striking down the death penalty in *Weems v. United States*,<sup>302</sup> where the Court announced that the cruel and unusual punishment prohibition “is not fastened to the obsolete but may acquire meaning as public opinion

<sup>295</sup> *Id.* at 100-01 (emphasis added).

<sup>296</sup> 408 U.S. 238 (1971).

<sup>297</sup> *Id.*

<sup>298</sup> The Fifth Amendment provides in pertinent part: “No person shall be held for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . . .” U.S. CONST. amend. V.

<sup>299</sup> RAUL BERGER, DEATH PENALTIES 35-41 (1977).

<sup>300</sup> Woodson v. North Carolina, 428 U.S. 280, 289 n.14 (1976) (citing H. BEDAU, THE DEATH PENALTY IN AMERICA 6 (Rev. ed. 1967)).

<sup>301</sup> *Ex parte Kemmler*, 136 U.S. 436, 446 (1890).

<sup>302</sup> 217 U.S. 349 (1909).



becomes *enlightened* by humane justice.<sup>303</sup> Justice Thurgood Marshall, basing his ruling in *Furman* on “evolving standards” as did the other majority justices, declared that “a penalty . . . permissible at one time in our Nation’s history is not necessarily permissible today.”<sup>304</sup>

It clearly appeared after *Furman*, however, that the “evolving standards” had not evolved quite as far as the Court had thought. After *Furman*, thirty-five states enacted new death penalty laws.<sup>305</sup> The Court then retreated like a dog with its tail between its legs and held the death penalty valid in *Gregg v. Georgia*.<sup>306</sup> Dissenting in *Gregg*, Justice Marshall said a recent study had “confirmed that the American people” were just uninformed and that, if properly informed, the people would agree that the death penalty “is shocking, unjust, and unacceptable.”<sup>307</sup>

## 2. Protecting the Criminal Element: The “Exclusionary” Rule, Self-Incrimination, and the Right to Counsel

Other precedents in the criminal law area based upon these “evolving standards” became established during the Warren Court era. Despite the fact that it had “long been established that the admissibility of evidence is not affected” by its being illegally obtained,<sup>308</sup> the Court held in *Weeks v. United States*<sup>309</sup> that evidence seized in violation of the Fourth Amendment was not admissible in federal court cases.<sup>310</sup> This “exclusionary rule” was ultimately imposed on the states in *Mapp v. Ohio*.<sup>311</sup>

Another area the Warren Court expanded to give greater protection to criminals was the Fifth Amendment’s self-incrimination doctrine. Under the Fifth Amendment no person may be “compelled in any

<sup>303</sup> *Id.* at 378 (emphasis added). This statement naturally implies that the *Weems* Court felt that the opinions of the Founding Fathers were not as “enlightened by humane justice” as their opinions were— an arrogant assumption at the very least.

<sup>304</sup> *Furman v. Georgia*, 408 U.S. 238, 329 (1971) (Marshall, J., concurring).

<sup>305</sup> *Gregg v. Georgia*, 428 U.S. 153, 179 (1976).

<sup>306</sup> 428 U.S. 153 (1976).

<sup>307</sup> *Id.* at 232 (Marshall, J., dissenting).

<sup>308</sup> 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2183, at 7 (1961).

<sup>309</sup> 232 U.S. 383 (1914).

<sup>310</sup> *Id.* at 398. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. Judge Benjamin Cardozo rejected this so-called “exclusionary rule” at the state court level, remarking that it was absurd that “[t]he criminal is to go free because the constable has blundered.” *People v. Devore*, 150 N.E. 585, 587 (N.Y. 1926).

<sup>311</sup> 367 U.S. 643, 660 (1961).

criminal case to be a witness against himself.<sup>312</sup> Although this provision was intended to apply to only the accused on trial in a criminal case,<sup>313</sup> the Court expanded its scope to cover the case of any witness who testifies under oath in any criminal or civil government proceedings.<sup>314</sup> In *Malloy v. Hogan*,<sup>315</sup> the Court overruled previous cases and made the Fifth Amendment privilege applicable to state court proceedings.<sup>316</sup> Although the privilege was not meant to prohibit law enforcement from taking advantage of a defendant's impulse to confess or to prohibit comment by prosecution on a defendant's failure to testify in criminal trials,<sup>317</sup> the Supreme Court altered the privilege's meaning to prohibit both of these practices. In *Miranda v. Arizona*,<sup>318</sup> the Court held that before police—State or Federal—may interrogate a suspect, he must be warned that he may remain silent, that this silence may not be used against him, and that he has a right to counsel.<sup>319</sup>

The Court found yet another area to expand criminal rights through reinterpreting the Sixth Amendment.<sup>320</sup> Historically, this provision did not mean the accused had the right to a taxpayer-paid defense lawyer; rather, "[t]he historical meaning of this provision was that the Court permit counsel, employed by defendant, to appear and participate in the proceedings." Despite this original understanding, the Court held in *Johnson v. Zerbst*<sup>321</sup> that federal courts were required to provide government-paid counsel to indigent defendants.<sup>322</sup> The Warren Court

<sup>312</sup> U.S. CONST. amend. V.

<sup>313</sup> 8 JOHN H. WIGMORE, *supra* note 308, at § 2252, at 324; see also Edward S. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 2 (1930).

<sup>314</sup> See, e.g., *Counselman v. Hitchcock*, 142 U.S. 547 (1892) (applying the Fifth Amendment to grand jury proceedings); *McCarthy v. Arndstein*, 266 U.S. 34 (1924) (applying the Fifth Amendment to bankruptcy proceedings); *Emspak v. United States*, 349 U.S. 190 (1955) (applying the Fifth Amendment to legislative committees). These rulings infringe on an accused's Sixth Amendment right "to have compulsory process for obtaining witnesses in his favor" in the event a subpoenaed witness claims the privilege. U.S. CONST. amend. VI.

<sup>315</sup> 378 U.S. 1 (1964).

<sup>316</sup> See *id.* at 6-9.

<sup>317</sup> Eugene H. Methvin, *Let's Restore the Fifth Amendment*, HUMAN EVENTS, Feb. 28, 1970, at 8. In *Wilson v. United States*, 149 U.S. 60 (1893), the Court first held that failure to testify creates no presumption of guilt. In *Bruno v. United States*, 308 U.S. 287 (1939), the Court held that the defendant was entitled to an instruction to that effect.

<sup>318</sup> 384 U.S. 436 (1966).

<sup>319</sup> *Id.* at 444-45. Before *Miranda*, the police solved ninety-one of every 100 murders; afterwards, unsolved murders tripled to an all-time high. John Ashbrook, *Are Judges Abusing Our Rights?*, READERS DIGEST, Aug. 1981, at 77, 78.

<sup>320</sup> The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend. VI.

<sup>321</sup> 304 U.S. 458 (1938).

<sup>322</sup> *Id.* at 463.

applied this requirement to the states in 1963 in *Gideon v. Wainwright*,<sup>323</sup> overruling *Betts v. Brady*.<sup>324</sup> As a result, hundreds of felony convictions were vacated on grounds the defendants were denied counsel because they could not afford one.<sup>325</sup>

## VII. SEPARATING CHURCH FROM STATE: THE EVOLUTION OF RELIGION'S ROLE IN AMERICA

There can be no doubt that one of the areas evolving law has impacted the most is the place of religion in American law. Even before America's birth as a nation, Christianity had been a cornerstone of American law.<sup>326</sup> Starting in 1947, however, the Supreme Court began eroding the law's Christian foundations by attacking religion's place in the public arena.

### A. *Erecting a Wall of Separation: Everson v. Board of Education*

In *Everson v. Board of Education*,<sup>327</sup> a state law authorized taxpayer payment of bus fares for students attending parochial schools.<sup>328</sup> Justice Black, writing for the Court, claimed that the Establishment Clause prohibits both the federal and state governments from establishing a state church, aiding either religion or irreligion by taxation, and participating in the affairs of religious organizations.<sup>329</sup> Justice Black also claimed that the Establishment Clause had been applied to the states by the Fourteenth Amendment's Due Process Clause.<sup>330</sup> "In the words of

<sup>323</sup> 373 U.S. 335 (1963).

<sup>324</sup> 316 U.S. 455 (1947).

<sup>325</sup> See *And the Court Said unto Gideon*, TIME, Oct. 18, 1963, at 53. TIME called the aftermath of *Gideon* "the greatest jailbreak of all time" because in many cases it was impossible to re-assemble evidence required for re-conviction. *Id.* After *Gideon*, but before expiration of the term, the Supreme Court vacated twenty-nine state court judgments and remanded for reconsideration in light of *Gideon*. J.P. Ludington, Annotation, *Constitutional Procedural Right of Indigent Accused to Appointment of Counsel in State Court Prosecution*, 93 A.L.R. 2d 747, 750 n.14.

<sup>326</sup> See *supra* Section III.

<sup>327</sup> 330 U.S. 1 (1947).

<sup>328</sup> *Id.* at 17-18. The First Amendment provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

<sup>329</sup> *Everson*, 330 U.S. at 15-16. More specifically, Justice Black said, based on the Establishment Clause, neither a state nor federal government can 1) set up a church or pass laws aiding any religion or preferring one religion over others, 2) force church attendance or profession of religious belief, 3) tax to support religious activities or institutions, or 4) participate in the affairs of religious groups. *Id.*

<sup>330</sup> The First Amendment proscribes laws prohibiting the free exercise of religion. U.S. CONST. amend. I. The Due Process Clause says liberty can be taken away with due process of law. *Id.* amend. XIV. Is the Court now saying freedom of religion may be taken

Jefferson," Black declared, "the clause against establishment of religion . . . was intended to erect 'a wall of separation between church and state' [which] must be kept high and impregnable. We cannot approve the slightest breach."<sup>331</sup> Thus, in 1947, the doctrine of separation of church and state was born.

In support of erecting this wall of separation between church and state, Black cited a great deal of irrelevant historical material, particularly from Thomas Jefferson, who Black erroneously asserted "played" a "leading role" in the First Amendment's making.<sup>332</sup> On the contrary, Jefferson was "in Paris at the time" and "had no hand in framing it."<sup>333</sup> Black borrowed Jefferson's aforementioned "wall" statement from *Reynolds v. United States*,<sup>334</sup> but neglected to mention that Jefferson's statement came from a letter he wrote in 1802, a full twelve years after the First Amendment's adoption.<sup>335</sup> Black also cited Jefferson's Religious Freedom Statute in support of his reading of the Establishment Clause and claimed the Court had previously held that the First Amendment had the same objective as the statute.<sup>336</sup> However, the cases Black cited do not support his contention.<sup>337</sup> In addition, Black

away by the Court's creation of substantive due process of law? The Constitution was not meant to deal in absurdities, but evidently evolutionary law has created some.

<sup>331</sup> *Everson*, 330 U.S. at 18. Having made this sweeping declaration, the Court held, incredibly, that "New Jersey has not breached it here." *Id.* Justice Jackson, dissenting, wrote that the "undertones" of the majority's opinion, "seem utterly discordant with its conclusions yielding support to commingling in education matters." *Id.* at 19. "The case," Jackson said, "which irresistably comes to mind as the most fitting precedent is that of Julia, who, according to Byron's Reports, 'whispering "I will ne'er consent," consented.'" *Id.*

<sup>332</sup> *Id.* at 13-14.

<sup>333</sup> Edward S. Corwin, *The Supreme Court as National School Board*, 14 L. & CONTEMP. PROBS. 3, 13 (1949).

<sup>334</sup> 98 U.S. 145 (1878).

<sup>335</sup> *Id.* at 164. Jefferson's letter read in part:

[t]hat the legislative powers of the government reach actions only, and not opinions,— I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and state.

*Id.* (quoting Letter from Thomas Jefferson to Nehemiah Dodge et al. (Jan. 1, 1802)) Jefferson's letter was quoted by the *Reynolds* Court to show that the First Amendment did not proscribe laws prohibiting polygamy. *Id.* at 164-66.

<sup>336</sup> *Everson*, 330 U.S. at 13. Jefferson's Statute simply protects religious freedom, prohibits compelling religious worship or support, and presumes the existence of God. *Id.* at 12-13.

<sup>337</sup> See *Davis v. Beason*, 133 U.S. 333 (1890) (holding that the First Amendment does not bar the legislature from prohibiting immoral acts); *Reynolds v. United States*, 98 U.S. 145 (1878) (holding that polygamy may be legislated against by the state); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871) (holding that the court had no authority to resolve an ecclesiastical split).

cited James Madison's *Memorial and Remonstrance*<sup>338</sup> in support of the "wall," which is equally irrelevant.<sup>339</sup> It involved a Virginia tax proposal, and was written four years before the First Amendment.<sup>340</sup>

Neither Jefferson or Madison are good witnesses for the Court's "wall" doctrine. As President, Jefferson concluded a treaty to provide money for a priest and to build a church;<sup>341</sup> recommended that military personnel attend "Divine services";<sup>342</sup> favored church tax exemptions;<sup>343</sup> and recommended use of the Bible and the Isaac Watts Hymnal in public education.<sup>344</sup> Madison supported Congressional-military chaplains<sup>345</sup> and the teaching of Christianity in public education.<sup>346</sup> He presented a bill making it an offense to work or employ labor on Sunday<sup>347</sup> and issued four Thanksgiving Proclamations as President celebrating "the goodness of the Great Disposer of Events."<sup>348</sup>

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<sup>338</sup> James Madison, *A Memorial and Remonstrance on the Religious Rights of Man* (June 20, 1785), reprinted in MARY C. SEGERS ET AL., *A WALL OF SEPARATION? DEBATING THE PUBLIC ROLE OF RELIGION* 130 (1998).

<sup>339</sup> *Everson*, 330 U.S. at 12.

<sup>340</sup> Corwin, *supra* note 333, at 11. Corwin asked: "What bearing do the views which Madison advanced in 1785 in a local political fight regarding . . . religious liberty in Virginia have on . . . the meaning of the First Amendment?" *Id.* Madison's *Memorial* itself is at odds with the Court's "wall" doctrine. See Madison, *supra* note 338, at 130. Madison opposed the Virginia tax bill for support of teachers of the Christian religion because, among other considerations, it would be "adverse to the diffusion of the light of Christianity" in that if Christianity could be established in exclusion of all other religions, *id.* at 136, "a particular sect of Christians" could be established in exclusion of other sects. *Id.* at 132. The *Memorial* provided that to be "a member of Civil Society" one must be "a subject of the Governor of the Universe." *Id.* at 64. It ends with a prayer "as we are in duty bound" to "the Supreme Lawgiver of the Universe." *Id.* at 137.

In any case, Madison himself had said that the federal government's "least interference" with religion "would be a most flagrant usurpation." NORMAN COUSINS, *IN GOD WE TRUST* 315 (1958). Madison said, "There is not a shadow of right in the general (federal) government to intermeddle with religion." *Id.* These views do not support an application of the Establishment Clause against the states.

<sup>341</sup> ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 38 (1982).

<sup>342</sup> CHARLES RICE, *THE SUPREME COURT AND PUBLIC PRAYER* 45, 63 (1964).

<sup>343</sup> CORD, *supra* note 341, at 189.

<sup>344</sup> WHITEHEAD, *supra* note 10, at 100. Jefferson said that "[r]eligion is the alpha and omega of the moral law," and was "a supplement to law in government of men." CORWIN, *supra* note 333, at 14.

<sup>345</sup> COUSINS, *supra* note 340, at 315.

<sup>346</sup> *McCullum v. Bd. of Educ.*, 333 U.S. 203, 248 (1948); see also *id.* at 245 n.11.

<sup>347</sup> CORD, *supra* note 341, at 217.

<sup>348</sup> *Id.* at 31.

### B. *The Original Understanding of "An Establishment of Religion"*

While citing these and other equally irrelevant sources, Justice Black made either erroneous or dishonest conclusions as to others.<sup>349</sup> Black apparently failed to examine sources which impeach his broad meaning. Significantly, a "wall of separation between church and state" is nowhere mentioned in any part of the Constitution. The First Amendment's framers "did not speak of the complete separation of church and state—indeed, they did not use the term at all."<sup>350</sup> In a 1985 case, then-Justice Rehnquist said "Jefferson's misleading metaphor"<sup>351</sup> should be "explicitly abandoned"<sup>352</sup> since it has "no historical foundation,"<sup>353</sup> which is shown by the following historical exposition.

In 1776, nine of thirteen colonies had official state churches.<sup>354</sup> By 1787, ten states gave preferential treatment to Protestantism and two states "favored simply the Christian religion," while five states had official state churches which remained existent after the First Amendment's adoption.<sup>355</sup> "[A]ll of the states still retained the Christian religion as the foundation stone of their social, civil and political institutions."<sup>356</sup> What the states were really concerned with was that the federal government might set up a national church or interfere with existing state establishments.<sup>357</sup>

To meet these concerns, Madison introduced in the first Congress an amendment to allay these fears.<sup>358</sup> His draft was amended to read as follows: "No religion shall be established by law, nor shall the equal rights of conscience be infringed,"<sup>359</sup> which words Congressman Sylvester said "might have a tendency to abolish religion altogether."<sup>360</sup>

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<sup>349</sup> In footnote 21 of the *Everson* opinion, Justice Black cited several cases as precedent for the broad interpretation *Everson* adopted. *Everson*, 330 U.S. at 15 n.21 (1947). None of the cases support the Court's broad meaning but instead support the narrow purpose stated by Madison and Justice Story, see *infra* text accompanying notes 358-367.

<sup>350</sup> BERNs, *supra* note 33, at 73.

<sup>351</sup> *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

<sup>352</sup> *Id.* at 107.

<sup>353</sup> *Id.* at 106.

<sup>354</sup> McClellan, *supra* note 62, at 300.

<sup>355</sup> *Id.* at 307.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* at 295.

<sup>358</sup> Madison's draft read: "The civil rights of none shall be abridged on account of religious belief or worship, nor any national religion be established nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed." James Madison, Proposed Amendments to the Constitution (June 8, 1789), reprinted in *CONTEXTS OF THE CONSTITUTION* 813 (Neil H. Cogan ed., 1999).

<sup>359</sup> *Id.* at 729.

<sup>360</sup> *Id.*

Congressman Huntington “felt the words might” result in being “extremely hurtful to” religion and hoped the amendment would be drafted in such way as to secure the free exercise of religion, “but not to patronize those who profess no religion at all.”<sup>361</sup> At this point, Madison said “the people feared one sect might obtain a pre-eminence” and that the word “national” should be inserted before the word “religion.”<sup>362</sup> Ultimately, Congress approved the words that now constitute the First Amendment.

Following the First Amendment’s enactment, the first Congress petitioned President Washington to proclaim a national day of prayer and thanksgiving (which he did)<sup>363</sup> and established the Congressional chaplaincy by which clergymen are paid to give official daily prayers in Congress.<sup>364</sup> It also promoted religion in education by reenacting the Northwest Ordinance.<sup>365</sup> The First Congress and Congresses for over 100 years after the First Amendment’s enactment funded the teaching of Christianity to the Indians.<sup>366</sup> Obviously, the First Amendment’s authors did not understand it in the way Justice Black did. Neither did Justice Story, who said that

*[i]n a republic, there would seem to be a peculiar propriety in viewing the Christian religion as the great basis on which it must rest for its support and permanence . . . .*

. . . .

Probably at the time of the adoption of the Constitution, and of the First Amendment . . . [t]he general if not the universal sentiment in America was, that Christianity ought to receive the encouragement from the state . . . .

. . . .

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<sup>361</sup> *Id.* at 730-31.

<sup>362</sup> *Id.* In regards to the First Amendment, the Court has called Madison its “author” in *Engel v. Vitale*, 370 U.S. 421, 436 (1962) (Douglas, J., concurring); its “leading architect” in *Flast v. Cohen*, 392 U.S. 83, 103 (1968); and its chief “promoter” in *Walz v. Tax Comm’n*, 397 U.S. 664, 705-06 (1970) (Douglas, J., dissenting). Nevertheless, the Court totally ignored what Madison said as to the First Amendment in the debates in the first Congress, which is what was relevant. This increases the suspicion that the Court did not want his true intent known because it argued against the Court’s “wall” doctrine.

<sup>363</sup> *Wallace v. Jaffree*, 472 U.S. 38, 101-03 (1985) (Rehnquist, J., dissenting).

<sup>364</sup> RICE, *supra* note 342, at 40.

<sup>365</sup> Corwin, *supra* note 333, at 14. The Northwest Ordinance provided: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” *Id.*

<sup>366</sup> CORD, *supra* note 341, at 43. Cord says Presidents Washington, Monroe, John Quincy Adams, Jefferson, Jackson and Van Buren all negotiated Indian treaties by which the U.S. Government built churches for and provided aid in Christianizing the Indians. *Id.* at 58-59.

The real object of the [First] Amendment was not to countenance, much less to advance, Mahometanism or Judaism or infidelity by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. . . .<sup>367</sup>

Had Justice Black really wanted to know the meaning of “an establishment of religion,” he would have examined Blackstone’s Common Law meaning of the term. According to Blackstone, “By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special advantages which are denied to others.”<sup>368</sup> However, having in effect discarded the Common Law in the *Erie* case,<sup>369</sup> the Court obviously no longer felt bound by this definition. Nor did the Court look at its own precedents and other historical authorities, including one case which actually defined a “religious establishment” in the same way that Blackstone did.

In the 1815 case *Pawlet v. Clark*,<sup>370</sup> the Court discussed the meaning of “the Church of England as by law established.”<sup>371</sup> In so doing the Court said that “the Church of England,’ so familiar in our laws and judicial treatises, is nothing more than a compendious expression for the religious establishment of the realm. . . . In this sense the Church . . . is said to have peculiar rights and privileges . . . under the patronage of the state.”<sup>372</sup> Nothing is said about public prayer or Bible study being a religious establishment—only a church having the patronage of the state.

### C. The Court Bans God, Prayer, and the Bible from Public Institutions

It was only later realized that not only had Blackstone been ushered out of our body politic and laws, but with *Everson*, so had God and His laws. *Everson* was quickly followed in 1948 by *McCullum v. Board of Education*,<sup>373</sup> which banned religious instruction from public schools.<sup>374</sup>

<sup>367</sup> 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1873-74, 1877, at 627-31 (Little, Brown & Co., 5th ed. 1891) (1833). Justice Story said, “[T]he whole power over . . . religion is left exclusively to the state governments.” 2 *id.* § 1879, at 634.

<sup>368</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*296.

<sup>369</sup> See *supra* notes 171-84 and accompanying text.

<sup>370</sup> 13 U.S. (9 Cranch) 282 (1815).

<sup>371</sup> *Id.* at 323. In *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815), the “free exercise of religion” did not prohibit the enactment of laws “aiding with equal attention the votaries of every sect to perform their own religious duties.”

<sup>372</sup> *Pawlet*, 13 U.S. (9 Cranch) at 325.

<sup>373</sup> 333 U.S. 203 (1948).

<sup>374</sup> *Id.* *McCullum* invalidated a program of Bible instruction that was virtually identical to 2,200 others in public school districts in forty-six states. *Id.* at 212.



Fourteen years later a state composed prayer to God used in public schools was held by the Warren Court to violate the First Amendment in *Engel v. Vitale*.<sup>375</sup> Also held to violate the First Amendment were public school prayer and Bible reading exercises in *Abington School District v. Schempp*.<sup>376</sup> So, it is permissible for Congress to have daily prayers<sup>377</sup> and for the U.S. Supreme Court open its sessions with the prayer "God save this honorable court,"<sup>378</sup> but it is wrong for a principal or teacher to lead school children in prayer! It is but one more absurdity of evolutionary law.

In *Epperson v. Arkansas*,<sup>379</sup> a state law prohibited the teaching of Darwin's theory of evolution in public schools and subjected teachers who taught evolution to prosecution.<sup>380</sup> When challenged by a school teacher, the Court held that the anti-evolution law violated the Establishment Clause, saying that the Establishment Clause "does not tolerate laws . . . casting a pall of orthodoxy over the classroom"<sup>381</sup> and that the Arkansas law was "an attempt to blot out a particular theory because of its supposed conflict with the Biblical account."<sup>382</sup> The Court's distortion of the Establishment Clause has resulted in the catch-22 of evolution being taught in public schools because it is "science" but the teaching of *Genesis* creation being prohibited because it is "religion."

Louisiana tried to remedy this problem by passing a law requiring that if evolution is taught, creation must be taught as well.<sup>383</sup> In *Edwards v. Aguillard*,<sup>384</sup> the Court held that this law violated the Establishment Clause as well because the law "embodie[d] the religious belief that a supernatural creator was responsible for the creation of humankind."<sup>385</sup> In other words, it now violates the Constitution to teach that there is a Creator, which ironically, was exactly what the Founding Fathers believed and what the *Declaration of Independence* affirms.<sup>386</sup> It is

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<sup>375</sup> 370 U.S. 421 (1962). The prayer read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422. Justice Black, writing for the Court, said the prayer was not "a total establishment of one particular religious sect to the exclusion of all others." *Id.* at 436. Justice Douglas, concurring, said the prayer did not "establish a religion in the strictly historic meaning of those words." *Id.* at 442.

<sup>376</sup> 374 U.S. 203 (1963).

<sup>377</sup> *Id.* at 213.

<sup>378</sup> *Id.*

<sup>379</sup> 393 U.S. 97 (1968).

<sup>380</sup> *Id.* at 98-99 n.3 (quoting ARK. STAT. ANN. §§ 80-1627, 80-1628 (1960 Repl. Vol.)).

<sup>381</sup> *Id.* at 105 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1964)).

<sup>382</sup> *Id.* at 109.

<sup>383</sup> LA. REV. STAT. ANN. §§ 17:286.1-17:286.7 (West 1982).

<sup>384</sup> 482 U.S. 578 (1987).

<sup>385</sup> *Id.* at 592.

<sup>386</sup> See *supra* Section III.

permissible, however, to teach an unscientific theory, evolution, which undermines those religious beliefs.

The State of Kentucky enacted a law requiring the posting of the Ten Commandments on public school classroom walls, which were furnished at private expense.<sup>387</sup> This law also offended the Darwinian sensibilities of the Court, which held the law to violate the First Amendment in *Stone v. Graham*.<sup>388</sup> The law violated the First Amendment, Justice Brennan declared, because it might “induce the school children to read, meditate upon, perhaps to *venerate and obey*, the Commandments” which was “not a permissible state objective.”<sup>389</sup> On the other hand, in *Board of Education v. Pico*,<sup>390</sup> a public school could not ban books from its library that were vulgar, “anti-American, anti-Christian, anti-Semitic and just plain filthy”—all were protected by the First Amendment.<sup>391</sup> Later cases have been equally hostile to religious observance in public schools.<sup>392</sup>

### VIII. EVOLVING TOWARDS GOMORRAH.<sup>393</sup>

#### THE RIGHTS OF PRIVACY, ABORTION, AND HOMOSEXUALITY

In the midst of this all-out assault on Christianity and morality in the guise of First Amendment jurisprudence, the Court turned its attention to liberating the American people from the Christian sexual mores that hampered them from true enjoyment of the freedoms the Constitution, as interpreted by the Court, guaranteed them. It is in the area of sexuality that the Court applied its evolutionary law perspective to produce some of the most outrageous and controversial decisions in American history.

#### *A. The Court Creates the Right of Privacy*

In 1965, in *Griswold v. Connecticut*,<sup>394</sup> the Court invalidated a Connecticut law banning purchases of contraceptives by married couples

<sup>387</sup> KY. REV. STAT. § 158.178 (1980).

<sup>388</sup> 449 U.S. 39 (1980).

<sup>389</sup> *Id.* at 42 (emphasis added). One has to wonder if the Court believes it is a permissible state objective to have students believe it is all right to murder their classmates as has been frequently done of late.

<sup>390</sup> 457 U.S. 853 (1982).

<sup>391</sup> *Id.* at 857.

<sup>392</sup> See, e.g., *Wallace v. Jaffree*, 472 U.S. 38 (1985) (prohibiting a moment of silent prayer); *Lee v. Weisman*, 505 U.S. 577 (1992) (prohibiting high school graduation prayers); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (prohibiting student led and initiated prayer at high school football games).

<sup>393</sup> This section heading was inspired by ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH* (1996).

<sup>394</sup> 381 U.S. 479 (1965).

because it violated the “right of privacy.” According to the Court, the Constitution prevents the State from invading “the sacred precincts of marital bedrooms.”<sup>396</sup> The Constitution does expressly enumerate zones of privacy,<sup>396</sup> it does not explicitly mention a specific right of privacy; and neither does the Common Law. Thus, in its analysis the Court was unsure where this privacy right was located, but nevertheless said it was a “fundamental” right that could be found in Amendments I, III, IV, V, IX, or XIV.<sup>397</sup>

The *Griswold* Court then performed one of the more amazing feats of the age of evolutionary law. It “found” the right of privacy “in penumbras, formed by emanations from” the Bill of Rights<sup>398</sup>—hardly a concept of constitutional precision.<sup>399</sup> Justice Stewart, dissenting in *Griswold*, could not find this shadowy right “in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.”<sup>400</sup> He could not find this right because it is a Court construct engineered by Justices Douglas and Brennan.<sup>401</sup>

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<sup>396</sup> *Id.* at 485. The bedrooms of non-married couples also apparently became “sacred” as the new right was extended to them in *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>396</sup> See U.S. CONST. amend. III (providing that soldiers are not to be quartered in private homes); *id.* amend. IV (banning unreasonable searches and seizures of person and property); *id.* amend. V (providing freedom from self-incrimination in criminal trials).

<sup>397</sup> *Griswold*, 381 U.S. at 484; see also *Roe v. Wade*, 410 U.S. 113, 152 (1973). The Ninth Amendment provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Madison, the Bill of Rights’ chief author, saw the Ninth Amendment as creating no new rights but as simply declaring rights that existed prior to and were already secured under the Constitution. James Madison, Speech in the House of Representatives (June 8, 1789), in 1 DEBATES IN THE CONGRESS OF THE UNITED STATES 449 (1802). Edward Dumbauld confirms this view as to the Ninth Amendment specifically. DUMBAULD, *supra* note 20, at 63. The Supreme Court itself has previously held that the Bill of Rights did not establish “any novel” governmental principles but simply embodied “certain guarantees and immunities . . . inherited from our English ancestors.” *Robertson v. Baldwin*, 165 U.S. 275, 281 (1896).

<sup>398</sup> *Griswold*, 381 U.S. at 484.

<sup>399</sup> An “emanation” is a gaseous substance, while a “penumbra” is a partly lighted area surrounding the complete shadow of a body, such as the moon, in full eclipse. WEBSTER’S NEW WORLD COLLEGE DICTIONARY 463, 1067 (4th ed. 1999). Justice Field once stated that “[t]he Constitution deals with substance, not shadows,” *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866), which antiquated idea surely must have preceded the age of evolutionary law.

<sup>400</sup> *Griswold*, 381 U.S. at 530.

<sup>401</sup> Documents between Justices Brennan and Douglas show they conspired to create the right. See Judie Brown & Robert G. Marshall, *The Secret Origins of the Right to Abortion*, ALL ABOUT ISSUES, Apr. 1989, at 26 (citing manuscripts from the Library of Congress); STEPHEN L. WASHBY, HE SHALL NOT PASS THIS WAY AGAIN: THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS 159 (1990).

### B. *Roe v. Wade*

*"The men who today snatch the worst criminals from justice will murder the most innocent persons tomorrow."*<sup>402</sup>

The Court once declared that the Constitution was not intended as a facility for crime but to prevent oppression.<sup>403</sup> Nevertheless, in 1973, the Court committed a monstrous crime against unborn children. Based in large part on its newly created right of privacy, it created the constitutional right to abort children in *Roe v. Wade*,<sup>404</sup> where it held a Texas statute prohibiting abortion unconstitutional.<sup>405</sup> Having previously declared that its decisions were not just interpretations of existing law, but were in fact the supreme law of the land,<sup>406</sup> the Court also declared that all anti-abortion statutes nationwide "of the current Texas type" violated the Fourteenth Amendment's Due Process Clause.<sup>407</sup> It mattered not that this new right was mentioned nowhere in the Constitution.

Justice Harry Blackmun, writing for the Court, either downplayed or attacked history where it opposed his conclusions in *Roe*. He belittled the Hippocratic Oath, which explicitly forbids abortion, as "a Pythagorean manifesto and not the absolute standard of medical conduct."<sup>408</sup> He suggested that Lord Coke's statement that abortion after quickening was "a great misprision, and no murder"<sup>409</sup> was an intentional misstatement of the law designed to foist Coke's peculiar views on England.<sup>410</sup>

The Christian resistance to abortion was for Blackmun a peculiar dogma, one to which apparently more enlightened (at least to Blackmun) "ancient religion," Roman and Greek paganism, did not adhere."<sup>411</sup> *Roe* was hauntingly Orwellian as it maintained a learned ignorance as to the humanity of unborn children, saying it "need not resolve the difficult question of when life begins."<sup>412</sup> While the Court had shown great

<sup>402</sup> KIRK, *supra* note 124, at 29 (quoting Letter from Edmund Burke to Chevalier de Rivarol (1791)).

<sup>403</sup> *Brown v. Elliott*, 225 U.S. 392, 402 (1911).

<sup>404</sup> 410 U.S. 113 (1973).

<sup>405</sup> *Id.*

<sup>406</sup> See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1937); *Cooper v. Aaron*, 358 U.S. 1 (1958).

<sup>407</sup> *Roe*, 410 U.S. at 164. Justice Blackmun, who wrote the opinion in *Roe*, later wrote in his part concurrence, part dissent in *Webster v. Reproductive Health Services*, 492 U.S. 490, 555 (1992), that abortion is "a limited fundamental constitutional right."

<sup>408</sup> *Roe*, 410 U.S. at 132.

<sup>409</sup> *Id.* at 135 (quoting 3 SIR EDWARD COKE, INSTITUTES \*50 (1948) (1789)).

<sup>410</sup> *Id.* at 135 n.26. Blackmun did not explain how this was accomplished if Coke's views were unpopular, nor did he say why it was accepted by the people for two centuries.

<sup>411</sup> *Id.* at 130.

<sup>412</sup> *Id.* at 159. Conversely, abortion advocate Dr. Malcolm Potts said it is "a scientific fact, which everyone really knows, that human life begins at conception." W. Douglas Badger, *Abortion: The Judeo-Christian Imperative, in WHOSE VALUES? THE BATTLE FOR*

compassion for convicted murderers just two years earlier when it struck down the death penalty, it had no compassion for unborn children who were not even "persons" under the Court's Fourteenth Amendment Darwinian jurisprudence.<sup>413</sup>

The Court's ruling that unborn children are not "persons" under the Constitution is impossible to reconcile with the Constitution itself, which implicitly protects the unborn. Its Preamble states that it is written "to secure the Blessings of Liberty to ourselves *and our Posterity*."<sup>414</sup> "Posterity" is defined as "generations of the future; anyone's children and their children . . . all of a person's descendants."<sup>415</sup> These blessings are not secured if one is not allowed to be born. It is but one more of the cruel absurdities of evolving law.

Dissenting in *Roe*, Justice Rehnquist said the fact that on enactment of the Fourteenth Amendment thirty-six states had laws limiting or prohibiting abortion was evidence that the abortion "right" is not "fundamental."<sup>416</sup> Justice White, who called *Roe* "an exercise of raw judicial power," could find "nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers."<sup>417</sup>

Professor Charles Rice observed that "when the [U.S.] Government, through the Supreme Court, declared its neutrality on the existence of God, the stage was set for *Roe v. Wade*, and the fate of millions of children was sealed."<sup>418</sup> Since then, America has exceeded the carnage of

MORALITY IN PLURALISTIC AMERICA 82 (Carl Horn ed., 1985). Renowned French geneticist Dr. Jerome Lejeune testified to a U.S. Senate Committee: "As soon as the 23 paternally derived chromosomes are united, through fertilization, to the 23 maternal ones, the full genetic information necessary and sufficient to express all the inborn qualities of the new individual is gathered . . . the new being begins to express himself as soon as he has been conceived." Jerome Lejeune, *A Scientist's View of When Life Begins*, HUMAN EVENTS, June 20, 1981, at 16.

<sup>413</sup> *Roe*, 410 U.S. at 158. This refusal to acknowledge an unborn child as a person came notwithstanding previous rulings that corporations are persons. See *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26 (1889) (holding that a corporation was a person under the Fourteenth Amendment); *Santa Clara County v. S. Pac. Ry. Co.*, 118 U.S. 394 (1886) (same).

<sup>414</sup> U.S. CONST. pmb1.

<sup>415</sup> WEBSTER, *supra* note 42.

<sup>416</sup> *Roe*, 410 U.S. at 174-75 (Rehnquist, J., dissenting).

<sup>417</sup> *Id.* at 221-22 (White, J., dissenting). Professor John Hart Ely, a pro-abortionist, said *Roe* was wrong "because it is bad constitutional law, or rather because it is not constitutional law and gives almost *no* sense of an obligation to try to be." John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973). Professor (now U.S. District Judge) John T. Noonan, Jr., said "critics of all persuasions had been unable to discover a rational basis" for *Roe*. EATON, *supra* note 44, at 93.

<sup>418</sup> WHITEHEAD, *supra* note 10, at 110.

both Carthage and Rome—and even Nazi Germany—with approximately forty million abortions.<sup>419</sup>

### C. The Court Believes Anti-Homosexual Views Are Evil

The Court has travelled so far down its anti-Biblical road of evolutionary law that in *Bowers v. Hardwick*,<sup>420</sup> it came within one vote of declaring that sodomy, the crime against nature that brought down Sodom and Gomorrah,<sup>421</sup> is a constitutional right.<sup>422</sup> Last year, it also came within one vote of declaring that the Boy Scouts of America, a private organization, must hire known homosexuals as Scout leaders.<sup>423</sup> Homosexual activists prevailed in *Romer v. Evans*,<sup>424</sup> where the Court held that a Colorado constitutional amendment repealing laws giving homosexuals protected status violated the Equal Protection Clause.<sup>425</sup> The Court in effect asserted that the law's "animosity" toward homosexuality was evil, and held the law did not have a "rational" basis.<sup>426</sup>

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<sup>419</sup> JIM NELSON BLACK, WHEN NATIONS DIE 166 (1994). "The Phoenicians murdered many thousands of children. And, yes, they burned their young. But in the entire history of Carthage or of Rome, they never killed 30 million in the name of 'a woman's right to control her own body.'" *Id.*

The Court has even set the stage for a right to infanticide with its recent decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), where it overturned Nebraska's law prohibiting partial-birth abortion. *Id.* In the partial birth abortion process, the baby's body is delivered, while its head is kept in the birth canal and a doctor thrusts scissors into the back of the child's skull, sucking its brain out with a vacuum before finishing the delivery. *Id.* at 1040-42 (Rehnquist, C.J., dissenting).

It has also continued its perversion of the word "liberty." In the famous mystery statement from *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), which obviously includes mothers but not their unborn children, the Court declared, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.* at 851. The "mystery statement" brings to mind *Judges 21:25* (King James), which reads: "In those days there was no king in Israel: every man did that which was right in his own eyes." This is a dangerous abuse or excess of "liberty" as understood by the Framers.

Justice Jackson warned that doctrinaire constructions of the Bill of Rights increased the danger of its safeguards being converted "into a suicide pact." *Terminello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). Historian Will Durant warned that governments tend "to perish by excess of [their] basic principle." WILL DURANT, THE STORY OF PHILOSOPHY 19 (1953).

<sup>420</sup> 478 U.S. 186 (1986).

<sup>421</sup> See *Genesis 19:1-29*.

<sup>422</sup> *Bowers*, 478 U.S. at 197.

<sup>423</sup> 530 U.S. 640 (2000).

<sup>424</sup> 517 U.S. 620 (1996). The case brings to mind *Isaiah 5:20*, which warns against calling "evil good, and good evil."

<sup>425</sup> *Romer*, 517 U.S. 620 at 635-36.

<sup>426</sup> *Id.*

Justice Scalia, dissenting in *Romer*, asked why it was not rational to enact a law disfavoring homosexual conduct in *Romer* if it was rational to criminalize sodomy in *Bowers*.<sup>427</sup> Scalia argued that the law simply prohibited *special* treatment of homosexuals and nothing more.<sup>428</sup> Thus, in view of *Bowers*, the *Romer* decision has no rational basis itself. Moreover, the Court appeared, as Scalia pointed out, to believe that opposition to homosexuality is as reprehensible as racial or religious bias.<sup>429</sup>

#### IX. JUDICIAL IMPERIALISM MUST BE STOPPED AND THE FRAMERS' CONSTITUTION RESTORED

The poisonous effect of Darwinism on the ethical thinking of judges, politicians, and cultural leaders brings to mind Winston Churchill's statement that "Lenin was sent into Russia by the Germans in the same way you might send a phial containing a culture of typhoid or cholera to be poured into the water supply of a great city, and it worked with amazing accuracy."<sup>430</sup> The Godless doctrine of Darwinian evolution and its progeny of legal positivism promotes ethical *nihilism* and has spawned ethical absurdity and confusion. It also has denied the American people the right to govern themselves through their elected representatives as they are entitled to do under the Constitution. It has transformed America from a Christian nation to an anti-Christian, secular state whose established religion is secular humanism.<sup>431</sup>

"Evolutionary jurisprudence," Justice Scalia writes, "has held sway in the courts for forty years or so."<sup>432</sup> The chief beneficiary of this has been the liberal left, who, unable to sustain majorities in the legislative branches of government, have succeeded through unelected, liberal activist judges to impose their unpopular, radical programs on the people. They have, as one writer notes, found a vehicle for giving their values "the force of law without bothering to take over the political authority of the state."<sup>433</sup>

<sup>427</sup> *Id.* at 636 (Scalia, J., dissenting).

<sup>428</sup> *Id.* at 638-39.

<sup>429</sup> *Id.* at 636.

<sup>430</sup> JAMES C. HUMES, CHURCHILL: SPEAKER OF THE CENTURY 266 (1980).

<sup>431</sup> EIDSMOE, *supra* note 11, at 391. Secular humanism rejects the existence or relevance of God and paves the way for man to worship himself. *Humanist Manifestos I and II* regard the Universe "as self-existing" and reject the moral laws of God. See AMERICAN HUMANIST ASS'N, HUMANIST MANIFESTOS I AND II (1973); see also EIDSMOE, *supra* note 11, at 391. "Tyranny is an inescapable result of removing God and His law. Indeed, the word 'tyranny' itself is derived from an ancient Greek word meaning 'secular rule,' or rule by man rather than God's law." RUSHDOONY, *supra* note 28, at 30.

<sup>432</sup> SCALIA, *supra* note 193, at 149.

<sup>433</sup> HERBERT SCHLOSSBERG, IDOLS FOR DESTRUCTION 204 (1983).

Viewing themselves as “stewards”<sup>434</sup> and “overseers”<sup>435</sup> instead of simply as interpreters of law in individual cases,<sup>436</sup> the judiciary has become an unelected legislature. This development is inimical to republican government. Chief Justice John Marshall, in establishing judicial review, said that the Courts were to be ruled by the Constitution and that judicial power was limited.<sup>437</sup> “Questions in their nature *political*,” Marshall said, “can never be made in this court.”<sup>438</sup>

## X. CONCLUSION: RECOVERING THE CONSTITUTION

Solzhenitsyn once observed that the West, in the onslaught of barefaced barbarity, reacts “with concessions and smiles.”<sup>439</sup> Lately, this seems to be the response to judicial tyranny. The appropriate response is righteous anger and moral outrage. The proper and just way to show the proper outrage would be impeachment of offending justices, who with their Darwinian jurisprudence, have committed treason against the Constitution and the nation. Impeachment is however at most, in the current political climate, a scarecrow, as the recent acquittal in the U.S. Senate of President Clinton demonstrated.

To do nothing is a crime itself. To borrow from President Lincoln’s words about the Dred Scott decision, if the people allow the policies of government to be fixed by decisions of the Supreme Court in ordinary litigation between individuals, “the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.”<sup>440</sup> There are other ways to fix government policies that are more practical and more ethical.

Amending the Constitution is however not a practical solution, since it would require a two-thirds majority in Congress and approval of three-fourths of the state legislatures. Moreover, it would be an admission that the Court was right to give its unconstitutional decisions constitutional status. And worse, it would take numerous amendments to correct the damage that has been done. Appointment of new justices who are devoted to the Constitution as written is a viable option and has been

<sup>434</sup> *Wolman v. Walter*, 433 U.S. 229, 263 (1977) (Powell, J., concurring in part and dissenting in part).

<sup>435</sup> *Meek v. Pittenger*, 421 U.S. 349, 373 (1975) (Brennan, J., concurring in part and dissenting in part).

<sup>436</sup> Both “steward” and “overseer” mean “manager.” WEBSTER’S NEW WORLD COLLEGE DICTIONARY, *supra* note 399, at 1028, 1406.

<sup>437</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179 (1803) (stating that the Constitution was addressed to the Courts).

<sup>438</sup> *Id.* at 170 (emphasis added).

<sup>439</sup> BENJAMIN HART, FAITH AND FREEDOM: THE CHRISTIAN ROOTS OF AMERICAN LIBERTY 28 (1988).

<sup>440</sup> Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *reprinted in* AMERICAN HISTORICAL DOCUMENTS, *supra* note 6, at 313.



accomplished in recent years. It must be done again as new vacancies occur.

Congress has, under Article III, clause 2, total control over the Supreme Court's appellate jurisdiction.<sup>441</sup> Even so, liberal lawyers assert that Congress may not impair the judiciary's power of judicial review. This argument is untenable because it says that an unwritten, assumed power by the Courts is superior to a power expressly given to Congress by the Constitution.

In making "exceptions" to and by "regulating" the judiciary's jurisdiction, Congress may enact laws by majority vote removing the jurisdiction of federal courts to consider cases involving school prayer, abortion, and capital punishment, among other issues.<sup>442</sup> If Congress removes these issues from federal jurisdiction, the issues could be considered only in state courts, not according to the Supreme Court's evolving law, but according to the written Constitution which state judges, pursuant to Article VI, are bound to uphold. Litigants would still have judicial review, albeit not in federal courts.

Congress could also require a super-majority of the Supreme Court before it could declare laws unconstitutional. Such a requirement was upheld as constitutional by the U.S. Supreme Court in 1930.<sup>443</sup> A five-to-four decision indicates there is doubt as to whether a law is really invalid. If there is doubt, it should be resolved in favor of the presumption of constitutionality.

Finally, it is imperative to reaffirm that the Constitution is not what the Supreme Court says it is, but rather that it is what the Constitution says it is. It is equally important to reaffirm, as Madison said, that under that Constitution the "ultimate authority . . . resides in the people alone."<sup>444</sup> We should remember the sage words of the famous Roman lawyer and statesman, Marcus Tullius Cicero:

Power and Law are not synonymous. In truth they are frequently in opposition and irreconcilable. There is God's Law from which all equitable laws of man emerge and by which men must live if they are not to die in oppression, chaos and despair. Divorced from God's eternal and immutable Law, established before the founding of the suns, man's power is evil no matter the noble words with which it is employed or the motives urged when enforcing it.

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<sup>441</sup> U.S. CONST. art. III, cl. 2.

<sup>442</sup> Congress should also enact much needed *habeas corpus* reform in state criminal matters.

<sup>443</sup> *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74 (1930). The U.S. Supreme Court held a state law valid requiring concurrence of all but one judge on the Ohio Supreme Court before a law could be held unconstitutional. The law did not apply in the trial court.

<sup>444</sup> THE FEDERALIST No. 46 (James Madison).

Men of good will, mindful therefore of the Law laid down by God, will oppose the governments whose rule is by men, and, if they wish to survive as a nation they will destroy that government which attempts to adjudicate by the whim or power of venal judges.<sup>445</sup>

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<sup>445</sup> TAYLOR CALDWELL, *A PILLAR OF IRON* 7 (1965).