RUTGERS JOURNAL OF LAW & RELIGION

VOLUME 11 **FALL 2009** **PART 1**

VOLUME 11 FALL 2009 PART 1

RUTGERS JOURNAL OF LAW & RELIGION

-ARTICLE-

MORALITY AND THE RULE OF LAW IN AMERICAN JURISPRUDENCE

James Lanshe[1]

TABLE OF CONTENTS

[1]Senior Honorary Research Associateship, School of Social Sciences and Law , Oxford Brookes University, Oxford, England. B.A. Georgetown University, M.P.A., Harvard University, M.B.A., University of Hawaii, M.Phil., Cardiff University, J.D., Cornell University School of Law.

To say that men and women should not inject their personal morality into public policy debates is a practical absurdity. Our law is by definition a codification of morality, much of it grounded in Judeo-Christian tradition.[2]

The men of old…deemed that if they heard the truth even from "oak or rock," it was enough for them; whereas you seem to consider not whether a thing is or is not true, but who the speaker is and from what country the tale comes. [3]

I. INTRODUCTION

As American society has evolved, so too has the meaning of the rule of law, or more precisely, the specific principles that inform the rule of law. The notion that moral and spiritual imperatives inform the rule of law has undergone significant changes throughout American history. This article explores the proposition that such conceptions perform a valuable role in modern jurisprudence, and are necessary for the conception of the American polity to endure in a form that enshrines rigour, fairness, and legitimacy.

Part II discusses the prominence that moral and spiritual imperatives played in the founding fathers' understanding of the rule of law. Part III explores the departure from these understandings in jurisprudential history and the transition to pragmatism. Part IV discusses some contemporary judicial philosophies regarding the rule of law that tend to exclude or diminish the importance of morality. Part V explores modern scholarship which supports the argument that moral values can, and must, play a role in jurisprudence and an American understanding of the rule of law.

[2] Barack Obama, Senator, Keynote Address to Sojourners at the Call to Renewal Conference (June 28, 2006).
[3] PLATO'S PHAEDRUS: A TRANSLATION WITH NOTES, GLOSSARY, APPENDICES, INTERPRETIVE ESSAY AND INTRODUCTION (Albert Keith Whitaker & Stephen Scully eds., R. Pullins Company) (2003).

II. THE FOUNDING PERIOD

There is significant evidence to support the proposition that the founding fathers were heavily influenced by spiritual and metaphysical precepts. These influences were conveyed to, and ultimately reflected in, America's most notable organic documents. The Declaration of Independence and the Constitution implicitly subsumed within them the earliest conceptions of the rule of law underlying the new American form of government.

It is well-established that secular philosophies, particularly Lockean liberalism, were integral to the ultimate design of the American governmental structure. However, the discussion below illustrates the ways in which religious, spiritual, and moral imperatives also played a defining role in the conception of the American government.

A. THOMAS JEFFERSON AND CLASSICAL REPUBLICANISM

It is definitely the case that Jefferson resorted to certain Lockean principles in drafting the Declaration. However, these alone were not the driving intellectual forces acting upon America's founding document. Evolving scholarship around the influence of classical republicanism has been offered as an alternative to the presumption of liberal Lockean hegemony (or perhaps as a complement to it). This philosophic approach introduced basic notions of "virtue" and the achievement of a "virtuous society" that were absent from the Lockean approach.[4] One of the main thrusts of this philosophical

[4] *See* GARRETT WARD SHELDON, THE POLITICAL PHILOSOPHY OF THOMAS JEFFERSON 5-6 (Johns Hopkins Univ. Press) (1991).

school, quite contrary to the Lockean ideals already described, is that individuals should subordinate their personal interests to the overall good of society.[5]

Classical republican ideals are discernable in several of Jefferson's writings. Following the drafting of the Declaration, for instance, Jefferson returned to Virginia where he is thought to have redirected the focus of his political thinking from an emphasis on liberal principles to a concern for the values found in classical republicanism.[6] This change in emphasis leads some scholars to conclude that Jefferson did not rely exclusively on Lockean liberalism, even at the time of the drafting the Declaration. Rather, Jefferson bore in mind the contrasting principles of classical republicanism, despite the obviously borrowed Lockean sentiments that otherwise mark the document.

In the context of a consideration of human nature, for example, Jefferson advocated the classical republican position that man had an innate moral sense, as opposed to the Lockean theory expressed in *An Essay Concerning Human Understanding* that man's nature is independent of any moral precepts or orientation.[7] Jefferson proposed that this sense is attributable to the fact that there is a human capacity for moral choice: humans have an innate sympathy or identification with others, and there is an overall fundamental sense of justice inherent in each person, which makes social life possible.[8] Further to this point, Jefferson referred to "the Creator" as having "intended

[5] ALLEN JAYNE, JEFFERSON'S DECLARATION OF INDEPENDENCE: ORIGINS, PHILOSOPHY & THEOLOGY 2 (Univ. of Kentucky Press) (1998).
[6] SHELDON, *supra* note 3, at 53.
[7] *Id.* at 55.
[8] *Id.* at 56.

man for a social animal," with the attendant consequence that in order to succeed within society, humans had to be imbued with some inherent notion of justice.[9] The clearest example of classical republicanism utilized by Jefferson was in connection with his descriptions of the nature of political society.[10] Here, he emphasized federalist theories of leadership and democracy, and stressed political participation by the members of society who were educated and economically independent.[11]

Jefferson and those of a like mind during that period were proponents of the existence of a sense of virtue and a corresponding need for social ethics within the newly developing republic. In emphasizing the importance of full participation in the community, to cultivate human development and happiness, Jefferson occasionally alluded to the teachings of Christianity. Most frequently in this regard, he made references to traditional Christian doctrines relating to the spiritual bond between all of mankind: a common bond amongst all, under peace, love, charity, common wants and common aids.[12] Employing these premises, Jefferson was able to move away from the moral doctrines of antiquity that exclusively served the private good and self-preservation. Instead, he promoted non-sectarian Christian philosophies that leaned towards serving the public good and fulfilling one's duties to society.[13] For Jefferson, these principles better satisfied the theory of a self-governing body under which the entire educated and ethical community could flourish.

[9] *Id.* at 58.
[10] *Id.* at 60-61.
[11] *Id.*
[12] SHELDON, *supra* note 3 at 105.
[13] *Id.* at 104, 106-07.

Despite his use of basic Christian moral doctrines, Jefferson held firm in his belief that organized churches distorted the true teachings of Christ, for example, the basics of a virtuous society, and thus drive people away from these principles.[14] To remedy this dilemma, Jefferson advocated religious freedom within his vision of a republican society, where denominational doctrines enjoy no hegemony.[15] Religious freedom, in Jefferson's view, would permit and foster dialogue among differing faiths within the republic and lead to a distillation of many different beliefs into one set of moral principles that society as a whole could accept.[16] Disestablishment of sectarian religious beliefs would also foster a community of tolerance and virtue—ideals that Jefferson believed to be essential to American society. The combination of these ideals propelled Jefferson's seminal thinking and, in turn, provided the animating philosophical precepts for the new republic.

B. EUROPEAN INFLUENCES ON THE FOUNDING PERIOD

In *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, Donald S. Lutz explores the varying influences on early American conceptions of the rule of law, and examines the influence of European expositors apart from John Locke.[17] In Lutz's comprehensive survey of political writings that were published in America during the Founding period from 1760 to 1805,[18] he quotes Bernard Bailyn as providing a compact list of five of the most prevalent sources

[14] *Id.* at 106-07.
[15] *See Id.* at 107.
[16] *Id.* at 110.
[17] Lutz, Donald S., *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought* 78 AM. POL SCI. REV. 189, 189 (1984).
[18] *Id.*

from which American colonists drew their political thinking.[19] In this list, Bailyn cites: (i) the writings of classical antiquity; (ii) the writings of Enlightenment rationalism; (iii) the tradition of English common law; (iv) the political and social theories of New England Puritanism; and (v) the writers identified as being associated with the English Civil War and Commonwealth period.[20]

In performing the survey of political writings, Lutz sought to identify those that heavily influenced the Framers. Instead of simply looking to the Founding documents, such as the Declaration of Independence and the Constitution for guidance, Lutz focuses on specific European writers who were directly cited by various Founding Fathers during the Revolutionary period.[21] Examinations of published documents of that time reveal that Locke was only one of many philosophers quoted by the Founders (who, incidentally, also referred to classical republicanism, Hume and the Scottish Enlightenment, among others).[22] In order to delineate a pattern in the types of philosophers and scholars that influenced the Founding Fathers, Lutz noted how many times prominent writers, primarily Madison, Jefferson, and Hamilton, quoted or paraphrased a source. In his research, Lutz referenced about 916 works, including citations of 224 individuals, representing approximately one-third of all public political writings longer than 2,000 words that were published during the Founding era.[23]

[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* at 190.
[23] Lutz, *supra* note 17 at 191.

Lutz discovered that the most commonly cited work within this material was the Bible.[24] Besides the Bible, many of the political documents that were analyzed identified with the European Enlightenment, especially during the initial stages of the forty-five year Founding period.[25] Perhaps unexpectedly, Lutz notes that Montesquieu was the most cited political writer identified by his research, slightly more than even Locke.[26] Both philosophers were prominent during the Revolutionary era, particularly in the 1760's. During that period, these Enlightenment thinkers accounted for nearly 60% of the Founding Fathers' quotations, though both are placed in entirely different contexts. As described by Lutz, the references to Locke are mostly used to justify the inevitable break from the oppressive British parliamentary system.[27] Locke's writings were valued for legitimising government by way of consent, and for opposing any kind of tyranny or repression, but Locke was less influential in the details of actually structuring and designing the new government.

The writings of Montesquieu, on the other hand, concerned the actual constitutional design that a newfound government should adopt at its inception. Consequently, the works of Montesquieu are cited more frequently than those of Locke following the 1780's.[28] During the Constitutional epoch, the writers of the Enlightenment and the Whig era were cited in nearly equal proportion; however, none of the Enlightenment authors dominated the Founders' writings like Montesquieu.[29] As a

[24] *Id.* at 192.
[25] *Id.*
[26] *Id.* at 192-93.
[27] *Id.* at 192.
[28] *Id.* at 193.
[29] Lutz, *supra* note 17.

result, Lutz determines that, besides the writings of Blackstone, Montesquieu was one of the most often cited, and therefore influential, authors of the Founding period.

Lutz concludes his study by underscoring the fact that although Montesquieu is widely cited, he is rarely considered in contemporary discussions concerning philosophical influences of the period.[30] Lutz further argues that while Montesquieu is too infrequently mentioned among leading early American philosophic influences, Locke's importance might also be said to be overstated.

C. CLASSICAL INFLUENCES ON THE FOUNDING PERIOD

The Founders also drew their inspiration from classical philosophers. Carl Richard's work, *The Founders and the Classics,* argues that the Founding Fathers "venerate[d]" the classics.[31] The ensuing discussion underscores the contention that the Founders intended classical ideals such as virtue, justice, and liberty to be an essential part of the Constitution they drafted.

Studies of the Founders' writings reveal heavy citation of the classics.[32] Classical works had a particularly profound effect on Thomas Jefferson.[33] A favourite quotation of Jefferson can be originally attributed to Euripides: "The words of truth are simple, and justice needs no subtle interpretations, for it has a fitness in itself."[34] Even George Washington, who unlike many of the other Founders received no formal classical training, revered classical works and saw to it that his stepson was educated in the

[30] *Id.* at 195.
[31] CARL RICHARD, THE FOUNDERS AND THE CLASSICS 12 (Harvard Univ. Press 1994).
[32] *Id.* at 26.
[33] *Id.* at 27.
[34] *Id.* at 29.

classics.[35] From an early age, the men of the Founding generation associated the works of classical authors and artists with personal and societal virtue.[36]

The Founders used classical symbolism to communicate ideas, impress colleagues or the public, and persuade adversaries.[37] The classics provided the Founders with models for personal behaviour, societal practice, and governmental formations.[38] The Founders' models for personal behaviour included actual and mythological figures, both Greek and Roman, as well as statesmen and war heroes.[39] The common theme was that these models were all men of virtue.[40] This was a concept that the Founders wished to impart to the new society they were building through the nation's Founding documents.

Classical Stoicism contributed significantly to the Founders' conception of human nature, including their theory of natural law on which they based the Declaration of Independence, the Bill of Rights, and much of their understanding of the nature and purpose of virtue.[41] The Founders wished to incorporate this classical sense of virtue into the new government, as well as an inherent sense of morality in the people.

Likewise, although the Founders had access to many aspects of Western discourse on natural law, they often relied upon the works of the Stoics.[42] For example, James Wilson quoted Cicero's explanation of natural law: "It is not one law at Rome, another at Athens; one law now, another hereafter: it is the same eternal and immutable law, given

[35] *Id.* at 35.
[36] *Id.*
[37] RICHARD, *supra* note 31, at 39.
[38] *Id.* at 53.
[39] *Id.* at 63.
[40] *Id.* at 169.
[41] *See id.* at 169, 175.
[42] *Id.* at 175-176.

at all times and to all nations."[43] This one law was implanted by God, the "author and promulgator" of natural law.[44] Most advocates of natural law were more explicit in asserting its existence than establishing its contents.[45] Nevertheless, the Founders shared the Stoic belief that both intuition and experience were necessary to understand natural law.[46] Thus, Thomas Jefferson believed that everyone to be born with a "moral sense" which God implanted in humans for the preservation of the race.[47] This moral sense, Jefferson wrote, "is as much a part of a man as his leg or his arm."[48]

However, the Founders interpreted human nature more optimistically than did the Stoics or other ancients.[49] The advances in science, technology, and industry of the Eighteenth Century provided them with the assurance that human rationality promised greatness.[50] Further, the Founders believed that because they studied history, they could break the cycle of past failures.[51] For them, history was not merely an academic subject, but a call to action and improvement.[52] Many lessons learned from the classics were implicit in their deliberations regarding the new Constitution. Consequently, the Constitution, as envisioned by the Founding Fathers, incorporated the values of classical philosophy such as virtue, morality, and justice.

[43] RICHARD, *supra* note 31, at 176.
[44] *Id.*
[45] *Id.* at 177.
[46] *Id.*
[47] *Id.*
[48] *Id.* at 178.
[49] *See* RICHARD, *supra* note 31, at 180.
[50] *Id.*
[51] *Id.* at 179.
[52] *Id.*

D. NATURAL LAW AT THE FOUNDING AND IN THE CONSTITUTION

In addition to common law, the European Enlightenment, and classical philosophers, the Founding Fathers used natural law as a source of inspiration in creating both a workable government and a society with a common sense of morality and virtue. They often turned to religion, which historically had provided certain foundational elements for the concept of natural law. By incorporating natural law into the Founding documents, the Framers believed that they would be able to achieve their objective of creating a moral and virtuous society of people who were worthy of the democratic republic they conceived.

The Founders intended principles of natural law to support the Constitutional framework they developed. Though the basic concepts underlying natural law have remained constant within the American experience, the jurisprudential means for achieving these objectives has changed over time. Natural law was regarded within the initial American experience as the "highe[st] or ultimate law universally binding on all regardless of time or place.[53] The American Constitution was thought to have reflected this in carrying with it the goals and ideals of the law of nature.[54]

Historically, the Founders had inherited not only the natural law tradition so critical in the development of their constitutional thinking, but also a tradition or system

[53] Michael Ambrosio, *Natural Law as a Wisdom Tradition*, *in* Proceedings of the Center for Catholic Studies: Knowledge and Wisdom 31, 31 (Seton Hall Univ.) (1998), *available at* http://library.shu.edu/pdfdocs/Knowledge-Wisdom.pdf.

[54] *See id.* at 31. Ambrosio has suggested that the connection between law and justice is the common thread in all natural law philosophies. He notes, for example, that for Aristotle equity is defined as the "correction of that which is deficient in the law by reason of universality." *Id.* In contrast, for Cicero, the source of natural law was "physical nature rather than human nature." *Id.* at 31-32. Ambrosio also notes that Cicero's naturalistic view was derived from the Stoic thought which held that natural law was based on right reason and reflected an order in the universe. *See id.* at 32.

of "unwritten law" from the previous British regime. Nevertheless, while embracing natural law, they also wished to deviate from the "unwritten law" rubric. The Founders wanted to have an enumerated set of rules and laws which all could understand and follow through the mechanism of a written Constitution. This document would also have within it values that were expressed through the notions of natural law and the inherent rights of all beings. By way of contrast, the constitution with which the Founders were most familiar—the British constitution—was "neither a single written document nor a category of either natural or enacted law."[55] Rather, it was an "amorphous admixture of various sources of law . . . essentially custom mediated by reason."[56]

Furthermore, the notion of fundamental rights (rights that could never be delegated or relinquished, even voluntarily) also impacted American thought about constitutionalism.[57] Fundamental rights were inalienably bestowed upon humanity by God and were rights "which no creature can give, or hath a right to take away."[58] Legislators could "no more rewrite these laws of nature than they could the laws of physics."[59] Thus, natural rights were conceived of as possessing the same law-like status, and by implication as having a similarly compelling "scientific" style of justification, as the laws governing the behaviour of physical bodies. To these concepts, the Founding Fathers added a third idea: "the constitution as a charter or form of government."[60]

---

[55] Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1130 (1987).
[56] *Id.*
[57] *Id.* at 1132.
[58] *Id.*
[59] *Id.*
[60] Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 843 (1978).

Notwithstanding the desire for a charter form of government, early eighteenth century Americans, through their received traditions and customs of English jurisprudence, assumed that "laws perceived as violating basic national values are unconstitutional, whether or not they conflict with actual provisions of the written constitution."[61] However, a preference for predictability led the Americans to favour a system that provided for the enactments of an elected legislature rather the reliance upon the views of an individual judge as to what constitutes justice.[62] The Founding Fathers studied the English theories of constitutionalism through the works of Coke and Bolingbroke.[63] Essentially, they found three distinct aspects embedded within those theories. First, some higher law (they thought the British constitution would suffice) "existed and operated to make void Acts of Parliament inconsistent with . . . fundamental law."[64] Second, this constitution "consisted of a mixture of custom, natural law, religious law, enacted law, and reason."[65] Finally, "judges might use that fundamental law to pronounce void inconsistent legislative or royal enactments."[66] Although those who held power in England never fully embraced these ideals themselves, the ideals were nevertheless "tremendously influential upon the generation that framed the American constitution," with the result that the American system of law and government "recognizes no higher legal authority than the written Constitution."[67] That said, shortly

[61] *Id.*
[62] *Id.* at 1128-29.
[63] *Id.* at 1129.
[64] *Id.*
[65] *Id.*
[66] Grey, *supra* note 60 at 1134.
[67] Michael Novak, *The Faith of the Founding: Religious and the Founding of the United States*, AM. ENTER. INST. OF PUB. POL. RESEARCH (2003) *available at* http://www.aei.org/article/16883.

after the adoption of the Constitution, American judges went on to develop "a body of unwritten constitutional law."

E. RELIGION AT THE FOUNDING

It is clear that religion played a major role in the conception of the American government, most evidently through the assimilation of natural law principles through the process described above. As discussed above, the Founders wished to emulate a utopian-like society that fostered senses of morality and virtue, ideals that were absent from past communities such as the Roman Empire, which in their estimation, contributed to its eventual failure. The Founders brought with them strong religious passions and a desire to inculcate virtuous standards into the society they were constructing. They wished to implant a sense of spirituality into their newly found community. Therefore, the questions of: (i) what religious sources inspired the Founders, (ii) how the Founders did so, and (iii) the manner in which they found expression in the fabric of early American society are all relevant to the central focus of this article.

Michael Novak explains that men such as Adams, Rush, Hamilton, Dickinson, and others saw and often cited, the actual source of natural rights and fundamental law as more religious and spiritual than John Locke envisioned in his writings.[68] Novak explains that the Framers envisaged a very public role for the establishment and worship of religion, thus striking any pre-conceived notion that the Founders wished to confine religion to its own private arena.

[68] *Id.*

Novak looks to scholar Jacques Maritain who argues that the American Founding and modern democracy can only be understood as a divine "inspiration of the gospel of Jesus Christ."[69] This thesis is elaborated to mean that the Constitution has elements within it that point beyond the secular influences of John Locke or the Enlightenment of the Eighteenth century. Instead, the Constitution of the United States has identifiable roots in traditional "Christian thought and civilization."[70] Therefore, the document can be understood as a primarily Christian-influenced text, one that is firmly rooted within the philosophical theology of its time.[71] Maritain held that the Constitution rests upon foundations that are antithetical to the notion that when "making human society [one must] stand aloof from God and from any religious faith."[72] Through public prayer, widespread days devoted to fasting and thanksgiving, and official religious gatherings, early Americans were clearly drawing on this spirit and inspiration.[73]

Maritain later wrote in *Reflections on America* that "The Founding Fathers were neither metaphysicians nor theologians, but their philosophy of life, and their political philosophy, their notions of natural law and of human rights, were permeated with concepts worked out by Christian reason and backed up by an unshakeable religious feeling."[74] These strong sentiments concerning the impact of religion (most notably Christianity) on the American Founding were a strong counter-argument to Locke who sought a separation of the church from the public sphere. It is on the basis of this original

[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] Novak, *supra* note 67.
[74] *Id.*

religious inspiration that Maritain deems it necessary to maintain what the Founders originally wanted: for the people to maintain their natural rights and to "hold fast to their own originality."[75] Thus, by implication, abandoning all association with Christian foundations would be damning to modern day Americans, as it would further drain any notions of morality or spirituality from the American legal system and government.

Novak also points out that the Founding documents all have a common feature: they depend distinctively on Jewish or Christian views concerning the relationship between humanity and God.[76] Novak explains that this fact allows such documents to maintain their intelligibility and credibility. The Judeo-Christian world-view that is prevalent throughout the documents, according to Novak, is one that holds each person's conscience to reckon in some way with the notion that there is a Supreme Creator.[77] Since every individual is aware that God created them, they all owe a debt of gratitude, a "primordial duty" to this Creator.[78] This duty takes shape in the Declaration of Independence's "unalienable rights;"[79] each individual, and that individual alone, can satisfy their personal duties to God. These duties cannot be taken up by anyone else.[80]

In further discussing the impact of religion within certain Founding documents, Novak cites the *Virginia Declaration of Independence and Thomas* Jefferson's *Bill for Establishing Religious Freedoms of 1779*.[81] The Virginia document was known for dealing directly with religion, in terms of its practice and influence. The document reads:

[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] Novak, *supra* note 67.
[80] *Id.*
[81] *Id.*

"[we hold] that religion . . . can be directed by only reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; *and that it is the mutual duty of all* to practice *Christian forbearance*, love, and charity towards each other."[82] This proclamation shows that religion was not only fostered by the state, but the Declaration also promoted purely Christian acts of kindness. Jefferson's bill also contained strictly Christian elements, as it states:

> [We were][w]ell aware that . . . . [a]lmighty God hath created the mind free, and manifested His supreme will that free it shall remain, by making it altogether insusceptible of restraint: That all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as it was in his Almighty power to do, but to extend it by its influence on reason alone . . . .[83]

This quotation from the bill reiterates the notions of the time that society as a whole owed certain duties to a Supreme Being, and that communities should be built around this objective. The bill went on to proclaim that "the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal . . . its operation, such act will be an infringement of natural right."[84] This thinking follows along the lines of all natural law theorists who posit that man-made laws contrary to divine laws are unenforceable.[85]

[82] *Id.* (emphasis added) (brackets in original).
[83] *Id.*
[84] *Id.*
[85] Novak, *supra* note 67.

Besides the notion that we are handed natural laws from a divine power, one of the main precepts that was stressed by the Founding Fathers was that religion cannot be forced upon their fellow citizens.[86] This was clearly evident in *Virginia's Declaration of Rights*, which James Madison reiterated following the passage of this document:

> We have a freedom to embrace, to profess, and to observe the religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man.[87]

Novak emphasizes that though early American society was permeated by religious worship, and a constant blurring of the lines between church and state, the government still respected those who did not accept this theistic thinking.[88]

Finally, Novak argues that the Founders had a specific understanding of the practices of the Jews and Christians, for these were the only religions whose God "set humans beings free" to build their own civilizations.[89] Novak goes on to honour the devout nature of the Founding Fathers. As he notes, Thomas Jefferson wrote in his autobiography that the authors of the *Virginia Bill for Establishing Religious Freedom* never actually mentioned the name of the "holy author of our religion."[90] The reason for this was that any mention of "Jesus Christ" would be "too denominational," and could alienate those who did not accept the Christian world-view. Since the *Virginia Declaration of Rights* contains such Christian language concerning religious liberty, the Founders wished, again, to keep their views non-denominational. However, they still

[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*

wished to invoke the Judeo-Christian belief that God seeks a close and personal relationship with individuals to remind people that they must also perform specific duties to honour that personal relationship with God.[91]

Concluding his essay, Novak posits that religion, and specifically Christianity, were of vital importance to many Founding Fathers. Though the Founders wanted to keep their notions of spirituality purely neutral and non-denominational, it is evident that they largely adhered to a Protestant-Christian outlook. Novak explains that the Christianity being portrayed by the Founders is not necessarily the "full-blooded Thomist" vision, but it nevertheless "embraces too many theological elements to be considered merely secular, philosophical, or unbelieving."[92] Overall, Novak's approach convincingly explores the goals of the Founding Fathers: their desire to separate church and state, while fostering an atmosphere that freely promoted the exercise of religion without coercion.

Ellis Washington provides further evidence for accepting this religious view of the Founding in an article concerning the use of "academic moralism" in legal analysis.[93] Judge Richard A. Posner describes academic moralism as the "propensity by certain legal philosophers and legal theorists in using moral or political arguments to defend an intellectual legal end."[94] Posner holds that such a method of lawmaking lacks intellectual and emotional power, and because of this, people are less inclined to change their beliefs

[91] Novak, *supra* note 67.
[92] *Id.*
[93] Ellis Washington, *Reply To Judge Richard A. Posner on The Inseparability of Law and Morality*, 3 RUTGERS J. OF L. & RELIG. 1 (2001).
[94] *Id.*

or behaviours to comply with legal requirements.[95] Against such a view, Washington sets out to demonstrate that the American Founders used many theistic principles in drafting the United States' most important documents, including the Declaration of Independence, the Constitution, and the Bill of Rights. In doing so, Washington concludes that deviating from these theistic foundations would expressly violate the Founders' intent.

Washington, like Maritain, discusses that the Founding documents were created under natural law principles. Washington cites the natural law belief that laws have their basis in the inherent rights that are found in all humans, and bestowed upon us by a deity; consequently, all man-made laws that come into conflict with these natural inherent rights are deemed unenforceable.[96] These natural law precepts were pivotal in the deliberations of the Framers at the onset of American political state. The colonists did not have to invent the underlying principles of the theory, but merely embraced the suppositions of the beliefs they had been given in this regard and used them as a "foundation" that contributed significantly toward forming their new Republic.[97]

Ellis Sandoz notes the religious influence present in the decision to revolt against English rule. The leadership of the country often resorted to religious symbolism through the actions of Congress, for example, the days of public fasting and thanksgiving were

[95] *Id.*
[96] *Id.* at 1, 16.
[97] *Id.*

scattered throughout the Revolutionary War.[98] Sandoz cites the Resolutions of June 12, 1775, which illustrate this religious symbolism:

> As the great Governor of the World, by his supreme and universal Providence, not only conducts the course of nature with unerring wisdom and rectitude, but frequently influences the minds of men to serve the wise and gracious purposes of his providential government; and it being, at all times, our indispensable duty devoutly to acknowledge his superintending providence, especially in times of impending danger and public calamity, to reverence and adore his immutable justice as well as to implore his merciful interposition for our deliverance: Congress recommended that July 20 be observed . . . as a day of public humiliation, fasting and prayer; that we may . . . unfeignedly confess and deplore our many sins . . . to bless our rightful sovereign, King George the third, and inspire him with wisdom to discern and pursue the true interest of all his subjects, that a speedy end may be put to the civil discord between Great Britain and the American colonies without further effusion of blood . . . that virtue and true religion may thrive and flourish throughout our land.[99]

The divine justification for colonial resistance is clear; the devout community of essentially loyal but unhappy colonial subjects is opposed by the blighted view of a monarchy sorely in need of the benefits of true Christian insight. Such religious proclamations had the objective of unifying the early Americans as one people under a singular moral and religious community in order to establish a true sovereignty.[100] During the Revolutionary period, the Founders needed this in order to galvanize the population and maintain the spirits of the colonists. Despite the widespread denominationalism that saturated the country, the Framers of the government wished for some sort of homogeneity in the budding society.[101] Without such harmony, the newly

[98] ELLIS SANDOZ, A GOVERNMENT OF LAWS: POLITICAL, THEORY, RELIGION, AND THE AMERICAN FOUNDING 136 (Louisiana State Univ.) (1990).
[99] *Id.* at 137.
[100] *Id.* at 138.
[101] *Id.* at 125.

founded union would have little chance to develop into the full-blown Republic that it would eventually become.[102]

Throughout these times the colonists held fast to the notion that the Revolution was "just and necessary"[103] and God would continue to bestow upon the people his providence in endorsing their undertaking.[104] Sandoz points out that March 16, 1776 was designated as a day for the nation to do its "indispensable duty" and "publicly to acknowledge the over ruling providence of God; to confess and deplore our offenses against him; and to supplicate his interposition for averting the threatened danger."[105] Clearly, there was an attempt to justify mass revolt by dubbing it a divine mission, which had the full support of a deity. Thus, the religious aspect of life simultaneously supported the community's sense of identity while bolstering its revolutionary political purpose.

Sandoz stresses that the use of religious symbolism as a unifying force continued in post-revolutionary America. The early Americans declared that their successful revolution against the British was a crucial undertaking that protected their natural human rights, and they were assisted by an intervention of "divine providence" in their rebellious cause.[106] In fact, Sandoz quotes John Quincy Adams as stating "the highest glory of the American Revolution . . . was this: it connected, in one indissoluble bond, the principles of civil government with the principles of Christianity."[107] Instead of fostering a tyrannical and oppressive government, the Founders believed invoking religious

[102] *Id.*
[103] *Id.* at 139.
[104] SANDOZ, *supra* note 98.
[105] *Id.* at 138.
[106] *Id.* at 140.
[107] *Id.* at 141.

principles was something attuned to principles of political autonomy and liberty. Hence, their religious attitudes were contrasted with the perceived tyranny of the irreligious British regime.

III. EARLY LEGAL PHILOSOPHIES AND THE TRANSITION TO PRAGMATISM

The American legal system gradually evolved from the era of Jefferson and the Founders, who created a system dominated by the combined influences of spiritual values and Lockean-inspired natural law principles outlined above, into one dominated by Pragmatism and Realism.[108] Modern jurisprudence, however, has moved away from these ideas, into a domain dominated by practical and empirical social concerns. Over time, metaphysical abstractness has been supplanted by a pragmatism that focuses on what is considered to be tangible and "factual." The application of the theory of Positivism was the first manifestation of the movement away from the Founding philosophies that initially animated the American conception of the rule of law.

---

[108] JAMES REICHLEY, FAITH IN POLITICS 113-14 (Brookings Institution Press 2002). Reichley illustrates some of the more dramatic instances of this domination:

> In the early years of the nineteenth century, state courts frequently held that Christianity is part of the common law that we have inherited from England, whether or not the state maintained an established church. In 1811, for example, Chancellor James Kent of New York upheld the conviction of a freethinker for blasphemy against Christianity on the ground that New York law "assumes we are Christian people, and the morality of the country is deeply engrafted upon Christianity." In 1824, the Pennsylvania Supreme Court ruled that "Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania." As late as 1838, Abner Kneeland, a popular lecturer against religion, was sent to jail in Massachusetts for blasphemy. Kneeland argued unsuccessfully in his defense that prosecution for blasphemy was in conflict with Massachusetts' own Declaration of Rights (premised on natural law principles).

Reichley also notes the explicit Christian references made in the arguments for the adoption of the Fourteenth Amendment and the Supreme Court's decision to outlaw Polygamy in *Reynolds v. United States*, 98 U.S. 145 (1878).

Positivism emerged as a post-Civil War response to what were perceived to be the vague metaphysical and theological underpinnings of natural law.[109] The earliest proponents of Positivism were Jeremy Bentham and John Austin.[110] For Bentham, natural law is a "hindrance" to true legal reform.[111] Natural rights, he famously declares, is "nonsense on stilts."[112] Utilitarianism, the general application of the principle of the greatest happiness of the greatest number, is in turn regarded as the exclusive means "for [the] improvement of societal law."[113] In turn, Austin honed Bentham's ideas, holding that "the command of the sovereign" comprises the true essence of the law.[114] For Austin, "[m]orality was not binding: law was."[115] Thus, legality, from this point of view, takes precedence over ethics.[116] The latter, along with the religious sentiment associated with it, is rendered an irrelevance or even a hindrance to the smooth application of the principle of utility.

Even though the Fourteenth amendment relied heavily on natural law, invocations of natural law in jurisprudence waned throughout the Nineteenth Century. Increasing industrialisation, advances in technology and communications, as well as the popularity of the "case method" approach to legal education first practiced by positivist Christopher Langdell (1826-1906), were together responsible for the decline in the importance of natural law in American jurisprudence. In "studying the written opinions of courts of

[109] JEFFRIE MURPHY & JULES COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 19 (Westview Press) (1990).
[110] Jeremy M. Miller, *Behind the Green Door in Chambers: Is there a Limit to Judicial Discretion?*, 12 OKLA. CITY U. L. REV. 59, 85 (1987).
[111] JEREMY BENTHAM, *Critique of the Doctrine of Inalienable, Natural Rights*, *in* ANARCHICAL FALLACIES 30 (A.I. Melden ed., Wadsworth 1970).
[112] *Id.*
[113] MURPHY, *supra* note 109, at 72.
[114] *Id.* at 22.
[115] *Id.*
[116] *Id.*

law," it was increasingly felt by courts and commentators that, in many cases, there were no overarching principles of law that could be used to adjudicate a dispute, but rather "many rules . . . exceptions to these rules, and exceptions to the exceptions."[117]

Eventually, however, it was not Positivism, but pragmatic Realism, that supplanted the natural law approach and became the foremost approach in the United States. American Realism came about both because of, and in response to, the influence of Positivism.[118] Oliver Wendell Holmes, Sr. (1809-1894), Karl Llewellyn (1893-1962), and Jerome Frank (1889-1957) were among its most prominent advocates.[119] However, Holmes, more than any other figure to that point, reshaped and reconfigured American perceptions of the rule of law. Holmes famously argued that law was simply "a prediction of what courts will decide" and that the role of a judge is incredibly discretionary.[120] Llewellyn and Frank added that while the "goal of law was the manifestation of fairness or justice," that was not always the result, since a judge could always be prejudiced or even simply stupid.[121] Realists argued that emphasis on "appellate opinion, *stare decisis*, and 'black letter' rules was therefore vapid," much less giving any credence to spiritual or moral values.[122] Instead, they argued that the

[117] *Id.* at 33.
[118] Miller, *supra* note 110, at 86.
[119] MURPHY, *supra* note 109, at 33.
[120] *Id.*
[121] *Id.*
[122] Miller, *supra* note 110, at 87. A lower court's duty to abide by Supreme Court precedent falls within the doctrine of *stare decisis*. Given the perceived weakening of *stare decisis* in recent decades, it is important to distinguish between the doctrine's two forms: first, the respect a court owes to its own prior decisions, and second, the respect a lower court owes to the decisions of courts above it in the judicial hierarchy. The first kind of *stare decisis*, sometimes referred to as "horizontal" *stare decisis*, has been the more prominent of the two, both in case law and in the academic commentary. There has been much debate over just what degree of deference the doctrine should command, but generally its binding force is understood as akin to a strong presumption, rather than to an inflexible rule of decision. The duty imposed by "vertical" *stare*

emphasis should be on "the workings and idiosyncrasies" of the system.[123] However, Realism itself was not a unified school of thought. Some Realists were skeptics, claiming that a judge can do as he or she pleases. Others embraced a quasi-natural law approach.[124] The overarching value of fairness was a key consideration under this theory, but ultimately each case's determination was fact sensitive.[125]

The most powerful strand of this new legal realism was Pragmatism, as propounded in its legal form by Oliver Wendell Holmes. The key aspect of Holmes' thinking was that he took an approach to the understanding of law from the point of view of results.[126] Together with William James,[127] Holmes expanded his philosophy of a pragmatic form of government, which would counter the previous theistic teachings of the Founding Fathers, prevalent in Holmes' early years (and against which he famously reacted).

---

decisis, as the second form of the doctrine is called, is generally acknowledged to be stronger. Few commentators question the lower courts' obligation to follow the rulings of higher courts; indeed, not even the most vociferous critics of *stare decisis* in its horizontal form take this position. In contrast to the flexibility usually recognized under the horizontal form of the doctrine, the duty prescribed by vertical *stare decisis* is frequently referred to as "absolute."

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *See* SURYA PRAKASH SINHA, JURISPRUDENCE: LEGAL PHILOSOPHY IN A NUTSHELL 271 (West Group 1993).

[127] *Id.* at 257. Much like Holmes, James was not a proponent of any sort of orthodox religion or teachings. James' works, dealing with both psychology and religion, developed his theory of pragmatism. Through his work, James argued how the meaning of ideas, be they scientific, religious, or political, are all ultimately found only through the succession of experimental consequences. The only way that we can truly find the "correct" way to solve problems is through trial and error, there are no absolutes, finalities or staticisms. Along with Oliver Wendell Holmes, James promoted the use of pragmatism through judicial review in the United States.

Though explored and harnessed through the work of Holmes, the idea of Pragmatism was built by the work of C.S. Peirce, William James and John Dewey.[128] These theorists believed that philosophy was in need of reconfiguration in order to reconcile two extreme tendencies.[129] At one end of the spectrum were the rationalists, who had a desire for order, first principles, abstraction, and certainty.[130] At the other extreme were the empiricists, who referred to David Hume's British school of empiricism.[131] These philosophers sought to avoid abstraction and instead concentrated on facts, the material world, and pluralism.[132] The problem with rationalism, according to James and Dewey, is that it has nothing to say about the temporal realm and consequently cannot guide us through it.[133] James and Dewey contended that the conceptual schemes promoted by this philosophy were fictitious.[134] While "abstraction is essential" in order to learn from experience, for James even abstractions should not be placed on a higher level than reality.[135]

The other aspect of Pragmatism that was posited by Dewey and James was a "theory of truth."[136] James best explained this theory as a sort of sophisticated understanding of science:

> Up to about 1850 almost everyone believed that sciences expressed truths that were exact copies of a definite code of non-human

[128] Brian Z. Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction*, 41 AM. J. JURIS. 315, 319 (1996).
[129] *Id.*
[130] *Id.*
[131] *Id.* at 319-20.
[132] *Id.*
[133] *Id.* at 319.
[134] Tamanaha, *supra* note 128.
[135] *Id.* at 320.
[136] *Id.* at 323.

> realities. But the enormously rapid multiplication of theories in these latter days has well-nigh upset the notion of any one of them being a more literally objective kind of thing than another. There are so many geometries, so many logics, so many physical and chemical hypotheses, so many classifications, each one of them good for so much yet not good for everything, that the notion that even the truest formula may be a human device and not a literal transcript has dawned upon us. . . . The suspicion is in the air nowadays that the superiority of one of our formulas to another may not consist so much in its literal "objectivity," as in subjective qualities like its usefulness, its "elegance" or its congruity with our residual beliefs.[137]

This second aspect of Pragmatism holds that peoples' actions and beliefs are the result of habit or custom, and we gain knowledge when some experience puts a "strain" on our pre-existing beliefs.[138] Thus, the thinking done by decision-makers in the American legal system and by people in the street is in both cases governed by pre-existing beliefs and traditions; however, people can be swayed from these beliefs through critical reflection, especially when they do not solve the problems at hand. A final ideal that sums up the two aspects of Pragmatism is the notion that "truth" is limited to the empirical, the real, the matter-of-fact.[139] It is a sphere where "science is supreme" and there is no room for any metaphysical or spiritual rumination.[140]

Oliver Wendell Holmes utilized the above aspects of Pragmatism to form his own legal philosophy that was diametrically opposed to the beliefs of the Founding Fathers. As explained earlier, the Founders were heavily influenced by theistic notions of natural law; that some divine spirit or supreme being bestowed upon man a set of rules to abide by, and any man-made laws which countered these instructions were to be considered

[137] *Id.* at 323-24.
[138] *Id.* at 324.
[139] *Id.*
[140] Tamanaha, *supra* note 128.

unenforceable.[141] Additionally, the Bible was the prevalent authority used throughout the works of the Founding period, as it was the most-cited text in the range of articles published during this era, from roughly 1760 to 1790. In contrast, the pragmatist legal theory seeks to do away with most of these hazy and "messy" theoretical beliefs. Instead of being concerned with abstractions and partial truths, the pragmatist only wishes to deal with what is actually (i.e., practically and hence concretely) known. Only by viewing the world in this way, the pragmatist avers, will we be able to gain knowledge and forge an adequate legal system that would efficiently solve daily problems.

Holmesian Pragmatism manages to combine the work of James and like minded philosophers while at the same time endorsing a sense of "legal Realism."[142] Holmes was part of the "Metaphysical Club," along with James, Dewey, and Charles Pierce.[143] In applying the theory, Holmes broke through the dominant belief held at the time, which held common law concepts were "essentialist notions" that could not be changed, and that they have a necessary and adequate internal structure supported by theistic notions.[144] To debunk these deeply-rooted beliefs and demonstrate that these laws were not divine in nature, Holmes uses empirical historical analysis. In fact, Holmes argues that the common law had terrestrial origins that reside in basic human needs, and in some cases was even created by mistake.[145] Instead of bowing down to the notion of God-

[141] Washington, *supra* note 93, at 16.
[142] Tamanaha, *supra* note 128, at 315.
[143] *Id.*
[144] *Id.*
[145] *Id.*

given rules, Holmes argues that we should be acknowledged as the ones who make the law in order better to serve our own purposes.

Through the introduction of Pragmatism into the post-Founding era of American society, Holmes and the other pragmatists wished to uproot the existing legal system and bring about monumental change. Ultimately, this change would be to render a completely instrumentally-oriented legal theory.[146] The legacy of the Holmesian approach is a conception of the rule of law devoid of any abstractness, and more often discussed in the pragmatic register, save for a few remaining classical natural law theorists. In the end, pragmatists wished for the law to abandon the perspective of the Founding Fathers: a transcendent legal system that stood above the rest of their world, which had its own set of untainted relations with society.[147] Once the natural law theorists had surrendered their views in favour of the instrumentalist approach, legal theory became transformed into a sphere no longer dependent upon any spiritual notions. This is a sphere organised solely for the benefit of perceived instrumental wants, rather than with a view to the moral issues that arise out of a concern with universal ordinations.[148]

Following the pragmatic approach advocated by Holmes and James, other legal theories successively became momentarily ascendant, including: historical theories of law, sociological theories of law, psychological theories of law, phenomenological theories of law and critical legal studies theories of law. However, each of these theories

[146] *Id.* at 316.
[147] *Id.* at 354.
[148] Tamanaha, *supra* note 128.

owes some recognition to the Realist, Pragmatism movement initiated by Holmes. As such, these theories and the scholars who advocate them, shun any religious notions being insinuated into the rule of law, even though there exists significant contrary sentiment within society at large to avoid entirely divorcing itself from its legal origins. Despite these societal inclinations, some strands of contemporary legal thinking, particularly in the academy, have even embraced the idea that laws should be mechanistically applied to society in order to control the actions of its people, contending that if the rules were rigidly applied and followed, there would be less corruption in the legal system. In contrast, if a legal system were entirely in the control of individual caprice, they claim, the system would fall short because of inevitable human failings.

IV. MODERN CONCEPTIONS OF MORALITY AND THE RULE OF LAW

American society has been celebrated for its notion of liberty, especially with regard to the spheres of individual rights and freedom. These ideals are integral to the perception of democracy in the United States. However, the notions of liberty and personal freedom could neither have taken hold nor grown in America if it was not already an ordered society, i.e., a society where decisions of each kind were made according to their own proper principles and within their own jurisdiction.[149] Nevertheless, the governmental rules and regulations required to ensure an ordered society and the ideals associated with enlarged individual freedom appear contradictory.

[149] Marci Hamilton, *The Rule of Law: Even As We Try to Export the Ideal of Justice By Law, Not Whim, Some in America Resist That Very Ideal*, FINDLAW, October 23, 2003, http://writ.news.findlaw.com/hamilton/20031023.html.

The rule of law is acknowledged as the conceptual foundation that has successfully fostered both an ordered society, and the notion of liberty.

This section explores three modern approaches to the rule of law, and the question of whether there is room for moral and metaphysical influences in contemporary American jurisprudence despite the more recent implications or the Realist, Pragmatist movement. Comparing these modern explications with those of the originators of American law and political theory allows for a demonstration of how society has redirected its approach to lawmaking, primarily from law which was heavily influenced by moral and spiritual principles to law initiated and implemented by the modern secular state.

Indeed, the social, moral and cultural foundations of the rule of law, and the theories which both inform and account for them, are no less important than the law's 'black letter'.[150] In so far as they are presented in the domain of law, such developments may in part be attributable to the natural evolution of the legal process through various stages, as articulated by Jacques Ellul:[151]

1. In its origin law is religious. This is confirmed by almost all sociological findings. Law is the expression of the will of a god; it is formulated by the priest; it is given religious sanction, it is accompanied by magic ritual. Reciprocally, religious precepts are presented in judicial garb. The relationship with the god is established by man in the form of a contract. The priest guarantees religion with the occult authority of law.
2. At a later stage law becomes increasingly secular. Religious and magic rule, on the one hand, and juridical and moral rule on the other, begin to be differentiated. Various influences contribute to this development. Above all, there is the emerging power of the state as distinct from the power of

[150] RAYMOND WACKS, PHILOSOPHY OF LAW xiv (Oxford University Press 2006).
[151] JACQUES ELLUL, THE THEOLOGICAL FOUNDATION OF LAW 18 (Seabury Press 1969).

> religion. At this point a second phase in the evolution of law begins, which might be called the stage of natural law. Law is established by custom or legislation, independently of the religious power, as if it were a spontaneous creation of society under the impact of economic, political, and moral factors. It is not dictated and created in one piece by the state. It is not imposed from outside. It springs directly from within society, from the common sentiment and the common will. These may not of necessity be consciously intended to result in a juridical creation, but they are certainly consciously experienced as habit and obedience. This law rests on the adherence of the people who brought it into existence. This adherence is won because the law is merely the expression of the conscience of these people and of the circumstances in which they live. There is no alternative to adhering to this code, since it is confined to expressing the two basic elements of men's life in society.
>
> 3. In its third phase, the next step is the elaboration of this law into a theory of natural law. It is the acknowledgment of this phenomenon and its intellectual explanation. This is what happened in eighteenth century in England. The jurist tries to organize law in a rational way.
> 4. Subsequently, in its final phase, law becomes a creation of the state. Principles are pronounced, juridical hierarchies are determined, laws are co-ordinated, a juridical technique is worked out which is increasingly precise, increasingly rational, and increasingly removed from spontaneity. At this point the code hardens. It becomes a consecrated abstraction, always trailing behind social and political evolution, always in need of being brought up to date by arbitrary innovations, more or less adapted to the conditions of society. Law becomes the affair of jurists, receiving authority and sanction from the state.[152]

Thus, the formal codification of pre-existing norms and customs constitutes the dynamic of the emergence of the rule of law. The historical development of this formalised codification is exemplified by an ever-increasing rigidity with regard to a legal system's ability to reflect changes within the culture from which it initially sprung. It is this which, in turn, gives rise to the exclusive identification of the state and judiciary with the

[152] Ellul goes on to suggest: "We shall see later what consequences this development has from a legal and social point of view. Here we only point out that this situation coincides with the decadent phase in every society. It is impossible to go backward and to recapture a new spontaneity of law, as it were, 'behind' such juridical technique. A wilted flower cannot blossom again. But the rosebush on which it grew can bring forth a new flower. Likewise in society, when it is totally renewed and launches a new civilization, can produce a new body of law." ELLUL, *supra* note 151, at 20.

realm of legality and the legal process. Law, one might say, becomes increasingly professionalized. Ellul's contentions regarding the natural evolution of the legal process and the effects of the fourth stage, in particular, are substantiated by the three contemporary constructions of the rule of law explored below, which diverge significantly from the philosophies of the founders.

A. RONALD CASS

Ronald A. Cass, one of the leading contemporary expositors on the rule of law theory, has analyzed the rule of law by dividing it into four essential elements, none of which allude to moral or theistic virtues. These elements stress that laws (1) are made with fidelity to rules; (2) must be of principled predictability; (3) are embodied in valid authority; and (4) must be made in a manner that is independent of individual government decision makers.[153] The objective of these elements is to promote freedom and stability by restraining unpredictable, undirected, and unauthorized official action.[154] "Fidelity to rules" is construed to mean that rules given to the public must be sufficiently instructive in order to merit general public adherence or fidelity.[155] The notion of "principled predictability" is directly derived from Professor Friedrich Hayek's view that laws must be fixed beforehand in order to allow society to foresee how they will be applied to given circumstances so as to allow individuals to plan their activities accordingly.[156] In order to satisfy this element of "principled predictability," the rule of law mandates that such

[153] RONALD A. CASS, RULE OF LAW IN AMERICA 4-19 (Johns Hopkins University Press 2001).
[154] *Id.* at 19.
[155] *Id.* at 5.
[156] *Id.* at 7-8.

proposed regulations reflect generality and neutrality.[157] Both concepts require the understanding that proposed laws should not be narrowly tailored to any particular individual or circumstance.[158] In essence, such freely transferable laws are less likely to reflect the judgments of specific individuals about others, thereby advancing the goal of creating a government of laws, and not of men.

However, the notion of being "embodied in valid authority," has sparked the controversy that is the subject of much of this article. The litmus test proposed by Cass to determine valid authority is simply to consider whether the law was enacted through an extreme concentration of governmental power. If, upon such examination, the fate of the law rests in the hands of only one or two people, the law ought to be declared invalid. Similarly, such laws would not survive scrutiny if they failed to honour reasonable public expectations.[159] It is important to note that, in Cass's account, morality plays virtually no role in determining the validity of these laws. Some contemporary moral theorists have argued that merely adhering to this step-by-step rule of law approach undermines critical resistance to morally suspect laws that are nevertheless procedurally valid.[160] In fact, a non-democratic legal system based on the denial of human rights, on widespread poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of Cass's view of the rule of law better than any of the legal systems of more enlightened Western democracies.[161] While a non-democratic system

[157] *Id.* at 11.
[154] *Id.* at 9.
[159] *Id.* at 8-9.
[160] *See* JIM WALLIS, GOD'S POLITICS: WHY THE RIGHT GETS IT WRONG AND THE LEFT DOESN'T GET IT 59-60 (Harpers 2005).
[161] CASS, *supra* note 153, at 13.

may well embody an inferior legal system, it may still excel in one respect: its conformity to the rule of law.[162] Finally, Cass's rule of law interpretation mandates that some external coercive force must back the power of lawmaking officials. This ensures that the processes of the government, rather than individual decision makers, govern.[163] Embedded in this principle are the ideals of predictability and legitimacy. Laws will be more predictable because the lawmakers are being influenced by outside sources, not their own personal views. Consequently, these laws will also be considered legitimate because they do not stem from a single arbitrary decision maker, but rather from an authority outside the control of individuals exercising the legal power.[164]

Cass's straightforward and mechanical analysis of the rule of law reflects Jaques Ellul's view of increasing formalisation and abstraction.[165] Cass's view has enjoyed acceptance to varying degrees by contemporary legal scholars. Nevertheless, most academics concede that the phrase "Rule of Law" continues to be one of the most scrutinized and debated ideas in the legal academy.[166] While many commentators endeavour to find new ways to assign a meaning and an interpretation of the notion of the rule of law, others side step this ordeal and instead focus on the kinds of ideals that support this somewhat abstract notion. Further, there remains the threshold question of whether the rule of law even warrants a definition worth discovering.[167] The framework

[162] *Id.* at 14.
[163] *Id.* at 17.
[164] *Id.*
[165] ELLUL, *supra* note 151.
[166] Gary Lawson, *An Empirical Test of Justice Scalia's Commitment to the Rule of Law*, 26 HARV. J.L. & PUB. POL'Y 803, 803-04 (2003).
[167] *Id.*

articulated by Cass mirrors what most refer to as "the traditional ideal of the Rule of Law," consisting of four or five precepts with regard to law making.

B. MARGARET RADIN

One of the more recent, and more radical, interpretations of the rule of law theory has come from Margaret Radin.[168] Radin is one of many who believe that the Supreme Court decision *Bush v. Gore* represented a gross deviation from the rule of law.[169] Radin uses a more traditional interpretation of the rule of law. She urges that this configuration need not be separate from individual cases in such a way that "logically pre-exist[s] their application."[170] She emphasizes a pragmatic approach that would dissolve the otherwise strict divisions between "rule-givers and rule-followers, and the conception of judges as rule-appliers rather than rule-makers."[171] For Radin, though judges ought to remain impartial by functioning separately from the legislature, they may nevertheless apply the law with a certain degree of discretion. In adjudicating, these decision-makers may do so in light of their own understanding of the moral nature of the community. Hence, judges need not blindly adhere to a strict, five-prong analysis of the kind advocated by Cass, but rather may inject what they believe to be the moral thinking of their own society into their decisions.[172] These pragmatic refinements to the rule of law may have direct implications on constitutionalism, as Radin notes that this view necessarily considers the Constitution to be more than just a governing document.[173] Alternatively, Radin believes

[168] *Id.* at 805.
[169] *Id.* at 806; *See also* Bush v. Gore, 531 U.S. 98 (2000).
[170] Lawson, *supra* note 166, at 806.
[171] *Id.*
[172] *Id.* at 807.
[173] *Id.*

the Constitution to be an organic condition that "constitutes" society as a constantly evolving political community endeavouring to reach a "better world" in the future.[174]

Though this approach is noteworthy in its effort to deviate from the mechanistic application of the rule of law illustrated by Cass, it is difficult to imagine such a system working in practice. For one thing, Radin has in fact attempted to introduce a non-traditional notion of morality into the rule of law. Such a view is different insofar as the rule of law as envisioned by the Founders does not follow Radin in adding subjective judicial interpretations of what is socially moral in a contemporary context into legal decisions.[175] While Radin's view illustrates the historical interrelationship of the rule of law and morality, it fails to maintain the necessary distinction between a judge's personal agenda or conviction and the decision before the court. Contrary to the traditional rule of law approach, Radin advocates an element of subjectivity as constituting the basis of court decisions, a view that brings with it the possible consequence of inconsistent decision-making.[176] On balance, this extreme rule of law construction demonstrates strong moral implications in adjudication, and thus, is in some ways more suggestive of the early colonists' views, though by no means symmetrical with them. Instead of a rigid, secular analysis, Radin theorises that the rule of law can be applied with some judicial discretion, using the moral understanding of the surrounding community as a resource for the legitimacy of such decisions. Whereas Cass's point of view asserts a mechanistic application of the rule of law, devoid of any moral, spiritual, or other

[174] *Id.*
[175] *Id.*
[176] *Id.*

metaphysical implications, Radin, in contrast, advocates a rule of law philosophy containing a moral component based on a judge's subjective interpretation of a community's normative standards. Radin's views should be further distinguished from those of the Founders insofar as she is seen to endorse the acceptability of using non-traditional conceptions of morality as compared to colonial applications of common law and natural rights tenets that provided the basis for early American law.

C. ANTONIN SCALIA

Yet another view of the rule of law is described by United States Supreme Court Justice Antonin Scalia, who has an intricate theory of the interpretation of judicial rule-based and principle-based systems. However, not even the conservative Justice Scalia emphasizes or speculates on incorporating any specific moral, spiritual, or metaphysical guidelines.

Justice Scalia offers an analysis of the rule of law that may be contrary to both the Radin's modernist approach and the Founders' more theistic approach.[177] He identifies a dichotomy between the "general rules" that are applied via the rule of law and the "personal discretion to do justice" that is afforded to laws that are enforced through the courts.[178] Essentially, he compares the adherence to rigid rules in the traditional rule of law analysis with a more lenient set of "principles" which can be referenced as a guide for decision-makers.[179] The latter approach arguably gives the decision-makers more

[177] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).
[178] *Id.* at 1176.
[179] *Id.* at 154.

discretion in their rulings, but may nevertheless lead to an unintended amalgamation of morality and rulemaking.[180]

Scalia asserts that the theoretical scope of a Federal or State Supreme Court holding is extremely expansive.[181] This is founded upon legal precedent: the mode of analysis adopted in a particular case is not solely binding on a particular decision, rather it is followed throughout the lower courts within that judicial system.[182] In effect, the judiciary is not simply applying the law to a given set of facts, but is asserting its *ability to make law*. The decision-maker can articulate whether the mode of analysis is strictly fact-specific, thereby establishing general rules, or whether a modicum of discretion is needed.[183] Establishing this framework allows Justice Scalia to proffer an evaluative analysis, allowing us to identify the better course for judges to take in their application of the rule of law: as a "law of rules," or a guideline of principles. This view allows greater latitude to judges than playing the role of rigidly applying rules devoid of any other considerations.[184]

Scalia holds that a strict rule-based approach, or the "traditional" rule of law application, is overly constraining on the judicial system.[185] These rules are over-broad generalizations that do not always fit into particular fact-patterns. Against the view which favours the formalistic approach of applying a legal precedent to any given circumstance, Scalia argues that if a particular fact pattern does not fit within the rules

[180] *Id.*
[181] *Id.* at 1177.
[182] *Id.*
[183] Scalia, *supra* note 177.
[184] *Id.*
[185] *Id.*

and the rule of law is simply applied automatically, justice is often not administered.[186] A discretion-conferring system would lift this constraint on the judiciary and allow future decision-makers more room with which to work. Thus, the law would develop on a case-by-case basis. Moreover, a particular holding's mode of analysis would not be entirely binding on a future holding. Instead, the future decision-maker would be allowed to shape the application of the laws to the facts as he or she saw fit.[187] Justice Scalia explains that this approach does not confer *total* discretion on decision-makers. Rather, the freedom a judge has in this regard is a matter of degree.[188]

Scalia does acknowledge the problems with this principled approach to the rule of law. For example, he admits that this system could potentially lead to similar cases breeding different results, because judges would be permitted to use discretion in deciding cases.[189] This would not only disrupt the uniformity and predictability of the law but could also contravene the objectives of the justice system.[190] However, Scalia claims that we should strive to attain a system of clearly enunciated rules, "even at the expense of the mild substantive distortion that any generalization introduces."[191] Consequently, Justice Scalia offers a compromise that allows for the existence of both theories in the underlying rule of law application: we should abide by a system of general laws, grounded in general principles provided by Congress or the Constitution.[192] Scalia asserts that the judiciary should carry these supplied general principles into their court

[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] Scalia, *supra* note 177, at 1177.
[190] *Id.*
[191] *Id.*
[192] *Id.* at 1183.

analysis, even though these principles rarely provide a "perfect fit" to the fact pattern.[193] The judge may make categorical decisions on the case based solely on these general principles.[194] Overall, to this end, it is possible to establish general rules in this fashion. However, it is also essential that these rules are grounded in valid social norms or principles.[195] If the latter were not the case, the judicial pronouncements would look similar to legislation, something to be avoided. In summary, Scalia looks favourably upon a rule of law system which relies on principles provided by Congress or the Constitution that are generally applicable to various sets of circumstances. It follows that from these general principles that rules can be established in order to provide a framework for judges. Scalia believes that any cause of action requiring "standardless balancing" should not be subject to judicial enforcement. Unlike Radin, Scalia does not allude to any "moral implications of the community" nor to a "Supreme Being" as a source for guidance. Scalia's approach does not suggest any direct moral implications inherent in the rule of law, and as a result, demonstrates a significant deviation from the earlier theories of the Founding Fathers. In summarizing his own views, Scalia has cited Aristotle's comment in *Politics* to the effect that, "rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the

[193] *Id.* at 1184.
[194] *Id.* at 1183-84.
[195] Scalia, *supra* note 177.

difficulty of framing general rules for all contingencies, to make an exact pronouncement."[196]

V. MAKING ROOM FOR MORALITY: THE CASE FOR TRADITION IN CONTEMPORARY JURISPRUDENCE

The question which presents itself at this point is whether there is any basis for compromise or process that would allow for an inclusory dialogue admitting of some value being attached to the guiding principles that initially animated the first hundred years of American jurisprudence, and, if so, how this might be reflected in future conceptions of the rule of law? Gerald P. Moran, a prominent scholar in the field of jurisprudence, has completed an in-depth study of contemporary jurisprudential philosophy.[197] To begin, Moran notes that American culture itself is perhaps the most powerful force that will prevent the United States legal system from evolving into a very different form.[198] Moran describes American culture as "our security, even though it may violate or lessen the security of others" (whereby he means minorities or special interest groups who from time to time stand distinct from the prevailing culture).[199] In his view, past case law, members of the United States Supreme Court, and other prominent legal figures have shaped our system into what it has become today, and have "developed" our "legal" culture. This is the most powerful restraint on change American society faces.

[196] *Id.*
[197] Gerald P. Moran, *A Radical Theory of Jurisprudence: The "Decisionmaker" as the Source of Law – The Ohio Supreme Court's Adoption of the Spendthrift Trust Doctrine*, 30 *AKRON L. REV.* 393. (1997).
[198] *Id.*
[199] *Id.*

Moran explains that this phenomenon is best understood by examining the notion of *stare decisis.*[200] He argues that *stare decisis* has set the precedent for the resolution of legal conflicts. Past decisions are used as "models" to be applied to given problems in the present day. By using these models as guides, judges are provided with the tools used to reach certain decisions.[201] Moran posits that so long as Americans generally look to past decisions to determine future problems, the community as a whole will continue to believe that this form of jurisprudence is both legitimate and sacred.[202] It is the empirical foundation for the American legal system; the source from which it derives its "power" to decide new cases.

Moran elaborates by explaining how present day decision-makers eloquently draft their opinions in a very skilful manner, subject to many revisions and re-writings over an extended period of time.[203] Though it may seem as if these decision-makers are inserting their own beliefs or rationalizations into the cases at hand, Moran suggests that they are merely disguised applications of precedents that have been handed down decades beforehand. "These legal opinions express the basis of a particular decision through syllogistic connections tied into a traditional proposition of law through well reasoned articulations."[204] On balance, the role of the decision-maker or judge is quite simply to bolster what has already been established as a "social norm." Thus, the entire final decision is merely a reference point to how American culture viewed a certain resolution

[200] *Id.*
[201] *Id.* at 404.
[202] *Id.*
[203] Moran, *supra* note 197, at 406.
[204] *Id.*

to a problem at a particular time, and the subsequent application of this thinking to the present problem. Therefore, Moran posits that American culture, especially past culture, plays a vital if not defining role in present day jurisprudence.[205] Moran asserts that even though new jurisprudential theories and studies have somewhat modified the "belief systems" present in modern day jurisprudence, the law is, and will likely remain, founded on past decisions.[206] In this way, American society's deep-seated cultural and societal norms are slow to change.

Margaret Radin also offers an interpretation of how the rule of law may change in the future.[207] She believes, however, that it is too soon to jettison this long-standing foundational construct; but, at a minimum, perhaps a reinterpretation of the theory may continue its usefulness into future jurisprudential thought.[208] Though many theories have been suggested in order to explain their origin, be they theistic, secular, or metaphysical, Radin follows the principles of Wittgenstein in proposing that rules are conceived and can exist only where there is a community that agrees with their practice.[209] In other words, the only way to claim that a rule governing society exists is the presence of a common agreement that there *is* a rule; it does not matter that the rule was pre-existing before it was formally recognized.

Radin promotes the idea that the rule of law be transformed into a hermeneutical social theory. Her hermeneutical theory promotes the ideal that law cannot be applied in

[205] *Id.* at 406-07.
[206] *Id.* at 413.
[207] Jane Margaret Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989).
[208] *Id.* at 781-82.
[209] *Id.* at 782-83.

the abstract without some sort of interpretation actually taking place, and this interpretation ultimately invokes the decision-maker's politics and values in one way or another. This interpretation blurs the line between rule-makers and those whose charge it is to apply them, as judges would be called upon to inject their own convictions into the controversies at hand when resolving legal issues.

Nevertheless, Radin seeks to preserve the idea that judges are independent and impartial, as well as a functionally independent of legislative authority. These judicial guidelines were originally established to ensure that a judge would confine himself or herself to the task of applying the rules to given fact patterns. However, Radin believes that these same rules may also be construed to suggest that judges are morally autonomous, and they make a commitment to their profession in light of their own moral understanding of their surrounding culture and the nature of their communities.[210] Judges are, therefore, an "interpretive community," and are extremely aware that they must act for the overall good of their societies. In conclusion, Radin holds that though rules can, and should, be continuously reinterpreted by the decision-makers, they are nevertheless rules that cannot be understood apart from their contexts or fixed in a particular time. Consequently, as long as judges continue to rule in the spirit of the betterment of their societies, total independence and impartiality from the application of the rules is not completely necessary.[211]

As presented to this point, the philosophies and ideologies underlying various manifestations and conceptions of the rule of law have been transformed, and are likely

[210] *Id.* at 817.
[211] *Id.*

to be further transformed, over time, sometimes subtly and sometimes dramatically. Correspondingly, the judiciary, in its approach to the rule of law, has been influenced to varying degrees by these changing paradigms. The most recent manifestation of this phenomenon being the recent, rapid shift toward judicial activism, which results in courts assuming roles and functions that go beyond merely interpreting the law, sometimes to the point of making entirely new law where none previously existed based upon sociological, economic or idealist priorities.

A number of legal philosophers are troubled by this development. In their view, judicial activism erodes both the natural law tradition of the Founders and respect for the rule of law. Contemporary application (or perhaps more appropriately in some cases misapplication) of the rule of law, and the resulting judicial determinations, have moved away from the traditions and moralities that once animated the rule of law. Michael Oakeshott, John Courtney Murray, John Rawls, Steven Pinker and Hadley Arkes are among the philosophers who address the significance of tradition and morality in the rule of law. Their theories not only correspond more nearly to the ideals embraced by the Founders, but also signify a broader challenge to contemporary jurists to give weight to the traditions upon which America was founded. At a time when many of the electorate identify "moral values" as a primary concern, not only should the judiciary take a less active role in making the law, but they should also consider the roles of both tradition and morality in their decisions.

Oakeshott helps to define the critical importance of traditional norms in society. His writings "encompass a philosophy of law, authority, the state, power, liberty, human

association and civil conduct which amount to a theory of politics, where 'politics' is defined as 'the activity of attending to the general arrangements of a collection of people who, in respect of their common recognition of a manner of attending to its arrangements, compose a single community'."[212] Human association involves a community of self-disclosed individuals and their relationship to the laws that both disclose their identities and govern them. For Oakeshott, it is the judiciary that acts as the "custodial office of the rule of law."[213] The court of law is "concerned with considering actual performances solely in respect of their legality," thereby providing an authoritative conclusion to a legal dispute.[214] "For Oakeshott, although specific rules may result from the process of adjudication, this cannot be confused with creating or enacting law."[215] Thus, the judiciary and the government are, and should be, limited in their respective spheres of influence.

More specifically with respect to the rule of law, Oakeshott advocates for a limited government, and posits that the judiciary should remain on the periphery of society. Oakeshott argues that "adjudication cannot be understood as the arbitrary exercise of the so-called 'subjective will' of the judge; a conclusion reached in this (in any case fanciful) manner could not pretend to the authority of [law]."[216] A judge does not create the law. Rather, for Oakeshott, the rule of law, like all forms of human

[212] Andrew Michael Sullivan, *Intimations Pursued: The Voice of Practice in the Conversation of Michael Oakeshott* 208 (University Microfilms International) (1990) (unpublished Ph.D. thesis, Harvard University).
[213] Guri Ademi, Comment, *Legal Intimations: Michael Oakeshott and the Rule of Law,* 1993 WIS. L. REV. 839, 888 (1993).
[214] *Id.* (citing MICHAEL OAKESHOTT, *Rule of Law, in* ON HISTORY AND OTHER ESSAYS 119 (Gazelle Book Services 1983)).
[215] Ademi, *supra* note 190, at 891.
[216] *Id.* at 238 (citing MICHAEL OAKESHOTT, ON HUMAN CONDUCT 133-34 (Claredon Press 1975)).

relationship, "is a product of [a] human imagination" that exceeds the individual.[217] The rule of law can be understood as an analysis of legal intimations, which "as a shared historical practice of legality, inform changes and developments in law."[218] These intimations are "learned from experience rather than being inherent or immanent and thus discovered."[219] Learning takes place within a human inheritance of beliefs and understandings.[220] "What every man is born an heir to is an inheritance of human achievements; inheritance of feelings, emotions, images, visions, thoughts, beliefs, ideas, understandings, intellectual and practical enterprises, languages, relationships…."[221] The rule of law is defined as being based on "human intimations," a history of human practices, both prudential and moral.[222] For Oakeshott, it is tradition and experience that shape the structure of the rule of law, not the judiciary.

Oakeshott's theories can be used to illustrate the current state of the judiciary. As noted, in recent years the judiciary has moved away from adjudicating, in the traditional sense of the term, to the realm of legislating, demonstrating a migration towards the Rationalist form of government and away from the Practical. This transfer of power from representative institutions to the judiciary, which is largely unelected and consequently less directly accountable to the public, has been called "juristocracy."[223] Ran Hirschl hypothesizes that this phenomenon is the result of the strategic interplay between

[217] Ademi, *supra* note 190, at 893.
[218] *Id.* at 843.
[219] *Id.* at 840 n.2.
[220] *Id.*
[221] *Id.* at 896 n.2 (quoting MICHAEL OAKESHOTT, THE VOICE OF LIBERAL LEARNING 43 (Yale University Press 1990)).
[222] *Id.* at 840.
[223] *See* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 1 (Harvard Univ. Press 2004).

politicians, the economic elite and the judiciary. The resulting judicial empowerment has insulated politicians from having to make moral and political decisions that may be adverse to their ability to retain their positions. This concentration of power in the hands of the judiciary has been even more troubling when courts are charged with making weighty moral decisions. Even more problematic is the idea that courts are relying less on the traditions and moralities that initially animated the rule of law, and relying more on the individual will of the judges. Judges are acting as Rationalist technicians, moving away from the practical, limited approach towards the government advocated by Oakeshott.

Like Oakeshott's illustration of the dichotomy in political life between the Rational and the Practical, Steven Pinker uses a similar parallel to demonstrate the differing views on the influence of tradition in society. [224] Pinker rejects the common labels of "liberal" and "conservative" when trying to explain the different conceptions of human nature. Rather, Pinker points to Thomas Sowell's "sweeping attempt to survey the underlying dimension" of political identification.[225] While Sowell refers to the "Unconstrained" and "Constrained" Visions, Pinker prefers the labels "Tragic" and "Utopian."[226]

Similar to the Rationalists discussed by Oakeshott, the Utopian Vision advocates the notion that "[t]raditions are the dead hand of the past, the attempt to rule from the

[224] STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE (Viking Penguin 2002).
[225] *Id.* at 287 (citing THOMAS SOWELL, A CONFLICT OF VISIONS (William Morrow 1987).
[226] *Id.*

grave."[227] The Utopian Vision theorizes that "human nature changes with social circumstances, so traditional institutions have no inherent value."[228] The Utopian Vision believes that limitations associated with tradition should not restrict the possibilities in a better world.[229] Just as Oakeshott's Rationalist would assert, political life should look towards the future and a "new and ideal order in society and government."[230] As such, it follows that traditions must be "stated explicitly so their rationale can be scrutinized and their moral status evaluated."[231]

In contrast, the Tragic Vision holds humans to be imperfect when it comes to their knowledge of the virtues and the wisdom needed to shape society by pure acts of instrumental will.[232] Adherents of the Tragic Vision "distrust knowledge stated in explicitly articulated and verbally justified propositions . . . [i]nstead they trust knowledge that is distributed diffusely throughout a system . . . which is tuned by adjustments by many simple agents using feedback from the world."[233] In Oakeshott's words, "[a] tradition is not something to which we must adhere; it is something which provides the starting point and the initiative for fresh enquiry."[234] Pinker's conception of the Tragic Vision holds that "[t]raditions such as religion, the family, social customs, sexual mores, and political institutions are a distillation of time-tested techniques that let

[227] *Id.* at 289.
[228] *Id.*
[229] *Id.* at 287.
[230] PINKER, *supra* note 224.
[231] *Id.* at 289.
[232] *Id.* at 287.
[233] *Id.* at 292.
[234] MICHAEL OAKESHOTT, THE CONCEPT OF A PHILOSOPHICAL JURISPRUDENCE: ESSAYS AND REVIEWS 1926-51 (Luke O'Sullivan, ed.) (2007).

us work around the shortcomings of human nature."[235] Human intimations, experiences and traditions play a critical role in political life because they compensate for the deficiencies in society. Advocates of the Tragic Vision observe that, "however imperfect society may be, we should measure it against the cruelty and deprivation of the actual past, not the harmony and affluence of an imagined future."[236] The Utopian Vision advocates change, whereas the Tragic Vision relies on the past, believing that traditional institutions are "as applicable to humans today as they were when they developed."[237]

There are other similarities between Oakeshott's Practical Approach and Pinker's conception of Tragic Vision. Oakeshott advocates limited government as he warns against the sin of intellectual pride in politics. Similarly, Pinker states, "[m]y own view is that the new sciences of human nature really do vindicate some version of the Tragic Vision and undermine the Utopian outlook that until recently dominated large segments of intellectual life."[238] Pinker relies on tradition because "our moral sentiments, no matter how beneficent, overlie a deeper bedrock of selfishness."[239] Both philosophers see man as inherently greedy and regard "the drive for dominance and esteem" as endangering good government.[240] Both assert that political life should start by looking at the influences of tradition.

Oakeshott's theories are indirectly supported by the Framers of the United States Constitution. As Pinker argues, the "brains behind the American Revolution (which is

[235] PINKER, *supra* note 224, at 288.
[236] *Id.*
[237] *Id.*
[238] *Id.* at 293.
[239] *Id.* at 288.
[240] *Id.* at 297.

sometimes labelled with the oxymoron 'conservative revolution') inherited the tragic vision."[241] The Framers of the American Constitution "acknowledge[d] the desire for individuals to further their interest in the form of an unalienable right to 'life, liberty, and the pursuit of happiness.'"[242] Like Oakeshott, the Framers feared intellectual pride in humans and the drive for "dominance and esteem."[243] They distrusted the hubris of individuals and turned to the tradition of natural law to draft the documents and institutions that would give rise to the United States.

As Hadley Arkes argues, the Founding Fathers relied on natural law to develop the country.[244] They were aware that "substantive principles of justice could be used then to judge the rightness or wrongness of any measure enacted in the positive law."[245] The Framers rejected the positive law of the British government and adopted the principles of natural law, as the natural law tradition was inherent in the hearts and minds of the Framers.[246] With the turn to Pragmatism and Realism, the United States has moved away from the natural law that once illuminated it. It has, in Oakeshott's and Pinker's language, shifted from the Practical and Tragic to the Rational and Utopian. Arkes states understand "just what constitutes a 'man'."[247] The loss of an objective definition of the human being, which was inherent in the promulgation of natural law, is reflected by the concentration of power into the hands of the political class. This would be particularly

[241] PINKER, *supra* note 224 at 296.
[242] *Id.*
[243] *Id.* at 297.
[244] HADLEY ARKES, NATURAL RIGHTS AND THE RIGHT TO CHOOSE 63 (Cambridge University Press 2002).
[245] *Id.* at 62 (citing JAMES WILSON, Wilson's First Lecture on Law in THE WORKS OF JAMES WILSON, volume 1, at 79 (ed. Robert Green McCloskey) (Harvard University Press 1967)).
[246] *Id.* at 23.
[247] *Id.* at 4.

troublesome to Oakeshott, because it undermines his discourse regarding the inherently ethical nature of human.

Like the Founding Fathers, John Rawls theorized that "a constitutional regime is one in which laws and statutes must be consistent with certain fundamental rights and liberties, for example, those covered by the first principle of justice."[248] The first principle of justice is the idea that justice must be "general in form, universal in application, and must provide guidance for ordering the conflicting claims of moral persons."[249] This is similar to the Founders' belief in natural law and their desire to root the country in principles of justice and morality and virtue. In essence, "one can draw a strong parallel between the method of reflective equilibrium and the traditional common law method of Anglo-American jurisprudence."[250]

The Founders based the Declaration of Independence on the notions of life, liberty and the pursuit of happiness.[251] These ideals were rooted in the natural law theories embraced by the founders; Thomas Jefferson "believed that [morality and virtue] arise from 'moral precepts, innate in man, and made part of his physical constitution, as necessary for a social being.'"[252] These ideals also form the basis of Rawlsian thought, as the principles of justice and the "good" are akin to the inalienable rights expressed by Jefferson. Rawls "began with the assumption of religious pluralism and asked how it is

[248] JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 145 (Harvard Univ. Press. 2001).
[249] Stephen Griffin, *Reconstructing Rawls' Theory of Justice: Developing a Public Values Philosophy of the Constitution*, 62 N.Y.U. L. REV. 715, 732 (1987).
[250] Michael C. Dorf, *In Praise of John Rawls, The Man Who Made Moral Philosophy Respectable Again – And Whose Views Also Profoundly Informed American Legal Thought*, FINDLAW, Dec. 11, 2002, http://writ.news.findlaw.com/dorf/20021211.html.
[251] *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
[252] James Gordley, *Morality and the Protection of Dissent,* 1 AVE MARIA L. REV. Ave 127, 133 (Spring 2003) (citing Letter from Jefferson to Adams).

that people with vastly different conceptions of what it means to live a good life, can nonetheless treat each other fairly."[253]

From there, Rawls developed his theory of reflective equilibrium. Reflective equilibrium is the belief that where people of many different faiths and moralities can come together and devise a common understanding based on those precepts innate to all humans. Like Jefferson's "philosophy of religion," where all religions come together to form a common morality, Rawls too believed that all people could come together to form a common morality through the process of reflective equilibrium.

The Jeffersonian ideal of the philosophy of religion is akin to the theories supported by John Courtney Murray. Murray asserts that the foundation of the American experience grew out of the religious pluralism. The diverse and divergent views held by early Americans forced the community to identify common truths that are rooted in the natural law made known to all of us.[254] Murray argues that while civil law and moral law are separate and distinct, the civil law should be informed by principles of morality, because the state is a subset of society. The "idea that government has a moral basis; that the universal moral law is the foundation of society; that the legal order of society – that is, the state – is subject to judgement by a law that is not statistical but inherent in the nature of man" is part of the consensus which first fashioned the American people into a

[253] Dorf, *supra* note 250.
[254] Gregory A. Kalscheur, *John Paul II, John Courtney Murray, and the Relationship Between Civil Law and Moral Law: A Constructive Proposal for Contemporary American Pluralism*, BOSTON COLLEGE LAW SCHOOL FACULTY PAPERS 11 (The Berkeley Electronic Press, 2004), *available at*: http://lsr.nellco.org/bc/bclsfp/papers/9 (citing JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 551 (Sheed & Ward 1960)).

body politic.[255] Murray contends that while the state holds a limited place in society, the morals that grow out of a society should inform the state, which governs society.

Recognizing that the contemporary judicial system has come to be dominated by predominantly secular values, Michael Perry's works, including *Love and Power: The Role of Religion and Morality in American Politics*[256] and *Religion and Politics: Constitutional and Moral Perspectives*[257] provide additional insight into the correct balance between the competing dynamics of increased secularism and traditional morality. Perry argues that American culture is so infused with religiously-based moral discourse that it is impossible to maintain a wall of separation between such discourse and public political debate. While there is a clear danger in government and the courts showing any preference for religious institutions as such, or for religion in general, discrimination against generalized religious values is equally problematic, because it is contrary to the jurisprudential history of the country. [258] The Declaration of Independence, the nation's seminal document, clearly expresses the Framers' ardent conviction that rights come from the Creator, but that does not impinge on the liberty of any individual to deny the existence of God, and to order his or her life accordingly. So, even though Perry cautions against judicial decisions based exclusively on religious grounds, he would not preclude a judge from relying on his or her religious beliefs, where the decision could also be supported by persuasive secular arguments.[259] According to

[255] *Id.* at 553.
[256] MICHAEL PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS 29 (1991).
[257] MICHAEL PERRY, RELIGION AND POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 47-49 (1997).
[258] PERRY, *supra* note 256, at 29.
[259] *Id.*

Perry, the proper role for religious values in the rule of law is prophetic, rather than coercive. He argues that the influence of religious values on rule of law considerations potentially permits society to tap into the rich resource of moral norms contained in the religious experience. Additionally, acknowledging religious values could for some deepen the sense of loyalty to the government, which is seen as having become too secular to the exclusion of all of our accumulated experience. According to Perry, neither political stability, nor considerations of epistemology, warrant the total exclusion of religious beliefs from debate on public policy, and several of the most prominent Founders' own words support that proposition.

VI. CONCLUSION

This article has attempted a candid exposition of the divergent and sometimes self-contradictory philosophies that supported the creation of the American republic: on the one hand, political philosophies laced with strands of natural law and human rights theories permeated by concepts worked out through the medium of Christian principles, and on the other hand, secular Lockean theories that emphasize the separation of church and state.[260] For an extended period of the nation's early history, however, there was

[260] An example of the tension between these approaches is illustrated by Vice President Joe Biden at two different points earlier in his career. Twenty-one years ago when Robert Bork was nominated to the Supreme Court Biden was chairman of the Senate Committee on the Judiciary at which time he stated, "As a child of God, I believe my rights are not derived from the Constitution. My rights are not derived from any government. My rights are not derived from any majority. My rights are because I exist. They were given to me and each of my fellow citizens by our Creator and they represent the essence of human dignity." Hadley Arkes, *Joe Biden: The Rise of an Empty Man*, CATHOLIC THING, Feb. 3 2009, http://www.thecatholicthing.org/content/view/1137/26. Compare this statement with Biden's later comments when Clarence Thomas was nominated to the Supreme Court at which time he criticized Thomas for being a follower of the natural law theories of Steve Macedo and Richard Epstein insofar as the law had any meaning outside the context of what the government states it to be. *See* Posting of Peter

some equilibrium between these competing ideals, both within society at-large and among the judges who served as the custodians of the laws. However, the Holmesean era of jurisprudential thought brought a tectonic-like paradigm shift that left elements of American society un-tethered from the fundamental traditions and values that were previously viewed as cohesive forces rather than divisive forces.

The modern trend towards judicial activism indicates a distinct departure from the Framers' conception of the judiciary. The Framers' envisioned the judiciary as a purely adjudicative body, tempered by historical antecedents. The modern movement of the judiciary has been towards a more pro-active, legislative-type body. It is troubling when the judiciary acts in a way that fails to recognize and accommodate, in some fashion, the moral traditions on which our country is based.

Oakeshott, Pinker, and Arkes come to the share the conclusion that the moral traditions, which first fashioned the American people into a body politic, should find some means of expression in order to continue to be reflected in the rule of law. Intimations, the shared inheritance of human beliefs and understandings, are an important element of society, and as a result, the state. As Oakeshott further suggests, the rule of law should stem from these intimations. Similarly, while Murray sees the civil law and the moral law as distinctly different, the moral law must have a place in government. In the absence of morality and tradition, rational jurists, susceptible to power and esteem, have been busy building "juristocracies" that tear at the very fabric upon which the United States was founded. Some moral, religious or spiritual principles must be

Boettke to Coordination Problem, http://austrianeconomists.typepad.com/weblog/2008/08/joe-biden.html (Aug. 23, 2008).

recognized as important elements of American jurisprudence, as they provide coherence between the past and the present and a provide guidepost for the future.

That said, the reason to look to American history and traditions is not that one must necessarily do precisely as the Founders did. Rather, one has to be prepared to acknowledge both their remarkable achievements in giving constitutional liberties, as well as their shortcomings in failing to anticipate the consequences of slavery and other inequalities. What one can do, and who one can become under the rule of law, however, need not be shaped with unfettered disregard for all that has gone before but with reflection and forethought that incorporates the collective sensibilities of an American society. American society collectively values the need for the separation of church and state on the one hand, yet, at the same time, carries with it the positive influence of morality on 'politics' in the American experience.

The history of the Constitution, and the rule of law it stands for, arguably interacts with religious principles or values at two levels. At one level, the Constitution seeks to protect the individual's freedom of belief and to regulate the government's relationship to religion. At a deeper level, however, the Constitution, as demonstrated here, came out of a society that had distinct religious philosophical inclinations, specifically Judeo-Christian traditions, to provide at least part of an overarching philosophical framework or template for constitutional order.

As I have demonstrated, the rule of law in its initial incarnation is the by-product of these philosophical influences, including most prominently classical liberalism and Christian social teaching. I have argued that religious influence in this context provides a

communitarian counterweight to the more individual-oriented focus of liberal democracy. Purging the rule of law of the values distilled from these religious influences, without putting anything in their place, threatens the balance between the weight of tradition in creating social cohesion and the rights of the individual.