The Law of Our Land

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INTRODUCTION

As we approach the two-hundredth anniversary of the United States Constitution and prepare to celebrate this great political and legal document, it is important to recall its foundation and its relationship to that foundation. On the occasion of the fiftieth anniversary of the inauguration of George Washington, John Quincy Adams delivered a powerful and convincing address that the Constitution "was the complement to the Declaration of Independence; founded upon the same principles, carrying them out into practical execution, and forming with it, one entire system of national government." This Declaration, in turn, rested upon "the laws of nature and of nature's God," which John Quincy Adams reminded his listeners on April 30, 1839, "presupposes the existence of a God, the moral ruler of the universe, and a rule of right and wrong, of just and unjust, binding upon man, preceding all institutions of human society and of government." In short, John Quincy Adams believed that the foundation of America's national Constitution was God's law and that the cornerstone of that Constitution was the Declaration of Independence.

Today, 150 years after John Quincy Adams spoke, his views are not only largely forgotten, but they are quite unpopular. If we sat in a typical high school, college, or graduate-level American government class, we would discover that the students do not learn God's law. Indeed, God and His law are ignored as irrelevant. Moreover, we would discover that the students do not hear much about the Declaration of Independence either. Rather, they most likely would be taught that the United States Supreme Court's series of opinions proclaiming the widely acclaimed slogan "one man, one vote" is the foundation of American democracy, and that the Court's opinions interpreting the Constitution's Bill of Rights constitute its cornerstone. After all, the daily newspapers, the television nightly news, the textbooks and the scholarly journals are packed with stories, analyses, and theories on the Court's latest pronouncements on equality, free speech, and search and seizure, not on the Constitution's dedication to federalism, separation of powers, and the supremacy of law.

What has happened in America to permit the Supreme Court to occupy "center stage," and to convey the view that the Bill of Rights has effectively become more important than Article I, Article II, and Article III of the United States Constitution? In many respects, it stems from a remark casually made by Chief Justice Charles Evans Hughes in the 1940's when he said that the Constitution is what the Supreme Court says it is. That view became an almost universal assumption soon after an unanimous Supreme Court spoke in *Cooper v. Aaron* in 1958 that the *Marbury v. Madison* decision declared:

> The basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment [which was the issue in that case] enunciated by this Court in the *Brown* case [*Brown v. Board of Education*, 347 U.S. 483 (1954)] is the supreme law of the land, and Art. 6 of the Constitution makes it of binding effect on the states "any Thing in the Constitution or Law of any State to the Contrary

notwithstanding."[1]

That was only twenty-eight years ago. Today if you read newspapers or any popular magazines, you will find that most everyone agrees with the statement that the Constitution is what the Supreme Court says it is, and when the Supreme Court speaks, it is the law of the land. That is why if you went into many high school, college, or law school classes dealing with the Constitution, you would be left to conclude that the Supreme Court is the foundation of the legal system in America.

This view is a perversion of the Marshall legacy following *Marbury v. Madison*.[2] Marshall never stated that the Court was supreme to the Constitution. As a matter of fact, one of the reasons he gave for judicial review was that the Court was bound by the Constitution just as every other branch of government was bound by the Constitution. Marshall had no illusions about judicial infallibility. He recognized that while *Marbury v. Madison* established judicial authority to interpret the Constitution in appropriate cases and controversies, the Court did not have the final say in the meaning of the Constitution. His contemporaries, both presidents and members of Congress, certainly agreed with him. They recognized that the language of Article VI of the Constitution, which states that the Constitution is the supreme law of the land, was, in fact, true. It is not the Court's interpretation that is law because the Court could easily be mistaken. But because we have assumed that what the Court says is law, we have found in America that the study of the Constitution has turned into a study of the Court's opinions, and particularly the study of the Court's opinions in cases arising out of the Bill of Rights.

We, as Americans, need to rediscover the true foundation and cornerstone of American Constitutional law. A cornerstone is never laid until the foundation is in place. Abraham Lincoln knew very well, when this country faced its greatest crisis, that unless he appealed to the foundation and to the cornerstone of the United States Constitution, he did not have a leg to stand on in the battle which led this country into a Civil War. In his debates with Stephen Douglas, he went to the Declaration of Independence and its commitment to the proposition that all men are created equal in order to withstand those who claimed that the Constitution had forever enshrined the institution of slavery.

An examination of the Declaration of Independence should yield an understanding of the foundational principles upon which America is established. Such an examination also should indicate that four of those fundamental principles are particularly important to the Constitution of the United States.

Abraham Lincoln in his first inaugural address in 1861 said this about the United States of America:

> The Union is much older than the Constitution. It was formed, in fact, by the Articles of Association in 1774. It was matured and continued by the Declaration of Independence

1. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

2. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

> in 1776. It was further matured; and the faith of all the then thirteen States expressly plighted and engaged that it should be perpetual, by the Articles of Confederation in 1778. And, finally, in 1787 one of the declared objects for ordaining and establishing the Constitution was to "form a more perfect union."[3]

A more perfect union cannot be formed unless there was a union which preceded the effort to form "a more perfect union." Here Lincoln reminds us that beginning in 1774, the first Continental Congress met and enacted its resolutions in which it claimed that the leaders of Great Britain had violated their rights under the laws of nature and their colonial charters. They did so by taxing the colonists without representation, by denying them their equality of rights as Englishmen, and by breaching the basic principle of separation of powers. The colonists formed themselves into what was called the Association so that they might be an effective voice to restore unity between the mother country and the colonies represented by that Congress.

The structure of the Association provided that should this union not be brought to pass by May 10, 1775, they should reconvene to consider further what might be done about the matter. But before the date had arrived, hostilities broke out on April 19, 1775, at Lexington, Massachusetts. When the Continental Congress reconvened in July of 1775, they wrote the Declaration of Causes and Necessities of Taking up Arms. These men recognized that their hopes to bring about a union had been dashed. Yet, even as they committed themselves to armed resistance, they purposed reconciliation, not independence. Nonetheless, they relied upon Divine Providence as the legal foundation upon which to justify their armed resistance, because they knew that they could not legitimately claim their right in the family of nations except by reference to the "laws of nature and of nature's God."

LAWS OF NATURE AND OF NATURE'S GOD

When they finally came to the point of declaring independence on July 4, 1776, Jefferson, who drafted that document, claimed in the first paragraph that the people were entitled to their independence on the basis of the "laws of nature and of nature's God." This phrase has been much misunderstood by modem scholars. One of the leading authorities on the Declaration of Independence, Carl Becker, claims that this reference to the "laws of nature and of nature's God" was an eighteenth century appeal to natural law, that is, the law that governs the affairs of mankind which is discoverable by man's reason unaided by any special revelation of God. Becker's case is an elaborate one based upon the scientific works of Isaac Newton and Descartes, and upon the philosophical works of John Locke. Becker claimed that eighteenth-century American statesmen believed that there is an exact correspondence between human reason and the objective world. He asserted that the words; "laws of nature and of nature's God" referred to man's rational explanation of the relation and operation of all things and that such explanation is based solely upon one's empirical experience. In Becker's own words, this is what he said about man's relationship to God, as men at that time perceived it to be:

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3. THE COMPLETE WORKS OF ABRAHAM LINCOLN 174 (J.G. Nicolay and J. Hay, ed., 1905).

> Since the later seventeenth century, God had been withdrawing from immediate contact with men, and had become, in proportion as he receded into the dim distance, no more than the Final Cause, or Great Contriver, or Prime Mover of the universe; and as such was conceived as exerting his power and revealing his will indirectly through his creation rather than directly by miraculous manifestation or through inspired books.[4]

Becker's view of the eighteenth-century mind and the meaning of the "laws of nature and of nature's God" is just simply erroneous.

First, the phrase "the laws of nature" had a fixed meaning in eighteenth-century England and America. Blackstone wrote that the law of nature was the will of God as seen in the created order. John Locke echoed this understanding in his Second Treatise of Government: "Thus the law of nature stands as an eternal rule of all men, legislators as well as others. The rules that they make for other men's actions, must, ... be conformable to the law of nature, *i.e.*, to the will of God,...[5] The laws of nature included all of the immutable laws of human nature which God prescribed for man. According to Blackstone, one of these laws of nature was the precept that man may pursue his own happiness. That particular right is specified in the Declaration of Independence. Blackstone also specifically distinguished law of nature from natural law when he wrote:

> Yet, undoubtedly the revealed law is (humanly speaking) of Infinitely more authority than what we generally call the natural law. Because one is the law of nature, expressly declared so to be by God himself: the other is only what, by the assistance of human reason, we imagine to be that law.[6]

Finally, the laws "of nature's God," while not the exact term used by Blackstone and others, parallels what Blackstone called the revealed or divine law. God has not just established His laws in the created universe; He has spoken those very laws in the Holy Bible. Blackstone wrote that this second revelation was necessary because man's reason was corrupted by the fall in the Garden of Eden. It was because he believed in the historical accuracy of the book of Genesis that he recognized that the laws of nature's God were also different from natural law.

In summary then, the phrase "the laws of nature and of nature's God" in eighteenth-century England was a most convenient term to refer to the laws of God in the created order and in God's Word. Those who claim otherwise have the burden of proof that the Declaration utilized the phrase in a novel way. Jefferson, Adams and other American patriots consistently claimed that the Declaration did not contain any new ideas. Even Professor Becker has recognized that it would have been foolhardy to call the American people to a revolution on principles which no one had ever heard of before. Yet Becker devotes several pages of his book to an attempt to prove that the new scientific ideas of Descartes and Newton and the novel philosophical work of Locke had become popularized

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4. C. Becker, THE DECLARATION OF INDEPENDENCE 36-37 (1942).

5. J. Locke, SECOND TREATISE OF GOVERNMENT 71 (C.B. Macpherson rev. ed. 1980) (1st ed. 1690).

6. 1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 42 (1765).

in America.

The more plausible explanation is that Jefferson and his colleagues had used the words "laws of nature and of nature's God" in the traditional way. Blackstone's Commentaries were widely read by American students of the common law. Locke's Second Treatise of Government had long been acknowledged by all scholars as the single most important book to support America's side in the War for Independence. It was convenient to rest America's legal claim for independence in the Declaration on such widely accepted and well-known views. Not only was it convenient, but it was very wise statesmanship. The "laws of nature and of nature's God" were the very foundation of England's common law and of England's constitutional monarchy. Blackstone and Locke were accepted legal and political authorities in Great Britain. The foundation of America's Declaration of Independence would therefore not only appeal to America's friends, but would disarm her enemies.

The Declaration of Independence, while designed to meet the immediate political needs of the American colonies, was also written for posterity. By appealing to God's law, and not to man's understanding of that law, the drafters rested their case on the eternal and unchanging decrees of almighty God. Thus we find at the beginning of the second paragraph, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights." These words unmistakably describe the God of the Christian faith. The book of Genesis states that man is not nature's accident, but God's creation. "So God created man in His own image, in the image of God created He him, male and female created He them."[7] Indeed, all of creation is a product of this same God, who is identified in both the Old and New Testaments as the Creator. (Isaiah 40:28, I Peter 4:19).

The Declaration's authors used Biblical terms to describe man's origin and man's originator because they believed that the book of Genesis gave the true account of the origin of the world and of mankind. They had rejected ancient evolutionary speculations. They did not yet know the modem evolutionary theories which first burst upon the scene after the middle of the nineteenth century. Moreover, it was the Biblical account of origins which accounted for the laws of nature which undergirded the Declaration's statement of rights. As Blackstone reminded us in the introduction to the second chapter of his Commentaries:

> Man, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependent being .... And consequently as man depends absolutely upon his maker for everything, it is necessary that he should in all points conform to his maker's will. This will of his maker is called the law of nature.[8]

Any effort to superimpose a different-meaning on the terms "created" and "creator" in light of the late nineteenth-century evolutionary theory, sparked by Darwin's Origin of Species, would be both

7. Genesis 1:27.

8. 1 W. Blackstone, *supra* note 6, at 39.

dishonest and unpersuasive. Modem scholars such as Becker, however, have belittled the significant role that the language of creation, and therefore the book of Genesis, played in the Declaration. While they have found no adequate substitute in the terms "natural selection," "survival of the fittest," or other popular phrases from the evolutionist's vocabulary to explain and to justify the ideas embodied in the Declaration, they are quick to assume that our founding fathers really lived in a world best described in Machiavellian, rather than Biblical terms. Becker's views are typical:

> To ask whether the natural rights philosophy of the Declaration of Independence is true or false is essentially a meaningless question. When honest men are impelled to withdraw their allegiance to the established law ..., they seek ... some 'law' of higher authority .... They formulate [this higher] law ... in such a way that it is, or it seems to them to be, rationally defensible. To them it is 'true' because it brings their actions into harmony with a rightly ordered universe, and enables them to think of themselves as having chosen the nobler part, as having withdrawn from a corrupt world in order to serve God or Humanity or a force that makes for the highest good.[9]

Such a cynical view of our forefathers, who willingly sacrificed their fortunes and their lives, can only be held by men who refuse to take seriously the language of the concluding paragraph of the Declaration which appeals to God as "Supreme Judge of the world," and which relies upon Divine Providence to protect the Declaration signers' "lives, fortunes, and sacred honor."

The last paragraph does not contain deistic language which limits God to some role of first cause, or prime mover, who suspends judgment and intervention in men's affairs until some far off day in the future. Rather, the language of appeal to God as the Supreme Judge and Divine Providence is terminology from Old Testament accounts of two historical events. First of all, the appeal to "Supreme Judge of the world" is reminiscent of Jephthah' s appeal to the Supreme Judge of the world when he led Israel against the Ammonites as recorded in Judges 11:27. "I have not sinned against thee, but thou did me wrong to war against me. The LORD, the Judge, he judge this day between the children of Israel and the children of Ammon." The appeal to Divine Providence is also reminiscent of the account in Genesis when God, in the moment of time, provided the ram in the thicket so that Abraham would not have to sacrifice his son Isaac upon the altar. That is where we learn that God is *Jehovah Jireh*, the provider. Similarly, the last paragraph of the Declaration of Independence is an appeal for God's mercy. In summary, the key language of the Declaration of Independence appeals to God's law, to God's created order, and to God's justice and mercy in support of America's resort to arms to free herself from the mother country.

What are the "laws of nature and of nature's God" upon which the forefathers relied in the Declaration? There are four principal foundational laws that anchor the Declaration of Independence, all of which are Biblical. First, the rights of man are God-given and unalienable. Second, the purpose of government is to secure those rights. Third, the power of civil government is given by consent of the governed. And finally, the right to govern is forfeited by a tyrannical ruler

9. C. Becker, *supra* note 4, at 277-78.

to lower magistrates in order to restore the rule of law.

Rights Are God-Given

The first principle is that certain rights are God-given and unalienable. That is a remarkable claim, but it is confirmed by the Bible itself. What God has given and defined for the benefit of all mankind cannot, even by the Great Giver Himself, be taken or given away. What accounts for such boldness? There is only one answer that the Creator, of whom the Declaration speaks, is indeed the God of the Holy Bible. God is the giver of the three unalienable rights which are listed in the Declaration. Genesis 2:7 says that He is the giver of life. II Corinthians 3: 17 says that He is the giver of liberty: "Now the Lord is that Spirit, and where the Spirit of the Lord is, there is liberty." Ecclesiastes 3:13 says that He is the giver of the pursuit of happiness: "That every man shall eat and drink, and enjoy the good of all his labour - it is the gift of God." In fact, He is the giver of all good things. James 1:17 reminds us that "every good gift, and every perfect gift is from above, and cometh down from the Father of lights, with whom is no variableness, neither shadow of turning."

What God has given to man has been made certain by His word. First, there is the promise of the Old Testament: "God is not a man that he should lie, neither the son of man that he should repent. Has he said and shall he not do it? Or hath he spoken and shall he not make it good?"[10] And secondly, there is the promise of the New Testament: "Heaven and earth shall pass away, but my words shall not pass away."[11] God also has promised that what He has given to man he will not take away. II Chronicles 19:7 says: "Wherefore now let the fear of the Lord be upon you. Take heed and do it, for there is no iniquity with the Lord our God, nor respect of persons, nor taking of gifts." What God Himself has given, and by His Word says, He will not take away, *a fortiori*, no man can deny or take from another man.

Purpose Of Government Is To Secure Rights

While God guarantees the rights that He granted to man, He has also ordained that man may choose to establish civil governments to protect those rights. This is the foundation of the second great anchor of the Declaration of Independence: "that to secure these rights governments are instituted among men." It is most instructive that the Declaration's authors did not make the same claim about governments as they had about unalienable rights. God endowed man with rights, but governments are instituted among men. Again, the Bible is the source of this distinction. Before Saul became King of Israel, God sovereignly ruled His chosen people. Moses, and the judges who assisted him, were God's oracles to make known the statutes and laws of God. They were God's lawbearers, and they were God's "executive" arm. Civil authority, as we know it today, did not exist in the early history of the nation of Israel. Hence, when the elders of Israel asked Samuel for a king in I Samuel 8:5, "to judge us like all the nations," God told Samuel, Israel's judge, "they have not rejected thee, but they have rejected Me, that I should reign over them." God then instructed Samuel to tell the

10. Numbers 23:19.

11. Matthew 24:35.

elders just what kind of a king they had requested. Notwithstanding God's warning that such a king would exercise unlimited power over them, the elders persisted in wanting to have a human king to "judge us, and go out before us, and fight our battles." Because the elders of Israel persisted, God relented and told Samuel, "Harken unto their voice, and make them a king." Thus, the civil kingdom of Israel was not a gift of God. Rather it had been instituted by men who refused to live under the direct, sovereign rule of almighty God.

The Declaration's endorsement of civil government not only parallels these passages of the Old Testament, but it also reflects the limits that God placed upon the king He gave to Israel. While the elders asked for a king who would take away the people's life, liberty, and pursuit of happiness (I Samuel 8:11-17), God gave them a king who was bound by law to secure those rights; one who had been promised to Israel through Moses long before the elders came to Samuel with their request.

> When thou art come unto the land which the Lord thy God giveth thee, and shalt possess it, and shalt dwell therein, and shalt say, I will set a king over me, like as all the nations that are about me; thou shalt in any wise set him king over thee, whom the Lord thy God shall choose: ... And it shall be, when he sitteth upon the throne of his kingdom, that he shall write him a copy of this law in a book out of that which is before the priests the Levites: And it shall be with him, and he shall read therein all the days of his life: that he may learn to fear the Lord his God, to keep all the words of this law and these statutes, to do them.[12]

So it came to pass that when Saul became king, Samuel told the people the manner of the kingdom and wrote it in a book. Paul reaffirmed this godly pattern for all civil governments when he wrote in Romans 13 that "there is no authority except that which God has established. The authorities that exist have been established by God."

A civil ruler is a "minister of God to thee for good" and as a minister of God, "a revenger to execute wrath upon him that doeth evil." In other words, God gave a written constitution to the civil kingdom of Israel and gave them a leader who was bound by the law in that written document.

Consent of the Governed

In 1644, Presbyterian Pastor Samuel Rutherford applied these very scriptures to an analysis of the authority of the King of England. He not only concluded that the purpose of government was to secure man's God-given rights, but he laid the groundwork for the third great principle of the Declaration of Independence: "That governments are instituted among men, deriving their just powers from the consent of the governed." In his great work Lex Rex, Rutherford wrote in support of those who sought to limit the power of the English king who claimed a divine right to rule without being accountable to the people.

12. Deuteronomy 17:14-20.

Locke wrote the same claim in his Second Treatise:

> To understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.
>
> A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; ...[13]

The Declaration summarized these views with the resounding phrase, "all men are created equal." God had not created any special class or family of men who were entitled to rule over other men. The claim of the English king to divine right was rejected because it did not conform to God's will, that is, to the laws of nature.

What, then, explained the right of the English king to rule? Rutherford contended that the source of the king' s authority was a covenant between him and the people under the law of God. Samuel Rutherford said:

> There is an oath betwixt the king and his people, laying on, by reciprocation of bands, mutual civil obligation upon the king to the people, and the people to the king; 2 Sam.5:3 "So all the elders of Israel came to the king to Hebron; and King David made a league with them in Hebron before the Lord: and they anointed David king over Israel." I Chron. 11:3, "And David made a covenant with them before the Lord and they anointed David king over Israel, according to the word of the Lord by Samuel."[14]

Likewise Locke concluded that civil rulers of all nations derived their authority from a compact or covenant.

> Men being, as has been said, by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby anyone divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it.[15]

The Declaration summarized this view in the phrase "the consent of the governed." But having once consented to be ruled, was there no limit on the authority of the ruler? Again, such a claim of unlimited authority was rejected as contrary to the "laws of nature and of nature's God."

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13. J. Locke, *supra* note 5, at 8.

14. S. Rutherford, LEX REX: THE LAW AND THE PRINCE 54 (Sprinkle ed. 1982) (1st ed. 1644).

15. J. Locke, *supra* note 5, at 52.

Rutherford wrote:

> The people gave the crown to David covenant-wise, and upon condition that he should perform such and such duties to them. And this is clear by all covenants in the word of God: even the covenant between God and man is so mutual, "I will be your God and ye shall be my people."[16]

Locke agreed:

> A man, as has been proved, cannot subject himself to the arbitrary power of another; and having in the state of nature no arbitrary power over the life, liberty, or possession of another, but only so much as the law of nature gave him for the preservation of himself, and the rest of mankind; this is all he doth, or can give up to the common-wealth, and by it to the legislative power, so that the legislative can have no more than this. Their power, in the utmost bounds of it, is limited to the public good of the society. It is a power, that hath no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the subjects.[17]

The Declaration summarized these views by limiting governments to the exercise of "just powers."

Unjust Ruler Forfeits Right To Govern

What happens if the ruler is unjust; if he violates the terms of his agreement with the people? This question leads to an examination of the fourth major principle of the Declaration of Independence. "Whenever any form of government becomes destructive of these ends," that is, to secure the people's unalienable rights, "it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness." Again, this was not a novel claim. Rutherford had already given it scriptural support when he wrote:

> The covenant is so mutual, that if the people break the covenant, God is loosed from His part of the covenant, Zech. 11:10. The covenant giveth to the believer a sort of action of law, ... to plead with God in respect of his fidelity to stand to that covenant that bindeth him by reason of his fidelity, Isa. 43:26; 63:16; Dan. 9:4,5; and far more a covenant giveth ground of a civil action and claim to a people and the free estates against a king, seduced by wicked counsel to make war against the land, whereas he did swear by the most high God, that he should be a father and protector of the church of God.[18]

This Biblical claim on behalf of the people to reject the king's right to rule had been made a century

16. S. Rutherford, *supra* note 14.

17. J. Locke, *supra* note 5, at 70-71.

18. S. Rutherford, *supra* note 14.

earlier in a French-Huguenot document entitled *Vindiciae Contra Tyrannos*. English historian Ernest Barker summarized the principles of the *Vindiciae* as follows:

> The right of public resistance runs through the whole argument ... resistance of officers of State and the three Estates, on grounds of public trusteeship and representation. By resistance kings must be kept within the divine law of the word of God; and by it they must be kept within the law of the land - a law not of their making, even if they have concurred in its making, a law according to which they have sworn at their coronation to rule, a law of which they are only the servants.[19]

These Biblical principles justifying the right of the people to resist and to replace a lawless king were carried forward in Locke's writings. Locke said:

> Whenever the legislators endeavour to take away, and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge, which God hath provided for all men, against force and violence. Whensoever therefore the legislative shall transgress this fundamental rule of society; and either by ambition, fear, folly or corruption, endeavour to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties, and estates of the people; by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and, by the establishment of a new legislative, (such as they shall think fit) provide for their own safety and security, which is the end for which they are in society.[20]

Locke, unlike Rutherford, does not cite Biblical passages, but Sir Ernest Barker, the English historian, believed that Locke was greatly influenced by that French-Huguenot treatise, *Vindiciae Contra Tyrannos*. The writers of the Declaration followed Locke's example, that is, they omitted the Biblical text which tended to divide people, but retained the essence of the Biblical claim in language which unified all Christians and satisfied even deists and unbelievers. The ideas, however, were unmistakably Christian.

The authors of the Declaration of Independence were not self-appointed revolutionaries. Rather, they were the people's representatives who had met several times since October 14, 1774, when they issued the famous Declaration of Resolves of the First Continental Congress. So important was this fact that the first Congress included a detailed statement of their authority to act on behalf of the people. In the Resolves, and other declarations in which they document that they were representatives of the people, they claimed a right to represent the people under the colonial charters. This was important because Congress desired to establish themselves as the lawful representatives

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19. E. Balter, CHURCH, STATE AND STUDY 9l (1930).

20. J. Locke, *supra* note 5, at 111.

of the people. This was necessary in order to exercise the authority and duty of lower magistrates, as servants of the people under God, and to insist that the English Parliament and king obey the law as required by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts.

This was the Christian revolutionary philosophy of John Calvin, the French Huguenots, and Samuel Rutherford. It was not the enlightenment humanist philosophy that sparked the anarchical French Revolution of a few years later. As Sir Ernest Barker pointed out in his analysis of the *Vindiciae*: "Private persons cannot resist the public authority. They have no commission from God ... [But the lawful public authorities] have not only the right, but the duty, to oppose and resist the intemperance of kings, according to the obligation of their office; ..."[21] The American patriots acted consistently with this Christian principle from their opening statement calling for no taxation without representation, to their closing argument that all political connection between the American states and the state of Great Britain be totally dissolved. As Christian statesmen, they recognized that God's law governed their own revolutionary actions, and they desired that God's law legitimize these actions.

CONSTITUTIONAL PRINCIPLES

It is not surprising, then, that once the Declaration was written, the first order of business for our statesmen, in recognition of their duty, was to form constitutions to bind the newly formed states and their newly formed governments. They reasoned that if the king of England and the Parliament could not violate the law of covenant, then they must subject themselves to that same law. Consequently, every one of the thirteen states, either by adopting the charter which had been given to them by the king, or by enacting new constitutional documents, such as the Commonwealth of Virginia did a month before the Declaration, put into writing the law to govern themselves, lest they likewise become tyrants and infringe upon the rights of the people. Thus, when it came time to form a more perfect union because the Articles of Confederation had not effectively bound the thirteen independent states into a cohesive union, those who wrote the Constitution recognized their duty to lay down some fundamental rules of law to protect the people of this nation from the very things that had been done by the king. Therefore, we should expect to find in the Constitution of the United States provisions that reflect the great principles of those early statesmen.

Three of those principles were as follows: first, no taxation without representation; second, equal privileges and rights; and third, separation of powers.

No Taxation Without Representation

"No taxation without representation" was not just a convenient slogan to get people to follow a bunch of revolutionaries. It was a principle of great importance and was one of the several charges against King George III in the Declaration. The Declaration asserted that King George violated the

21. E. Barker, *supra* note 19, at 83-84.

"laws of nature and of nature's God" by "imposing taxes on us without our consent." But that is not the first time that charge had appeared in the documents charting America's path to independence. The Resolutions of the Stamp Act Congress in 1765 contained the same appeal. In fact, John Adams traced the great principle of no taxation without representation to the Magna Charta of 1215. Unquestionably, America's founding fathers believed it to be a foundational right in any properly constituted and properly maintained government.

An examination of Article I, Section 7 of the United States Constitution will reveal a simple statement that all revenue bills must originate in the House of Representatives. Without a knowledge of the history of America, it would be impossible to understand why a revenue bill must originate in the House of Representatives. Why would not a revenue bill be perfectly legitimate if it originated in the United States senate? An examination of the United States Constitution will reveal that there was only one governing body of the new national government which was directly elected by the people, and that was the House of Representatives. The United States Senate, at that time, was elected by the state legislatures of the member states. Therefore, senators were not directly responsible to the people, they were only indirectly responsible to the people. Since legislative power did not reside in the Presidency, the only way to insure or safeguard the principle of no taxation without representation was to require that revenue bills originate in the legislative body directly responsive to the people, the House of Representatives.

It is important to recognize that this principle of no taxation without representation was not just designed to protect one generation, but was designed, as the preamble of the Constitution states, to protect our posterity. This prompted Thomas Jefferson to be concerned about the threat of borrowing money and putting the government in debt, because if it were a long-term debt, those who would have to pay taxes to pay off that debt would never have been represented in the House which made the decision to borrow. Indeed, several times Jefferson called for an amendment to the Constitution that would have prohibited the United States government from borrowing any money. He recognized that even though revenue hills originate with the House of Representatives, if there was runaway borrowing and long-term debt, the principle of no taxation without representation would he violated.

Why did they not put such a provision into the United States Constitution? Probably, because they believed that the monetary system which was required, one that had to be based upon a gold standard, would put a natural limit upon the ability of the government to borrow. The Constitution was not designed for a fiat paper money system which opens the door to long-term debt. Article I, Section 7 cannot be understood apart from Article I, Section 8 which requires Congress to have a gold standard in its monetary policy.[22] It is important, therefore, to recognize that these specific provisions in the Constitution cannot be understood apart from an understanding of the foundational principles upon which they are based.

22. See, G. Bancroft, A PLEA FOR THE CONSTITUTION OF THE UNITED STATES (Spencer Judd ed. 1982).

Equal Privileges And Rights

While the principle of no taxation without representation is implied by Article I, Section 7 and other provisions of the United States Constitution, the principle that "all men are created equal" has been explicitly incorporated in two places. In Article I, Section 9, the United States is prohibited from granting any "Title of Nobility." Likewise, in Section 10 of the same article, the states are prohibited from granting "any Title of Nobility." The significance of these two prohibitions has been lost today, but they were at the heart of our forefathers' hope of a government truly representative of all of the people. In *The Federalist*, Alexander Hamilton wrote:

> Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the cornerstone of republican government; for so long as they are excluded there can never be serious danger that the government will be any other than that of the people.[23]

James Madison echoed Hamilton's sentiments in *The Federalist*:

> If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior. It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it: otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans and claim for their government the honorable title of republic.[24]

Both Madison and Hamilton believed that one cannot have a government which grants "entitlements"; otherwise, the government will be controlled by "special interests" and will cease to be a republican government.

Isaac Backus, a delegate to the Constitutional ratifying convention in Massachusetts, praised the prohibition of grants of nobility by saying:

> Another great advantage, sir, in the Constitution before us, is, its excluding all titles of nobility, or hereditary succession of power, which hath been a main engine of tyranny in foreign countries. But the American revolution was built upon the principle that all men are born with an equal right to liberty and property, and that officers have no right to any power but what is fairly given them by the consent of the people. And in the Constitution now proposed to us, a power is reserved to the people constitutionally to reduce every

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23. *The Federalist* No. 84 (A Hamilton) at 512 (New American library ed. 1961).

24. *Id.* No. 39 (J. Madison) at 241.

> officer again to a private station; and what a guard is this against their invasion of others' rights, or abusing of their power![25]

Men like former Speakers of the House, "Tip" O'Neill and Carl Albert, and former presidents, Richard Nixon and Jimmy Carter, are hardly reduced to the private station from which they came before they began their service to the country. To the contrary, they receive significant pensions, sometimes in an amount exceeding that which they were earning while in office.

But the problem of "titles of nobility" does not end with pensions for former office holders. Black's Law Dictionary defines "nobility" as a division of the people either by writ or by patent, by which certain people enjoy specified privileges that others do not enjoy. Such privileged classes were formerly called "Sirs," "Lords," and "Barons." Today they may be called "senior citizens," dairy or tobacco farmers, bankers, single mothers with dependent children, or "the disadvantaged." In an early affirmative action case that reached the United States Supreme Court in 1980, Justice John Paul Stevens, in dissent, warned that special privileges granted to minority racial groups were tantamount to a "title of nobility":

> The 10% set-aside contained in the Public Works Employment Act of 1977 ... creates monopoly privileges in a $400 million market for a class of investors defined solely by racial characteristics .... The economic consequences of using noble birth as a basis for classification in 18th-century France, though disastrous, were nothing as compared with the terror that was engendered in the name of "egalite" and "fraternite." Grants of privileges on the basis of characteristics acquired at birth are far from an unmixed blessing.
>
> Our historic aversion to titles of nobility is only one aspect of our commitment to the proposition that the sovereign has a fundamental duty to govern impartially.[26]

It must be noted here that Stevens' concerns reflect those of Backus who viewed the prohibition against titles of nobility as a safeguard not only of American political liberties, but also of the equal right to obtain property, free from governmentally imposed obstacles, such as the granting of special economic benefits to particular individuals or groups. The very nature of a title of nobility was an entitlement to certain privileges, not only political but also economic.

It is clear, then, that the founding fathers had more in mind in 1787 when they prohibited the United States, or any state, from granting titles of nobility than just the assurance of the republican form of government. Other clauses in the United States Constitution guarantee elections and the democratic participation of citizens, thus prohibiting hereditary office holding. More than equality of participation, however, was at stake. In order to guarantee true republicanism, that is, the dual principle of equal participation in and benefit from government, it was necessary to positively

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25. 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 150-51 0. Elliot ed. 1888).

26. *Fullilove v. Klutznick*, 448 U.S. 448, 532-33 (1980) (Stevens, J., dissenting).

exclude the development of privileged classes in the United States.

This understanding of the prohibition against titles of nobility has far reaching implications for modern public policy. It certainly calls into question the modern practice of granting lifetime pensions to former Presidents, Speakers of the House, and other officers. A pension, by current definition, is free from annual review by the Congress which has provided for it. If the intention of the prohibition against titles of nobility clause was to insure that federal officers would be returned to a private station, which Backus makes clear, it would seem to prohibit the continued payment to those officers out of the federal treasury. The Constitution provides for the compensation of Presidents, Congressmen, and other officials during their terms of office in consideration of the services they render to the government. Pensions, however, are a grant of special economic benefit to former officials over and above regular compensation for their services. In other words, pensions might be described as a grant of a privilege, exclusive of senatorial capacity, a *de facto* title of nobility.

Rigorously applied, the dual concept of equal participation in, and benefit from, government would affect modem spending policy dramatically. This principle prohibits grants of special benefit, not only to individuals, but also to groups. Strictly speaking, no class or group of Americans should receive any economic or political privilege not common to every American. Special grants of aid to particular groups, such as farmers, automobile manufacturers, minorities, the poor, professors, and the like violate the principle of equal benefit from government. Our modem violations of this principle have led to two circumstances which our founding fathers never intended.

First, various groups of Americans now receive very different levels of benefits from the federal government. Secondly, the benefit one receives is based upon the group's degree of political organization and activism. America today is the nation of the caucus, the PAC, and the special interest group, not a nation of the people. The abandonment of the principle of equal benefit has led to the deterioration of the principle of equal protection embodied in "all men are created equal" and the guarantee of a republican form of government. Not only that, but there is a *de facto* creation of the House of Lords in America in the Federal Reserve Board. We are not content with just giving subsidies to the banking industry; the Congress has actually delegated its responsibility to form a monetary policy to a group of people who are not in any way responsive to the people. It is no wonder that some people call the chairman of the Federal Reserve Board the second most powerful man in America.

Separation Of Powers

The Federal Reserve Board, also, reflects a breach of the third important principle: separation of powers. That principle has been undermined today because we have abandoned a true definition of law. We have assumed that when Congress passes a statute providing for the licensing of television stations, for example, in the "public interest, convenience, or necessity," that it is a law, when as a matter of fact, it is not law according to a right definition of that term.

At the time that the United States Constitution was adopted, political statesmen and legal scholars

alike agreed with Blackstone that a law, properly defined is a "rule of conduct ... commanding what is right and prohibiting what is wrong."[27] This definition of law - that it must be a rule - was repeated by Justice Hugo Black in his opinion in the famous steel seizure case when he found that a Presidential order was, in fact, a law and therefore beyond the President's executive power:

> The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress - it directs that a Presidential policy be executed in a manner prescribed by the President. The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed ....[28]

If a statute merely proclaims a policy, such as, licenses are to be issued in the "public interest, convenience, or necessity," then it is not a rule of conduct because it does not, standing alone, prohibit any wrong action or command any right action. Rather it is only a statement of policy. And the Federal Communications Commission, which was created to administer that policy, becomes, in fact, the one that makes the law. Not only does it make the law, it also enforces the law. Not only does it enforce the law, it adjudicates the law. Therefore, it violates the principle that no government institution ought to exercise legislative, executive, and judicial power.

When Congress ceased to pass rules, and enacted only policies, it found that the judicial system was intrinsically ill-adapted to the new tasks. Kenneth Culp Davis, who is probably the leading authority in administrative law, says this about the necessity of creating a system of administrative law:

> Courts could not investigate, supervise, fix rates, grant or deny licenses, issue regulations, correlate all such activities. Many of the new tasks obviously called for organizations of specialists - a judge could hardly furnish the skills in law, accounting, and engineering supplied by the staff of a relatively simple agency like the FCC, ... The Social Security Board's Bureau of Old Age and Survivors Insurance, handling nearly a million claims annually, requires a vast organization of clerks to examine applications and assure that requisites are met, other clerks to check the work of the first clerks, officers to handle problem cases of many classifications, hearing officers to consider contested cases, and reviewing officers for administrative appeals.[29]

In other words, when Congress breached its responsibility to legislate, it created a vast bureaucracy which combined legislative, executive, and judicial power.

By abrogating its duty to legislate, Congress has imposed upon the American people a bloated bureaucracy in the same manner as had King George III and the English Parliantent upon the American colonies. That offense led the writers of the Declaration of Independence to level this

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27. 1 W. Blackstone, *supra* note 6, at 44.

28. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952).

29. K. Davis, ADMINISTRATIVE LAW 13-14 (1951).

charge on the king: "He has erected a multitude of new offices, and sent hither swarms of officers, to harass our people, and eat out their substance." Yet men like Professor Davis tell us that such eighteenth-century objections are outmoded:

> The solution of twentieth century problems calls for twentieth century understanding. Montesquieu (who, of course, was one of the great spokesmen for separation of powers) knew nothing of regulating airlines and television, or even railroads and securities exchanges. From the beginning Congress has conferred judicial power upon tribunals other than courts. The men who wrote the Interstate Commerce Act experimented by giving the Commission both legislative and judicial powers. When the results proved satisfactory, later congresses added to the Commission's powers, ignoring the conceptualism of a strict theory of separation of powers. Building carefully on further experience, Congress and all state legislatures have conferred mixed powers upon many agencies. The abstract and faulty philosophies of former centuries have yielded to modern experience.[30]

CONCLUSION

If we are to have a Constitution which protects the rights of the people, if we are to have a government which is designed to secure our God-given rights, then we cannot forget the cornerstone upon mich the Constitution is based: the Declaration of Independence. If we forget the Declaration's foundation of immutable "laws of nature and of nature's God," which do not change with changing experience, then we will suffer under the rule of tyrants. As we come into the 200th year of the Constitution, we, the American people, must rise up and demand that our lawfully elected representatives return to constitutional government. We must not allow the Constitution to be eroded away.

30. *Id.* at 30-31.

Other writings by Herbert W. Titus:

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The Constitution and the High Court: The Case for Textual Fidelity
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Moses, Blackstone and the Law of the Land
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