

## Constitutional Corner – America’s Fundamental Principles: Rule of Law

"If it be asked, What is the most sacred duty and the greatest source of our security in a Republic? The answer would be, An inviolable respect for the Constitution and Laws -- the first growing out of the last. ... A sacred respect for the constitutional law is the vital principle, the sustaining energy of a free government." Alexander Hamilton<sup>1</sup>

What Hamilton calls our “sacred duty” today we call the “rule of law.” “The rule of law is the legal principle that law should govern a nation, as opposed to being governed by arbitrary decisions of individual government officials.”<sup>2</sup>

The “Rule of Law” is what produces “ordered liberty,” which I wrote of last week. Without law, a society would, given man’s fallen state, quickly turn to licentiousness and, inevitably, anarchy.

But what is “law?” Are all “laws” duly passed by an appointed legislative body actually “laws?” Must we have an “inviolable respect” for everything that calls itself “law?” Do we even have an obligation to obey the Constitution? Those are the themes we will explore today.

Law: “A rule, particularly an established or permanent rule, prescribed by the supreme power of a state to its subjects, for regulating their actions, particularly their social actions.”<sup>3</sup>

Law has been an integral part of human society since the dawn of recorded history. We need look no further than the Garden of Eden for promulgation of the first law -- and its quick violation.<sup>4</sup>

In English/American legal history we usually look to the 1215 Grand Charter (Magna Carta) as the foundation for our written law, although it was certainly not the first document which specified the rights of subjects.

“Laws are imperative or mandatory, commanding what shall be done; prohibitory, restraining from what is to be forborn; or permissive, declaring what may be done without incurring a penalty,” continues Mr. Webster. But he also concludes: “The laws which enjoin the duties of piety and morality, are prescribed by God and found in the Scriptures.”

So what about a “law” that purports to control our morality, is it indeed a law? What if it conflicts with Scripture? Which is to be followed? We enjoy freedom of religion in this country. What if I decide not to model my life after the Scriptures? Am I still governed by the Bible’s laws? Fair questions all.

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<sup>1</sup> Essay in the American Daily Advertiser, Aug 28, 1794.

<sup>2</sup> [https://en.wikipedia.org/wiki/Rule\\_of\\_law](https://en.wikipedia.org/wiki/Rule_of_law)

<sup>3</sup> <http://webstersdictionary1828.com/Dictionary/Law>

<sup>4</sup> Genesis 2:17.

The Founders had an answer -- which we today have largely discarded.

The Founders knew there was, first and foremost, natural law; law created by God to produce “ordered liberty.” This law has existed as long as mankind itself. This law was created long before civil, man-made law was ever envisioned by man. The eminent British jurist Sir William Blackstone put it this way:

"This law of nature, being [of equal-age] with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.<sup>5</sup>

Rufus King, a “Blackstone lawyer,” said it this way: “[The] law established by the Creator, which has existed from the beginning, extends over the whole globe, is everywhere and at all times binding upon mankind. . . . [This] is the law of God by which He makes His way known to man and is paramount to all human control.”<sup>6</sup>

We know of this natural law because it “is promulgated by the very fact that God instilled it into men's minds so as to be known by them naturally,” wrote Thomas Aquinas.<sup>7</sup> Hebrews 10:16 says essentially the same thing.

So do we really need to be told that it is wrong to take innocent human life, whether born or unborn? No, we don’t – or we shouldn’t need to be. But some men’s and women’s consciences are so seared that this and a few other natural laws needed more “visibility.” According to Blackstone, God then took a portion of natural law that He apparently didn’t want us to ignore or push into the deep recesses of our consciousness, and had it written down; we call this Biblical Law.<sup>8</sup>

Finally, God gave mankind the freedom to construct additional law: civil law. But civil law is and must remain, subservient to natural law. That’s why I have difficulty when I read Article 6 of the Constitution, which says, in part: “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every

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<sup>5</sup> Commentaries on the Laws of England, Book 1, Chapter 2.

<sup>6</sup> Letter to C. Gore, February 17, 1820.

<sup>7</sup> <http://cstl-cla.semo.edu/hhill/Classical%20Natural%20Law%20Theory.htm>

<sup>8</sup> “[D]ivine providence... in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in diverse manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures.” Commentaries on the Laws of England, Book 1, Chapter 2

state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”<sup>9</sup> (emphasis added)

The fifty-five Framers, certainly the thirty-two lawyers amongst them, knew this statement was patently false; they all knew that natural law trumped civil law, including the civil law they had just drafted and called the U.S. Constitution (if they had only added the word “civil” before “law”). Yet the Constitution was drafted and ratified while containing that clause, so we have created this as yet unresolved “tension.”

Today we know, instinctively, that there is a “higher law” that must at all times be obeyed, even when it conflicts with civil law.

I wrote about this last September in light of what we could call the “[Kim Davis Affair](#)” and again, [after Obergefell v. Hodges was announced](#). I won’t repeat myself; but I encourage you, if interested, to revisit those earlier essays.

“[I]f the public are bound to yield obedience to laws to which they cannot give their approbation, they are slaves to those who make such laws and enforce them,” wrote “Candidus,” in the Boston Gazette.<sup>10</sup>

“No society can exist unless the laws are respected to a certain degree, but the safest way to make them respected is to make them respectable. When law and morality are in contradiction to each other, the citizen finds himself in the cruel alternative of either losing his moral sense, or of losing his respect for the law—two evils of equal magnitude, between which it would be difficult to choose,” wrote Frederick Bastiat<sup>11</sup>

Indeed, there can be and in fact are, for want of a better term: “bad laws.” They have been around for millennia. First century Roman historian Publius Cornelius Tacitus wrote: “Formerly we suffered from crimes, now we suffer from laws.” Edmund Burke added: “Bad laws are the worst sort of tyranny.”<sup>12</sup>

But what makes a law “bad?”

There are many qualifiers: first and foremost, as we’ve seen, a “law” that conflicts with natural or scriptural law.

Second, an “unjust” law.

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<sup>9</sup> [https://en.wikipedia.org/wiki/Supremacy\\_Clause](https://en.wikipedia.org/wiki/Supremacy_Clause)

<sup>10</sup> January 20, 1772.

<sup>11</sup> The Law, June 15, 1850.

<sup>12</sup> In a speech at Bristol, England, 6 September 1780.

Henry David Thoreau urged: "Anyone in a free society where the laws are unjust has an obligation to break the law." Dr. Martin Luther King echoed: "One has a moral responsibility to disobey unjust laws."

But what is unjust? Unjust in what way; to whom? Professor Randy Barnett, in *"Restoring the Lost Constitution,"* suggests "a law is *just*, and therefore binding in conscience, if its restrictions are (1) *necessary* to protect the rights of others and (2) *proper* insofar as they do not violate the preexisting rights of the persons on whom they are imposed."<sup>13</sup> Barnett further argues that, "in the absence of unanimous consent, there is a duty to obey the law only when the legislature's powers are limited."<sup>14</sup> Notice that only just laws bind us on conscience. We need not, indeed Professor Barnett says we cannot, consent to obey all laws dutifully passed.

It took the country 58 years after *Plessy v. Ferguson* (1896) and the "separate but equal" laws<sup>15</sup> it condoned to decide that such laws were unjust (set right by *Brown v. Board of Education* in 1954). To my mind, *Roe v. Wade* is unjust to the rights of as yet unborn Americans, but not all Americans agree. In fact, America has never been more divided over what constitutes "injustice" than perhaps the period leading to the War for Southern Independence (aka, the Civil War). Some see the simultaneous existence of American billionaires and American homeless as evidence of injustice, and demand government "fix this."

A law that restricts the exercise of a constitutional right also qualifies as unjust, says a distinguished Supreme Court Justice: "When a legislature undertakes to proscribe the exercise of a citizen's constitutional rights it acts lawlessly and the citizen can take matters into his own hands and proceed on the basis that such a law is no law at all," wrote William O. Douglas.<sup>16</sup>

James Madison offers some additional criteria for "bad law:"

"It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man who knows what the law is today can guess what is will be tomorrow."<sup>17</sup> (emphasis added)

Frederick Bastiat identifies another class of "bad laws:" they enact what he calls "legal plunder."

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<sup>13</sup> Randy E. Barnett, *Restoring the Lost Constitution-the Presumption of Liberty*, Princeton University Press, 2004, p. 44.

<sup>14</sup> Ibid, 39.

<sup>15</sup> In this case a Louisiana law that required blacks to sit in separate railway cars.

<sup>16</sup> Dissenting opinion in *Poulos v. New Hampshire*, 345 U.S. 395 (1953).

<sup>17</sup> Federalist no. 62, February 27, 1788.

"But how is this legal plunder to be identified? Quite simply. See if the law takes from some persons what belongs to them, and gives it to other persons to whom it does not belong. See if the law benefits one citizen at the expense of another by doing what the citizen himself cannot do without committing a crime. Then abolish this law without delay, for it is not only an evil itself, but also it is a fertile source for further evils because it invites reprisals. If such a law — which may be an isolated case — is not abolished immediately, it will spread, multiply, and develop into a system."<sup>18</sup>

If we put our thinking caps on, I believe we can identify examples of laws Congress has passed that meet some or all of these criteria.

Which brings us to the government. So far we've talked about "Rule of Law" in terms of individuals obeying the law -- or not; what about governments?

"Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."<sup>19</sup>

Congress is consistently faulted by many on the Right for failing to observe constitutional limits on its power. These critics conveniently forget (if they ever knew) that the Supreme Court has effectively erased those limits and has provided Congress with near plenary spending power. But what about the other branches of government?

In "*Lawless, the Obama Administration's Unprecedented Assault on the Constitution and the Rule of Law*," author David Bernstein explores multiple ways in which the current administration has flaunted this American fundamental principle. Instance after instance of lawless behavior, many of them encouraged by the President's supporters, have, in my view, demeaned the Office of President as well as the Rule of Law. Mind you, the President did not try to justify his lawless actions as a "check and balance" on the unconstitutional actions of Congress, which would make his actions understandable, perhaps even acceptable if the reasoning were sound; he has openly acknowledged their unconstitutionality: "We can't wait for an increasingly dysfunctional Congress to do its job. Where they won't act, I will."<sup>20</sup>

What is most discouraging, and which bodes ill for the survival of "Rule of Law" in this country, is to see the President's party cheer him on. Bernstein recounts the 2014 State of the Union address in which Obama uttered a statement similar to the one above. Upon hearing these words, "House and Senate Democrats responded with a standing ovation."<sup>21</sup> Amazing! Never

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<sup>18</sup> The Law, June 15, 1850.

<sup>19</sup> U.S. Supreme Court Justice Tom C. Clark in *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>20</sup> Mary Bruce, *Obama Offers Mortgage-Relief Plan: "We Can't Wait" for Congress*, ABC News (Oct. 24, 2011), <http://abcnews.go.com/blogs/politics/2011/10/obama-offers-mortgage-relief-plan-we-cant-wait-for-congress/>.

<sup>21</sup> Bernstein, p. 9.

tell a Progressive that the Constitution is an obstacle to his or her version of “progress.” While nearly every President in the modern era has tried to expand the power of the Presidency, Obama’s actions are unprecedented in their hubris.

The great Supreme Court jurist Learned Hand, in 1944, gave a brief speech, [\*The Spirit of Liberty\*](#), before a million and a half people in Central Park, New York, on what was called “I Am an American Day” (could you imagine such an event being held today?). Hand observed:

“I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.”

So while the Rule of Law is and will remain a fundamental American principle, a blind obedience to the law, regardless of its legitimacy, serves no one in the end.

I’ll let Mr. Jefferson have the final word: “A strict observance of written laws is doubtless one of the highest duties of a good citizen, but it is not the highest. The law of necessity, of self preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law would be to lose law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.”<sup>22</sup> (emphasis added)

In summary: rule of law is critical to the preservation of liberty and freedom; both individuals and governments must respect rule of law. But governments also bear the responsibility of enacting legitimate and just laws, law in harmony with natural and revealed law, and laws worthy of the respect and obedience of their citizens. Failing to do that consistently, such governments can become illegitimate in their own right.

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<sup>22</sup> Thomas Jefferson, Sept 20, 1810 letter to John Colvin.