



The Decay of Liberty and the Rule of Law in 21st Century America

Peter H. Johnston

Ideas have consequences.

When walking through a law library in Cambridge, Mass., as I did with my son a number of years ago, one comes across an arresting inscription: “OF LAW THERE CAN BE NO LESSE ACKNOWLEDGED THAN THAT HER SEATE IS THE BOSOME OF GOD, Bishop Hooker, *Ecclesiastical Politie*, 1st Booke, p. 94 (1604).” This inscription is found in the Langdell Reading Room of the law library at Harvard University, whose motto is “Veritas,” the Latin word for “truth.” As we will explore, the concept of the law whose “seate is the bosome of God” is the basis for the American rule of law. Over time, however, this idea has been deliberately set aside (including, ironically, efforts initiated at Harvard, as we will see), leading to a very different “rule of law” that has adversely affected America into the 21st century. This disturbing trend has harmfully impacted not only the field of law but also economic markets and constitutional liberty. Ideas do have consequences.

Background on the Rule of Law

As a student of history, business, and law, I find it essential to keep reminding myself of where I have come from in order to keep a proper perspective on where I am now and where I am going. Such purposeful reflection, while not the ultimate goal in life, is not wasted. As a foreign proverb says, “What’s the use of running if you’re on the wrong road?” Or as the famed dissident from the former Soviet Union, Alexander Solzhenitsyn, warned in a speech in Washington, D.C. in 1975, “If we don’t know our own history, we will simply have to endure all the same mistakes, sacrifices, and absurdities all over again.”¹

In the United States, liberty’s eagle rose on two wings.² It rose on one wing familiar to 20th and 21st century students of history and/or government, that of the Enlightenment, but also rose on one other no less essential wing for liberty’s eagle to fly. The second wing of faith, as Michael Novak illuminates in his book, *On Two Wings: Humble Faith and Common Sense at America’s Founding*, has been largely overlooked by mainstream academia and media in the past century. That ignoring, however, does not negate its importance, not only to American history but to the very nature of American liberty. That wing is found in Hebrew metaphysics – a vital part of the worldview prevailing in the hearts and minds of the vast majority of America’s founders.

A look at the Liberty Bell, a powerful symbol of American freedom, reveals the basis of liberty inscribed on it. That bell, cast in 1753, has the inscription from the ancient Hebrew Torah, “PROCLAIM LIBERTY THROUGHOUT ALL THE LAND UNTO ALL THE INHABITANTS THEREOF” from Leviticus 25:10.

FAMILY RESEARCH COUNCIL

801 G STREET NW, WASHINGTON, D.C. 20001
202-393-2100 • fax 202-393-2134 • (800) 225-4008 *order line*
www.frc.org

July 2017
Issue Analysis IS17G01

As a part of the Torah, it reflects the covenant-keeping nature of God to His people. As Rabbi Michael Gotlieb writes:

From the Torah's beginning until its end, God is portrayed as being personally involved in the welfare of humanity. Deism is not a Jewish notion. God is not an "unmoved mover," the proverbial clockmaker who after assembling and winding his ware, steps back watching it tick down, never to again involve Himself with it. On the contrary, God hears our innermost thoughts, feels our deepest concerns, judges us and guides us through our lives. A traditional Jewish concept of God is one that is interactive and intimately personal.³

The stated source of truth for the inscription of the Liberty Bell cast in 1753 is the third book of the Old Testament. The stated source of truth for the Declaration of Independence twenty-three years later was the laws of nature and of nature's God. Clearly, our Founding Fathers relied heavily on a source of truth that they believed was outside of themselves and was unchanging from generation to generation. In other words, American liberty rests on a foundation of truth that transcends individuals and transcends cultures.

Our founders were willing to risk their lives, their fortunes, and their sacred honor for this liberty. The lifeblood of their commitment stemmed from an awareness of the ebb and flow of liberty going back over five hundred years to a meadow in England. The year: 1215. The setting: lords and barons gathered in a time of virtually no liberty – as had been the case throughout most of human history. Their purpose: to confront King John who had yielded significant English land holdings to the French king in what is modern day France (but at that point the land belonged to England), and who had submitted significant authority and power to the pope with regard to land in England itself. On the 15th of June, 1215, King John submitted to the lords and barons of England in signing the Magna Carta (meaning "Great Charter"), placing him as king under the law rather than above the law. Author Rodney Stark, in his book *The Victory of Reason*, credits protections in the Magna Carta with effective growth in English capitalism as opposed to other areas subject to tyranny. "As was made explicit in the Magna Charta, the English merchants enjoyed secure property rights and free markets, unlike early capitalists in southern Italy and those in the Walloon areas of Flanders, who were destroyed by despots."⁴

Some 550 years after the signing of the Magna Carta, a relatively small but committed group of patriots who were knowledgeable of the blood of martyrs in the march of liberty gathered in a hall in Philadelphia in 1776. They were not ignorant of their Judeo-Christian heritage, and they were not ignorant of western history as a whole; hence, the writings of Cicero during the time of the Roman Republic were not unfamiliar:

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; [...] one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for He is the author of this law, its promulgator, and its enforcing judge.⁵

In addition, these 18th century patriots were not unfamiliar with the 17th century writings of John Locke, such as, "The law of Nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for man's actions must...be conformable to the law of Nature – i.e., to the will of God."⁶ And they would not have been unfamiliar with the writings of one of their own American contemporaries. In 1775, Alexander Hamilton wrote:

Good and wise men, in all ages, have... supposed that the deity, from the relations we stand in to himself and to each other, has constituted an eternal and immutable law, which is indispensably obligatory upon all mankind, prior to any human institution whatever. This is what is called the law of nature... Upon this law depend the natural rights of mankind.⁷

He added:

The Sacred Rights of Mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole volume of human nature, by the Hand of the Divinity itself; and can never be erased or obscured by mortal power.⁸

Based on the principles espoused in the Declaration, our Founders fought for liberty and in 1783 negotiated the Treaty of Paris with Great Britain, which ended the war and acknowledged independence for our nation. Four years later, recognizing the inadequacy of the Articles of Confederation that were designed to implement the principles of the Declaration in government, representatives of the states gathered in Philadelphia and drafted another document designed to provide a better system of government to implement the guiding principles of the Declaration. Author Matthew Spalding writes, "Through a carefully written constitution, they created an enduring framework of limited government based on the rule of law." He adds, "With this structure, they sought to establish true religious liberty, provide for economic opportunity, secure national independence, and maintain a flourishing society of republican self-government – all in the name of a simple but radical idea of human liberty."⁹

What is the Rule of Law?

In the 17th century, Samuel Rutherford captured the heart of the rule of law in the title to his seminal work, *Lex Rex*, or "the law is king." This stands in stark contrast to *Rex Lex* ("the king is law"), the form of governance under which the vast majority of humanity has lived throughout the centuries, whether by written code or simply enforced rule. Author Charles Colson asserts that the rule of law was "the defining principle of the American experiment" from our nation's very beginning, that our founders were "steeped in works such as *Rex Lex* – which means 'the law is king' – penned by Scottish cleric Samuel Rutherford. Rutherford argued that a nation's laws must be based not on the whims of men but on the decrees of God."¹⁰

In contrast to the rule of law, Spalding cautions, "Throughout most of human history, the rules by which life was governed were usually determined by force and fraud: He who had the power – whether military strength or political dominance – made the rules."¹¹ When the law is king, no individual nor any branch of government, as in the United States, is above the law; the law is not to be applied arbitrarily. In writing the Massachusetts Constitution during the Revolutionary War and addressing the division of powers for the commonwealth in 1780, John Adams addressed the purpose of the division of powers for the commonwealth to be "to the end it may be a government of laws, not of men."¹² In other words, under the rule of law, whether one is homeless or the president of the country, whether one is black, white, or brown, whether one is male or female, the law is to be applied uniformly, not arbitrarily.

The American Rule of Law in the Declaration of Independence

The signing of the Declaration of Independence signifies the birth of the United States of America. With the signing and the commitment of 56 patriots pledging their lives, their fortunes, and their sacred honor to the cause of liberty, the Declaration provides the starting point of the unique American rule of law as applied to the United States. Author Michael Novak asserts that the “very form of the Declaration was that of a traditional American prayer, a compact not unlike the Mayflower Compact.”¹³ He explains how Jefferson included two references to God in Hebrew terms and that two additional Hebrew names for God were added by Congress before the document was affirmed. He further explains:

If these Hebraic texts of the Declaration were strung together as a single prayer, the prayer would run as follows: Creator, who has endowed in us our inalienable rights, Maker of nature and nature’s laws, undeceivable Judge of the rectitude of our intentions, we place our firm reliance upon the protection of divine Providence, which you have extended over our nation from its beginnings. Amen.¹⁴

A simple reading of the introductory paragraphs reveals several essential elements of the unique American rule of law birthed with that signing. The Declaration opens:

In CONGRESS, July 4, 1776.

The unanimous Declaration of the thirteen united States of America.

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the power of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

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, that among these are Life, Liberty and the pursuit of Happiness – That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed...¹⁵

First, there is an appeal to a higher law than any man’s law as a basis for birthing this new nation – the Laws of Nature and of Nature’s God. Author Larry Arnn writes, “Only of God can it be said that His will constituted a rule that all peoples, in all places, and at all times must obey.” He adds, “The Founders needed a law as universal as the circumstances the law is supposed to cover. They needed a law applicable in all nature.”¹⁶ Second, there is a recognition of self-evident truths that apply to all of humanity regardless of culture. Third, there are “unalienable rights” – meaning rights that cannot be justly taken away by man that transcend culture and time. Fourth, those unalienable rights are endowed by their Creator. Authors Charles Colson and Nancy Pearcey recognize that according to the Declaration, “there exist certain ‘unalienable rights’ that are beyond the authority of the government either to grant or deny; it can only recognize them as preexisting.” They add what ought to be self-evident but what seems to escape modern understanding. If “the government confers these rights, then they are *not* unalienable, for the government can also take them away – and any group out of favor can be crushed by the self-interest of the majority or the naked force of the state.”¹⁷

Looking to the Laws of Nature and of Nature's God and reflecting on human history as a whole and their experience specifically as colonies, our Founders understood that such rights were not enumerated and certainly did not thrive in a vacuum. Recognizing that most of man's history reflected the tyranny of the ruler over the ruled, they foresaw the need to identify one purpose of government – to secure or protect those unalienable rights recognizing that the just powers of government came from the consent of those whom government was bound to protect. Thus the unique American rule of law from its birth contains at least the following elements:

1. The American rule of law has its basis in a higher law.
2. The American rule of law is based on truths that transcend culture and time.
3. The American rule of law recognizes unalienable rights – rights that transcend culture and time.
4. The American rule of law recognizes that unalienable rights are endowed by our Creator.
5. American government exists to uphold those principles.

The Relationship of the Declaration of Independence to the U.S. Constitution

While elite cultural powers of the 20th and 21st century have essentially pronounced a divorce between the Declaration of Independence and U.S. Constitution,¹⁸ they were designed to function and still do function as a unit. While they were written in different styles and serve different purposes, of necessity they must be looked at in conjunction with one another. In so doing, we not only understand the purpose and the principles that underlie our government, but also understand the structure and systems by which that purpose and those principles are to effectively be carried out. While there are legal means to make changes to the structure and systems found in the Constitution (for instance through amendments), significantly, there is no provision to make changes to the purpose and principles on which our nation and its government are built as found in the Declaration.¹⁹

The Declaration and the Constitution comprise the lion's share of the organic law of the United States.²⁰ According to Black's Law Dictionary, "organic law" is defined as "The fundamental law, or constitution, of a state or nation, written or unwritten. That law or system of laws or principles which defines and establishes the organization of its government."²¹

Citing Abraham Lincoln, author Matthew Spalding elaborates on the relationship between the Declaration and the U.S. Constitution:

[Lincoln] once explained the relationship between the Declaration of Independence and the Constitution by reference to Proverbs 25:11: "A word fitly spoken is like apples of gold in a setting of silver." While he revered the Constitution, and was a great defender of the union, he knew that the word "fitly spoken" – the apple of gold – was the assertion of the principle in the Declaration of Independence. "The *Union*, and the *Constitution*, are the *picture of silver*, subsequently framed around it," Lincoln wrote. "The *picture* was made *for* the apple – *not* the apple for the picture." He maintained that the Constitution was made to secure the principles proclaimed in the Declaration of Independence, and that those principles and the Constitution, properly understood, were perfectly compatible.²²

Larry Arnn puts it this way: "The central precepts of the American government are found in the Declaration of Independence, and they encompass the inseparable conceptions of nature, equality, rights, and consent. To know the purposes of the United States is to understand these terms."²³ In

understanding these terms as our Founders used them, one recognizes that although not specifically stated, property was considered one of those rights for the purposes of the Declaration. Moreover, property was understood in a significantly broader context than how it is used in modern times. In one valid sense, according to Madison in his essay "Property," it included "a man's land, or merchandize, or money" but in an equally valid but broader sense, "a man has property in his opinions and the free communication of them."²⁴

With a view to the principles in the Declaration, Arnn observes, "Constitutional rule operates in service of these principles. Its genius is its ability to deploy but also restrain the use of power and to capitalize on voluntary action to advance the public good."²⁵ In other words, limited government served as one sphere of authority among others to promote the public good. Colson and Pearcey explain that at our founding, "the government was to be limited not only by the rule of law but also by the scope of its authority over society." Catholics used the term *subsidiarity*, holding "that the higher social institutions, like the state, exist only to help subordinate institutions, like the family."²⁶ Protestants in the Reformation used the term *sphere sovereignty* to arrive at a similar result of limited government in the overall cultural context. For Protestants, the concept included the understanding that individuals had the biblical authority to approach God directly, "no longer approaching him only through the mediating structure of the church." Subsequently, "all spheres of society – including the state, family, school, corporation, as well as professional and voluntary associations – stand not under the church but directly under God's authority."²⁷ As mentioned, this worldview combined with the express rule of law put significant constraints on tendencies of governmental overreach. Colson and Pearcey continue:

This understanding was greatly liberating because it meant that no sphere may properly dominate the others; all are responsible to God directly, through the conscience of the individuals involved. Moreover, the power of each sphere is limited by the power of the others. As Dutch theologian Abraham Kuyper explained in the nineteenth century, the sovereignty of the state is limited "by another sovereignty, which is equally divine in origin" – namely, the sovereignty of the other spheres of society.²⁸

In several parental rights cases in the early 20th century, the U.S. Supreme Court affirmed the importance of the family sphere over the state with respect to the raising of children. Looking back historically, the Court reflected on the oppressive state mandates recommended by Plato in ancient Greece and practiced in Sparta with regard to the rearing of children. In *Meyer v. Nebraska* (1923), the Court wrote:

Although such measures have been deliberately approved by men of great genius [such as Plato who was referenced], their ideas touching the relationship between the individual and the State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.

Two years later, the Court revisited the issue in *Pierce v. Society of Sisters* (1925), writing:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public speakers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

And in 1944, the Supreme Court again addressed the issue of liberty and the family sphere of authority with respect to the state:

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . It is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter (*Prince v. Commonwealth of Massachusetts*).

The relationship of civil government to other select spheres as envisioned by our Founders and founding documents is illustrated below:

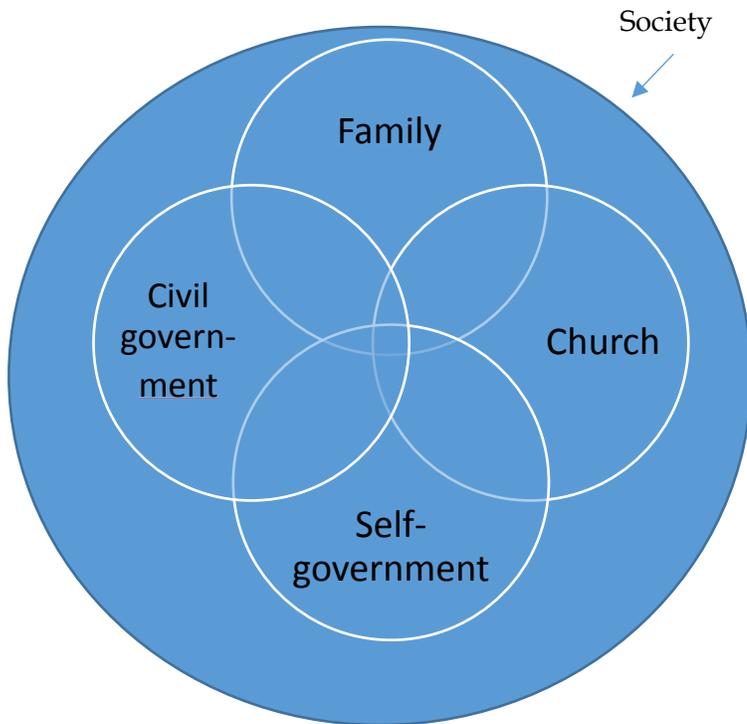


Fig. 1: Spheres of Influence in American Society

With respect to the proper relationship and application of the Declaration to the Constitution, the constructive effect of the American rule of law was not limited solely to the field of law. Spalding cites a lecture given by Abraham Lincoln in 1859 in which he addressed how the American rule of law catalyzed American prosperity, and that protections regarding private property including special provision for patents in the Constitution combined with other “great discoveries and inventions for communicating ideas—speech, writing, [and] the printing press.” He quotes Lincoln as saying that before the American patent provisions for ideas existed, “the inventor had not special advantage from his own invention,” but “[t]he patent system changed this; secured to the inventor, for a limited time, the exclusive use of his invention; and thereby added *the fuel of interest to the fire of genius* in the discovery and production of new and useful things.”²⁹

Spalding rightly recognizes that neither markets, nor property, nor profits in and of themselves were unique to our new country, but that the American rule of law contributed toward a powerful transformation of these concepts. He explains:

...by guaranteeing in law the equal liberty to acquire and protect a wide scope of property, they linked the rewards of the marketplace to the creativity of the human mind – unleashing innovation, enterprise, and the vast expansion of prosperity for the well-being of every American, indeed for the benefit of all mankind.³⁰

Put simply from the Founders' perspective, the Declaration and the Constitution (including the original Bill of Rights) spelled liberty, a liberty that had a profound societal – indeed worldwide – impact.

Departure From the American Rule of Law

It has wisely been stated that eternal vigilance is the price of liberty.³¹ At its founding in 1634, the primary purpose of Harvard College was to train clergy. Harvard played an instrumental part, however, in turning the study, practice, and application of law away from its foundation in a higher law. Within a decade of Charles Darwin's publication of the *Origin of Species*, Harvard appointed a president completely immersed in Darwinian evolutionary beliefs, Charles William Eliot. During his tenure from 1869 to 1909 and until his death in 1926, Eliot endeavored to transform education throughout the United States to embrace his beliefs in every academic discipline. Historian and Constitutional law scholar Herbert W. Titus explains:

Eliot assumed that the key to knowledge was man's observation under the discipline of a scientific mind... Eliot discarded what was left of Harvard's historic commitment to an orthodox Christian faith in God and, together with other educational leaders of his time, fashioned for American education a new faith in man.³²

With missionary-like zeal for the spirit of humanism, Eliot spearheaded education's pursuit of truth solely through experience and knowledge apart from its divine source. According to Eliot, "man and the universe were not governed by fixed and unchangeable laws; they were actually governed by 'slowly formed habits,' which were still evolving."³³ Ironically, he often used a scripture verse to support his goal by quoting John 8:32 ("And ye shall know the truth, and the truth shall make you free"), even encouraging colleges to use this scripture as their motto. However, he separated the scripture from the context in which its author placed it. John 8:31 reads, "If ye continue in my word, then are ye my disciples indeed." Properly understood in its context, only in continuing in Christ's words and being his disciples could one know the truth and the truth make him free. While Jesus emphasized the inseparable nature of truth, God, and revelation, "Eliot and his followers believed that man, beginning with himself, could determine all truth by means of the scientific method."³⁴ Eliot aggressively took steps to implement his beliefs in the field of law beginning at Harvard.

Eliot found a legal disciple in a relatively unknown and unproven individual, Christopher Columbus Langdell. Within one year of becoming president of Harvard, Eliot offered Langdell a position as professor of law even though, reportedly, Langdell "was a young man of no legal reputation, of no national fame, and of almost no other trial experience. He did not fit the profile of those who had previously received Harvard law professorships." What did fit was his commitment with Eliot to use "the scientific method to study and teach law." Less than a year later, Langdell became the first Dean of Harvard Law School.³⁵

In 1975, the American Association of Law Schools asked Harvard Professor Harold J. Berman to write on the secularization of legal education in our country. Berman pointed directly to Langdell, stating, "With Langdellian legal education, the older idea that law is ultimately dependent on divine providence, that it has a religious dimension, gradually receded, and I think we can say, has ultimately almost vanished."³⁶

Author Herbert Titus came to a similar conclusion: “For Langdell and his modern day followers, the rule of law did not precede the human conflict. Rather, the human conflict gave rise to the rule of law.”³⁷

Eliot’s presidency at Harvard (1869-1909) and Langdell’s service as dean of the law school (1870-1895) coincided with other significant post-Civil War changes in the nation economically, socially, and with regard to American influence internationally. Their tenure corresponded with the roots and germination of a massive shift in intellectual thought that had and continues to have massive implications for our nation. The Progressive Era of 1890-1920 ushered in the “progressive” movement, a label used by Democrats in their bid for the presidency in 2016 and in describing the 2016 Democrat platform.³⁸

Colson and Pearcey further trace the roots of the movement and its development at the end of the 19th century, tracing the undermining of the belief that human law needed to stem from a higher law back to Darwin and the ascendancy of pragmatism. In addition to President Eliot and Dean Langdell, other intellectual elites at Harvard University in the late 19th century included Oliver Wendell Holmes, Jr., Charles Pierce, and William James, who made up the progressive base. Contrary to a belief in transcendent truth rooted in the character of God, Colson and Pearcey write that these leaders “defined truth as the hypothesis that works best. Or as James succinctly put it, ‘Truth is the cash value of an idea.’” Colson and Pearcey summarize the effect of this paradigm shift:

What pragmatism meant for law was stated baldly by Holmes in 1897 when he advised an audience of law school students to put aside the notions of morality and look instead at the law as a science – the science of state coercion. His crass summary of what this means is captured in his famous dictum that law is the ‘majority vote of that nation that can lick all others.’ In other words, without divine law as the final moral authority, the law is reduced to sheer force.³⁹

By embracing those beliefs, it is no surprise that progressives during this era felt that our founding principles no longer fit with our advancing culture. Spalding identifies two specific “revolutionary, *anti-foundational* concepts” which characterized progressive thinking.⁴⁰ Specifically, progressives believe that “there are no fixed truths and that all ideas change and evolve with time.”⁴¹ Since, according to progressives, there are no fixed truths or universal standards of right and wrong, government could not be guided by nor bound by them. Thus, Spalding adds, “All truth claims are contingent, merely personal ‘values’ relative to other equally valid claims. It made no sense to say anything was a ‘self-evident’ truth.”⁴² He elaborates:

By this argument, any concepts of natural right or natural law – that is ideas of right and law grounded in a fixed or enduring nature – had to be rejected. “The idea that men possess inherent and inalienable rights or a political or quasi-political character which are independent of the state, has been generally given up,” the prominent progressive scholar Charles Merriam wrote in his 1920 book *American Political Ideas...* Notions of a natural moral order of standards that can and should guide man and politics, were considered naïve and akin to mythology.⁴³

These differences between our Founders’ perspective and that of progressives play out in a variety of ways. The following table identifies the contrasting viewpoints:

Founders Viewpoints	Progressive Viewpoints
Transcendent universal truth	Relative truth
Law above the law with its source outside of man	Science of law originated with man
Moral law governing the universe the basis of human law	No such thing as moral law governing the universe and thus no moral basis for human law
Law is “discovered” based on eternal, transcendent principles	Law is “made” as it evolves through slow process of growth
Declaration of Independence and Constitution work in tandem	Declaration of Independence and Constitution divorced
Constitution as a legal document	Constitution as a living document
Civil government as one of several intersecting spheres of authority in society	Civil government subsuming other spheres of authority in society
Government to protect	Government to promote and provide
Unalienable rights endowed by our Creator	Civil rights granted by government
Limited government with separation of powers	Expansive administrative state
Equality of opportunity	Equality of outcome
Fixed concepts of truth and liberty based on higher or natural law	Evolving relative concepts of truth and liberty determined by culture
Liberty as the goal based on fixed standards	Progress as the goal with ever evolving standards
American rule of law	21st century “rule of law” in America

Fig. 2: Contrasting Viewpoints of Founders and Progressives

With these varying perspectives, there was a subsequent departure in practice from the American rule of law.

Consequences of the Change in the American Rule of Law

The very foundation of our society has shifted with this change in perspective. C.S. Lewis has written that the “very idea of freedom presupposes some objective moral law which overreaches ruler and ruled alike.” He continues, “Subjectivism about values is eternally incompatible with democracy... if there is no Law of Nature, the ethos of any society is the creation of its rulers, educators, and conditioners.”⁴⁴ Building on that truth, Colson and Pearcey recognize that the “understanding of a transcendent law above human law (or positive law) is critical to the preservation of liberty and justice.”⁴⁵ They add, “...the Western political tradition has generally assumed that in order to be valid, human laws must be grounded in the natural law by which God orders his creation, which is in turn a participation in his eternal law.”⁴⁶

University of California at Berkeley law professor Phillip Johnson recognizes that when morality is removed as a basis for lawmaking, something else has to take its place. The substitutes, he says, are “utility” and “rights.” Based upon that perspective, Johnson explains, “The state has authority to regulate personal conduct to the extent necessary to serve the general welfare (utility) or to protect rights (such as a right to be free from discrimination).”⁴⁷ In this context, Johnson continues, “a general right to be free from moral coercion makes perfect sense. It merely means that an individual does not forfeit her freedom merely because other people happen to disapprove of what she wants to do.”⁴⁸ This shift has very real consequences. In essence, while the U.S. Supreme Court has yet to rule on it, some lower courts have said the government has the right to regulate – and thus require – the baking of wedding cakes for same-sex couples by businesses owned by Christians to protect the right of the same-sex couples to be free from discrimination, in spite of those actions violating the consciences and religious freedom of those Christian business owners.⁴⁹

Johnson does acknowledge the problems with this modernist viewpoint, which makes each individual king or queen of his or her own moral life and offers no higher authority for law. In a reflection on a lecture given by Yale Law School professor Arthur Leff (who believed in “made” law, not “found” law), Johnson points out that Leff is refreshingly forthright about the consequences of such a viewpoint. Citing Leff, Johnson writes, “the all-purpose response to assertions of authority in our society is ‘the grand sez who.’ By this whimsical expression Leff meant that following the death of God there remains no universally accepted source of moral authority.”⁵⁰ As a result, Johnson explains, “there is no obvious reason for any person to feel obligated to obey the commands of another – other than the threat of force,” as Oliver Wendell Holmes unabashedly professed. Johnson concludes, “People feel entitled to behave as they please and to have no obligations other than those they choose to recognize.”⁵¹ A similar assessment is expressed by former U.S. ambassador to the U.N. Commission on Human Rights, Jerome J. Shestack. In a *Wall Street Journal* editorial entitled, “There’s Nothing Alien About Natural Rights,” he contrasted natural rights (as the underlying basis for the Declaration of Independence) with legal positivism, or rights based simply on man’s authority, which, as mentioned, gained ascendancy in the 19th and 20th centuries. Shestack maintained, “Positivism holds that legal authority stems solely from what the state has laid down as law...However, the flaw in positivist philosophy is that the law is not better than the source of its authority.”⁵²

Colson and Pearcey identify four specific consequences of this divorce of moral authority from the law:⁵³

1. Important legal boundaries on human behavior are removed;
2. Government functions are not based on high moral principles but by employing “utilitarian procedures;”
3. Decision making takes place absent honest moral debate and genuine productive persuasion based on principle; rather, decision making is reduced to a function of power. He who has the most power rules; and
4. Ultimately the very rule of law itself is sacrificed, resulting in the re-ascendency of that from which the rule of law was designed to protect – arbitrary rule. This is because “[t]he rule of law cannot survive unless there is an unchanging and transcendent standard against which we can measure human law.” Absent that type of standard, “the law is whatever the lawmakers or judges say it is – which can only result, eventually, in the collapse of free government.” Consequently, “[t]he postmodern assault on objective moral truth has put us on the road to tyranny” – just what the American rule of law, according to our Founders and our founding, fought to overcome.

Numerous evidences of this shift and practical consequences in law, business, and family can be found throughout the 20th century. For instance, in that “anti-foundational” progressive spirit in January of 1944, President Franklin Delano Roosevelt actually proposed a “Second Bill of Rights.” Drawing upon the persuasive attraction to the original Bill of Rights enshrined as our first ten amendments to the U.S. Constitution, but departing radically from its nature and purpose, Roosevelt’s Second Bill of Rights included the following:⁵⁴

- The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation;
- The right to earn enough to provide adequate food and clothing and recreation;
- The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;
- The right of every businessman, large and small to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;
- The right of every family to a decent home;
- The right to adequate medical care and the opportunity to achieve and enjoy good health;
- The right to adequate protection from the economic fear of old age, sickness, accident, and unemployment;
- The right to a good education.

Roosevelt then summarized, “All of these rights spell security. And after this war is won we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being.”⁵⁵ Lauding Roosevelt’s vision, University of Chicago law professor Cass Sunstein writes that Roosevelt’s Second Bill of Rights “attempts to protect both opportunity and security, by creating rights to employment, adequate food and clothing, decent shelter, education, recreation, and medical care.” He adds, “The presidency of America’s greatest leader, Franklin Delano Roosevelt, culminated in the idea of a second bill. It represented Roosevelt’s belief that the American Revolution was radically incomplete and that a new set of rights was necessary to finish it.”⁵⁶

However, does civil government have the right to “create” rights through powers not given in the Declaration nor enumerated in the Constitution, particularly when in order to do so, out of necessity, the government would have to “legally” steal from others?⁵⁷ In other words, does our nation’s civil government have a legitimate authority to take property from an individual, an unalienable right of that person, in order to provide a government created right of another? This question is vastly different than a separate moral question of whether individuals, or group organizations such as churches, ought to voluntarily help a needy individual in an area of genuine need. Has our “rule of law” in the 20th and 21st century so stepped outside of the overlapping spheres of influence into the government overriding and subsuming these spheres, so that other options are not even considered? And in fact, has the government’s legal plunder from some to provide for others decreased or minimized the ability of some to be able to voluntarily help others through non-government spheres of influence?

While Roosevelt’s Second Bill of Rights has not been enshrined constitutionally, the spirit of such governmentally created rights has progressively permeated government policy ever since Roosevelt’s speech. Consider the unrelenting movement of just three of Roosevelt’s *rights*: “the right to adequate protection from the economic fears of old age, sickness, accident, and unemployment,” “the right to adequate medical care and the opportunity to achieve and enjoy good health” and “the right to a good education.” While these are noble goals for individuals and state and local governments to pursue (which the Constitution does not prevent), what authority is granted by the Constitution for the federal government to provide for them? Some legislators clearly do not care. To illustrate this, Larry Arnn

shares House Speaker Nancy Pelosi's response to a question from a reporter during debate about the Affordable Care Act. The reporter asked her, "Where specifically does the Constitution grant Congress the authority to enact an individual health insurance mandate?" Her response reflected that of many of her colleagues: "Are you serious? Are you serious?"⁵⁸ Her open disregard for the Constitution simply reflects a dominant attitude among many political leaders.

The Affordable Care Act is another example of how we now live under a "rule of law" in 21st century America that has become a massive bureaucracy which includes an administrative layer, or "fourth branch" of government that is far removed from the people. Arnn asserts that we have had to "invent a new kind of government system" – a fourth branch of government that proponents posit would "be wholly focused on the public good because it will operate outside politics and beyond political control."⁵⁹ In effect, it merges legislative, executive, and judicial authority under the umbrella of government agencies. Arnn then contrasts this new system with the beliefs of our Founders:

This is the origin of the entitlement state and the administrative system that goes with it. Built on a different understanding of nature, of equality, and of consent, it proposes different policies and different ways of pursuing them. It sets out to solve the problems of want, misfortune, and injustice in the society. It holds out the great hope of a planned and rational society, in which none need suffer unduly and all who suffer will have relief. These are the new self-evident truths it has discovered.⁶⁰

Oklahoma Wesleyan University (OKWU), where the Keating Center for Capitalism, Free Enterprise, and Constitutional Liberty is located, is currently challenging the administrative behemoth through litigation with regard to mandates of the federal Department of Education's Office of Civil Rights (OCR). OKWU joined a lawsuit originally sponsored by the Foundation for Individual Rights in Education (FIRE), a campus civil rights organization which alleges that according to a mandate issued in 2011, OCR is requiring all institutions of higher learning governed by Title IX to "adjudicate [incidences of sexual assault] using an unconstitutional process and standard."⁶¹ The lawsuit challenges the mandate, alleging that OCR failed to offer it for public notice and comment before implementation as the Administrative Procedure Act requires. Oklahoma Wesleyan explains, "This requirement [compliance with the APA] ensures government agencies do not have unfettered discretion to create new laws – a function normally performed by Congress."⁶²

According to Dr. Everett Piper, President of Oklahoma Wesleyan, the university is committed to defending the constitutional rights of its students, and "we also refuse to accept any government intrusion that would require OKWU to teach the antithesis of our Christian beliefs concerning sexual behavior." Moreover, Dr. Piper adds, "all of our students should have the legal right to avail themselves of local law enforcement without their petition being compromised by the intrusion of an OCR-mandated committee of amateurs that contravenes the due process and confidentiality of the legal process."⁶³ Addressing the exact problem brought on by our departure from the American rule of law, Dr. Piper further explains:

The Department of Education used Title IX as a pretext to suddenly and unilaterally change the law – imposing a one-size-fits-all mandate which essentially requires colleges to negate the constitutional rights of our students. Oklahoma Wesleyan is committed to protecting our students and their legal rights and this mandate is an infringement upon those rights and on the privacy of mainly the young women with whom we have been entrusted. While we fully support Title IX as it was written and passed in 1972, the officials at the Department of Education unfortunately have taken it upon themselves to implement an unrelated social agenda using Title

IX to coerce and intimidate schools through the threat of a loss of federal funding. This must stop. Our individual freedoms and liberties, endowed to us by God and enshrined in our Constitution, are too important to be infringed upon by bureaucratic mandate.⁶⁴

Former U.S. senator and former president of the Heritage Foundation, Jim DeMint, addressed consequences of this shift in worldview. DeMint wrote, “Today, we’re seeing the consequences of a political Left that has rejected the concept of natural law – regardless if arrived at through faith or reason – because it pointed to uncomfortable truths regarding sexuality, marriage, human nature, and a higher purpose.” He adds, “But when we reject the very foundation of our unalienable rights, those rights become arbitrary things granted by government, and very alienable indeed.” He continues, “If there is no natural law, then people were not created equal, nothing is self-evident, there are no unalienable rights, and governments are not instituted to protect rights: they exist to prescribe them.”⁶⁵

Conclusion

The American rule of law of the Founders offers a stellar example of how faith and reason have mutually played an integral part in the flight of the American eagle. The rule of law today is not the American rule of law of our Founders. The American rule of law was built on faith – in a higher law based on transcendent truth and universal principles applicable to all people and for all times as espoused by the Declaration of Independence – and reason – including the unity of the system our Founders devised for carrying out those principles as set forth in the Constitution. However, individuals committed to a “progressive” agenda have bound the wing of faith and crippled the flight of the American eagle and liberty as envisioned by our Founders.

The progressive divorce of the Constitution from the Declaration has not been without consequences. This shifting foundation for truth has resulted in a shifting foundation for law resulting in ever changing definitions of liberty. In essence, we have moved from fixed, transcendent concepts of truth, law, liberty, and equality to evolving concepts of truth, law, liberty, and equality in which man is the measure of all things. In the realm of relative truth, there are no absolutes of right and wrong. We have moved from a rule of law designed to combat law’s arbitrary application, to law being the majority vote that can “lick all others” under the auspices of moral relativism, a prospectively ominous future for any individuals or groups which do not hold majority power.

The future, however, does not have to be bleak. Just as influential men and women in various centers of power caused a cultural shift away from the Founders’ vision, so too can committed, influential men and women today restore that vision with trust in God to reclaim its byproducts of liberty and godly prosperity.

Peter H. Johnston, M.B.A., J.D., is Scholar in Residence at Oklahoma Wesleyan University's Keating Center for Capitalism, Free Enterprise, and Constitutional Liberty.

¹ William Federer, “96 Years Ago Today, A Russian Voice For Freedom Was Born,” *Western Journalism*, December 11, 2014, accessed July 18, 2017, <http://www.westernjournalism.com/96-years-ago-today-russian-voice-freedom-born/>.

² Michael Novak, *On Two Wings: Humble Faith and Common Sense at the American Founding* (San Francisco: Encounter Books, 2002).

³ Michael Gotlieb, “God’s Covenant,” *Jewish Journal*, January 10, 2002.

-
- ⁴ Rodney Stark, *The Victory of Reason: How Christianity Led to Freedom, Capitalism, and Western Success* (New York: Random House, 2005), 148.
- ⁵ Jim DeMint, "You Have No Rights Without Natural Law," *The Federalist*, July 15, 2016, accessed July 18, 2017, <http://thefederalist.com/2016/07/15/you-have-no-rights-without-natural-law/>.
- ⁶ R.C. Cannada, *America's Rule of Law* (Kansas City, MO: National Lawyers Association Foundation, 2001), 3.
- ⁷ Alexander Hamilton, *The Farmer Refuted* (1775), <https://founders.archives.gov/documents/Hamilton/01-01-02-0057>.
- ⁸ *Ibid.*
- ⁹ Matthew Spalding, *We Still Hold These Truths: Rediscovering Our Principles, Reclaiming Our Future* (Wilmington, DE: ISI Books, 2009).
- ¹⁰ Chuck Colson, "Whose Law Is It Anyway: Darwinism and the Law," *BreakPoint*, September 25, 1995, accessed July 18, 2017, <http://thepoint.breakpoint.org/bpcommentaries/breakpoint-commentaries-search/entry/13/12837>.
- ¹¹ Spalding, 82-83.
- ¹² *Ibid.*, 84.
- ¹³ Novak (2002).
- ¹⁴ *Ibid.*, 18.
- ¹⁵ Larry P. Arnn, *The Founders' Key: The Divine and Natural Connection Between the Declaration and the Constitution and What We Risk by Losing It* (Nashville: Thomas Nelson, 2012), 127.
- ¹⁶ *Ibid.*, 44.
- ¹⁷ Charles Colson & Nancy Pearcey, *How Now Shall We Live?* (Wheaton, IL: Tyndale House Publishers, 1999).
- ¹⁸ Arnn (2012).
- ¹⁹ Cannada (2001).
- ²⁰ "Organic Laws," United States Code, accessed July 18, 2017, <http://uscode.house.gov/browse/frontmatter/organiclaws&edition>.
- ²¹ Cannada, 17-18.
- ²² Spalding, 190.
- ²³ Arnn, 119.
- ²⁴ *Ibid.*, 195.
- ²⁵ *Ibid.*, 119.
- ²⁶ *Ibid.*, 402.
- ²⁷ *Ibid.*
- ²⁸ Colson & Pearcey, 402.
- ²⁹ Spalding, 79-80.
- ³⁰ Spalding, 80.
- ³¹ Ann Berkes, "Eternal Vigilance," Monticello.org, August 22, 2010, accessed July 18, 2017, <https://www.monticello.org/site/blog-and-community/posts/eternal-vigilance>.
- ³² Herbert W. Titus, *God, Man, and Law: The Biblical Principles* (Oak Brook, IL: Institute in Basic Life Principles, 1994), 2.
- ³³ *Ibid.*, 3.
- ³⁴ *Ibid.*, 2.
- ³⁵ *Ibid.*, 3-4.
- ³⁶ Harold J. Berman, "The Secularization of American Legal Education in the Nineteenth and Twentieth Centuries," *Journal of Legal Education*, 27 (1975): 384.
- ³⁷ Titus, 6.
- ³⁸ Sophie Tatum, "Clinton campaign hails progressive Democratic platform," CNN, June 25, 2016, accessed July 18, 2017, <http://www.cnn.com/2016/06/25/politics/hillary-clinton-campaign-praises-democratic-platform-draft/index.html>.
- ³⁹ Colson & Pearcey, 404.
- ⁴⁰ Spalding, 192.
- ⁴¹ *Ibid.*, 194.
- ⁴² *Ibid.*, 192.
- ⁴³ *Ibid.*, 192-193.
- ⁴⁴ Colson & Pearcey, 397.
- ⁴⁵ *Ibid.*, 400.

⁴⁶ Ibid., 401.

⁴⁷ Phillip E. Johnson, *Reason in the Balance: The Case Against Naturalism in Science, Law & Education* (Downers Grove, IL: InterVarsity Press, 1995), 139.

⁴⁸ Ibid.

⁴⁹ Todd Starnes, "Christian bakers face government wrath for refusing to make cake for gay wedding," Fox News, February 3, 2015, accessed July 19, 2017, <http://www.foxnews.com/opinion/2015/02/03/christian-bakers-face-government-wrath-for-refusing-to-make-cake-for-gay.html>.

⁵⁰ Phillip E. Johnson, 147.

⁵¹ Ibid.

⁵² J.J. Shestack, "There's nothing alien about natural rights," *Wall Street Journal*, September 6, 1991, p. A8.

⁵³ Colson & Pearcey, 409-410.

⁵⁴ "Second Bill of Rights," Wikipedia, accessed July 19, 2017, https://en.wikipedia.org/wiki/Second_Bill_of_Rights.

⁵⁵ Spalding, 202.

⁵⁶ Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (Cambridge, MA: Basic Books, 2004).

⁵⁷ Frédéric Bastiat, *The Law* (Irvington-on-the-Hudson, NY: Foundation for Economic Education, 1850).

⁵⁸ Arnn, 7.

⁵⁹ Ibid., 61.

⁶⁰ Ibid.

⁶¹ Oklahoma Wesleyan University, "Oklahoma Wesleyan Files Suit Challenging Department of Education," press release, August 15, 2016, <http://www.okwu.edu/blog/2016/08/oklahoma-wesleyan-files-suit-challenging-department-education/>.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Jim DeMint, *The Federalist*, July 15, 2016.