The Catholic Lawyer

Volume 31
Number 1 *Volume 31, Number 1*

Article 4

The Constitution and the Declaration of Independence: Natural Law in American History

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THE CONSTITUTION AND THE DECLARATION OF INDEPENDENCE: NATURAL LAW IN AMERICAN HISTORY

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This year the nation celebrates the bicentennial of the United States Constitution, the product of four months of debate by the Founding Fathers at the Constitutional Convention of 1787. Actually we have reasons for continuing this bicentennial from 1987 through 1991. A comprehensive dating of the anniversary could extend after the drafting of the Constitution to 1788, when nine states ratified the document to make the new government operative, and through 1789, when Congress officially accepted the Bill of Rights. Thereafter, the anniversary could extend to 1790, when Rhode Island became the last of thirteen states to ratify the Constitution, through 1791, marking the acceptance of the first ten amendments by Virginia as the necessary eleventh state to incorporate the Bill of Rights into the Constitution.

The Constitution, with its first ten amendments, composes one integral whole. It had no Bill of Rights when first sent to the states for ratification. This lack of a list of rights which would incorporate those listed as "inalienable" in the Declaration of Independence almost defeated the acceptance of the Constitution. In one key state after another, the omission was declared an essential defect in the new basic law, and the Constitution scraped its way to acceptance only on the promise that the omission would be remedied after ratification.[1] North Carolina in 1789 and Rhode

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* B.A., St. John's University, 1935.

[1] *See generally* J. MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787 627-97 (G. Hunt & J. Scott ed. 1920) (discussion of various recommendations of ratifying states).

Island in 1790 agreed to union with the other states under the Constitution only after the amendments were added to the document and were in the process of ratification.

From its acceptance in 1788 until the 1880's, the Constitution with its first ten amendments was considered the national legal implementation of the legal philosophy proclaimed in the Declaration of Independence. The philosophy stated that the nation had that independence to which it was entitled by the laws of nature.[2] It also stated that certain rights were inalienable because they were founded in human nature, having their source in the Creator of the human race, and that governments originate to secure these rights among men.[3] The disastrous omission from the Constitution of the legal protection of the rights for which Americans fought the Revolutionary War was remedied by the first ten amendments.

Another way to state this philosophy is to say that inalienable, natural rights are founded in natural law just as civil rights have their foundation in civil law.[4] Natural law is that law which natural justice requires, when proper respect is paid to the human dignity of each individual human being. It does not give rights to animals or plants. It is the law which reasonable persons discover when thinking of the basic relations that ought to govern human beings in their just treatment of each other. By the law of nature, no man ought to kill me if I offer no harm to him. Similarly, I ought not to take another's honestly owned property, nor should he steal mine. All have a right to pursue happiness within the ambit of the principles of natural law.

The natural law philosophy embodied in the Declaration of Independence lay imbedded in thousands of years of human history. Its roots can be traced back to medieval times and even to centuries before Christ. Four principal sources for the philosophy have been noted: the heritage from classical antiquity, such as Aristotle and Cicero; natural law principles of the medieval scholastic philosophers embedded later in English common law; Enlightenment rationalist writers of the seventeenth and

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[2] *See* F. LEBUFFE & J. HAYES, THE AMERICAN PHILOSOPHY OF LAW 223 (4th ed. 1947) (natural rights lie at the basis of our Republic and our Constitution).

[3] *See generally* C. BECKER, THE DECLARATION OF INDEPENDENCE 24-79 (1922).

[4] The distinction between natural law and inalienable rights, one common among eighteenth century philosophers, has been substantially blurred by Jefferson's use of the term "inalienable rights" in the Declaration of Independence. While "inalienable rights" include those rights which may not be transferred to another, for example, the right to life, it has been suggested that Jefferson intended "natural rights" to be those secured in the Declaration. These rights include those which are antecedent to the state and must be recognized and respected by the state. *See* F. LEBUFFE & J. HAYES, *supra* note 2, at 214. Thus, natural rights which are independent of civil law, further limit the civil law which is obligated to respect them. *Id.* at 221.

eighteenth centuries, with John Locke held as most authoritative; and the political and social theories of New England Puritans.[5]

I. THE NATIONAL BILL OF RIGHTS

Soon after the new government was organized, James Madison took the lead in correcting the "flaw" in the Constitution. Madison was eager to see the Constitution ratified as a vote of national solidarity, and therefore realized that the only way to unite the opposing factions was to rally for the explicit provisions of the natural law rights already present in the majority of state constitutions. In his speech to the House of Representatives on June 8, 1789, early in the first session of the First Congress, he began the drive for the Bill of Rights:

> It cannot be a secret to the gentlemen in this house, that, notwithstanding the ratification of this system of government . . . yet still there is a great number of our constituents who are dissatisfied with it. . . . We ought not to disregard their inclination, but, on principles of amity and moderation, conform to their wishes, and expressly declare the *great rights of mankind* secured under this constitution.[6]

In the minds of the Founding Fathers, the "great rights of mankind" included the inalienable rights to life, liberty and the moral pursuit of happiness. A fourth right was usually listed in state constitutions, the right to honestly acquired property.[7] Other documents list freedom of conscience as a fifth natural right.[8] The amendments were to detail the specific means whereby the "great rights of mankind," the natural, inalienable rights, were to be secured.

In the speech introducing the amendments, Madison showed he knew exactly what a Bill of Rights should be:

> The people of many states have thought it necessary to raise barriers

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[5] B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 23-35 (1967).

[6] J. Madison, Speech before the First Congress of the United States (June 8, 1789), *reprinted in* 12 THE PAPERS OF JAMES MADISON 198 (C. Hobson & R. Rutland ed. 1979) (emphasis added).

[7] *See* VA. CONST. art. I, § 1. The natural right to acquire property flows from the rational and historical precept that "[t]aking man as he is . . . the only way man can fulfil [sic] the individual and social purposes of his nature is through private property." F. LEBUFFE & J. HAYES, *supra* note 2, at 248. Christian moral theology has tempered this virtually unlimited right by declaring the two-fold aspects of ownership: the individual and the social, the latter resting upon superior considerations of the social good. *Id.*

[8] LeBuffe defines this right as the "immunity from external compulsion in following outwardly the dictates of conscience." F. LEBUFFE & J. HAYES, *supra* note 2, at 240-41. While this right primarily centers on the freedom to worship according to one's conscience, *see* VA. CONST. art. 1, § 16, it has also been legislatively recognized as valid grounds for objecting to combatant service in the armed forces. *See* 50 U.S.C. § 456j (1982).

> against power in all forms and departments of government, and I am inclined to believe, if once bills of rights are established in all the states as well as the federal constitution, we shall find that altho' some of them are rather unimportant, yet, upon the whole, they will have a salutary tendency.
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> . . . .
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> In some instances they assert those rights which are exercised by the people in forming and establishing a plan of government. In other instances, they specify those rights which are retained when particular powers are given up to be exercised by the legislature. In other instances, they specify positive rights, which may seem to result from the nature of the compact. Trial by jury cannot be considered as a natural right, but a right resulting from the social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature. In other instances they lay down dogmatic maxims with respect to the construction of the government; declaring, that the legislative, executive, and judicial branches shall be kept separate and distinct: Perhaps the best way of securing this in practice is to provide such checks, as will prevent the encroachment of the one upon the other.
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> But whatever may be [the] form which the several states have adopted in making declarations in favor of particular rights, the great object in view is to limit and qualify the powers of government, by excepting out of the grant of power those cases in which the government ought not to act, or to act only in a particular mode.[9]

Thus, the Constitution with its first ten amendments and the laws and court decisions which depended on it were implementations of the "laws of nature" of the Declaration. It was to fulfill the very purpose of government and specify in legal terms how the "great right of mankind" was to be protected and practiced in the United States. As time went on, the philosophy of natural law soon gained unquestioned support in American political thought.

II. NATURAL LAW PROCLAIMED IN STATE CONSTITUTIONS

Henry Clay and Daniel Webster in the 1840's could make Fourth of July speeches without mentioning inalienable rights. However, in state constitutions, the philosophy was expressed and the legal rights which came from it were specified. The original and later state constitutions spelled out the principles. Virginia adopted its constitution in 1776 with its Declaration of Rights:

> A declaration of rights made by the representatives of the good people of Virginia, assembled in full and free convention; which rights do pertain to them and their posterity, as the basis and foundation of government.

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[9] J. Madison, *supra* note 6, at 203-04.

> 1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.
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> . . . .
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> 15. That no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperence, frugality and virtue, and by frequent recurrence to fundamental principles.
> 16. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other.[10]

The intervening paragraphs further clarified principles of government and dealt with the specific civil rights which were established to protect the natural rights.

Kentucky in her constitution of 1792 proclaimed that, "all men, when they form a social compact, are equal."[11] These phrases appear in most western state constitutions of the nineteenth century. Even when slavery became a problem, after the invention of the cotton gin in 1793, the words were edited rather than the philosophy abandoned. Kentucky, in 1799, changed the phrase to "all free men, when they form a social compact, are equal."[12] Similar wording appears in the constitutions of Alabama, Arkansas, Florida, Mississippi, and Texas.

III. THE PROBLEM OF SLAVERY

A word must be said concerning the institution of slavery in the United States. It troubled the consciences of the Founders as a situation which contradicted the philosophy upon which they rooted their own rights and upon which they were building their legal edifice. Thomas Jefferson wrote a ringing denunciation of the slave trade in his original draft of the Declaration of Independence, only to have the clause eliminated by the Continental Congress:

> [The king of Great Britain] has waged cruel war against human nature itself, violating its most sacred rights of life & liberty in the persons of a

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[10] The Virginia Bill of Rights (June 12, 1776), *reprinted in* H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 103-04 (9th ed. 1975).

[11] KY. CONST. of 1792, art. XII, § 1. *See generally* J. COWARD, KENTUCKY IN THE NEW REPUBLIC 138 (1979) (noting later limitations on 1792 proclamation).

[12] KY. CONST. of 1799, art. XII, § 1. *See generally* COWARD, *supra* note 11.

> distant people who never offended him, captivating & carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither. this (sic) piratical warfare, the opprobrium of *infidel* powers, is the warfare of the *Christian* king of Great Britain. *determined (sic) to keep open a market where MEN should be bought & sold*, he has prostituted his negative for suppressing every legislative attempt to prohibit or to restrain this execrable commerce . . . ."[13]

It was comforting to blame slavery on the King, but Jefferson in his notes tells why the clause was struck out:

> The clause too, reprobating the enslaving the inhabitants of Africa, was struck out in complaisance to South Carolina and Georgia, who had never attempted to restrain the importation of slaves, and who on the contrary still wished to continue it. Our Northern brethren also I believe felt a little tender under the censures; for tho' their people have very few slaves themselves yet they had been pretty considerable carriers of them to others.[14]

The nation would later pay in the blood of the Civil War for the violation of natural law and natural human rights represented by American slavery. The sincerity and consistency of the Founding Fathers gained credence by the fact that in their generation there were indications that the problem might be solving itself. It was being outlawed in the North and was unprofitable as an economic system in the South. What changed this was the 1793 invention of the cotton gin. Once cotton became a profitable crop, another generation attempted to justify slavery for the black people in their midst. They said the blacks were not able to take care of themselves and were better treated than factory workers in the North.

IV. THE NATURAL LAW AND THE CIVIL WAR AMENDMENTS

The injustice of legalized slavery was ended by the Union victory in the Civil War. Following the war, the legal status of freed blacks was established by three amendments to the Constitution. The thirteenth amendment ended the institution of slavery in 1865; the fifteenth amendment, in 1879, proclaimed that the right of citizens to vote could not be denied or abridged by race, color, or previous condition of servitude. Section I of the fourteenth amendment is pertinent to the theme of this essay:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

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[13] C. BECKER, *supra* note 3, at 166-67.
[14] *Id.* at 171-72.

> shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[15]

The wording of the fourteenth amendment, ratified in 1868, indicates a reiteration of the natural law philosophy which the Founders intended to be the foundation of American law: "nor shall any State deprive any person of life, liberty, or property, without due process of law." Professor Raoul Berger's exhaustive study of the amendment leads conclusively to this judgment. According to Professor Berger:

> The "privileges or immunities" clause was the central provision of the Amendment's § 1, and the key to its meaning is furnished by the immediately preceding Civil Rights Act of 1866 [footnote omitted], which, all are agreed, it was the purpose of the Amendment to embody and protect. The objectives of the Act were quite limited. The framers intended to confer on the freedmen the auxiliary rights that would protect their . . . "life, liberty, and property," . . . and a few historical comments will show the ties between the two.
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> At Locke's hands, said Edward S. Corwin, natural law dissolves "into the rights of 'life, liberty, and estate,' " a derivation noted by Francis Bacon. The trinity was reiterated by Sir Matthew Hale (footnote omitted) and sharply etched by Blackstone in his chapter on "the Absolute Rights of Individuals":
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> > "these may be reduced to three principal or primary articles. . . . I. The right of personal security [consisting] in a person's legal and uninterrupted enjoyment of life, his limbs. . . . II. . . . [T]he personal liberty of individuals . . . [consisting] in the power of locomotion, of changing situations or moving one's person to whatsoever place one's own inclination may direct, without imprisonment, or restraint, unless by due course of law. . . . III. The third absolute right, inherent in every Englishman . . . of property: which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only by the laws of land."[16]

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[15] U.S. CONST. amend. XIV, § 1.

[16] R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 20-21 (1977). This writer thinks that Professor Berger's data, given *id.* at 20-36, leads to a conclusion opposed to his thesis that the Constitution is merely positive law. He states, "The Founders were deeply committed to positivism, as is attested by their resort to written constitutions—positive law. Adams, Jefferson, Wilson, Madison, and Hamilton, states Robert Cover, 'were seldom, if ever, guilty of confusing law with natural right.' " *Id.* at 252. A written constitution is, of course, positive law. It allocates powers and duties of the three branches of government, it determines terms of office, etc. But the American Constitution was drafted and amended to implement, by legal protection, the rights which come from natural law. It is impossible to interpret properly the legal protections due these rights unless one understands the natural law origin of these human rights. If the misuse of constitutional freedom of speech causes a riot and deaths, how can one adjudicate properly unless he understands that in natural law, life is more important than freedom of speech? Berger states in this quotation: "At Locke's hands, said Edward S. Corwin, natural law dissolves

V. POST CIVIL WAR RECOGNITION OF NATURAL LAW

Thus, the national Constitution from its beginning, even with its fateful sickness arising from the compromise over slavery, was the implementation of the philosophy proclaimed in the Declaration of Independence. This purpose of the Constitution to protect the inalienable, natural rights was proclaimed after the Civil War by the Supreme Court in 1874:

> It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. . . .
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> The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.
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> There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B.[17]

An even more explicit appeal to the Declaration of Independence was given by Justice Field in 1884:

> As in our intercourse with our fellow-men certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that the new evangel of liberty to the people: "We hold these truths to be self evident" — that is so plain that their truth is recognized upon their mere statement — "that all men are endowed" — not by edicts of Emperors, or decrees of Parliament, or acts of Congress, but "by their Crea-

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'into the rights of "life, liberty, and estate . . . ." ' " *Id.* at 20. But Corwin's use of the word "dissolves" does not mean annihilate. Corwin uses this expression to indicate Locke's version of natural law. Corwin states "As the matrix of American Constitutional Law the documentary Constitution is still, in important measure, Natural Law under the skin." *Cf.* UNIVERSITY OF NOTRE DAME, NATURAL LAW INSTITUTE PROCEEDINGS, VOL. III 47, 53 (E. Barrett ed. 1950). And from Berger's same quotation, R. BERGER, *supra*, at 20, what are the "absolute" rights from Blackstone if not natural law rights?

[17] Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 662-63 (1874).

> tor with certain inalienable rights" — that is, rights which cannot be bartered away, or given away, or taken away except in punishment of crime — "and that among these are life, liberty, and the pursuit of happiness, and to secure these" — not grant them, but secure them — "governments are instituted among men, deriving their just powers from the consent of the governed."[18]

VI. "FIXED" CONSTITUTION VERSUS SUPREME COURT CHANGES

The Constitution can be changed only by the amending process specified in Article V:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress. . . .[19]

As long as it was not amended, the Constitution must be interpreted in its original sense: the meaning given to it by those who drafted it and the generation that ratified it.

That the "original intention" of the Framers is binding on later Court interpretations is evidenced by Madison's words:

> [I] entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone, it is the legitimate Constitution. And if that not be the guide in expounding it, there can be no security for a consistent and stable, more than faithful exercise of its powers.[20]

This principle of a "fixed" Constitution binds legislatures. James Madison further stated, "[W]hat a metamorphosis would be produced in the Code of law if all its ancient phraseology were to be taken in its modern sense."[21] This same principle must also bind the courts. Chief Justice Marshall, in the precedent-setting *Marbury v. Madison* decision, declared: "From these, and many other selections . . . it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of *courts*, as well as of the legislature. Why otherwise

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[18] Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 756-57 (1884) (Field, J., concurring).

[19] U.S. CONST. art. V.

[20] THE WRITINGS OF JAMES MADISON 191 (G. Hunt ed. 1910) (letter to Henry Lee, June 25, 1824).

[21] *Id.*

does it direct the judges to take an oath to support it?"[22]

VII. SUPREME COURT APPLIES NEW PHILOSOPHY TO CONSTITUTION

In the latter half of the nineteenth century, especially from the 1880's on, Supreme Court interpretations of the Constitution and the rights which flow from it indicated an abandonment by the Court of the natural law philosophy which gave it birth. This is all the more regrettable because the one compromise-violation of the natural law in the Constitution, that which protected slavery, was corrected between 1865 and 1870 by the thirteenth, fourteenth, and fifteenth amendments.

1887 is noted as the year of change. In 1886, the Supreme Court decided that a corporation was a person within the meaning of the fourteenth amendment. In 1887, it reversed the long-revered *McCulloch v. Maryland*[23] decision, enunciated in 1819, that the wisdom of a legislative act is a question for the legislature's judgment. Edward S. Corwin, in his classic, *The Constitution and What it Means Today*, states the guideline which replaced the natural law-natural right principles:

> [T]he Court has never exercised its censorship of legislation, whether national or State, more energetically than during the half century between 1887 and 1937, when its thinking was strongly colored by *laissez faire* concepts of the role of government. This point of view, translated into congenial constitutional doctrines, like that of "liberty of contract" and the exclusive right of the States to govern industrial relations, brought hundreds of State laws to grief, as well as an unusual number of Congressional enactments. Two persistent dissenters from this tendency were Justices Holmes and Brandeis, both of whom thrust forward maxims of judicial self-restraint in vain.[24]

Historical events shed light on the Supreme Court's stance during this time. In 1859, Charles Darwin published his "Origin of Species," the biological theory that all living things were developed from simpler organisms through a kind of natural selection: the "fittest" would survive and reproduce, while the weak would die away; the result, he theorized, would be a constant improvement in surviving species.

Even before Darwin, Herbert Spencer, a contemporary English philosopher, popularized evolution as a universal law leading to progress. He traced the formation of the earth from an originally nebulous mass, noting that embryological development started with only a mass of cells. All higher species, he claimed, came from lower ones. With Darwin, he believed in the survival of the fittest, but Spencer went further; he applied

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[22] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179 (1803) (emphasis in original).
[23] 17 U.S. (4 Wheat.) 316 (1819).
[24] E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 176 (1973).

his evolutionary theories to society. "Any adequate theory of society," Spencer concluded, "will recognize the 'general truths' of biology and will refrain from violating the selection principle by 'the artificial preservation of those least able to take care of themselves.' "[25] Spencer's application of evolution to society, though it antedated Darwin, came to be called "Social Darwinism."

According to Spencer, who had a large following in the United States, progress in society comes in great measure from the economic struggle among men. In the world of business, the fittest survive; those who can dominate others by their competitive instinct are the fittest. This was a wonderful justification for those such as the Carnegies and Rockefellers. John D. Rockefeller told a Sunday school audience "[t]he growth of a large business is merely a survival of the fittest. . . . This is not an evil tendency in business. It is merely a working out of a law of nature and a law of God."[26] James J. Hill, his nineteenth century contemporary, a railroad magnate defending business consolidation, similarly said, "the fortunes of railroad companies are determined by the law of the survival of the fittest."[27]

Because Social Darwinism was the working of newly discovered natural sociologic laws, as its devotees argued, the implication was that government should keep its hands off. The *laissez faire*, let-to-do theory flowered into political theory and policy. The government had no obligation to check health conditions in factories, mines, and railroads; indeed, this would impede progress. If workers had seventy-hour work weeks, if children under twelve years of age manned sewing machines in the sweat shops sixty-hours per week, so be it. When individual states passed statutes to protect the lives and health of workers, these laws were interfering with the new natural law that the "fittest" must survive. Under popular pressure, however, states did, in fact, pass laws to protect working people.

VIII. SOCIAL DARWINISM—*Laissez Faire* COURT DECISIONS

If state legislatures did not believe in Social Darwinism, there was another way to insure the survival of the fittest millionaires. The courts could read into law what the popularly elected legislators refused to do, and that is exactly what happened. In the most celebrated case, *Lochner v. New York*,[28] the Supreme Court nullified a New York law which had limited the hours of work in a bakery to not more than sixty hours per week. The Court used the fourteenth amendment to further the *laissez*

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[25] R. HUFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 44 (1965).
[26] *Id.* at 45.
[27] *Id.*
[28] 198 U.S. 45 (1905).

faire theory of social progress as the proper guide for law. Justice Oliver Wendell Holmes, in his famous dissent in the case, castigated the Court's use of the fourteenth amendment in this manner:

> The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court . . . [a] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. . . . I think that the word "liberty," in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law . . . . A reasonable man might think it a proper measure on the score of health. . . .[29]

One of the fundamental principles of American law is that the police power of the State is "the power to promote the public health, safety, morals, and general welfare."[30] One can link this principle to the principle of the Declaration of Independence, that the first purpose of government is to secure the inalienable rights of life, liberty, and the pursuit of happiness.

It may be said in passing that the fourteenth amendment was never meant to be used by its framers to assert a new philosophical guideline, such as *laissez faire*, to interpret the Constitution. Raoul Berger of Harvard sums up its purpose—to protect the newly freed blacks after the Civil War.[31] But by declaring corporations "persons" under the law in 1886, the way was opened to "protect" them with the "privileges and immunities" of the fourteenth amendment. The Court applied this new philosophy of Social Darwinism, a philosophy unknown, never contemplated by the drafters of the Constitution, and not followed by those who wrote the fourteenth amendment nor agreed to by the people, to interpret the

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[29] *Id.* at 75-76 (Holmes, J., dissenting).

[30] E. CORWIN, *supra* note 24, at 388.

[31] R. BERGER, *supra* note 16, at 407. In his exhaustive study he notes another and related misuse of the fourteenth amendment:

> The historical records all but incontrovertibly establish that the framers of the Fourteenth Amendment excluded both suffrage and segregation from its reach; they confined it to protection of carefully enumerated rights against State discrimination, deliberately withholding federal power to supply those rights where they were not granted by the State to anybody, white or black. This was limited-tragically limited-response to the needs of black newly released from slavery; it reflected the hagridden racism that held both North and South in thrall; nonetheless, it was all the sovereign people were prepared to do in 1868.

Id.

Constitution. This new guideline for interpretation made it unconstitutional for the state and federal governments to interfere with "freedom of contract" between workers and legal persons—persons which often included giant corporations who forced workers to accept contracts which endangered life and limb.

One commentator summed the Court's approach up as follows:

> During the first ten years of the Fourteenth Amendment, hardly a dozen cases came before the Court under all its clauses put together. During the next twenty years, when the *laissez faire* conception of governmental functions was being translated by the Bar into the phraseology of Constitutional Law, and gradually embodied in the decisions of the Court, more than two hundred cases arose, most of them under the Due Process of Law clause. During the ensuing twelve years, this number was more than doubled—a ratio which still holds substantially.
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> During this later period, moreover, an increasing rigor was to be discerned in the Court's standards, especially where legislation on social and economic questions was concerned.[32]

This insertion by the Court of its own philosophy into constitutional law and the omission of traditional natural law concepts of the purpose of government meant that the inalienable rights of citizens were not receiving the protection due them by government. The Declaration of Independence's statement that "to secure these rights governments are instituted among men" was nullified. While the Court was being guided by *laissez faire* concepts, it struck down state and federal laws meant to protect the people. Meanwhile, giant corporations were preying on natural law—natural justice rights of defenseless citizens.

The Court, following *laissez faire* principles, had used a philosophy to interpret the Constitution which does not flow from the natural law foundation that produced it. The people never agreed to the insertion of a new legal philosophy, and the people alone have a right to establish a constitution or change its meaning. *Laissez faire* was made an absolute guide rather than a political attitude of mind. Untold harm was done to human rights and human dignity by the Court's effort to replace the philosophy of the Declaration of Independence with its own limited concepts. In the sense that the United States is not a Socialist or Communist state, and therefore the less government the better, *laissez faire* may very well be justified. Its limit is reached, however, when natural law—natural justice is violated.

IX. THE COURT REVOLUTION UNDER ROOSEVELT

The Supreme Court used the *laissez faire* concept of the proper

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[32] E. CORWIN, *supra* note 24, at 388.

function of government as a guide, and as a philosophy, in its interpretation of the Constitution from 1887 to 1937. The Great Depression followed the New York stock market crash in 1929. There were approximately twelve million unemployed when Franklin Roosevelt was inaugurated in 1933. Under his leadership, the National Recovery Act authorizing extensive business regulations, was passed. It was declared unconstitutional by the Supreme Court in May, 1935. During the months that followed, the Farm Mortgage Law, the Agricultural Adjustment Act, the Bituminous Coal Act, and the Municipal Bankruptcy Act were cast into oblivion by the Court.[33] They were all part of the New Deal which Roosevelt had promised to the people. In November, 1936, the people gave Roosevelt a sixty-one to thirty-nine percent endorsement; it was taken as a rebuke to the Court and represented the peoples' vote against *laissez faire.*

To end the impasse, Roosevelt proposed his famous "Court-packing" plan. He charged that the Court was handicapped by the superannuation in its members, and proposed that for each Supreme Court Justice on the bench ten years and six months past his seventieth birthday, another Justice be appointed. The Court would be expanded to a total of fifteen Justices; this was within Congress' power, and the President would nominate the new Justices. The Senate overwhelmingly, seventy to twenty, rejected the plan, reflecting the view of the people. The constitutional separation of powers, the system of checks and balances between the judicial, executive and legislative powers of the American government, were sacred in American tradition.

A change in Court philosophy arrived when Justice Willis Van Devanter resigned in May of 1937 and Justice Hugo Black was appointed to the Court the same year. Some of the New Deal legislative defeats had been decided by five to four Court majorities, allowing Social Darwin *laissez faire* principles to be maintained by the smallest possible majority Court vote. One or two new Justices could make a difference. However analyzed, the change in Court attitude concerning *laissez faire* was evident from 1937 onward. The Wagner Labor Relations Act and the Social Security Acts were both declared constitutional in 1937.[34] Justice Hugo Black summed up the Court's new attitude in 1963:

> We refuse to sit as a "superlegislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due

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[33] *See, e.g.,* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (Bituminous Coal Act struck down); United States v. Butler, 297 U.S. 1 (1936) (Agricultural Adjustment Act); *see also* H. MANDELL, MAN MADE MORALS 349-53 (1966).

[34] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding National Labor Relations Act of 1935, 29 U.S.C. §§ 151-187 (1935)); Steward Machine v. Davis, 301 U.S. 58 (1937) (Social Security Act); Helvering v. Davis, 301 U.S. 619 (1937) (same).

> Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought" . . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours.[35]

The day when the Court utilized the Social Darwin—*laissez faire* guideline for interpreting the Constitution had indeed passed. This did not mean that the use of the fourteenth amendment to impose the private philosophies of the Justices on the nation had departed. The abortion issue is an example of its current usage; thus the problem remains as a continuing one.

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[35] Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963) (citations omitted).