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# *The Unraveling of American Constitutionalism: From Customary Law to Permanent Innovation*

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The nearly invariable response of those who are frustrated by court-imposed assaults on America's traditional culture is to propose constitutional amendments crafted to maintain the status quo ante. In 2003, for example, a state court struck down the Massachusetts law defining marriage as between a man and a woman. Activist officials in several other states soon employed the Massachusetts court ruling as an excuse for performing much-publicized, though plainly illegal, ceremonies purporting to join homosexuals in marriage. In reaction, citizens in many parts of the country mounted successful drives to protect, by various means, traditional marriage in their states. Yet the danger remained that the federal courts, and particularly the U.S. Supreme Court, would strike down traditional marriage laws throughout the land in much the same way that the High Court had negated state laws restricting or banning abortions back in 1973. To ward off this possibility supporters of traditional marriage, including President George W. Bush,<sup>1</sup> saw little to be done except to call for a federal

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<sup>1</sup> "Bush Backs Amendment Banning Gay Marriage," *The Washington Post*, Wednesday, February 25, 2004; page A01.

constitutional amendment. But success in such a course is doubtful. The Framers, viewing constitutional changes as by and large dangerous to liberty, stacked the odds against adoption, requiring two-thirds majorities of both houses of Congress and ratification by three-fourths of the states. Even if proponents were to get a preservation of marriage amendment approved, it would be, to paraphrase Burke, in truth and in substance, an amendment not made, but prevented.<sup>2</sup> All that would be achieved would be to preserve the Constitution inviolate in this one instance, while doing nothing to counter the host of other illegitimate inversions inflicted on the Constitution every year. Clearly, the amendment process—which was never intended to protect *against* change and is poorly designed for that purpose—cannot cure the sickness unto death that now besets our federal and state constitutions, of which the current assault on marriage is but one of myriad symptoms.

It could be more plausibly argued that to regain the “free government” that is our birthright, nothing less would suffice than for Americans to defend constitutionalism with the same tenacity as their forebears the colonial whigs, who took up arms against their British rulers when nothing less would preserve their historic rights under the English constitution. But before we can defend the constitutionalism for which our ancestors risked all, we first must understand its specific nature and purpose. Toward that end it is useful to remember that in France, Spain, and other absolute monarchies of continental Europe the law typically was considered to be whatever the ruler said it was.<sup>3</sup> Not so in England. There, as an outgrowth of the medieval Christian teaching that all men, including rulers, are morally flawed, hence in need of restraints, the tradition took hold that even kings were “under God, and under the Law, because the Law makes the king.”<sup>4</sup>

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<sup>2</sup> Burke wrote that the Glorious Revolution of 1688 “was, in truth and in substance, a revolution not made, but prevented.” Quoted in *Selected Works of Edmund Burke*, vol. 2, “Reflections on the Revolution in France,” ed. Edward J. Payne (Oxford: Clarendon Press, 1874-1878), 102n81.

<sup>3</sup> See M. Stanton Evans, *The Theme is Freedom: Religion, Politics, and the American Tradition* (Washington, DC: Regnery Publishing, 1994), especially chapter 5, “The Uses of Tradition,” and chapter 6, “If Men Were Angels.”

<sup>4</sup> Henry de Bracton, *De legibus et consuetudinibus Angliae (On the Laws and Customs of England)*, circa 1260 A.D.

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### *Traditional English Law A Creature of Custom, Not Government*

Government could be subordinate to the law because English law was not made by government. Rather, the English common law and constitution were seen as emerging slowly over centuries from the “custom and usage” of society as a whole. This respect for custom did not signify passive acceptance of whatever history produced. Rather, it reflected the belief that right order evolved historically, that the good society resulted from proper restraints on man’s lower inclinations. Sound custom tended to express and support man’s higher nature and to establish a connection between a timeless, higher good and the particular circumstances of man’s temporal life. Sound custom was viewed as constituted by a myriad of decisions down the ages intended to further a higher good.<sup>5</sup> “The common law of England,” explained the seventeenth-century common lawyer John Davies, “is nothing else but the common law and custom of the realm. . . . A custom taketh beginning and groweth to perfection in this manner; when a reasonable act once done is found to be good and beneficial to the people, and agreeable to their nature and disposition, then they do use and practice it again and again, and so by often iteration and multiplication of the act it becometh a custom . . . customary law is the most perfect and most excellent, and without question the best, to make and preserve a commonwealth. For the written laws that are made by either the edict of princes, or by council of estates [i.e., Parliament] are imposed on the subject before any trial or probation made, whether the same be fit and agreeable to the nature and disposition of the people, or whether they will breed any inconvenience or no. But a custom doth never become a law to bind the people, until it had been tried time out of mind . . . .”<sup>6</sup> Society,

*Sound custom furthers a timeless, higher goal in particular circumstances.*

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<sup>5</sup> For a discussion of the connection between a belief in tradition and a belief in a universal order, see Joseph Baldacchino, “The Value-Centered Historicism of Edmund Burke,” *Modern Age*, Vol. 27, No. 2 (Spring 1983). Also see Claes G. Ryn, *A Common Human Ground: Universality and Particularity in a Multicultural World* (Columbia and London: University of Missouri Press, 2003) and Claes G. Ryn, “Leo Strauss and History: The Philosopher as Conspirator,” *Humanitas*, Volume 18, Nos. 1 and 2, 2005, esp. 44-46.

<sup>6</sup> J. G. A. Pocock, *The Ancient Constitution and the Feudal Law* (Norton, 1967), 35; quoted in Evans, *The Theme is Freedom*, 88. In the following century, one of the Framers of the U.S. Constitution, James Wilson of Pennsylvania, described the common law in terms very similar to Davies’s: “This law is founded on long and general custom. A custom that has been long and generally observed, necessarily carries with it intrinsic evidence of consent. . . . Can a law be made in a

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far from being a mass of isolated and interchangeable individuals, was an organic body composed of vital institutions—the family, the town, the guild, the university, the Church—each with its own history and intrinsic value. The role of government was not to displace these institutions or to render them superfluous but to assist each to function properly within its sphere through the maintenance of peace and order.

*Customary law above both rulers and ruled.*

The common law was quintessentially traditional. It combined Christian practices and mores, judicial decisions, parliamentary statutes, and the grants and agreements of kings—adding up to an enormous body of precedents, all of which were thought to benefit and elevate society. Representing the uninterrupted practice and consent of many generations, these precedents—which were studied in detail by common lawyers but known and revered more generally by the literate public at large—prescribed rights and corresponding duties for virtually every situation and circumstance. Customary law, the “law of the land,” provided restraints on the governed but also—and with no less force—on public officials of every variety.

Those parts of customary law that applied specifically to rulers—delineating the purpose of their respective offices and restricting the means by which those purposes could be obtained—composed the great corpus of the English constitution. By long tradition the people were to be secure in their persons and property, which meant, among other things, that the king could not compel the payment of taxes, but that taxes were to be “a free gift” of the people, given by themselves or through their representatives. Similarly, it was prohibited to quarter soldiers in private homes, to declare martial law in peacetime, to require excessive bail, to impose cruel and unusual punishments, to imprison a person without a specific charge before a judge, or to deny the right of the people to bear arms.<sup>7</sup>

Such constraints on rulers existed because they were “sanctified by long usage, a uniformity of principle and practice for ages

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manner more eligible? Experience, the faithful guide of life and business, attends it in its every step. . . . The regions of custom offer us a most secure asylum from the operations of absolute, despotic power.” Pocock, 33; quoted in Evans, 89.

<sup>7</sup> For a sampling of the written acknowledgments of these rights by English monarchs, see the Charter of Liberties (1100 A.D.), Magna Carta (1215 A.D.), Confirmation of Charters (1297 A.D.), Petition of Right (1628 A.D.), and English Bill of Rights (1689 A.D.), [www.nhinet.org/ccs/docs.htm](http://www.nhinet.org/ccs/docs.htm).

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past.”<sup>8</sup> And it was precisely such limits on government to which common lawyers and judges, among others, referred when delin- eating and upholding the “rights of Englishmen.” Under the com- mon law rule of *stare decisis*, “to stand by decided cases,” judges were bound to follow precedents in rendering their decisions. The purpose, as Russell Kirk has pointed out, was to assure “even- handed justice . . . from one year to another, one decade to another, one century to another,”<sup>9</sup> and thus to protect the people from “in- novations” by government.

### *‘Innovations’ Violate Constitutionalism*

Because constitutional rights were synonymous with the re- straints on government embodied in customary law, the greatest threat to English liberties, constantly to be guarded against, were governmental innovations that undermined centuries-old cus- toms.<sup>10</sup> “The *first* safety of princes and states,” warned a pamphlet on *British Liberties* in 1766, “lies in avoiding all councils or designs of innovation, in antient and established forms and laws, *especially those concerning LIBERTY, PROPERTY and RELIGION* . . . and thereby leav- ing the channel of *known and common justice* clear and undis-

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<sup>8</sup> John Phillip Reid, *Constitutional History of the American Revolution*, vol. 1, *The Authority of Rights* (Madison: The University of Wisconsin Press, 1986), 72; hereinafter cited as “*Rights*.”

<sup>9</sup> Russell Kirk, *The Roots of American Order* (La Salle, IL: Open Court, 1974), 185.

<sup>10</sup> Reid notes that, because innovations endangered the security of custom, the “very quality of an innovation made opposition to it imperative, even to the extent of embracing a counter innovation to prevent an innovation even more dangerous.” He cites, e.g., the *New-York Journal’s* measuring, in the following pas- sage, of “the potential innovation of American independence against the contin- uing innovations of parliamentary legislation”:

The British Parliament is violently usurping the powers of our colony governments, and rendering our legal Assemblies utterly useless; to pre- vent this, the necessity of our situation has obliged us to depart from the common forms, and to adopt measures which would be otherwise unjust- ifiable; but, in this departure, we have been influenced by an ardent de- sire to repel innovations destructive to all good government among us, and fatal to the foundation of law, liberty, and justice: We have declared, in the most explicit terms, that we wish for nothing more, than a restora- tion to our ancient condition.

John Phillip Reid, *Constitutional History of the American Revolution*, vol. 3, *The Au- thority to Legislate* (Madison: The University of Wisconsin Press, 1991), 157-58; hereinafter cited as “*Legislate*.”

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turbed.”<sup>11</sup> The underlying rationale for the constitutional doctrine against innovation was explained by the Englishman William Paley in his 1785 book *Principles of Philosophy*. “The opinion of right,” wrote Paley, “always following the custom, being for the most part founded in nothing else, and lending one principal support to government, every innovation in the constitution, or, in other words, the custom of governing, diminishes the stability of government.” A “known and settled usage of government,” Paley added, “affords the best security against the enormities of uncontrolled dominion,” but “this security is weakened by every encroachment which is made without opposition, or opposed without effect.”<sup>12</sup>

Customary  
rights  
regarded as  
property  
owned by  
inheritance.

As an inheritance from their ancestors, passed down from “time immemorial,” the limits on government that were indistinguishable from long-established custom were “owned” by the people in the same way that landed or personal property was owned and, indeed, were considered a higher kind of property.<sup>13</sup> Accompanying the people’s “property” in these traditional constraints was a sacred obligation to preserve them unchanged and to transmit them in undiminished form to their posterity. It was the living generation’s duty, a Massachusetts writer argued in 1739, “to preserve” rights “entire, without suffering the least Breach to be made on them.”<sup>14</sup>

The duty of the people to defy “innovations” was facilitated by the constitutional requirement of a trial by jury of one’s peers in the vicinage (local community), who traditionally judged not only the facts but also the law when necessary.<sup>15</sup> And if passive disobedience did not prevent governmental assaults on ancient

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<sup>11</sup> Anon., *British Liberties* (London, 1776), p. lx, quoted in *Legislate*, 157.

<sup>12</sup> William Paley, *Principles of Philosophy* (London, 1785), 411, 426, quoted in *Legislate*, 157.

<sup>13</sup> *Rights*, 103.

<sup>14</sup> “Americanus,” *A Letter to the Freeholders and other Inhabitants of the Massachusetts-Bay, relating to their approaching Election of Representatives* (Newport, R.I., 1739), 2, quoted in *Rights*, 187.

<sup>15</sup> Reid reports that “colonial whigs controlled local juries and in some colonies used them to defeat imperial policy and nullify parliamentary statutes . . . . To defy what they considered unconstitutional parliamentary commands by applying what can be called ‘whig law’ or seventeenth-century English constitutional ideals, colonial juries not only protected local citizens from imperial prosecutions, they also punished royal officials ‘guilty’ of enforcing ‘unconstitutional’ imperial law.” *Rights*, 53.

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custom, the people, making good use of their right to bear arms, were forcibly to resist. So it was that King John was met in battle on the field at Runymede in 1215 and forced to promise in the Magna Carta never again to violate the ancient rights of the English. So also the experience of Charles I, who in 1649 paid with his head for ignoring customary restraints on his power, and that of his son James II, who for similar transgressions lost his throne in the “Glorious Revolution” of 1688-89.

The “Glorious Revolution” would be seen in retrospect as the high point for the old constitution—at least in Great Britain proper. As Parliament gained ascendancy over the king in the eighteenth century, the ancient understanding of law as customary restraint on rulers as well as ruled came gradually to be displaced by a new theory that the law, including the constitution itself, was whatever a parliamentary majority ordered by sovereign command. This radical inversion of the traditional meaning of English law occurred for a variety of reasons, not the least of which was the declining influence in Britain during this period of the Christian faith that had long animated the perception of rulers as flawed human beings in need of fixed constraints.

*English law gave way to discretionary power as Christian influence waned.*

But across the Atlantic, thanks in large part to the Great Awakening—a multi-denominational revival movement that swept the colonies, including the universities, beginning in the 1740s—dedication to the constitution of traditional restraints remained as vigorous as ever it had been in the days of King John or King Charles. Indeed, the scholarly authority on English law who was still most revered in the colonies was the seventeenth-century jurist Sir Edward Coke, author of the *Institutes of the Laws of England*.

Coke, who was chief justice under King James I, was dismissed from the bench in 1616 for his insistence that the king was under the law. But Coke—who later would play a leading role as a member of the House of Commons in the parliamentary struggle against Charles I—was equally adamant that not the king only but Parliament, too, was subordinate to law. As Winston S. Churchill recounts in his *History of the English Speaking Peoples*, “Coke himself was reluctant to admit that law could be made, or even changed. It existed already, merely awaiting revelation and exposition. If Acts of Parliament conflicted with it they were invalid.”

Hence, when Parliament, beginning in the 1760s, enacted numerous statutes for the colonies in violation of customary re-

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*Arbitrariness  
in government  
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"between  
Slavery and  
Liberty."*

straints and then compounded the injury by proclaiming (in the Declaratory Act of 1766) its right to "make laws and statutes . . . to bind the colonies . . . in all cases whatsoever," colonial whigs were shocked almost beyond belief. Government that could trample time-honored tradition and impose its own "will and pleasure" was "arbitrary." And arbitrariness, as John Phillip Reid explains in his magisterial, four-volume *Constitutional History of the American Revolution*, was in eighteenth-century parlance a measure of the difference "between Slavery and Liberty," between "unconstitutional and constitutional," between "power and right."<sup>16</sup>

### ***Customary Law a Protection Against Tyranny***

When eighteenth-century constitutionalists spoke of "slavery," they were referring not to chattel slavery but to the subjection of the people to government unconstrained by customary law, which was the opposite of liberty and rights.<sup>17</sup> In the colonies this belief was a frequent motif of sermons delivered by Christian ministers in connection with public elections. In his election sermon of 11 May 1738 before the General Assembly of Connecticut, for example, clergyman Jared Eliot exclaimed, "Blessed be God. . . . We live under a Legal Government." He added that, by "Legal," he meant "Limited."<sup>18</sup>

*Emerging  
constitution of  
discretionary  
power sparked  
colonial  
resistance.*

For more than a decade after passage of the Stamp Act in 1765, which violated their traditional right to tax themselves, Americans vigorously defended the constitution of custom against the emerging constitution of discretionary power. From Maine to Georgia, the colonists organized massive resistance to Parliament's arbitrary rule, tarring and feathering (and otherwise intimidating) the king's tax collectors; boycotting and sometimes destroying products such as tea that were subject to the illegitimate taxes, and finally taking up arms against the soldiers sent by Parliament to subjugate their cities.

Throughout most of that period, including more than a year following the start of overt warfare at Lexington and Concord, American whigs were not seeking separation from Britain but a restoration of their ancient rights under the English constitution.

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<sup>16</sup> *Legislate*, 137.

<sup>17</sup> Eliot, *Give Cesar his Due* (New London, Conn., 1738), 36, quoted in *Legislate*, 57.

<sup>18</sup> *Ibid.*, 144.



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At issue was not whether Parliament's taxes and statutes were fair or reasonable or whether they were administered harshly or even whether they were enforced at all. What mattered was that government was claiming powers that conflicted with old constitutional tradition. The colonials were, according to the articulated constitutional formula put forth in the Providence Instructions of August 1765, entitled to "a full and free Enjoyment of *British* Liberty, and of our particular Rights as Colonists, long since precisely known and ascertained, by uninterrupted Practice and Usage."<sup>19</sup>

*American Revolution was fought to restore ancient rights.*

Some commentators—including many who consider themselves neoconservatives, or Straussians, or sometimes both<sup>20</sup>—have portrayed the American War of Independence, much like the revolution that erupted in France some two decades later, as an attempt to overthrow long-established political and cultural traditions in favor of ahistorical universal principles. In fact, the colonial whigs, whose resistance against the British government eventuated in independence, had begun with the more limited goal of forcing that government to obey the limits prescribed by the English constitution of custom.

The colonials who took up arms against Britain were cut from the same conservative cloth as the British statesman Edmund Burke. Burke defended, in Parliament and elsewhere, the resistance of the colonies to constitutional abuses, but he discerned no good motives whatever in those who later sought to eviscerate French culture in the name of abstractions such as "liberté," "égalité," and "fraternité." "A spirit of innovation," wrote Burke, "is generally the result of a selfish temper and confined views. People will not look forward to posterity, who never look backward to their ancestors."<sup>21</sup> Contrasting the abstractions of the French Jacobins with the concrete, historical liberties for which English reformers had done battle over the centuries, Burke wrote that, for the English, the "very idea of the fabrication of a new government, is enough to fill us with disgust and horror. We wished . . . to derive all we possess as *an inheritance from our forefathers*."<sup>22</sup>

*Colonials who resisted British innovations were traditionalists in the Burkean mold.*

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<sup>19</sup> Providence Instructions, 13 August 1765, *Boston Post-Boy*, 19 August 1765, p. 3, col. 1, quoted in *Legislate*, 154-55.

<sup>20</sup> See Ryn, "Leo Strauss and History."

<sup>21</sup> Edmund Burke, *Reflections on the Revolution in France* (Harmondsworth: Penguin Books, 1968; originally published 1790), 119.

<sup>22</sup> *Ibid.*, 117 (emphasis in the original).

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“Our oldest reformation is that of Magna Charta,” Burke explained. “You will see that Sir Edward Coke, that great oracle of our law, and indeed all the great men who follow him, . . . are industrious to prove the pedigree of our liberties. They endeavor to prove, that the antient charter, the Magna Charta of King John, was connected with another positive charter from Henry I. and that both the one and the other were nothing more than a re-affirmance of the still more antient standing law of the kingdom.” Burke went on to note that, “from Magna Charta to the Declaration of Right, it has been the uniform policy of our constitution to claim and assert our liberties, as an *entailed inheritance* derived to us from our forefathers, and to be transmitted to our posterity; as an estate specially belonging to the people of this kingdom without any reference whatever to any other more general or prior right.”<sup>23</sup>

Burke had supported the colonial whigs in their struggle with the British government because he had viewed them as acting within this same constitutional tradition. In his famous “Speech on Conciliation with the Colonies,” delivered in the House of Commons on 22 March 1775, Burke observed that, as “descendants of Englishmen,” the “people of the colonies” are “not only devoted to liberty, but to liberty according to English ideas, and on English principles. Abstract liberty, like other mere abstractions, is not to be found.”<sup>24</sup>

That, like Burke, the leaders of the colonial resistance viewed themselves as traditionalists, rather than innovators, is attested by abundant historical evidence. John Adams, in the resolves he drafted against the Stamp Act for the town of Braintree, wrote: “We take it clearly . . . to be inconsistent with the spirit of the common law and the essential fundamental principles of the British constitution that we should be subjected to any tax imposed by the British Parliament . . . the most grievous innovation of all is the alarming extension of the power of the courts of admiralty . . . no juries have any concern there . . . [this] is directly repugnant to the Great Charter itself; for by that charter . . . ‘no freeman shall be . . . condemned, but by lawful judgment of his

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<sup>23</sup> Ibid., 117-18, 119 (emphasis in the original).

<sup>24</sup> Edmund Burke, “Speech on Conciliation with the Colonies,” 22 March 1775, [http://press-pubs.uchicago.edu/founders/documents/amendI\\_religions23.html](http://press-pubs.uchicago.edu/founders/documents/amendI_religions23.html).

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peers.” On another occasion Adams declared: “The patriots of this province desire nothing new; they wish only to keep their old privileges.”<sup>25</sup>

*John Adams:  
“The patriots  
of this province  
desire nothing  
new.”*

In a similar vein, John Dickinson, later a framer of the U.S. Constitution, protested: “A dependence on the crown and Parliament of Great Britain is a novelty—a dreadful novelty . . . This word ‘dependence,’ as applied to the states connected with England, seems to me a new one. It appears to have been introduced into the language of the law by the commonwealth act of 1650 [i.e., more than a century earlier]. A ‘dependence on Parliament’ is still more modern. A people cannot be too cautious in guarding against such innovations.”<sup>26</sup>

Since government has no authority outside the traditional constitution, the Massachusetts House of Representatives explained in a 1768 letter to the British Lords Commissioners of the Treasury, it follows that the constitution “is fixed: it is from thence that all power in the state derives its authority: therefore, no power can exceed the bounds of it without destroying its own foundation.”<sup>27</sup> Seven years later the Massachusetts Provincial Congress reminded the colony’s voters that, “When a people entitled to that freedom which your ancestors have nobly preserved as the richest inheritance of their children, are invaded by the hand of oppression, . . . resistance is so far from being criminal, that it becomes the Christian and social duty of each individual.”<sup>28</sup>

Because such arguments merely reiterated the ancient doctrine of resistance to arbitrary government, they met with much agreement not only in the colonies but also in Britain. In a 1769 letter to the King, for example, the freeholders of the English county of Middlesex complained that “a certain Unlimited and Indefinite DISCRETIONARY POWER, the prevention of which is the sole aim of all our laws,” had been “introduced into every Part of the Administration of our Happy, Legal CONSTITUTION.” The letter added that “our ancestors by their own fatal experience well knew that in a

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<sup>25</sup> *The Political Writings of John Adams* (Liberal Arts Press, 1954), 23-24, 68, quoted in Evans, *The Theme Is Freedom*, 86.

<sup>26</sup> C. H. McIlwain, *The American Revolution* (Ithaca: Cornell, 1958), 23, quoted in Evans, *The Theme is Freedom*, 86-87.

<sup>27</sup> Letter from the Massachusetts House to the earl of Shelburne, 15 January 1768, quoted in *Legislate*, 127.

<sup>28</sup> Address to the People, 9 February 1775, *American Archives* (4th ser.) 1:1332, quoted in *Rights*, 112.

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*Lawful  
resistance  
to arbitrary  
government  
essential to  
constitutionalism.*

state, where discretion begins, law, liberty and safety end.”<sup>29</sup> And in the year of the Declaration of Independence a correspondent for the *London Evening Post* argued that there was not an “uncontrollable” supreme power in the British government. “For if government be supreme, it is above the law; . . . but if the law be paramount, then all other powers may be lawfully resisted. And, indeed when we suppose a supremacy in government, which on no occasion, can be lawfully resisted, we destroy the difference betwixt free and absolute governments.”<sup>30</sup>

Such thinking enjoyed much support even within Parliament itself. Edmund Burke’s position has already been mentioned. In a Commons speech against two of the Coercive Acts that were to punish Massachusetts for the Boston Tea Party, George Johnstone argued in March 1774 that, since Bostonians had acted in defense of their constitutional rights, their actions were not criminal.<sup>31</sup> And during Commons debate just two weeks before the Battle of Lexington in 1775, Charles Manners, marquis of Granby and member for Cambridge University, spoke in support of colonial resistance. “If the peaceable part of mankind must tamely relinquish their property and their freedom, and submit to the yoke of the oppressor, merely to avoid the imputation of rebellion,” said Manners, “where are your inherent and indefeasible rights, the glory and the boast of Englishmen?”<sup>32</sup>

Others in Parliament who agreed with the Americans were the London Alderman William Beckford and Willoughby Bertie, fourth earl of Abingdon. Opposing a motion to reject a petition from Pennsylvania because it disparaged the Declaratory Act, Beckford reminded his colleagues that “Acts of Parliament are not like the laws of the Medes and Persians. An Act of Parliament against Common Right is a nullity, so says Lord Coke.” Similarly,

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<sup>29</sup> [Robert Macfarlane], *The History of the Reign of George the Third, King of Great Britain &c. to the Conclusion of the Session of Parliament Ending in May 1770* (London, 1770), 315-16 (quoting Middlesex Petition to the King, 1769), quoted in *Legislate*, 18-19.

<sup>30</sup> Anonymous, *A Defence of the Resolutions and Address of the American Congress, in Reply to Taxation no Tyranny* (London, [1775], 78, 84-85 (reprinting *London Evening Post*), quoted in *Legislate*, 84.

<sup>31</sup> Speech of George Johnstone, Commons Debates, 25 March 1774, *American Archives*, 1:54, cited in *Legislate*, 31.

<sup>32</sup> Speech of Marquis of Granby, Commons Debates, 5 April 1775, *Gentleman’s Magazine* 45 (1775), quoted in *Rights*, 189.

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Abingdon, still protesting the Declaratory Act in 1778, complained in a Lords speech: “The legislative body has done what it was not authorised by its constitution to do. It has dared to say, that it has a right to bind in all cases whatsoever; thereby making the rights of Englishmen subject to its will, and in a limited government, establishing unlimited tyranny.”<sup>33</sup>

*English Customary Law Codified in State and Federal Constitutions*

By the 1770s, however, majority opinion in Parliament and in Britain as a whole no longer adhered to the constitutionalism that was implicit in the statements just cited. Instead, the majority, though still paying lip service to “liberty” and “rights” and government “under law,” had embraced the radically different notion that law, including the constitution itself, was whatever Parliament said it was.<sup>34</sup> The effect in practice was to make government—notwithstanding obfuscating rhetoric to the contrary—supreme *over the law*. This kind of governance the Americans—who still identified liberty with centuries-old limits on governmental discretion—could not accept. Forced to decide between independence or the termination of their inherited rights, they reluctantly chose the former course some fifteen months after the war with Britain had begun at Lexington. And though the fighting would drag on for upwards of five more years, the Americans moved quickly to codify the restraints of customary law in their state constitutions and, subsequently, in the federal constitution as well.

*American whigs were forced to seek independence to preserve constitution of custom.*

No two of the state constitutions were alike, but all sought to preserve the public’s ancient property in rights under the new conditions of independence. Some listed the abuses by Parliament that had impelled the break with Britain and made it clear that, if the new governments were to engage in similar abuses, they, too, would be subject within the law to disobedience and rebellion.

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<sup>33</sup> Speech of Lord Abingdon, Lords Debates, 7 December 1778, *The Parliamentary History of England, From the Earliest Period to the Year 1803* (London, 1806-20), 20:14, quoted in *Legislate*, 60-61.

<sup>34</sup> The inversion of the meaning of “law” was explicitly recognized when, following the Glorious Revolution, the coronation oath was changed so that the king swore to enforce “the statutes in Parliament agreed upon” rather than the laws and customs upheld by past monarchs. Betty Kemp, *King and Commons 1660-1832* (London, 1957), 30, cited in John Phillip Reid, *Constitutional History of the American Revolution*, vol. 4, *The Authority of Law* (Madison: The University of Wisconsin Press, 1993), 54.

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The Maryland constitution declared, for example: “The doctrine of non-resistance, against arbitrary power and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.”<sup>35</sup>

While wording varied, the state constitutions typically specified lists of privileges and immunities that government could not lawfully infringe. Included in such lists were rights to habeas corpus and trial by jury, protections against warrantless searches and against martial law for civilians, and the right of the people to keep and bear arms. With Parliament’s interference in their internal affairs still a fresh wound, several states reserved to their people, as the Maryland document put it, “the sole and exclusive right of regulating the internal government and police thereof.”

Also explicitly protected by every state save Connecticut was the free exercise of religion, which was in no way regarded as inconsistent with the states’ expected encouragement and support of Christianity. On the contrary, religion was considered the irreplaceable foundation of public morality, the maintenance of which was a fundamental purpose of government. Thus a majority of the states either maintained established religions or required that elected officials be Christian or, even more narrowly, Protestant. Far from considering the establishment of Christianity a hindrance to free exercise, several states, including Massachusetts, plainly viewed the right of the public to maintain such an establishment as perhaps the preeminent example of what free exercise entailed.<sup>36</sup>

When the states subsequently negotiated and ratified the federal constitution, immense care was taken to assure that the new general government would enhance, rather than destroy, the attainment of government’s traditional purposes as codified in the state constitutions. With but a few explicitly enumerated exceptions, the states were to retain all of their traditional common-law authority to regulate for the public good within their borders. Conversely, the general government was to have no powers except those specifically delegated to it by the states. And should the federal government overreach its limited authority, wrote Hamilton in *Federalist* 26, the state governments were expected “to

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<sup>35</sup> Constitution of Maryland (1776), [www.nhinet.org/ccs/docs/md-1776.htm](http://www.nhinet.org/ccs/docs/md-1776.htm).

<sup>36</sup> For specific provisions see the first constitutions of the original states, [www.nhinet.org/ccs/docs.htm](http://www.nhinet.org/ccs/docs.htm).

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sound the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent." Hamilton's conception of armed resistance by the states and the people to federal overreaching as an intrinsic part of the American constitutional system is, like much else in the founders' constitutions, carried over substantially unchanged from the English constitution of custom. As Reid notes, "One aspect of British constitutional rights was the right to resist even the government's invasion of them. Should the government invade rights, the invasion would be 'unlawful' and resistance to the invasion 'lawful.'" Reid explains that the "legal theory of the duty to defend rights was based on the ownership of rights," and he gives the example of Samuel Johnson, who wrote in 1694 that "the Rights of the Nation being Invaded, may be Defended; for otherwise they are No Rights." Drawing on the same legal doctrine, London's Common Council told King George III in 1775 that the Americans "ought to enjoy peace, liberty, and safety," and "whatever power invades these rights ought to be resisted."<sup>37</sup>

*Under old English constitution, government's invasion of rights was "unlawful," resistance to the invasion "lawful."*

The Framers deliberately protected the states' power of armed resistance against federal encroachments by prohibiting the general government from putting down "domestic Violence" unless requested to do so by the state or states directly involved.<sup>38</sup> This explicit restriction on federal authority to resist insurrections was retained in the Constitution in its final form, despite warnings from some delegates that the state governments might actually lead an insurrection against federal power. The majority of state delegations agreed with Luther Martin of Maryland that, so far as domestic violence is concerned, "The consent of the State ought to precede the introduction of any extraneous force whatever." They did so despite warnings from James Madison that "There might be a rebellion agst. The U. States" (i.e., the general government) and from John Dickinson that an insurrection "may proceed from the State Legislature itself."<sup>39</sup> As a further limitation on federal power vis-à-vis the state governments, whether armed or otherwise, the Framers banned the general government from purchasing and exercising exclusive jurisdiction over any land except by

*States' power of resistance against federal encroachments deliberately protected by Framers.*

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<sup>37</sup> *Rights*, 188-89.

<sup>38</sup> The Constitution of the United States, Article IV, Section 4, [www.nhinet.org/ccs/docs/constitution.htm](http://www.nhinet.org/ccs/docs/constitution.htm), hereinafter cited as "Constitution."

<sup>39</sup> James Madison, *Notes of Debates in the Federal Convention of 1787* (New York: Norton, 1969), 474-75, 559-60.

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“the consent of the Legislature of the State in which the Same shall be, for the erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings.”<sup>40</sup> The delegates agreed without objection to require state permission for federal land purchases after Elbridge Gerry of Massachusetts noted that, otherwise, “this power might be made use of to enslave any particular State by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience to the Genl. Government.”<sup>41</sup>

### *Religion and Morals*

*States were granted exclusive power to regulate religion and morals.*

Of the innumerable powers not relinquished by the states under the federal Constitution, most fundamental was their common-law power of police. The latter—which the U.S. Supreme Court would uphold (in the 1849 *Passenger Cases* and elsewhere) as belonging *exclusively* to the states—is the authority to pursue within their jurisdictions a broad range of purposes, including, according to the High Court, not only the maintenance of public health and safety but also religion and morals.<sup>42</sup>

Because formal legal relationships between government and organized religious bodies were matters for the states to decide exclusively, the First Amendment banned the general government from either supporting *or* opposing state religious establishments or from interfering with free exercise. But the Framers never thought for a moment that the federal or state governments could achieve their legitimate purposes in splendid isolation from the traditional practices and observances of multi-denominational, and particularly Protestant, Christianity.

When John Jay in *Federalist* No. 2 listed six key elements held in common by Americans and serving as essential supports for the federal union, two of the six were that they professed “the same religion” and, which was intimately related, that they were “very similar in their manners and customs.” Echoing Jay, who served

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<sup>40</sup> Constitution, Article I, Section 8, Clause 17.

<sup>41</sup> Madison, *Notes*, 581.

<sup>42</sup> In his opinion in the 1849 *Passenger Cases* 48 U.S. 283 (1849), Justice Woodbury listed among the states’ legitimate purposes under the police power: legislation to control “sickness or crime . . . , danger of pauperism, danger to health, danger to morals, danger to property, danger to public principles by revolutions or change of government, or danger to religion.”



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as the first Chief Justice of the United States from 1789 to 1795, George Washington, in his Farewell Address to the American people, said that, "With slight shades of difference, you have the same religion, manners, habits, and political principles." Then, lest there be any confusion, the father of his country stressed that "national morality" was inseparably related to the Christian beliefs traditionally held by Americans and that the maintenance of both the morals and the religious beliefs was indispensable to the purposes of the general as well as the state governments. "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports," said Washington. "In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. . . . And let us with caution indulge the supposition that morality can be maintained without religion. . . . [R]eason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."<sup>43</sup>

*Framers believed shared religion and customs essential to federal union.*

With other Framers, Washington cautioned against "the spirit of innovation," believing that chief among the virtues and institutions essential to free government were those of reflection and restraint. He urged public officials to "resist with care the spirit of innovation upon [the Constitution's] principles," remembering "that time and habit are at least as necessary to fix the true character of governments as of other human institutions." Public officials, Washington added, were "to confine themselves within their respective constitutional spheres," since the "spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create . . . a real despotism." Moreover, because of "that love of power, and proneness to abuse it, which predominates in the human heart," it was necessary for federal and state officials not only to stay within the limits of their own authority but also to act as "the guardian of the public weal against invasions by the others." If changes should be needed in the distribution or balance of powers, said Washington, let them be achieved

*In Farewell Address, Washington urged officials to "resist with care the spirit of innovation" on constitutional principles.*

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<sup>43</sup> Washington's Farewell Address, 1796, [www.nhinet.org/ccs/docs/farewell1796.htm](http://www.nhinet.org/ccs/docs/farewell1796.htm).

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“by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit, which the use can at any time yield.”<sup>44</sup>

*American Officials Soon Repeated British Parliament’s Mistakes*

That these counsels of Washington—shared by almost all of the other Framers—are reminiscent of the English constitution of custom should hardly be surprising. It was precisely to preserve their rights to law based on tradition from parliamentary usurpation that Americans had fought for independence in the first place. How ironic, therefore, that the new American government soon began to repeat Parliament’s mistakes. Rather than scrupulously observing the limits of their own authority and checking the excesses of others, the Executive and Legislative branches soon developed a pattern of doing as they pleased. The working assumption at both the state and federal levels came to be that all actions of the elected branches were constitutional unless struck down by the judiciary. This attitude inevitably meant a vast expansion of official power since relatively few governmental acts are challenged in the courts at all and fewer still are challenged successfully. It also meant that the judiciary, which Hamilton had said in *Federalist* No. 78 would be “beyond comparison the weakest of the three departments of power,” instead became the strongest.

Allowed by elected officials to become the sole arbiters of constitutional meaning and presented with virtually no external checks on their power, judges found themselves in the same position as members of the British Parliament had been at the time of the American Revolution. Constitutions, both federal and state, now effectively have come to mean whatever court majorities dictate that they mean at any given moment, with the whims of shifting majorities of the U.S. Supreme Court being the last word. This is a complete inversion of the courts’ intended legitimate role. Far from introducing “dangerous innovations in the government,” Hamilton had explained, it was the judiciary’s duty to prevent the legislature from doing so “whenever a momentary inclination

*For Hamilton, purpose of courts to prevent “dangerous innovations in the government,” purpose of precedents to “avoid an arbitrary discretion in the courts.”*

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<sup>44</sup> Ibid.

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happens to lay hold of a majority of their constituents,” thereby allowing the opportunity needed for “more deliberate reflection” to come to the fore. “To avoid an arbitrary discretion in the courts,” wrote Hamilton, “it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.” Judges were to be “bound down” by precedent for the same reason that the Framers had made it exceedingly difficult to enact constitutional amendments in the first place: to protect from “innovations” the ancient traditions and customs whose protection from government is codified in our state and federal constitutions.<sup>45</sup>

Reid says of the eighteenth-century constitutional mind that underlay the American Revolution that its “methodology can be summed up in two words, precedent and custom: adherence to precedent and conformity to custom.”<sup>46</sup> Observing precedents was the methodology by which judges were to be forced to apply the customary meaning of the laws and the constitution to new cases, rather than changing long-established meanings to suit their own personal preferences. As Edmund Burke noted in a 31 January 1770 speech in the House of Commons, a judge should not reach a judgment by making a policy choice between interests, but “upon a fixed Rule, of which he has not the making, but singly and solely the application to the Case. The very Idea of Law [is] to exclude discretion in the judge.”<sup>47</sup>

*For Burke,  
“The very  
Idea of Law  
. . . to exclude  
discretion in  
the judge.”*

This methodology was always subject to some slippage owing to the subjectivity and need to consider varying circumstances that are inseparable from judgment, but the morality of constitutional restraint commended by Washington, Hamilton, and other Framers served for more than 100 years to keep the slippage largely in check. That situation changed drastically about a century ago, however, as justices of the U.S. Supreme Court began systematically employing isolated words and phrases taken out of historical context to subvert the customary law that it had been the courts’ solemn duty to uphold.

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<sup>45</sup> Hamilton, *Federalist* No. 78.

<sup>46</sup> *Legislate*, 18.

<sup>47</sup> *The Writings and Speeches of Edmund Burke. Volume II Party, Parliament, and the American Crisis*, 325, quoted in *Legislate*, 18.

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### *'Incorporation Doctrine' Subverts the Bill of Rights*

Particularly portentous was the complete reversal by the High Court of the purpose of the first ten amendments to the Constitution. Known collectively as the Bill of Rights, these amendments were approved by the First Congress to meet the demands of several states that some of the Constitution's implicit limits on federal power be made explicit. Accordingly, the Supreme Court repeatedly had held throughout the nineteenth century that the restrictions of the Bill of Rights applied to the federal government but not the state governments, which were ruled in such matters by their own constitutions. But in 1905 the Supreme Court, in *Lochner v. New York*, struck down a state labor law forbidding a bakery from requiring or permitting an employee to work more than sixty hours a week.<sup>48</sup> The court held that the New York law interfered with the right of contract between employers and employees and struck down the law as an ostensible violation of the Fourteenth Amendment's "due process" clause. This interpretation of the Fourteenth Amendment was an abrupt departure from long-established precedent. The amendment's "due process" and its "equal protection" clauses referred exclusively to certain well-defined rights intended to protect black Americans, and the Court had so held on numerous occasions. Nevertheless, the strained interpretation in *Lochner* became the basis for a radical new invention of the Supreme Court called the "incorporation doctrine." This last is the name given by the Court to its spurious assertion that the restrictions of the first eight amendments, previously applicable only to the general government, are now incorporated into the Fourteenth Amendment and thus applicable to the states as well. And since the Court, as part of the federal government, takes upon itself the power to decide how the Bill of Rights applies to the states, the incorporation doctrine is ipso facto a federal usurpation of the powers of police reserved by the Constitution exclusively to the states.<sup>49</sup>

Initially the Supreme Court used the incorporation doctrine primarily to interfere with state economic regulations and crimi-

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<sup>48</sup> *Lochner v. New York* 198 US 45 (1905).

<sup>49</sup> The "incorporation doctrine" is one of two major means by which the Supreme Court has transformed the police power, intended by the Framers to belong exclusively to the states, into a virtual monopoly of the general government. The second method frequently used by the Court to enable the federal govern-

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nal law. But, starting with the Court's 1948 *McCullum v. Board of Education*<sup>50</sup> decision striking down religious instruction in the public schools, the doctrine became a weapon directed against the states' exclusive power to regulate in religious and moral matters. Though the First Amendment explicitly enjoined the federal government to "make no law respecting an establishment of religion"—that is, neither for nor against—the Court not only pronounced state religious establishments unconstitutional but expanded the definition of establishment far beyond its constitutional meaning. Thus the Court banned not just direct public fi-

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ment to usurp the police power of the states has been the broadening of the commerce clause (Article 1, Section 8, clause 3), which grants Congress power to "regulate Commerce with foreign Nations, and among the several States," to include activities having no relation to commerce whatever, not even *intrastate* commerce, which was meant to be regulated by the states to the extent permitted by their own constitutions. A recent example is the Court's ruling in *Gonzalez v. Raich* (No. 03-1454. Argued November 29, 2004—Decided June 6, 2005). By a 6-3 vote, the Court struck down a California law that permitted the backyard cultivation of marijuana for personal use when prescribed by a doctor for pain caused by cancer or other serious illnesses. Writing for the majority, Justice Stevens held that, "Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." In a concurring opinion, Justice Scalia—though he prides himself as a "textualist" who interprets the Constitution according to its original text, rather than a meaning that evolves over time—went even further, arguing that, "Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce." Joined by Chief Justice Rehnquist and Justice Thomas, Justice O'Connor wrote in dissent, "The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. . . . Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation." Only Justice Thomas penetrated to the core of the constitutional issue, writing in a separate dissent: "Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers."

<sup>50</sup> *McCullum v. Board of Education*, 333 US 203 (1948).

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nancial support for a particular denomination but also the friendliness toward America's religious tradition that Washington and other Framers had considered essential to constitutional government at both the state *and* federal levels.

*“National morality” commended by George Washington has been systematically subverted.*

The impact on what President Washington termed the “national morality” has been enormous. Just five decades ago the moral ethos of American society remained much as it had been when the colonial whigs fought the Redcoats to preserve the traditional culture from arbitrary government. As in ancient times the family was revered as the fundamental unit of society. Churches played a central role in American life, and their impact was everywhere apparent—in the people's manners and decorum, in their public modes of address, in their respect for virtue and self-restraint, in the way they conducted their businesses and educated their children. It followed that the laws and public institutions of states throughout the land both reflected and supported the old ways and customs. But then, wielding its new “incorporation doctrine,” the High Court turned with a vengeance against the nation's religious heritage. A key target was the system of public education, previously a vital link in the transmission of America's traditional culture. It would now be systematically subverted. In staccato fashion, the Court overturned the Constitution of custom for which the American Revolution was fought. It put an end in the states' public schools to religious instruction (1948),<sup>51</sup> prayers, including even non-denominational prayers (1962),<sup>52</sup> Bible reading (1963),<sup>53</sup> displaying the ten commandments (1980),<sup>54</sup> allowing a moment for silent prayer (1985),<sup>55</sup> displaying a nativity scene (1989),<sup>56</sup> and non-denominational prayer by a clergyman at commencement exercises (1992).<sup>57</sup>

In the hands of judges, either oblivious or scornful of Anglo-American constitutionalism, innovations disguised as “precedents” set the stage for more extreme innovations to come. In its 1965 opinion in *Griswold v. Connecticut*, for example, the Supreme

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<sup>51</sup> *Ibid.*

<sup>52</sup> *Engel v. Vitale*, 370 US 421 (1962).

<sup>53</sup> *Abington Township School District v. Schempp*, 374 US 203 (1963).

<sup>54</sup> *Stone v. Graham*, 449 US 39 (1980).

<sup>55</sup> *Wallace v. Jaffree*, 472 US 38 (1985).

<sup>56</sup> *Allegheny County v. ACLU*, 492 US 573 (1989).

<sup>57</sup> *Lee v. Weisman*, 505 US 577 (1992).

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Court ruled that state restrictions on the sale of contraceptives, until then a matter for the people's elected legislators to decide, now violated a newly minted "right of marital privacy" which the Court claimed to have discovered "within the penumbra of specific guarantees of the Bill of Rights."<sup>58</sup> Just eight years later in *Roe v. Wade* the Court promulgated a previously unknown "right of personal privacy," citing "the penumbras of the Bill of Rights" first mentioned in *Griswold* as a precedent, and used it to strike down laws restricting abortions in all 50 states.<sup>59</sup> A Supreme Court that was to exercise only judgment but not will or force has constituted itself as a legislative body subject to no higher authority.

*Innovations disguised as "precedents" set stage for more extreme innovations to come.*

### ***Customary Constitutionalism All but Destroyed by the Courts***

The Chinese Communists under Mao Zedung waged a sustained "Campaign Against the Four Olds—old ideas, old culture, old customs and old habits."<sup>60</sup> With Mao gone, his successors are cautiously allowing and to some degree even encouraging the Chinese to re-embrace their ancient traditions. With the support of leading law-school faculties and a generally anti-traditional intellectual and cultural establishment, the U.S. Supreme Court is waging unrelenting war on the customary constitutionalism for which many thousands of Americans have given their lives.

Small wonder that the courts below the Supreme Court, both state and federal, have behaved similarly. The extent of the subversion of traditional constitutionalism is nowhere better illustrated than in Massachusetts, where the state's Supreme Judicial Court has ordered, by a slim 4 to 3 margin, the licensing of "marriages" by two persons of the same sex.<sup>61</sup> A more blatant example of judges' substituting their own idiosyncratic beliefs for the rule of law is hard to imagine. Thus, the four judges in the majority admitted that the existing statute, as enacted by the elected legislature, "may not be construed to permit same-sex couples to marry." They acknowledged that the "everyday meaning of 'mar-

*Judges' personal whims displace the rule of law.*

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<sup>58</sup> *Griswold v. Connecticut*, 381 US 479 (1965).

<sup>59</sup> *Roe v. Wade*, 410 US 113 (1973).

<sup>60</sup> Bette Bao Lord, *Legacies: A Chinese Mosaic* (New York: Alfred A. Knopf, 1990), 56.

<sup>61</sup> *Goodridge vs. Department of Public Health*, Supreme Judicial Court of Massachusetts, November 18, 2003, [www.mass.gov/courts/courtsandjudges/courts/supremejudicialcourt/goodridge.html](http://www.mass.gov/courts/courtsandjudges/courts/supremejudicialcourt/goodridge.html).

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riage' is '[t]he legal union of a man and woman as husband and wife,' *Black's Law Dictionary* 986 (7th ed.1999)" and that marriage has never "had a different meaning under Massachusetts law" or under the "English common law" from which the statutory definition is derived, or even under "the *jus gentium*, the common law of nations." But against the weight of all of universal history in support of the state's position that traditional marriage provides the optimum setting for the raising of children, these four individuals decided to impose on the people of Massachusetts their own contrary opinions. The judges asserted the plainly disputable premise that "[n]o one disputes" that the plaintiff homosexual couples "are families, that many are parents, and that the children they are raising, like all children, need and should have the fullest opportunity to grow up in a secure, protected family unit," and concluded that "[t]here is thus no rational relationship between the marriage statute and the Commonwealth's proffered goal of protecting the 'optimal' child rearing unit." On this basis the judges imposed what they themselves termed a "reformulation" of the definition of marriage. Marriage was now "to mean the voluntary union of two persons [of whatever sex] as spouses, to the exclusion of all others."<sup>62</sup>

In thus substituting their own personal preferences for that of the elected legislature, as the three judges in the minority noted, the majority ignored well-established Massachusetts precedent, which holds that, "In considering whether . . . a rational basis exists, we defer to the decision-making process of the Legislature, and must make deferential assumptions about the information that it might consider and on which it may rely." The majority simply ignored the requirement of article 30 of the state constitution's Declaration of Rights that "the judicial shall never exercise the legislative and executive powers." Far from giving proper deference to the presumed rationality of the elected legislature, so exalted was the majority judges' assessment of their own wisdom as compared with that of all others that they were not given the least pause by the fact that the Massachusetts legislature was not alone in its position. As the three judges in the minority pointed out, "No State Legislature has enacted laws permitting same-sex marriages; and a large majority of States, as well

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<sup>62</sup> Ibid.



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as the United States Congress, have affirmatively prohibited the recognition of such marriages for any purpose.”<sup>63</sup>

Nor did the majority give weight to the fact that among the legitimate purposes to be taken into account by the legislature in its laws concerning marriage was the public morality. The majority judges readily stipulated that the regulation of marriage is within the legislature’s police power, which by long precedent that they themselves cited includes the duty of the legislature to protect the public “morals.”<sup>64</sup> Yet, for the traditional moral standards upheld by the existing statute, the majority decided to substitute a new morality of their own. One of the majority judges, John M. Greaney, frankly admitted this in a concurring opinion. “I am hopeful,” he wrote,

that our decision will be accepted by those thoughtful citizens who believe that same-sex unions should not be approved by the State. I am not referring here to acceptance in the sense of grudging acknowledgment of the court’s authority to adjudicate the matter. My hope is more liberating. The plaintiffs are members of our community . . . . We share a common humanity . . . . Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance, and respect. *We should do so because it is the right thing to do.*<sup>65</sup>

Both the legislature and the judges were applying moral codes to the licensing of marriages, but the judges were doing so through a blatant abuse of their legal authority. The legislature, on the other hand, was acting within its legitimate police power. What is more, it was legislating in accordance with the state constitution, which makes clear that the public morals to be protected are the same traditional Christian mores that were said by George Washington to be essential to all of the other purposes of government. In words very similar to Washington’s, Article 3 of the Massachusetts Declaration of Rights, as amended by Article 11, states that “the public worship of God and instructions in piety, religion and

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<sup>63</sup> Ibid.

<sup>64</sup> In a reference to a 1965 precedent, the majority opinion itself declares: “For due process claims, rational basis analysis requires that statutes ‘bear a real and substantial relation to the public health, safety, *morals*, or some other phase of the general welfare’ *Coffee-Rich, Inc. v. Commissioner of Pub. Health* . . . , quoting *Sperry & Hutchinson Co. v. Director of the Div. on the Necessaries of Life*, 307 Mass. 408, 418 (1940).” Ibid. (emphasis added).

<sup>65</sup> Ibid. (emphasis added).

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morality, promote the happiness and prosperity of a people and the security of a republican government.”<sup>66</sup>

Now some might argue that the words of the Massachusetts constitution just quoted, together with the parallel views of the first president, have been rendered meaningless by U.S. Supreme Court rulings aimed at completely secularizing both the federal and state governments. As explained above, however, those rulings of the Supreme Court are with few exceptions as constitutionally ungrounded as the Massachusetts court’s ruling “reformulating” the meaning of marriage. Such decisions by courts at any level—embodying the notion that judges can impose their own will “in all cases whatsoever”—reflect just the kind of arrogance that made the British Parliament slip its constitutional moorings some two centuries ago. And the problem does not end with judges. The number of officials in every branch of the federal and state governments put together who take seriously the constitutional restraints on their authority could probably gather in the chamber of the United States House of Representatives, with seats to spare.

*Restoration of  
American  
constitutional  
government  
unlikely in  
foreseeable  
future.*

Our whig forebears rejected as “null and void” all acts of the British government that exceeded the limits of the constitution of custom, which was their political and cultural inheritance, their “property.” To restore the “free government” for which they defied the most formidable military power of their time, today’s Americans would have to be willing to show similar courage and dedication. To restore government to its proper position “under the Law,” we would have to be prepared like them to risk our lives, our fortunes, and our sacred honor. But to state that requirement is to recognize how unlikely is the restoration of American constitutionalism within a foreseeable future.

Freedom’s vestiges have all but vanished. The American people have not even a faint memory of the meaning of Anglo-American constitutionalism. Ignorance of this tradition is abysmal even in the nation’s law schools. Government in the United States bears virtually no resemblance to the constitutional republic that the Framers gave us—if, as Benjamin Franklin cautioned, we could “keep it.” By the standards of our forebears, we have entered upon

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<sup>66</sup> Constitution of the Commonwealth of Massachusetts, [www.mass.gov/legis/const.htm](http://www.mass.gov/legis/const.htm).

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an era of arbitrary, lawless government. Although it may be too late to “keep” constitutional government, we have a duty—to our ancestors and posterity as well as ourselves—at least to try to regain some of what has been lost, in the mind and the imagination at minimum, hoping that the spirit of the Constitution might at some time be reawakened in new historical circumstances. For this to be possible, it is necessary first of all to reinvigorate—and adapt to the conditions of our own time—the culture of moral restraint from which the customary constitutionalism bequeathed by our whig ancestors is indistinguishable.

Accordingly, historic customary international law comprised long-established, well-known, and relatively fixed rules governing relations among all states. Customary international law's authority, however, is the subject of much academic controversy. The generally accepted view is that both treaties and customary international law derive their normative force from the consent of states: states explicitly consent to treaties, and tacitly consent to new customary international law. See *supra* note 12. However, scholars are increasingly questioning the orthodoxy that international law must be grounded in state consent to be legitimate. The Unraveling of American Constitutionalism: From Customary Law to Permanent Innovation. By Baldacchino, Joseph. Read preview. Academic journal article Humanitas. The Unraveling of American Constitutionalism: From Customary Law to Permanent Innovation. By Baldacchino, Joseph. Government could be subordinate to the law because English law was not made by government. Rather, the English common law and constitution were seen as emerging slowly over centuries from the "custom and usage" of society as a whole. This respect for custom did not signify passive acceptance of whatever history produced. Rather, it reflected the belief that right order evolved historically, that the good society resulted from proper restraints on man's lower inclinations. By Robert Barnes, American constitutional lawyer representing high-profile clients in civil and criminal trials, and known for his prescient political prognostications in American and international elections. Follow him on Twitter @Barnes\_Law. Do we really think "it can't happen here" in America? Could we quarantine the constitution? Are we doing it already? Panics from pandemics unleash unchecked governmental power. Our founders were intimately familiar with pandemics, viruses and plagues, yet they did not allow any to suspend our Constitutional liberties. Not one word in the Constitution about plagues or pandemics to exempt the government from any of our Bill of Rights. Why do our current courts allow it? Because the public is asleep at the wheel. Customary international humanitarian law fills in certain gaps in protection provided to victims of armed conflict by treaty law. These gaps result either from the lack of ratification of relevant treaties or from the lack of detailed rules on non-international armed conflicts in treaty law. The advantage of customary law is that it is not necessary for a State to formally accept a rule in order to be bound by it, as long as the overall State practice on which the rule is based is "widespread, representative and virtually uniform" and accepted as law. As it identifies the rules of customary in

Customary law is the idea that law not codified, but that has been in practice for a long period of time can become binding law. Malcolm N. Shaw defines customary international law as the following: "Customary international law refers to international obligations arising from established state practice, as opposed to obligations arising from formal written international treaties. According to Article 38(1)(b) of the ICJ Statute, customary international law is one of the sources of international law. Customary international law can be established by showing (1) state practice and (2) *opinio juris*..." For example, this can be seen with early international courts such as the League of Nations' Permanent Court of Justice, and then later the United Nations' International Court of Justice. American Journal of International Law. Article. Article. 82 It is possible that neither the American people nor the government wants to move beyond the box, preferring to reject the trend in international law and policy by resolutely insisting on old forms of conventions and customary law. It is hard to see how this approach serves U.S. interests; our constitutional structures will ultimately have to adapt to the new global order of the twenty-first century, much as they did to the new domestic order of the twentieth century. English constitutionalism in the period of American colonization comprised both strands of the constitutional tradition. The common law courts in the early seventeenth century insisted on the superiority of law to the royal prerogative. Sir Edward Coke gave famous expression to the idea of a higher law controlling government in asserting that "sovereign power" is no parliamentary word. "magna carta is such a fellow, that he will have no sovereign." Coke also said that "when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, By Robert Barnes, American constitutional lawyer representing high-profile clients in civil and criminal trials, and known for his prescient political prognostications in American and international elections. Follow him on Twitter @Barnes\_Law. Do we really think "it can't happen here" in America? Could we quarantine the constitution? Are we doing it already? Panics from pandemics unleash unchecked governmental power. Our founders were intimately familiar with pandemics, viruses and plagues, yet they did not allow any to suspend our Constitutional liberties. Not one word in the Constitution about plagues or pandemics to exempt the government from any of our Bill of Rights. Why do our current courts allow it? Because the public is asleep at the wheel. (3) Customary international law is unwritten law deriving from practice accepted as law. It remains an important source of public international law.663 Customary international law is among the sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice, which refers, in subparagraph (b), to "international custom, as evidence of a general practice accepted as law".664 This wording reflects the two constituent. 663 Some important fields of international law are still governed essentially by customary international law, with few if any appl