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***THE RULE OF LAW DOESN'T  
MEAN WHAT IT USED TO:  
Why Amending the Constitution  
Has Become So Popular***

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*The Rule of Law  
Doesn't Mean What it Used To*

# ***THE RULE OF LAW DOESN'T MEAN WHAT IT USED TO: Why Amending the Constitution Has Become So Popular***

**By Judge Arthur Christean**

In 1958, in response to the "May Day" display of military might by the former Soviet Union, President Dwight D. Eisenhower established "Law Day" as a way of celebrating our heritage of liberty and the importance of the rule of law. Since then the first week of May has been set aside for this purpose.

Every year during the month of June, all eyes turn to the U.S. Supreme Court to await the high Court's most important and often controversial pronouncements, often reserved for the last month of its term. Media outlets, politicians, lawmakers, lawyers, and political activists of every stripe eagerly await these rulings. All recognize the reality that in terms of defining and limiting the way all citizens live their lives, these decisions now carry more weight than all the lawmakers of the nation and Congress combined.

It is a matter of debate and discussion every year whether or not this is the way the founders intended the system to work; especially so when the Court's rulings run, as they often do, against the will of the majority and the content of significant religious and moral traditions.

## ***Challenges to the Rule of Law***

The challenges to the rule of law today are many and varied. Rogue states and worldwide terrorist organizations are at war with the United States and everything it stands for. But the greatest challenge within the nation is the seduction of the law for political purposes. The use of the courts to advance particular causes and agendas undermines public trust in the integrity of the judicial process and contributes to the polarization of the nation. A major factor in this trend is the now well accepted view that courts should be representative bodies like legislatures, with proportional representation of certain groups, and that judges have an implicit obligation to represent particular constituencies as great if not greater than their explicit oath to uphold the constitution.

In the best selling novel and mystery thriller *The Da Vinci Code* the author presents an intriguing alternative view of the origins of Christianity based on long suppressed hidden knowledge known only to an elite few. Despite its historical and philosophical errors which scholars and church critics have pointed out, the book has enjoyed spectacular success, resting atop the New York Times bestseller list for over 62 weeks. Its major premise challenges the theological foundations of Christendom and its basic doctrines. It would have its readers accept totally new and radically different ideas about their religious faith and its founder.

Something similar been going on with respect to the legal culture and the rule of law in the United States. It has not come about as the result of any one book or single event, but rather represents the evolution of a completely alternative view of the nature of American society and the meaning of the rule of law within it. Just as the *Da Vinci Code* skillfully undermines traditional religious faith and seeks to per-

suaude the reader to accept a new version of Christianity, so likewise does the new version of the rule of law seek to persuade the nation that the old view of the rule of law is obsolete, and that a new and radically different one should be adopted.

### *Historic Meaning of the Rule of Law*

The American tradition of the rule of law, expressed in the words "we are a government of laws not of men," has come to embrace the nation's loftiest ideals and founding principles. It asserts that the will of the people is superior to all forms of absolutist or totalitarian forms of government. The sovereignty or will of the people as reflected in the ballot box, in legal codes and precedents is regarded as the only true and legitimate source of government authority. Within America the rule of law has also meant respect for the foundational principles of separation of powers, federalism, popular sovereignty, and the protection of basic individual rights as set forth in the Bill of Rights.

The ideals this tradition seeks to enshrine are, above all, freedom and equal justice under law. Similarly, that government should be the "servant not the master" of the people and that in the Seventeenth century words of John Winthrop, America should be a "city on a hill" -- a beacon to others around the world -- whose laws and policies should always acknowledge the hand of God in the nation's founding and progress.

In sum, the original idea of the rule of law was to serve as the guiding light of a nation built on pride of heritage, hope for the future, high aspirations of morality, equal standing of all citizens before the law, and acknowledgement of the creator as the source of basic rights.

Within this American legal tradition, one idea has been absolutely central. It is that courts and judges must transcend politics and not attempt to act as policymakers. Rather, that they function as constitutionally authorized umpires to see to it that everyone plays by the rules and receives "due process of law" before the government acts to deprive anyone of life, liberty or property. Judges are also charged with the all important duty of maintaining the integrity of the constitutional structure of limited government with its checks and balances.

These core ideas about the proper role of the judiciary, and the necessity of judicial restraint, have been at the heart of the American scheme of government and its legal philosophy from the republic's founding. Today these ideas are being challenged as never before.

### *New Meaning of the Rule of Law*

A new, invigorated, dramatic polarization of American politics began with the civil rights, women's rights, gay rights and abortion rights movements of the 1960's. People continue to have spirited differences of opinion as to whether this decade and the cultural shifts it spawned did more harm than good, but there is no doubt it has had a powerful impact on the nation's educational system and its legal culture, including the education of future lawyers and judges. Even today, many of the nation's top leaders, media people and opinion makers harbor a great deal of nostalgia for the perceived idealism and passion of this era.

During the 1960's and the years following, these various rights groups coalesced around a new view of America. It was a distinctly negative one. It was a view of an America that was to blame for much of the world's problems; not only because of its disproportionate economic success and military dominance, but also because of its history of slavery and perceived mistreatment of minorities, women, the poor, the handicapped, and the environment. A number of political action groups formed whose aims were to

transform American society. The nation's universities became the main support base for this new vision of a flawed America in need of reform, an America whose power and place in the world had to be diminished.

From this shared sense of historical guilt and shame a new version of the rule of law emerged. It was one that supported national policies of punishment and recompense for past wrongs, and saw various forms of entitlements, preferences, protections and compensations to certain victim groups as fully justified and necessary. In addition, under this new view, the nation had to do everything possible to disassociate itself from the cause of much of its misguided past, namely organized religion. The "wall of separation" between church and state not only had to be kept as high as possible, but national policy needed also to elevate the secular and marginalize religion and its influence on public life to protect the nation from any return to past patterns of religious bigotry.

Not only did this new version of the rule of law depart from established interpretations (and historical language) of the original intent of the founders of the nation, but in many important areas it completely reversed them. It sought to institutionalize new and radically different ideas about what America stands for and how it should be governed. Trouble was, the people and their elected representatives often balked at this new view of things. Proponents had to turn to the courts to implement this new meaning of the rule of law. The courts did not disappoint them.

Judicial interpretations were able to bend and adapt constitutional language in state and federal constitutions to fit the new concept of the rule of law. Many rulings proceeded to either permit or endorse policies or behavior which all previous generations would have found abhorrent, or to prohibit policies and practices which all previous generations had taken for granted as wholly beneficial and proper.

A whole series of landmark cases followed over the next four decades that addressed the issues raised by these various "rights" groups. They seemed to have one thing in common: the transformation of the American nation and its people. These included the "wall of separation" school prayer decisions of the 1960's, the pornography rulings of the 1970's, the creation of a new and heretofore unknown "right" to abortion with the Roe v. Wade decision of 1973, decisions upholding affirmative action and preferences, and the numerous "free speech" decisions of the 1970's through the 1990's many of which blurred the distinction between speech and obscenity and bizarre forms of "expression" such as flag burning, sacrilegious paintings and exotic dancing.

More recent examples of the high Court's decisions in the new mold include the 2003 decision upholding the Campaign Finance Reform Act which restricts political speech via campaign contributions and media ads during the sixty and thirty day periods before elections. Ironically, political speech was the very kind of core activity essential to a free society the First Amendment was intended to protect. There is also the much anticipated June 2004 decision on the retention of "under God" in the pledge of allegiance which sidestepped the issue and left the matter open to further litigation.

All these decisions created new national norms. These have come to be identified by several terms, but two of the most common are: "political correctness" and "diversity." The American people have never been given the opportunity to approve or adopt these new norms at the ballot box.

### ***The Unpredictable Nature of the New Rule of Law***

The constitutional framers were very careful to build in checks against the abuse of power by the various branches of government and meant to preclude the growth of power by the judicial branch and its

usurpation of the legislative function. They meant for people to have little to fear from the courts because they had only "moral" authority without the power of "the purse or the sword."

Indeed the Bill of Rights was adopted to satisfy critics of the new constitution in 1787 that it contained insufficient safeguards against the growth and abuse of federal executive power and a return to some form of monarchy. Ironically, it is this same Bill of Rights, and particularly the First Amendment, that has proven to be the greatest source of enlargement of federal judicial power and hence control over the lives of people. Not only this, but federal court rulings have become highly unpredictable, depending more and more on the ethnic, social, religious, and gender makeup of a particular bench and the perceived political loyalties of the judges that comprise it.

For most of the nation's history matters of morals, marriage and family were left almost entirely to the states. Under the well established meaning of federalism -- the division of powers between the federal government and the states-- the central government was not to intrude in these matters. Until the post WWII period it generally did not do so. However, this area of the law has undergone significant change and federal judicial intervention has grown dramatically. A singular example is the U.S. Supreme Court's decision upholding the right of the states to prohibit criminal sodomy in 1987 (*Bowers v. Hardwick*, 478 U.S. 186 (1986)) and then reversing itself in 2004 by denying them the right to do so (*Lawrence v. Texas*, 539 U.S. 558 (2003)). And now, because of the Massachusetts Supreme Court's decision on gay marriage, and the reliance of proponents of gay marriage on the "full faith and credit" clause of the federal constitution to implement this policy nationwide, the U.S. Supreme Court will no doubt be called upon to set national policy on marriage.

Intervention by the U.S. Supreme Court is almost certain to happen because of the pattern, established over several decades, of legislative bodies ducking hot button social issues and passing the buck to the courts. Case in point: the failure of the Senate vote on Wednesday, July 14, 2004 to advance a constitutional amendment on gay marriage. This outcome probably reflects the wishes of many senators that the whole matter would just go away. Unfortunately it will not. This sort of default by the national legislative branch is an illustration of the way judicial power continues to grow.

The founders did not anticipate that courts would become the branch of government most to blame for the erosion of basic freedoms and family values. Yet in many ways this is precisely what has happened. Those who wish to alter American society and family life in fundamental ways, such as legitimizing gay marriage, need not go through the democratic process of persuading a majority of their fellow citizens of the merits of their cause. All they need do now is persuade a few judges.

Imposing new social policies through court rulings leave those who desire to preserve traditional values and ways of life in America no alternative but the difficult and time consuming process of constitutional amendment. This completely reverses the burden of persuasion at the heart of the democratic process. It shifts it to those who do not want radical alteration of the society instead of resting it where it belongs, squarely on the shoulders of those who do. It substitutes compulsion for consent, one of the hallmarks of non-democratic societies where the few rule the many.

### ***Public Reception to the New Rule of Law***

The response to this gradual incorporation into the national consciousness of an alternative version of the rule of law described above has been twofold:

The first is what might be called pragmatic accommodation. This is characterized by attitudes that the

whole business of the rule of law is "no big deal" and we should "live and let live." Much of this comes from the basic American sense of fair play and tolerance. It shrugs off any alarm over the growing nature of judicial power as something that really won't change who or what we are as a nation or have any harmful impact on our national culture. The danger to this view is that it assumes it is possible to continue to accommodate that which is antagonistic to one's basic values and beliefs indefinitely, without consequence. All historical evidence is to the contrary.

The second is what might be termed an attitude of resignation or inevitability, that we cannot turn back the tide. This view proceeds from a sense of helplessness, that we can do nothing against the wave of moral drift and degeneration threatening to engulf us, except to hunker down and isolate ourselves in protective cultural cocoons. The experience of Ronald Reagan's presidency and how he was able to overcome similar challenges during the Cold War offers clear evidence to the contrary. It supplies hope that with valiant and determined leadership we can save ourselves and turn back the tide.

What is most disturbing about this now well established practice of the manipulation of the courts to bring about basic change in the society at large is that it violates both the spirit and design of the American constitutional system. It upends the American scheme of government by granting power to certain groups all out of proportion to their actual numbers. It allows them to hold the majority of the American people hostage until their lifestyle preferences and beliefs are legally incorporated into the national culture. Guaranteeing one the right to be heard and having one's ideas adopted are not the same thing.

What the constitutional framers called "factions" we call today group identity politics or special interests. These "factions" almost prevented the new nation from being born at the Constitutional Convention in 1787. They now threaten to destroy national unity. Our future course will be made manifest when the next Presidential appointment to the Supreme Court is made. The intense nature of the political power plays that it will engender will make the nature of the high stakes involved obvious to all.

Like so many things in America's polarized society today, everything boils down to political choices. Those who oppose activist judges who stretch and bend the historic rule of law will vote for candidates who promise to promote judicial restraint; those who like judges as ultimate policymakers because the legislative process takes too long will vote for candidates who promise more of the same.

The words of a former President of the United States in a time of serious national crisis are apt: "The candid citizen must confess that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers."-Abraham Lincoln, March 4, 1861.