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ESSAY

Albert Venn Dicey and the Principles of the Rule of Law: Is Justice Blind? A Comparative Analysis of the United States and Great Britain

MICHAEL L. PRINCIPE*

I. INTRODUCTION

Although law is a practical discipline, its cornerstone is the study of jurisprudence, or “the science of law.”¹ Jurisprudence, particularly the segment of jurisprudence entitled legal theory, defines, describes, and illuminates all individuals as social, political, and legal beings. This is true for proponents of Natural Law,² Legal Positivism,³ Dialectical Materialism,⁴ Formal

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1. Jurisprudence is defined as: “The science of law; the study of the structure of legal systems, i.e., of the form, as distinguished from the content, of systems of law” BARRON’S LAW DICTIONARY 276 (Steven H. Gifis ed., 4th ed. 1996).

2. Plato and Aristotle observed that natural law is a legal concept that explores “good” and “bad” laws and the appropriate reactions thereto—individuals can discover and appeal to natural law through rational observation. See HILAIRE MCCOUBREY & NIGEL D. WHITE, TEXTBOOK ON JURISPRUDENCE 57 (1993). John Finnis, a natural law theorist, contends that:

the classical naturalist argument does not improperly derive ‘ought’ propositions from the simple observation of human conduct, a descriptive ‘is’ proposition. [Finnis] argues instead that people understand their individual aspirations and nature from an ‘internal’ perspective and that from this there may be

Rationality,⁵ Sociological Jurisprudence,⁶ Legal Realism,⁷ Critical Legal Studies,⁸ or the Chicago School of Thought.⁹ Within the

extrapolated an understanding of the 'good life' for humanity in general. Thus a general 'good' may be derived from particular experiences or appreciations of 'good,' which is not to say that what people in fact want they always 'ought' to have.

Id. at 91. Plato and Aristotle made the most important contributions to classical Hellenistic legal theory. *See id.* at 57. Proponents of natural law include Plato, Aristotle, St. Augustine, St. Thomas Aquinas, John Locke, William Blackstone, Thomas Jefferson, and Dr. Martin Luther King, Jr. *See* Letter from Martin Luther King, Jr. to Bishop C. C. J. Carpenter et al. (April 16, 1963), in MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 77-100 (1963).

3. Beth Walston-Dunham elaborated on the theory of positivism in the following way: "the positivist theory . . . proposes that a government should have a single entity to determine what is right and wrong as a matter of law. The law cannot be questioned or challenged. If the law is violated, punishment will automatically follow." BETH WALSTON-DUNHAM, INTRODUCTION TO LAW 6 (2d. ed. 1994).

4. *See generally* HUGH COLLINS, MARXISM AND LAW (Raymond Williams & Steven Lukes eds., 1982) (discussing the theory of dialectical materialism). Karl Marx argued that an understanding of "historical materialism," which is a history of conflict wherein one class exploits another, is crucial to understanding history itself. As a result of this conflict, the class in power will ultimately ensure that the laws enacted maintain its economic domination. *See* MCCOUBREY & WHITE, *supra* note 2, at 106. As such, law is really just a form of class rule that political power sanctions. *See id.* at 106-107.

5. *See* MAX WEBER ON LAW IN ECONOMY AND SOCIETY (Max Rheinstein ed. & Edward Shils & Max Rheinstein trans., 1954). Max Weber distinguished legal systems on the basis of rational and irrational legal procedures and formal or substantive law. *See id.* at 224-255, 349-356. Modern western law is an example of formal rationality, in that the rules are logical and applied consistently and equally to all cases, without reference to moral, religious, or other normative criteria. *See id.* at 224-255.

6. *See* WALTER F. MURPHY & C. HERMAN PRITCHETT, COURTS, JUDGES AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 5 (4th ed. 1986). Founded by Roscoe Pound, the Sociological Jurisprudence movement focused on the relationship between society and the legal system. *See id.* Pound believed that if the law does not satisfy society's fundamental social needs, then the law cannot control society. *See id.* Eventually named Dean of Harvard Law School, Pound argued that legal professionals must expand their educational horizons beyond the study of legal rules and incorporate all social sciences into their thinking. *See id.*

7. *See id.* at 6. Dissidents, generally law professors, broke away from the sociological school and launched an attempt to broaden the scope of legal reasoning. *See id.* Rejecting the traditional emphasis on legal rules, they argued that the focus of legal study should be on the judicial decisions' effects on social behavior. *See id.* Karl Llewellyn was one of the most influential Realists. *See id.*

8. *See id.* at 7. Since its development via the efforts of law professors in the late 1960s, the Critical Legal Studies movement renewed the realist critique by proffering that laws are not neutral and independent. *See id.* Instead, the Critical Legal Studies movement argues that laws reflect and legitimize the values of society's dominant classes. *See id.* As such, personal bias and social context play important roles in legal reasoning. For a discussion of the Realists' critique of the manner in which judicial bodies reach their decisions, see MCCOUBREY & WHITE, *supra* note 2, at 187-188.

realm of legal theory, the Rule of Law has been one of the twentieth century's bedrock legal doctrines. The Rule of Law refers to various established legal principles imposing limitations on governmental authority.¹⁰ English legal scholar Albert Venn Dicey¹¹ defined the Rule of Law as follows:

[It] means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts . . . [and], lastly, . . . that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.¹²

Although the U.S. and Westminster¹³ Governments are founded on principles of democracy,¹⁴ the political reality is, unfortunately, that these authorities largely ignore Dicey's definition of the Rule of Law whenever they find it inconvenient.¹⁵ By examining recent examples wherein government authorities in the United States and Great Britain

The main concern of the realist movement was the desire to discover how judicial decisions were reached in reality, which involved a playing down of the role of established rules, or the 'law in books,' to discover the other factors that contributed towards a judicial decision, in order to discover the 'law in action.'

Id. at 188.

9. See David M. O'Brien, *Ginsberg and the Chicago School of Thought*, L.A. TIMES, Nov. 8, 1987, at V1. Philosophy "teaches that law is best understood in light of economic theories and basic techniques such as cost-benefit analysis. In other words, legal principles or rights should be applied, or eliminated, when costs outweigh benefits." *Id.*

10. See *supra* notes 2–8 (exploring the various legal principles).

11. Albert Venn Dicey was a Venerian Professor of English Law, Fellow of All Souls College at Oxford. See ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (10th ed. 1961).

12. *Id.* at 42.

13. See Explore Parliament, *Parliamentary Education Unit Homepage* (last modified Mar. 6, 2000) <<http://www.explore.parliament.uk/search/data/asp?r=352>> (explaining that the name "Westminster" is often used to refer to the central British Government because the Palace of Westminster was one of William the Conqueror's principle homes, and subsequent monarchs clustered their government institutions around the Westminster area).

14. See Hon. Lord Griffiths, *Judicial Independence Abroad—Controlling Britain's "Uncontrolled" Constitution*, JUDGES' J., Summer 1989, at 29, 39.

15. See *infra* Parts II–III.

ignored the legal limitations the Rule of Law imposes, this Essay proffers that authorities should either discard the Rule of Law altogether or begin living up to its standards.

II. GREAT BRITAIN AND PARLIAMENTARY SUPREMACY

Parliamentary supremacy is the basis of Great Britain's political system.¹⁶ According to Robert Francis Vere Heuston,¹⁷ the doctrine of parliamentary supremacy originated in Thomas Hobbes' political philosophy and was subsequently developed by Sir William Blackstone¹⁸ and Albert Venn Dicey.¹⁹ In Blackstone's *Commentaries on the Laws of England*,²⁰ which is one of the great treatises on law, he described the unlimited legislative authority of Parliament:

It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections. It can in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure too bold, the omnipotence of Parliament. True it is, that what the Parliament doth, no authority upon earth can undo.²¹

16. See *infra* note 21 and accompanying text (describing Parliament's unlimited legislative power).

17. R.F.V. Heuston was a fellow of Pembroke College at Oxford. See R.F.V. HEUSTON, *ESSAYS IN CONSTITUTIONAL LAW* (2d ed. 1964).

18. Sir William Blackstone was one of the founders of the English effort to establish the study of law as a university endeavor rather than an apprenticeship within the Inns of Court, which are:

ancient unincorporated bodies of lawyers which for five centuries and more have had the power to call to the Bar those of their members who have duly qualified for the rank or degree of Barrister-at-Law. With the power of call goes a power to disbar or otherwise punish for misconduct, a power which has had to be exercised only infrequently.

Online Law, Lawyers on the Web, *Law Search* (visited Feb. 18, 2000) <http://www.online-law.co.uk/bar/lincolns/history/inns_of_court.html>.

19. See DICEY, *supra* note 11, at 1.

20. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND BOOK THE FOURTH* (Univ. Chicago Press 1979) (1769).

21. DICEY, *supra* note 11, at 42 (quoting Blackstone). "Septennial" means "occurring, appearing, or being made, done, or acted upon every seven years; [especially] a seven year-term of office." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2070 (3d ed. 1986). "Triennial" means "continuing or having a term of three years." *Id.* at 2443.

Dicey further explained the nature of parliamentary supremacy in his work, *Introduction to the Study of the Law of the Constitution*.²² Dicey maintained that Parliament has “the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.”²³ Pursuant to Dicey’s definition, Parliament included the King, the House of Lords, and the House of Commons—described collectively as the King in Parliament.²⁴

Today, “Parliament” simply refers to the House of Commons.²⁵ Because of the powers Blackstone and Dicey described in the Westminster System,²⁶ Parliament has “no legal restrictions on the subject matter over which it may legislate.”²⁷ As a result, Parliament assumes the power to limit or even extinguish civil liberties whenever these rights conflict with the government’s interests.²⁸ Thus, “many people in the United Kingdom have come to believe that human rights are now much better protected in many foreign legal systems than they are in Britain.”²⁹

According to Professor of Jurisprudence and Law Ronald Dworkin,³⁰ rather than protecting the traditions of liberty that John Milton, John Locke, Thomas Paine, and John Stuart Mill inspired, “now Britain offers less formal legal protection to central freedoms than most of its neighbours in Europe.”³¹ Various criminal procedural protections, as well as the freedom of speech,

22. See DICEY, *supra* note 11, at 40 (explaining that no one truly has the power to override Parliament’s actions).

23. *Id.*

24. See *id.* at 39.

25. See Communications Directorate, United Kingdom Parliament, *United Kingdom Parliament*, House of Commons Section (last updated Feb. 10, 1998) <<http://www.parliament.uk/parliament/guide/commons.htm>>.

26. See *supra* text accompanying notes 21–24.

27. DAWN OLIVER, *GOVERNMENT IN THE UNITED KINGDOM* 148 (1991).

28. See *id.* (noting that limitations on civil liberties may be necessary to uphold legitimate government interests, such as national security, public morals, public safety, public order, or protection of the rights of others).

29. RODNEY BRAZIER, *CONSTITUTIONAL REFORM* 125 (1991).

30. Ronald Dworkin is a Professor of Jurisprudence at Oxford University and a Professor of Law at New York University School of Law. See New York University, *New York University Homepage*, Department of Philosophy Faculty & Staff Section, Ronald Dworkin (visited Feb. 17, 2000) <<http://www.nyu.edu/gsas/dept/philofaculty/dworkin/>>.

31. RONALD DWORKIN, *A BILL OF RIGHTS FOR BRITAIN* 1 (1990).

protest, and privacy, can all be sacrificed to satisfy the Westminster Government's whims.³² It is most distressing that the British Government often targets populations needing the most protection. The most disturbing government abuses involve: compromising immigrants' civil rights;³³ intimidating or censoring broadcasters and journalists;³⁴ invading individual privacy;³⁵ denying access to traditional public places for protest;³⁶ and curtailing basic protections for those detained for *suspected* involvement in the Irish Republican Army.³⁷ Perhaps the greatest indication that civil liberties are in jeopardy in Britain is the frequency with which civil liberties cases come before the

32. *See generally id.* at 1–9 (providing examples of the targets of the Westminster Government's abuses, such as: censorship and indiscriminate prosecution under the pretext of official secrecy; legally uncontrolled privacy invasion under the Interception of Communications Act, 1985 (Eng.); drastic limitations on the right to protest under the Public Order Act, 1986 (Eng.); and the erosion of certain criminal procedural safeguards under the Prevention of Terrorism Act, 1974 (Eng.)).

33. *See id.* at 1.

34. *See id.* at 3–4.

35. *See id.* at 5–6.

36. *See id.* at 6–7.

37. *See id.* at 7–9. The author noted that:

[t]he right to a fair trial was restricted in Northern Ireland. Jury trials were denied for offenses connected with political violence, the right to silence had been sharply curtailed and evidentiary rules permitted the admission of confessions that might have been obtained by abusive treatment in detention. Moreover, lawyers representing political suspects continued to be harassed and intimidated Detainees could still be interrogated for up to forty-eight hours without the right to consult a solicitor. Moreover, political suspects could be detained for up to seven days Questions continued to be raised about the investigation of killings by security forces, and decisions as to whether to prosecute were still shrouded in secrecy In the United Kingdom as a whole, serious curbs on free expression continued, made possible in part by the lack of written protection for individual liberties; the U.K. has no Bill of Rights.

HUMAN RIGHTS WATCH WORLD REPORT 249–250 (1994). Figures released by the Home Office show:

People of African and Caribbean descent are around five times more likely to [be] stopped and searched as white people. They also make up a higher proportion in prison than might be expected in the general population Nationally [blacks] . . . are five times more likely to be stopped than whites Black people make up 12% of the prison population compared with 2% of the population as a whole.

BBC Online Network, *Black People 'Singled Out' By the Law*, Dec. 8, 1998 (visited Jan. 19, 2000) <<http://news2.thls.bbc.co.uk/hi/english/uk/newsid%5F229000/229977.stm>>. *See also* Explore Parliament, *supra* note 13 (“The Home Office is the Government Department which looks after the police, prisons, the fire service and community relations among[] other things.”).

European Court of Human Rights in Strasbourg. Between 1965 and 1990, twice as many petitions were lodged against the United Kingdom, which lost more significant cases before the Court than did any other nation.³⁸

Although eminent constitutional scholar Professor C. Herman Pritchett stated that “a written constitution is not necessary to the protection of civil liberties,”³⁹ greater protections are indeed necessary because fewer constitutional checks and balances exist in the Westminster system than in other western democracies.⁴⁰ Consequently, Parliament is more vulnerable to executive and administrative influences.⁴¹ Under close inspection, these vulnerabilities are distinctly recognizable. For example, even though Parliament has supreme law-making powers,⁴² the executive branch invariably controls Parliament.⁴³ Moreover, because the executive branch exerts tremendous influence over Parliament, which is, for all intents and purposes, the highest court

38. See DWORKIN *supra* note 31, at 17.

39. C. HERMAN PRITCHETT, CONSTITUTIONAL CIVIL LIBERTIES 1 (1984).

According to Professor Pritchett, even:

the most elaborate safeguards in a written constitution will be meaningless unless the country to which they apply has a tradition that makes freedom a value of the highest order, and unless there are the resources, the opportunities, and the will to protect the principles of an open society from attack or frustration.

Id.

40. See Michael L. Principe, Essay, *Dicey Revisited: Great Britain Joins the Fray in Examining Individual Rights Protections in the Westminster System*, 12 WIS. INT'L L.J. 59, 63 (1993) (explaining that “there are fewer constitutional checks and balances in the Westminster system than in other western democracies . . .”).

41. See HUMAN RIGHTS COMMISSION, A GUIDE TO THE PROPOSED BILL OF RIGHTS IN QUESTIONS AND ANSWER FORM 6 (1986).

42. See Griffiths, *supra* note 14, at 34. According to Lord Griffiths:

One aspect of this doctrine is the rule that there are no legal limitations upon the legislative competence of Parliament; the power to legislate on any matter whatsoever is vested in Parliament and there exists no competing authority with power either to legislate for the United Kingdom or to impose limits upon the legislative competence of Parliament.

Id. See also HON. GEOFFREY PALMER, A BILL OF RIGHTS FOR NEW ZEALAND: A WHITE PAPER 25 (1985).

43. See PALMER, *supra* note 42, at 25. Palmer notes that the “law and convention of the [C]onstitution gives the Executive, through Parliament, very wide powers, possibly unrestrained by law, to take away our most precious rights and freedoms.” *Id.* The Prime Minister, as head of the executive branch, is also the leader of the majority party in Parliament; therefore, he or she indirectly controls Parliament.

in the land,⁴⁴ the Westminster Government maintains almost unlimited power.

The lack of procedural safeguards inherent in parliamentary supremacy, together with the various substantive abuses the government levies against political minorities,⁴⁵ make it absolutely necessary to implement systemic changes to bring the United Kingdom within the boundaries of Dicey's definition of the Rule of Law. Over the past few decades, the U.K. Government has significantly abused its discretionary authority by arbitrarily subjecting certain classes of individuals to unequal treatment.⁴⁶ The U.K. Government's capricious actions clearly violate Dicey's definition of the Rule of Law and these actions should no longer be tolerated.

Recent developments in British jurisprudence may alleviate this dilemma. In addition to the United Kingdom's membership in the European Community,⁴⁷ the U.K. Parliament passed its own Human Rights Act on November 9, 1998.⁴⁸ Hailed as one of the

44. See Griffiths, *supra* note 42, at 34. According to Lord Griffiths:

It follows from th[e] doctrine [of parliamentary supremacy] that the courts cannot find an Act of Parliament to be ultra vires. The legal rule governing the relationship between the courts and the legislature is that the courts are under a duty to apply the legislation made by Parliament and may not hold an Act of Parliament to be invalid or unconstitutional. Consequently, where common law and statute law conflict the latter prevails. A Judge cannot refuse to apply an Act of Parliament on the ground that it is contrary to a fundamental principle of the common law, or that common law development has rendered the statute obsolete. On the other hand, Parliament can abolish well-established rules of common law, and quite frequently does . . .

Id.

45. See *supra* notes 33–37 and accompanying text.

46. See *supra* notes 33–37 (citing examples of the U.K. Government's abuses of power, violations of the Rule of Law, and subsequent violations of individual rights).

47. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter *European Convention on Human Rights*]. See also Sir David Williams, *Constitutional Issues Facing the United Kingdom*, 30 L. LIBR. 13, 17 (1999). According to Professor Williams, in the European Union "it has become more and more recogni[z]ed that the House of Lords, through the process of '[m]isapplying' British statutes deemed to be at odds with Community law, has come perilously close to striking down statutes." *Id.* "British membership of the European Union has 'blown a hole through the middle of Dicey's doctrine of parliamentary sovereignty.'" *Id.* (paraphrasing *Why Britain Needs a Bill of Rights*, *ECONOMIST*, Oct. 21, 1995, at 64, 65 ("An effective bill of rights would, indeed, be an infringement of parliamentary sovereignty . . .")).

48. Human Rights Act, 1998, ch. 42 (Eng.) [hereinafter *Human Rights Act*], reprinted in 7 HALSBURY'S STATUTES OF ENGLAND AND WALES 492–531 (Andrew Davies, et al. eds., 4th ed. 1999) [hereinafter *HALSBURY'S STATUTES*].

most important constitutional reforms in decades,⁴⁹ the Human Rights Act incorporates much of the European Convention on Human Rights into domestic law.⁵⁰ This enables British courts to apply the Convention's provisions without inconveniently forcing citizens to travel to Strasbourg to obtain judicial protection against human rights violations.⁵¹ Unfortunately, the Human Rights Act "restricts the courts to declarations of incompatibility with the Convention (allowing Ministers to take appropriate, fast-track legislative remedies) rather than allow the courts directly to strike down incompatible legislation emanating from Westminster."⁵²

Although British Government Home Office Minister Lord Williams stated that, the Human Rights Act "maintains the absolute sovereignty of parliament,"⁵³ the Government must change the way it arbitrarily deals with political minorities. If it does not, the European Court of Human Rights, as the ultimate appellate court, may continue to find itself devoting a significant portion of its workload to resolving civil rights disputes between

49. See Steven Greer, *A Guide to the Human Rights Act 1998*, 24 EUR. L. REV. 3, 3 (1999). See also BBC Online Network, *UK Politics: Human Rights Bill Becomes Law* (visited Jan. 27, 2000) <<http://news2.thls.bbc.co.uk/hi/english/uk%5Fpolitics/newsid%5F210000/210639.stm>> [hereinafter *Human Rights Bill Becomes Law*].

50. See Human Rights Act note (General Note), reprinted in HALSBURY'S STATUTES, *supra* note 48, at 499 (providing for incorporation of the articles of the European Convention on Human Rights into domestic law).

Section 1(1) defines the scope of the legislation by establishing "the Convention rights," which include: Articles 2 to 12 and 14 of the European Convention on Human Rights, Articles 1 to 3 of the First Protocol, and Articles 1 and 2 of the Sixth Protocol, all of which are to be read with Articles 16 to 18 of the Convention. See Human Rights Act, ch. 42, § 1(1), reprinted in HALSBURY'S STATUTES, *supra* note 48, at 499. Specific rights incorporated include the right to life; the right to not be subjected to torture, inhuman or degrading treatment, or punishment; the right to liberty and personal security; the right to a fair trial; the right to not be punished, without justification, under national or international law; the right to respect for private and family life, home, and correspondence; the right to freedom of thought, conscience, and religion; the right to freedom of expression; the right to freedom of assembly and association; the right to enjoy all the rights and freedoms set forth in the Convention without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status; and the right to peaceful enjoyment of property. See Human Rights Act, ch. 42, § 12; pt. I, arts. 2–18, reprinted in HALSBURY'S STATUTES, *supra* note 48, at 510–511, 522–525.

51. See Human Rights Act, ch. 42, §§ 4–5, reprinted in HALSBURY'S STATUTES, *supra* note 48, at 502–503 (providing that the court may determine whether legislation is compatible with the European Convention on Human Rights and the rights protected thereunder).

52. Williams, *supra* note 47, at 17.

53. *Human Rights Bill Becomes Law*, *supra* note 49, para. 9.

the British Government and its citizens. The Government should realize that Britain's participation in the European Community limits parliamentary supremacy because potential complainants can now report violations of their liberty interests protected under the European Convention to the European Court of Human Rights.⁵⁴ The British Government has a strong interest in having domestic judges strike down British laws, rather than having foreign judges declare those laws incompatible with the Convention. For this reason, some British scholars suggest that, despite consistent rejection of the concept of judicial review in the past, "[t]he cumulative impact of the changes, however, may well lead to an assumption of judicial review akin to that in *Marbury v. Madison*"⁵⁵

III. THE UNITED STATES AND JUDICIAL REVIEW

In *The Federalist No. 78*, Alexander Hamilton provided the classic argument for judicial review.⁵⁶ Hamilton argued that the U.S. Constitution is a fundamental law and therefore, it is the judiciary's responsibility to ascertain its meaning and reconcile variances with legislative acts.⁵⁷ Judicial review authorizes courts

54. See European Convention on Human Rights arts. 25–28, *supra* note 47, at 236–240. According to the terms of the Convention, however, a petitioner must first exhaust all domestic remedies before petitioning the European Court of Human Rights. See *id.* art. 26, *supra* note 47, at 238.

55. Williams, *supra* note 47, at 17 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

56. See MURPHY & PRITCHETT, *supra* note 6, at 15–16 (referring to THE FEDERALIST NO. 78 (Alexander Hamilton)). See also THE FEDERALIST NO. 78 (Alexander Hamilton), reprinted in III THE ESSENTIAL FEDERALIST 143–149 (Quentin P. Taylor ed., 1998).

57. See MURPHY & PRITCHETT, *supra* note 6, at 15–16. According to Hamilton: It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes stands in

to review actions of the executive and legislative branches and declare these actions invalid if they violate the U.S. Constitution.⁵⁸ Although the U.S. Constitution neither expressly prohibits nor provides for judicial review, judges have routinely exercised this power ever since Chief Justice John Marshall established it in *Marbury*.⁵⁹

The U.S. Supreme Court's interpretations of the Bill of Rights,⁶⁰ dramatically expanded individual civil liberties.⁶¹ Interestingly, the Constitution's framers initially declined to include a bill of rights in the Constitution because they argued that to do so "would be an even greater threat to liberty."⁶² As the ratification process unfolded, however, it became apparent that people were dissatisfied with the lack of individual protections against governmental intrusions.⁶³ Therefore, some states conditioned their ratification on the promise that civil liberty protections would be quickly incorporated into the Constitution.⁶⁴

At this point, Thomas Jefferson, a staunch supporter of a bill of rights, exchanged a series of letters with James Madison

opposition to that of the people declared in the Constitution, the judges ought to be governed by the latter rather than the former.

THE FEDERALIST NO. 78 (Alexander Hamilton), *reprinted in* III THE ESSENTIAL FEDERALIST, *supra* note 56, at 145.

58. *See generally* *Marbury*, 5 U.S. (1 Cranch) at 177–178 (shaping the principle of judicial review).

59. *See* Williams, *supra* note 47, at 17 (quoting Chief Justice Marshall on the importance of judicial review affecting framers' intent).

60. U.S. CONST. amends. I–X.

61. *See infra* notes 71–75 and accompanying text. *See also, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 344–355 (1963) (holding that a criminal defendant has a Sixth Amendment right to assistance of counsel in state, as well as federal, proceedings); Mapp v. Ohio, 367 U.S. 643, 660 (1961) (holding that the right to privacy embodied in the Fourth Amendment is enforceable against the states, and therefore, an individual should be free from invasions of privacy by state officers conducting unlawful searches); Miranda v. Arizona, 384 U.S. 436, 444–445, 499 (1966) (holding that the Fifth Amendment privilege against compelled self-incrimination applies when an accused is subject to custodial interrogation); Griswold v. Connecticut, 381 U.S. 479, 485–486 (1965) (holding that the right to privacy includes the right to purchase and use contraceptives).

62. ARCHIBALD COX, THE COURT AND THE CONSTITUTION 38 (1987). The framers believed that the powers they granted to the federal government were very limited. *See id.* They also believed that confining Congress' authority to exercising its delegated powers only would eliminate threats to fundamental rights. *See id.* The framers feared that including a bill of rights would have suggested loose construction of the delegated powers, which could have opened up great potential for trouncing on individual liberties. *See id.*

63. *See* PRITCHETT, *supra* note 39, at 2.

64. *See id.*

attempting to convince Madison of the need for such individual protection.⁶⁵ In one letter, Jefferson wrote, "Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference."⁶⁶ Although not necessarily opposed to a bill of rights, Madison never believed that the omission of a bill of rights from the U.S. Constitution was "a material defect."⁶⁷ Nevertheless, Jefferson convinced Madison of the need for a bill of rights by addressing the positive and negative aspects thereof.⁶⁸ Thereafter, Madison proposed the first ten amendments to the House of Representatives,⁶⁹ and the states eventually ratified the Bill of Rights on December 15, 1791.⁷⁰

Perhaps the clearest example of the U.S. Supreme Court's assumption of power is its interpretation of the Fourteenth Amendment as incorporating the Bill of Rights so it applies to the states.⁷¹ Although the Due Process Clause of the Fourteenth

65. See *infra* notes 66–68 and accompanying text.

66. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in *FREE GOVERNMENT IN THE MAKING: READINGS IN AMERICAN POLITICAL THOUGHT* 285 (Alpheus Mason & Gordon E. Baker eds., 4th ed. 1985) [hereinafter *FREE GOVERNMENT IN THE MAKING*].

67. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788) in *FREE GOVERNMENT IN THE MAKING*, *supra* note 66, at 286.

68. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789) in *FREE GOVERNMENT IN THE MAKING*, *supra* note 66, at 290. Jefferson wrote:

There is a remarkable difference between the characters of the inconveniences which attend a Declaration of rights, and those which attend the want of it. The inconveniences of the Declaration are that it may cramp government in it's [sic] useful exertions. But the evil of this is shortlived, moderate, and reparable. The inconveniences of the want of a Declaration are permanent, afflicting and irreparable: they are in constant progression from bad to worse. The executive in our governments is not the sole, it is scarcely the principal object of my jealousy. The tyranny of the legislatures is the most formidable dread at present, and will be for long years.

Id.

69. See Herbert J. Storing, *The Constitution and the Bill of Rights*, in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* 32, 34–35 (M. Judd Harmon ed. 1978). Interestingly, Madison would have liked certain rights extended to the states; however, because a consensus could not be reached during this Congress, the matter of incorporating the Bill of Rights so it applies to the states remained dormant until a century and a half later. See *FREE GOVERNMENT IN THE MAKING*, *supra* note 66, at 281–282 (discussing Madison's proposed amendments and his objection, with which a majority of the framers agreed, to the insertion of word "expressly" before the word "delegated" in the Tenth Amendment's reference to the powers reserved to the states).

70. See PRITCHETT, *supra* note 39, at 3.

71. See, e.g., *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241

Amendment⁷² was initially interpreted as protecting only economic freedoms and property rights against state action,⁷³ beginning with *Gilow v. New York*,⁷⁴ the Court gradually interpreted the Fourteenth Amendment as applying most of the Bills of Rights provisions to the states—in that those rights that are fundamental to individual liberty apply to the states via the Fourteenth Amendment.⁷⁵ Thus, not only did the Supreme Court exercise powers of judicial independence never before utilized in judicial history, it expanded civil liberties far beyond what the framers imagined.

Despite this progress in protecting individual rights, the United States has a woeful history of arbitrarily subjecting political minorities to discretionary governmental power.⁷⁶ Whether the subject matter is race, gender, national origin,

(1897) (holding that the taking of property “for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the [F]ourteenth [A]mendment”). *See also* *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding that a defendant accused under Louisiana law of simple battery was entitled, under the Sixth and Fourteenth Amendments, to a jury trial).

72. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

73. *See* PRITCHETT, *supra* note 39, at 19. According to Pritchett, “since the 1870s the Court had been interpreting the [D]ue [P]rocess [C]lause of the Fourteenth Amendment to protect economic freedoms and property rights against state action, and it had shown no hesitation to strike down state legislation on what came to be known as ‘substantive due process’ grounds.” *Id.* Furthermore, “[i]t is rather anomalous that the Fourteenth Amendment for a half century after its adoption should have been of very little value to the blacks in whose behalf it was primarily adopted, while it should so quickly have been accepted by the Court as a protector of corporate rights.” *Id.* at 298.

74. 268 U.S. 652, 664–666 (1925) (discussing the incorporation doctrine, which assumes that certain amendments apply to the states by way of the Fourteenth Amendment Due Process Clause). *See also* PRITCHETT, *supra* note 39, at 20, noting that:

In the course of upholding the conviction of a prominent Communist under the New York criminal anarchy statute, Justice Sanford for the conservative Court made this astounding concession: ‘We may and do assume that freedom of speech and of the press . . . are among the fundamental rights and ‘liberties’ protected . . . from impairment by the States.’ This issue had not been argued before the Court, and the holding was unnecessary to the decision of the *Gilow* case. It was in this offhand manner that the historic decision was made enormously enlarging the coverage of the First Amendment and the jurisdiction of the Supreme Court to guarantee the freedom of speech and press against state or local action as well as against Congress.

Id.

75. *See* COX, *supra* note 62, at 182.

76. *See infra* notes 79–80 and accompanying text (discussing government violations of rules of law detrimentally affecting various groups and ideologies).

religion, sexual preference, or political ideology, the U.S. Government finds ways to violate the Rule of Law to protect its own political priorities.⁷⁷ Issues involving race—which are apparent in every area of life—test the Rule of Law most severely. Historical and contemporary examples of governmental violations of the Rule of Law on the basis of race include: the U.S. Border Patrol's human rights abuses along the U.S./Mexico border;⁷⁸ the first ninety years of the U.S. Supreme Court's interpretation of the Equal Protection Clause;⁷⁹ discrimination in voting;⁸⁰ police use of deadly force;⁸¹ U.S. federal criminal court sentencing;⁸² and racial disparities in capital punishment sentencing.⁸³

77. *See id.*

78. *See* HUMAN RIGHTS WATCH WORLD REPORT, *supra* note 37, at 344–345 (“Documented abuses included numerous beatings, sexual assault, arbitrary detention, unjustified shootings, and murder Those vulnerable to mistreatment included undocumented immigrants, refugees, U.S. citizens and legal residents Racially motivated verbal abuse by immigration law enforcement agents was also extremely common”). The U.S. Border Patrol of the Immigration and Naturalization Service, an executive agency, was purportedly responsible for these abuses. *See id.* at 344.

79. *See* PRITCHETT, *supra* note 39, at 315 n.5 (noting that of 554 U.S. Supreme Court decisions prior to 1960 involving the Equal Protection Clause, “426 (77%) dealt with legislation affecting economic interests, while only 78 (14%) concerned state laws alleged to impose racial discrimination or acts of Congress designed to stop it . . .”).

80. *See id.* at 340–342. A “grandfather clause” is a provision “allowing persons, engaged in a certain business before the passage of an act regulating that business, to receive a license or prerogative without meeting all the criteria that new entrants into the field would have to fulfill.” BARRON'S LAW DICTIONARY, *supra* note 1, at 222. Grandfather clauses were used to institute race discrimination in voting. *See* PRITCHETT, *supra* note 39, at 340 (describing a 1915 grandfather clause imposing a literacy test for voting but exempting individuals whose ancestors were entitled to vote prior to enactment of the Fifteenth Amendment—thereby preventing minorities from voting). The “poll tax” was another device used for similar purposes. *See id.* at 340–341. A “poll tax” is a “capitation tax; a ‘tax of a fixed amount upon all the persons, or upon all the persons of a certain class, resident within a specified territory’” BARRON'S LAW DICTIONARY, *supra* note 1, at 377. Around 1900, payment of a poll tax was a prerequisite to exercising the right to vote in many states. *See* PRITCHETT, *supra* note 39, at 340. Although the amount of money was small to some, it was a large amount to many, especially racial minorities who were generally indigent. *See id.* Prospective voters were also required to pass literacy tests before registering to vote. *See id.* at 341–342.

81. *See* JOHN KAPLAN & JEROME SKOLNICK, CRIMINAL JUSTICE: INTRODUCTORY CASES AND MATERIALS 207 (4th ed. 1987). A study of fifty U.S. cities by the nonprofit Crime Control Institute evidenced a decline in the number of people police officers killed between 1971 (353 citizens killed) and 1984 (172 people killed). *See id.*

The report explained the reduction by stating ‘[a] substantial portion of the overall decline’ was due to lower rates of police killing blacks The ratio of blacks to whites killed dropped from 7 to 1 in 1971, to 2.5 to 1 in 1978. The study said a 39 percent drop in all killings from 358 in 1971 to 214 in 1978 ‘may have been due almost entirely to fewer black people killed.’

If, as Professors Walter F. Murphy and C. Herman Pritchett argue, “a written constitution is an effort to establish a Rule of Law by marking some of the outer limits of public authority and by making some choices among fundamental values,”⁸⁴ then it is up to the various governmental branches to insure that all individuals are treated equally within those limits. As illustrated in this Essay, the executive, legislative, and judicial branches of both the federal and state governments in the United States have yet to successfully provide such insurance.⁸⁵

IV. CONCLUSION

The Rule of Law is a noble set of principles, according to which, regardless of racial, gender, educational, or economic differences, the government treats each individual equally and fairly.⁸⁶ If respected by government, the Rule of Law inspires loyalty among citizens. By observing the Rule of Law, a nation demonstrates that it values individuals and their importance. Conversely, by ignoring the Rule of Law, a nation acts arbitrarily, capriciously, and discriminatorily and illustrates that race, gender, wealth, and power are the values most important to the regime. In the end, ignoring the Rule of Law produces an elitist society.

Both the United Kingdom and the United States presumably recognize the Rule of Law. An Englishman, Albert Venn Dicey,

Id.

82. See Laura Frank, *Blacks Get Stiffer Sentences*, USA TODAY, Sept. 25, 1995, at 3A. Although the sentencing controls the U.S. Sentencing Commission created were developed to guarantee equality in federal criminal sentencing, a 1995 investigation discovered that, on average, blacks receive ten percent longer sentences than do whites for similar crimes. See *id.* In fact, in some federal districts, this discrepancy was as great as forty percent. See *id.*

83. See KAPLAN & SKOLNICK, *supra* note 81, at 635–636. In a 1984 report of the racial patterns in capital sentencing in Georgia, Florida, and Illinois, Samuel R. Gross and Robert Mauro found “when we control for the race of the victim, blacks who killed whites were several times more likely to be sentenced to death than whites who killed whites in each state.” *Id.* at 636. For example, in Georgia, 20.1% (32/159) of those blacks who killed whites were sentenced to death, while only 5.7% (35/614) of those whites who killed whites were similarly sentenced. See *id.* Of those blacks who killed blacks, 0.8% (11/1310) were sentenced to death, while 2.9% (1/34) of those whites who killed blacks were sentenced to die. See *id.*

84. MURPHY & PRITCHETT, *supra* note 6, at 601.

85. See *supra* notes 78–83 and accompanying text (providing specific instances of when the executive, legislative and judicial branches failed to provide such assurances).

86. For Dicey’s definition of the Rule of Law, see *supra* text accompanying note 12.

elaborated on the value of the Rule of Law,⁸⁷ and the framers of the U.S. Constitution attempted to incorporate it into the Constitution's governmental framework by expressly limiting the government's powers.⁸⁸ Problems arise when governments conveniently ignore the Rule of Law when it conflicts with their political whims.

Fortunately, a variety of factors currently force the United Kingdom⁸⁹ and the United States⁹⁰ to re-examine the Rule of Law and its principles. The U.S. constitutional system, which provides for judicial review of government action, seemingly gives the United States an advantage in the struggle to protect human rights. Yet, even with this advantage, the United States continues

87. See *supra* text accompanying note 12.

88. See *supra* notes 60–70 and accompanying text (discussing the Bill of Rights' proposal and ratification).

89. In addition to its experiences with the European Court of Human Rights and the European Economic Community, the United Kingdom faced a decade of intense pressure from a number of organizations calling for radical change in its political system. See Anthony Lester, *A Bill of Rights for Britain* (visited Jan. 1, 2000) <<http://www.charter88.org.uk/pubs/manpaps/lester.html>>. For example, in a 1991 Mori Poll, seventy-nine percent of the individuals polled favored a bill of rights and felt that "their rights would be most effectively protected if they were written down in a single document." Patrick Dunleavy & Stuart Weir, *They Want to See it in Writing: Patrick Dunleavy and Stuart Weir Continue Out Series on Constitutional Reform with an Examination of Poll Findings Regarding a 'Bill of Rights,'* INDEPENDENT (London), Oct. 2, 1991, at 21.

90. "While leaders and pundits talk of full employment, inner city unemployment is at crisis levels," said the Milton S. Eisenhower Foundation. "The rich are getting richer, the poor are getting poorer, and minorities are suffering disproportionately." Deb Riechmann, *Study Says Racial, Economic Divide Widening*, SANTA BARBARA NEWS-PRESS, Mar. 1, 1998, at A6. "From 1990 to 1997, California added 2.2 million Hispanics, raising its total to 9.9 million and solidifying its position as home to the nation's largest Hispanic population. By 2009, Hispanics are expected to outnumber blacks nationwide." Larry Wheeler, *Hispanic Gains*, USA TODAY, Sept. 4, 1998, at 5A. Despite the fact that the disparity between men's and women's wages has narrowed in the 35 years since President Kennedy signed the Equal Pay Act, a Council of Economic Advisers study showed women still only "make 75 cents for every \$1 earned by a man." Susan Page, *Study: Women Make 75 Cents for Every \$1 a Man Earns*, USA TODAY, June 11, 1998, at 9A. A study Nobel Laureate Economist Robert Solow oversaw showed that, although 13.2% of all white children lived in poverty, 39.9% of all Hispanic children and 46.6% of all black children also lived in poverty. See Patricia Edmonds, *The Bottom Line of Poverty: New Study Says it Costs Billions*, USA TODAY, Nov. 16, 1994, at 3A fig. Because poverty results in greater health problems, slower educational development, and increasing odds of abuse, neglect, delinquency, and crime, the study estimated that the country "loses \$36 billion in future worker productivity" yearly. *Id.* at 3A. As Professor Solow stated, "This report provides evidence, possibly for the first time, that we can save money by reducing child poverty." *Id.*

to flagrantly disregard the principles of the Rule of Law. As for the United Kingdom, despite protests to the contrary,⁹¹ recent developments dramatically weaken parliamentary supremacy.⁹² What remains to be seen is whether the government will allow the judiciary to perform its task of protecting civil liberties.

“Not since Dicey spoke for himself has there been such a determined effort to reconcile his ideas of the Rule of Law with his central doctrine of Parliamentary Sovereignty.”⁹³ Hopefully, both nations will begin observing the principles of the Rule of Law without reservation, thereby expressing that they value individuals. If not, then perhaps the principles should be discarded as relics of a bygone era.

91. *See supra* notes 47–55 and accompanying text.

92. *See supra id.* (referring to Great Britain’s membership in the European Community and the possible deteriorating effects that the membership has on the U.K. Parliament’s supremacy).

93. Williams, *supra* note 47, at 17.

