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American Minute with Bill Federer

Thomas Cooley, President of American Bar Association, 1893: on Religion, 2nd Amendment, Local Control of Government, O.W. Holmes, Jr.

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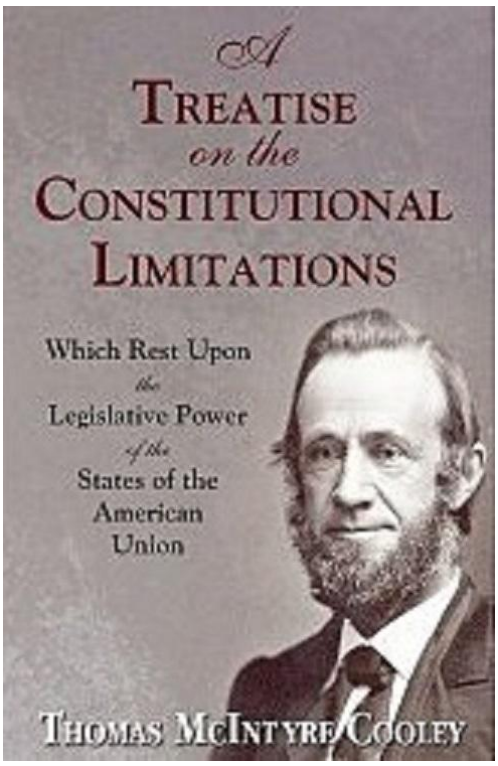

The dean of the University of Michigan Law School was **Thomas McIntyre Cooley,** who died September 12, 1898.

Thomas M. Cooley was:

- **Chief Justice of Michigan's Supreme Court** (1864-1885),
- **President of the American Bar Association** (1893-1894), and
- the **first Chairman of the Interstate Commerce Commission** (1887) ...
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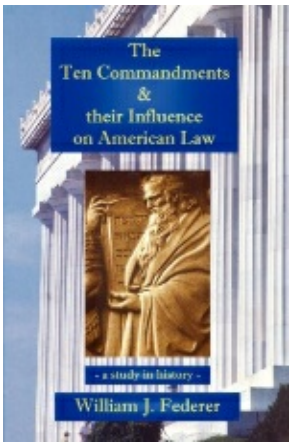


Ten Commandments and their Influence on American Law

Thomas Cooley's commentaries were influential in

shaping American law.

He declined offers to teach at:

- Hastings College of Law,
- University of Texas,
- Johns Hopkins University,
- Boston Law School,
- University of Pennsylvania and
- Cornell Law School.

In ***Constitutional Limitations,*** 8th Edition, Volume 2, p. 966, 974, Thomas Cooley stated:

"While thus careful to establish, protect, and **defend religious freedom and equality,**

the American constitutions contain no provisions which prohibit the authorities from such **solemn recognition of a superintending Providence** in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings ..."

Cooley continued:

"Whatever may be the shades of religious belief, **all must acknowledge** the fitness of recognizing in important human affairs **the superintending care and control of the great Governor of the Universe,** and of **acknowledging with thanksgiving His boundless favors,** of **bowing in contrition when visited with the penalties of His broken laws."**

In his ***General Principles of Constitutional Law,*** 1890, **Thomas Cooley** wrote:

"It was **never intended by the Constitution** that the **government** should be **prohibited** from **recognizing religion,** or that religious worship should never be

provided for in cases where **a proper recognition of Divine Providence in the working of government** might seem to require it, and where it might be done without drawing an invidious distinction between religious beliefs, organizations, or sects ..."

Cooley continued:

"The Christian religion was **always recognized in the administration of the common law of the land,** the **fundamental principles of that religion must continue to be recognized** in the same cases and **to the same extent as formerly."**

The **American Bar Association** acknowledged the **historic attitude** toward the **Christian religion.**

James H. Landman, director of community programs for the **American Bar Association Division for Public Education in Chicago,** wrote in "Trying Beliefs: The Law of Cultural Orthodoxy and Dissent" *(Insights on Law and Society,* American Bar Association Division for Public Education, Winter 2002, Vol. 2, No. 2):

"For **most of our history,** the **majority of Americans** have practiced some form of **Christian Protestantism ...**

In 1925 ... **public schools** ... still played a significant role in inculcating **Anglo-Protestant moral values."**

Modern day constitutional law scholar **Edward S. Corwin** wrote how the views of **Justice Joseph Story and Thomas Cooley** were similar regarding the First Amendment, in *The Constitution and What it Means Today,* 14th Ed. (1978, Harold W. Chase and Craig R. Ducat, Eds., at p. 246, n.1.):

"Justice Story believed the **United States Congress was still free to prefer the Christian religion over other religions, in contrast to modern Constitutional**

law and interpretation ... is also **supported by Cooley** in his *Principles of Constitutional Law,* where it is said that the clause forbids 'the setting up of recognition of a state church of special favors and advantages which are denied to others.'"

A change began to occur in the interpretation of constitutional law in the late 1800s.

In 1890, Harvard Law School Dean **Christopher Columbus Langdell** pioneered a novel technique of **applying Darwin's theory of evolution** to the **legal process** with his innovative **"case precedent" method** of practicing law.

No other law school at the time taught this.

Evolutionary law, also called **"legal realism,"** grew in its acceptance, especially in 1902 when Harvard graduate **Oliver Wendell Holmes, Jr.,** was put on the Supreme Court.

As described by his biographer in *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes* (1991), **Holmes'** theory of **"legal realism":**

"... shook the little world of lawyers and judges who had been raised on Blackstone's theory that **the law, given by God Himself,** was immutable and eternal and judges had only to discover its contents.

It took some years for them to come around to the **view that the law was flexible,** responsive to **changing social and economic climates ...**

Holmes had ... **broken new intellectual trails ...** demonstrating that the corpus of **the law was neither** ukase (an edict) **from God** nor derived from Nature, but ... was **a constantly evolving thing,** a response to the continually developing social and economic

environment."

Allen Mendenhall wrote in ***Oliver Wendell Holmes Jr. and the Darwinian Common Law Paradigm*** *(European Journal of Pragmatism and American Philosophy,* VII-2, 2015):

"He **pushed American jurisprudence away from the Blackstonian conception of the common law** that had appealed to the **founding generation** ...

Holmes admired Sir Frederick Pollock, his British pen pal and a popular jurist, and **Pollock admired Darwin** and modeled his jurisprudence on **evolutionary theory** ...

Holmes presented the **common law as evolutionary** rather than static."

Mendenhall explained further:

"Frederic R. Kellogg (in *Oliver Wendell Holmes, Jr., Legal Theory, and Judicial Restraint,* Cambridge University Press, 2007) picks up on **Holmes's Darwin connection** and calls attention to the pragmatic qualities of **Holmes's evolutionary common-law theories."**

Mendenhall added:

"Holmes sought to incorporate the latest science into his jurisprudence ... by using the **new biological and anthropological materials on evolution** that the **Darwinian revolution** in thought was providing' ...

Holmes's apparent Darwinism dovetailed with pragmatism. His **jurisprudence** has been called **'evolutionary pragmatism.'"**

Justice Oliver Wendell Holmes, Jr., demonstrated his **callous pragmatism** in the ***1927 Buck v. Bell decision,***

which allowed the government to forcibly **sterilize people without their knowledge or consent,** writing:

"Three generations of imbeciles are enough."

Because of Holmes' decision, Virginia **sterilized** more than 8,000 people until the practice was finally stopped.

At the Nuremberg Trials, 1945-1946, Nazi officers cited **Holmes'** ***Buck v. Bell*** **decision** in their defense of **killing of millions of Jews** who, in their twisted views, they considered inferior.

Holmes' novel views were not readily accepted.

American Bar Association president Frank J. Hogan stated in 1939:

"If the Constitution is to be construed to mean what the majority at any given period in history wish the Constitution to mean, **why [have] a written Constitution?"**

U.S. Supreme Court stated in *Westbrook v. Mihaly* (2 C3d 756):

"Constitutional rights may not be infringed simply because the majority of the people choose that they be."

Supreme Court Justices began to divide into two general categories:

1) those who hold that the Constitution should maintain the **original meaning** of those who wrote it and only changed through the Amendment process; and

2) those who hold that Justices can evolve the Constitution to have new meanings at their discretion.

U.S. Attorney General William Barr stated at Notre

Dame University, October 11, 2019

"By and large, the **Founding generation's** view of human nature was drawn from the classical **Christian tradition** ...

Modern secularists dismiss this idea of morality as other-worldly superstition imposed by a kill-joy clergy.

In fact, **Judeo-Christian moral standards** are the ultimate utilitarian **rules for human conduct ...** They are like **God's instruction manual** for the best running of man and human society ..."

Barr added:

"Violations of these **moral laws** have **bad, real-world consequences** for man and society. We may not pay the price immediately, but **over time the harm is real ...**

I think we all recognize that over the past 50 years **religion** has been **under increasing attack.**

On the one hand, we have seen the **steady erosion of our traditional Judeo-Christian moral system** and a comprehensive effort to **drive it from the public square.**

On the other hand, we see the **growing ascendancy of secularism** and the doctrine of **moral relativism.** By any honest assessment, the consequences of this moral upheaval have been grim ..."

Barr added:

"Law is being used as a **battering ram** to **break down traditional moral values** and to establish **moral relativism** as a new orthodoxy.

Law is being used as **weapon** in a couple of ways.

First, either through legislation but more frequently **through judicial interpretation, secularists** have been continually seeking to eliminate laws that reflect **traditional moral norms.**

At first, this involved rolling back laws that prohibited certain kinds of conduct. Thus, the watershed decision **legalizing abortion.** And since then, the **legalization of euthanasia** ...

More recently, we have seen the **law used aggressively to force religious people** and entities to subscribe to practices and policies that are **antithetical to their faith.**

The problem is not that religion is being forced on others. The problem is that **irreligion and secular values are being forced on people of faith** ...

... This reminds me of how some **Roman emperors** could not leave their loyal **Christian** subjects in peace but would
mandate that they violate their conscience by offering religious sacrifice to the emperor as a god.

Similarly, **militant secularists** today **do not have a live and let live spirit** - they are not content to leave religious people alone to practice their faith. Instead, they seem to take a delight in **compelling people to violate their conscience.**

For example, the last Administration sought to force **religious employers,** including **Catholic religious orders,** to **violate** their sincerely held **religious views** by funding **contraceptive** and **abortifacient coverage** in their health plans.

Similarly, California has sought to require **pro-life pregnancy centers** to provide notices of **abortion rights.**

This refusal to accommodate the free exercise of religion is relatively recent. Just 25 years ago, there was broad consensus in our society that **our laws should accommodate religious belief** ..."

He continued:

"Ground zero for these **attacks on religion** are the **schools.** To me, this is **the most serious challenge to religious liberty.**

For anyone who has a religious faith, by far the most important part of exercising that faith is the **teaching of that religion to our children.** The passing on of the faith ...

The first front relates to the content of **public school curriculum.**

Many states are adopting **curriculum** that is **incompatible with traditional religious principles** according to which parents are attempting to raise their children. They often do so without any opt out for religious families.

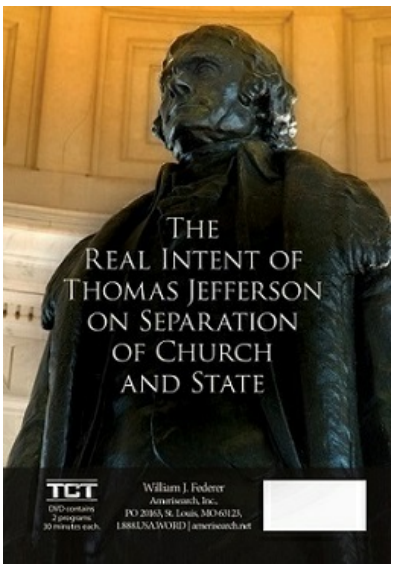
Thus, for example, New Jersey recently passed a law requiring public schools to adopt an **LGBT curriculum** that many feel is **inconsistent with traditional Christian teaching.**

Similar laws have been passed in California and Illinois.

And the Orange County Board of Education in California issued an opinion that “parents who disagree with the instructional materials related to **gender, gender identity, gender expression and sexual orientation may not excuse their children** from this instruction ..."

Barr concluded:

"I can assure you that, as long as I am Attorney General, the Department of Justice will be at the forefront of this effort, ready to fight for the most cherished of our liberties: the **freedom to live according to our faith."**



DVD The Real Intent of Jefferson on Separation of Church and State

Another historic view that both **Justice Story** and **Thomas Cooley** commented on was the purpose of the **Second Amendment.**

Justice Joseph Story wrote in his *Commentaries on the Constitution of the United States,* 1833 (3:§§ 1890--91):

"The importance of this article will scarcely be doubted ... The **militia** is the natural **defense** of a free country **against ... domestic usurpations of power by rulers.**

It is against sound policy for a free people to keep ... **standing armies** in time of peace ... from ... the facile (easy) means, which they **afford to ambitious and unprincipled rulers,** to **subvert the government,** or **trample upon the rights of the people.**

The **right** of the **citizens** to **keep and bear arms** has justly been considered, as the **palladium** (guarantee) of the **liberties of a republic;** since it offers **a strong moral check against the usurpation and arbitrary power of rulers;** and will ... **enable the people to resist** and

triumph over them."

Michigan Supreme Court Chief Justice **Thomas Cooley quoted Justice Joseph Story** in *The General Principles of Constitutional Law* (2nd Ed., 1891, p. 282):

"The **Second Amendment** ... was meant to be **a strong moral check against the usurpation and arbitrary power of rulers** ... "

He continued:

"... The right is general. It may be supposed from the phraseology of this provision that the **right to keep and bear arms** was only guaranteed to the militia; but this would be an interpretation not warranted by the intent.

The **militia ... consists of those persons who,** under the law, **are liable to the performance of military duty,** and are officered and enrolled for service **when called upon ...**

If the right were limited to those enrolled, **the purpose of the guarantee might be defeated altogether** by the action or the neglect to act of **the government it was meant to hold in check.**

The meaning of the provision undoubtedly is, that **the people,** from whom the militia must be taken, **shall have the right to keep and bear arms,** and they need no permission or regulation of law for that purpose."

Similarly, **Justice William J. Brennan Jr.,** explained in *U.S. v. Verdugo-Urquidez* (494 U.S. 247, 288, 1990):

"The term **'the people'** is better understood as a **rhetorical counterpoin**t to **'the government'** ...

that **rights that were reserved** to **'the people'** were to protect all those subject to 'the government' ...

The **Bill of Rights did not purport to 'create' rights.** Rather, they designed the Bill of Rights **to prohibit our government from infringing rights and liberties presumed to be pre-existing."**

In *U.S. v. Verdugo-Urquidez* (1990), the Supreme Court stated:

"'The people' protected by the **Fourth Amendment,** and by the **First** and **Second Amendments,** and to whom rights and powers are reserved in the **Ninth** and **Tenth Amendments,** refers to a class of **persons** who are part of a national community ...

The Fourth Amendment's drafting history shows that **its purpose was to protect the people** of the United States **against arbitrary action by their own government."**

James Madison thought it unimaginable that people in the various States would allow themselves to be disarmed, as this would create a frightful situation where only the federal government possessed arms.

He wrote in *Federalist, No. 46:*

"Those who prophesy the downfall of the State governments ... that the **federal government may ... accumulate a military force** for the projects of ambition ... It could be necessary now to disprove the reality of this danger.

That **the people** and **the States** should, for a sufficient period of time, **elect** an uninterrupted succession of **men ready to betray both;**

that the **traitors** should, throughout this period, uniformly and systematically **pursue some fixed plan for the extension of the military establishment;**

that **the governments and the people of the States** should silently and patiently behold the gathering storm, and continue to supply the materials, until it should be prepared to burst on their own heads,

must appear to every one more like **the incoherent dreams of a delirious jealousy** ..."

Madison described the unlikely scenario:

"Extravagant as the supposition is ... let a **regular army,** fully equal to the resources of the country, be formed; and let it be **entirely at the devotion of the federal government;** still it would not be going too far to say, that the **State governments, with the people on their side, would be able to repel the danger ...**

A standing army ... does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men.

To these would be opposed a militia amounting to near **half a million of citizens with arms in their hands,** officered by men chosen from among themselves, **fighting for their common liberties ...**

It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.

Those who are best acquainted with **the last successful resistance of this country against the British arms,** will be most inclined to deny the possibility of it."

Supreme Court Justice James Wilson stated his *Lectures on Law,* 1790-91:

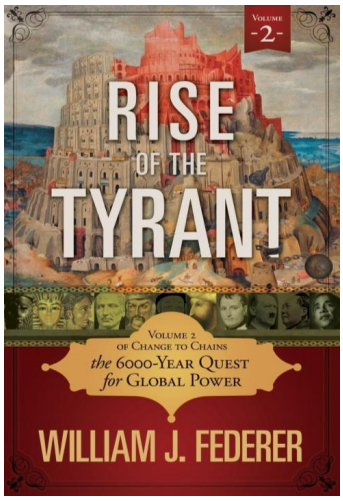
"The defense of one's self, justly called the **primary**

law of nature, is not, nor can it be abrogated by any regulation of municipal law.

This **principle of defense** is not confined merely to the **person;** it extends to the **liberty** and the **property of a man:**

it is not confined merely to **his own person; it extends to the persons of all those,** to whom he bears a peculiar relation-of his **wife,** of his **parent,** of his **child ...** nay, **it extends to the person of every one, who is in danger;** perhaps, to the liberty of **every one, whose liberty is unjustly and forcibly attacked."**

Rise of the Tyrant - How Democracies and Republics Rise and Fall



In addition to being armed, **James Madison** explained how **local control** of police departments and subordinate governments are a key to **resisting the ambitions of the federal government:**

"Besides **the advantage of being armed,** which **the Americans possess over the people of almost every other nation,** the existence of **subordinate governments, to which the people are attached ... forms a barrier against the enterprises of ambition,** more insurmountable than any which a simple government of any form can admit of.

Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the **governments are afraid**

to trust the people with arms ...

But were the **people to possess the additional advantages of local governments chosen by themselves** ... it may be affirmed with the greatest assurance, that the throne of **every tyranny** in Europe **would be speedily overturned** in spite of the legions which surround it."

Madison thought it an insult to suppose that the people and the States would ever succumb to schemes allowing the federal government to usurp power:

"Let us not insult the **free and gallant citizens of America** ... with the supposition that they can ever reduce themselves to the necessity of making the experiment, **by a blind and tame submission** to the long train of insidious measures which must precede and produce it ...

The federal government ... and **its schemes of usurpation** will be easily **defeated by the State governments, who will be supported by the people ...**

The powers proposed to be **lodged in the federal government** are as little formidable to those reserved to the individual States ...

All those alarms which have been sounded, of ... **annihilation of the State governments,** must, on the most favorable interpretation, be ascribed to the chimerical (unrealistic) fears of the authors of them."

Thomas Cooley confirmed Madison's views in *People v. Hurlbut* (24 Mich. 44, 108 (1871):

"Local government is [a] matter of **absolute right;** and the state cannot take it away."
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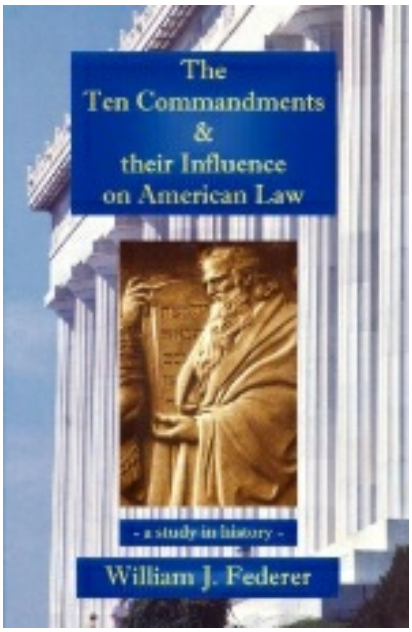

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