THE CONSTITUTIONAL JURISPRUDENCE OF WILLIAM BENTLEY BALL AND CHARLES E. RICE

By Stephen M. Krason

In the last four decades of the twentieth century, two especially prominent names can be recalled among Catholic figures in the area of American constitutional law: William Bentley Ball and Dr. Charles E. Rice. Ball died in 1999, and Rice continued his work into the twenty-first century, passing only in 2015. Ball was noted for his courtroom work as an attorney defending religious liberty and parental education rights. He handled cases from the county trial court level up to the United States Supreme Court, where he was involved in three dozen cases. He is especially remembered for the 1972 Supreme Court case *Wisconsin v. Yoder*,[1] one of the main religious liberty decisions in the Court's history, which upheld the educational rights of the Amish. He also was a constitutional scholar and prolific writer on these topics and had served as one of the original faculty of Villanova University Law School. The William Bentley Ball Memorial Archive, across from the Supreme Court in Washington, D.C., was established as a witness to his legacy and a resource library for those continuing his legal and constitutional efforts.

Rice was a long-time professor at Notre Dame Law School and author of numerous books and articles on constitutional law, pro-life issues, and Catholic topics. He was also an editor of *The American Journal of Jurisprudence* (formerly the *Natural Law Forum*) that is published at Notre Dame Law School. He had earlier practiced law in New York City and taught at New York University and Fordham law schools. Additionally, he had been one of the founders of both the New York State Conservative Party and one of the first right-to-life organizations in the country. Rice was well-known both in the scholarly domain and in the popular one, as he was a prominent Catholic lay apologist and played a prominent role in a host of leading Catholic and legal organizations such as: the Thomas More Law Center, the Center for Law and Justice, and the Eternal Word Television Network. He also played a role in the founding and early development of Ave Maria School of Law.

This article discusses the jurisprudential thought of each man, especially as it concerns the areas that their legal thought and efforts were directed to:

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1. *See generally* Wisconsin v. Yoder, 406 U.S. 205 (1972).

the Free Exercise and Establishment Clauses of the Constitution, human life issues in American constitutional law, parental educational and other rights, and the role of the natural law in American constitutional jurisprudence. I should emphasize that even though there have been additional U.S. Supreme Court cases in these areas since the passing of both men—more, obviously, since Ball's death because he died at the end of the last century—the Court has continued in the direction that they so strongly criticized. Thus, their critique is as valid today as it was when they were writing. I should also emphasize that my inquiry is, specifically, into their thinking on constitutional jurisprudence; it does not focus on their writing on moral questions (except as they are connected to their constitutional thought), Catholic Church issues, public policy, or other areas of the law.

WILLIAM BENTLEY BALL

Ball stressed the crucial character of the rights of conscience. In his only authored book, *Mere Creatures of the State: Education, Religion, and the Courts*, he quotes one of the two Catholic Founding Fathers, Daniel Carroll, as saying that they are rights "of peculiar delicacy."[2] He tersely states what the religion provisions of the First Amendment were intended to do. They were "designed as a wall against state power affecting religion."[3] The establishment clause "barred the setting up of a state church," and the Free Exercise Clause "forbade government to prohibit the observance of religion."[4] How Ball believes these intentions apply to particular situations and contexts is seen in his critique of the numerous U.S. Supreme Court decisions since World War II and in his analysis of contemporary developments and trends in church-state law.

Ball's critique of the Supreme Court fell into three separate categories: his critique of its Establishment Clause jurisprudence, his critique of its Free Exercise jurisprudence, and his argument that its decisions had the effect of establishing a religion of secularism. On the first of these, he was particularly critical of the *Lemon v. Kurtzman* decision[5] and the line of cases issuing forth

2. WILLIAM BENTLEY BALL, MERE CREATURES OF THE STATE? EDUCATION, RELIGION, AND THE COURTS 8 (1994) (quoting Daniel Carroll, Cont'l Cong., Representative, Address to the United States House of Representatives (Aug. 15, 1789) (urging it to propose the adoption of a constitutional amendment to protect religious freedom, which would become the First Amendment) [hereinafter MERE CREATURES OF THE STATE].

3. *Id.* at 11.

4. *See generally* Lemon v. Kurtzman, 403 U.S. 602 (1971).

5. *See generally id.*

from it. *Lemon* involved Pennsylvania and Rhode Island statutes that provided state funds to go toward the salaries of teachers of secular subjects in nonpublic, including religious-affiliated, elementary and secondary schools.[6] Pennsylvania's statute also provided funds for state-approved textbooks and instructional materials.[7] Ball argued the case before the Supreme Court to uphold the statutes. The Court struck down the statutes and enunciated a three-pronged test that had to be met if a statute, federal or state, was to be sustained under the Establishment Clause: (1) it must have a secular legislative purpose; (2) its principal or primary effect must be such that it neither advances nor inhibits religion; and (3) it does not foster an excessive entanglement of the state with religion.[8]

Ball notes how the Court seemed to be directly influenced by a *Harvard Law Review* article by the prominent constitutional law scholar, Paul Freund, which had appeared not long before it took up the case.[9] Freund had cautioned about not just political, but also administrative entanglements. The latter would arise simply when government checked a religious school's records to make sure that the funds were not being used in any way for religious purposes. Political entanglement can be found merely by people choosing sides on the issue of nonpublic school funding; this would cause "[p]olitical fragmentation and divisiveness along religious lines."[10] According to Ball, neither Freund nor the Court could provide anything in the thinking of the Founding Fathers or the framers of the First Amendment or in constitutional precedent to justify these definitions.[11] In fact, Ball says that history is replete with political division along religious lines (e.g., abolitionism, the Prohibition movement, and the Civil Rights movement). It is certainly problematic—as the Court itself was careful to recognize in a general sense—to suggest that what people "choose through the normal democratic processes" must be constitutionally rejected just because religious concerns may have been involved.[12]

6. *See generally id*.

7. *Id.* at 602.

8. ALPHEUS T. MASON & DONALD G. STEPHENSON, JR., AMERICAN CONSTITUTIONAL LAW: INTRODUCTORY ESSAYS AND SELECTED CASES 511 (Reid Hester ed., 16th ed. 2012).

9. MERE CREATURES OF THE STATE, *supra* note 2, at 32.

10. Lemon, 403 U.S. at 623.

11. MERE CREATURES OF THE STATE, *supra* note 2, at 33–34.

12. William Bentley Ball, *The Effect of Current Judicial Decisions on the Place of Catholics in the Life of the Country*, *in* WHEN CONSCIENCE AND POLITICS MEET: A CATHOLIC VIEW 71–72 (Ignatius Press ed., 1992).

Ball criticizes the decisions following from *Lemon* as producing judicially concocted, arbitrary, and often obtuse and far-fetched standards to judge Establishment Clause cases, such as: whether the activity in question would create a "symbolic union" of church and state; if it would have a "primary effect of advancing religion;" whether public school teachers coming to a religious school to teach secular courses might somehow "intentionally or inadvertently" promote religion (to the pupils who are already there for religious reasons); and insisting that mere frequent contacts between public and religious school personnel to work out such things as scheduling matters would constitute a dangerous entanglement.[13] It is interesting, as we see below, that the courts have often not been so concerned about whether such things as state officials enforcing state-imposed educational standards on religious schools create an excessive entanglement.[14] Ball says that these standards, with their "open-ended phrasing" (he calls them "constitutional add-ons") are "blank checks" that the justices "can fill in according to their personal biases."[15]

The Court's separationist jurisprudence is generally viewed as having started with the case of *Everson v. Board of Education*,[16] which was decided after World War II. Interestingly, Ball says that *Lemon* is really a departure from *Everson*.[17] Ball actually called *Everson* a Free Exercise case since it ensured that the parents of children in religious schools would not be denied a public benefit—free bus transportation of their children to school—that other children could receive. The *Lemon* line of cases, to the contrary, had the effect of denying religious school children the various public benefits that children in government schools were receiving.[18] What tended to happen is that the Court placed an increasing emphasis on Justice Hugo Black's dictum in *Everson* of the "rigid wall of separation between church and state" and gave it an ever more extreme interpretation, while losing sight of the actual holding in *Everson*.[19] In some cases after *Lemon*, the Court sustained assistance—especially educational assistance of one kind or another—given directly to

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13. MERE CREATURES OF THE STATE, *supra* note 2, at 47-48.

14. *Id.* at 47–49.

15. *Id.* at 221.

16. *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947).

17. William Bentley Ball, *The Church-State Game: A Symposium on Kiryas Joel*, FIRST THINGS (Nov. 1994), http://www.firstthings.comarticle/1994/11/the-church-state-game-a-symposium-on-kiryas-joel [hereinafter *Church-State Game*].

18. William Bentley Ball, *Litigating* Everson after Everson, *in* EVERSON REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS 221–24 (Jo Renée Formicola & Hubert Morken eds., 1997).

19. *Id.* at 225–26.

students and parents, but it was unwilling to accept anything provided to a religious school or other institution even for secular activities.[20] Ball's contrasting constitutional view, which he said is wholly consistent with *Everson*, is that so long as the aid is for the individual—which aims to carry out a public purpose—there is no problem with statutes or laws "directing the aid to the institutions where they, of right, choose to be."[21]

Ball was sharply critical of other tests the post-*Lemon* Court used in church-state cases. One was the *County of Allegheny v. ACLU* decision (the "crèche-menorah case"),[22] which concerned the constitutionality of Chanukah and Christmas Nativity displays erected on county property in Pittsburgh by religious organizations. The former was stored, erected, and removed at city expense, although it was accompanied by secular symbols; the latter involved no public expense but there were no such secular symbols near it.[23] In allowing the menorah but disallowing the crèche, the Court effectively laid down what Ball called a "physical setting-eye of the beholder" test: if the physical setting of a religious object on public property conveys a religious message, it must be disallowed.[24] He was disturbed at the Court's "guesswork as to how particular arrangements and sizes of objects will cause particular viewers to believe that government is trying to inflict religion on them."[25] The Court also established an "endorsement" test in the case, which holds that whether a particular religious display is to be viewed as an "endorsement" of religion would depend on how a "reasonable observer" would understand it.[26] The Court—not the actual man on the street—is to be the one that determines what a reasonable observer would think.

The prong of the test enunciated by *Lemon*—that state action should have the effect of neither advancing nor inhibiting religion—has actually been the perspective that has shaped most of the Court's church-state jurisprudence since World War II.[27] Far from religion or religious bodies gaining any favor

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20. *Id*. at 225–27.

21. *Id*. at 226.

22. *See* Cty. of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573 (1989).

23. *Id*. at 573.

24. William B. Ball, *The Crèche-Menorah Case: Limiting Religious Freedom*, THE WORLD AND I (Dec. 1989), at 196–97 [hereinafter *Crèche-Menorah Case*].

25. *Id*. at 198.

26. *Id*.

27. *See, e.g.*, GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA xii-xiii (1987); *see generally* STEPHEN M. KRASON, SEPARATIONISM, ACCOMODATIONISM, AND CHURCH-STATE ADJUDICATION IN AMERICAN CONSTITUTIONAL LAW 206–14 (Stephen M. Krason et. al. eds., 2009) (arguing that the Court's embracing of this interpretation of the Establishment Clause collides with the historical background of the First Amendment. The soundest scholarship has made clear that the actual intent of the Establishment

from government, however, Ball tells us that the Court's decisions on tax exemptions have actually had the effect of imperiling religion. In *Walz v. Tax Commission*,[28] while the Court held that exempting from taxation properties used exclusively for religious worship did not offend the Establishment Clause, it refused to say either that this was because of the very fact that they are *religious* or that there was a Free Exercise right to an exemption.[29] In the famous *Bob Jones University v. United States* case,[30] the Court held that a "pervasively religious organization" may rightfully have its tax exemption revoked if it offends what it called a "federal public policy."[31] Ball says that the latter notion was "pure invention" by the Court.[32] The case involved the strongly religious, non-denominational Protestant school's policy forbidding interracial dating and marriage among its students.[33] The IRS had retroactively revoked the university's tax exemption in 1976, and the case followed.[34] Ball argues that the IRS had no statutory authority to do this, and the term "federal public policy" didn't even *appear* in any federal statute.[35] He viewed what the Court did as equivalent to "the seventeenth century doctrine of Reason of State," which allowed "the prince to violate the common law and rights of citizens 'for the end of public utility.'"[36] In the *Texas Monthly v. Bullock* decision,[37] the Court declared that it was unconstitutional to grant a sales tax exemption to religious literature but not to other types of literature. More troubling was the Court's stating that tax exemptions, legally, are subsidies.[38] Ball says that such a notion "at core attacks the concept of religious tax exemption"; and essentially means that only if religion "has a

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Clause was merely to proscribe the federal government's establishing of a national church and to ensure that there would be no sect preference by the state).

28. *See generally* Walz v. Tax Comm'n, 397 U.S. 664 (1970).

29. WILLIAM B. BALL, IN SEARCH OF A NATIONAL MORALITY: A MANIFESTO FOR EVANGELICALS AND CATHOLICS 212 (William B. Ball, ed., 1992) [hereinafter MANIFESTO], *see, e.g.*, Stephen M. Krason, *Our Founding Fathers, Religion, and Religious Liberty*, 18 CATH. SOC. SCI. REV. 241–48 (2013) (arguing that the fact that the Court did not view a religious body per se as deserving of a tax exemption perhaps suggests a belief that religion is not valuable in and of itself for the political community. Indeed, its insistence that government may not do anything to advance religion underscores this. This view clearly collides with that of America's Founders).

30. *See generally* Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

31. MANIFESTO, *supra* note 29, at 212.

32. *Id.*

33. Bob Jones Univ., 461 U.S. at 580.

34. *Id.* at 581.

35. MANIFESTO, *supra* note 29, at 212.

36. *Id.* at 212–13.

37. *See generally* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

38. MANIFESTO, *supra* note 21, at 214.

secular justification may it qualify for exemption," that is, it has no value in and of itself.[39] Indeed, this seemed to contradict the very language of the Internal Revenue Code.[40] To be sure, however, the Court's action was consistent with its thinking that government may not favor religion over irreligion.[41] Besides tax exemptions, these decisions adversely affected the freedom of religious bodies. Ball also firmly believed that the direction of the Court on free exercise with respect to individuals and groups in the last two decades of the twentieth century was gravely troublesome, as we see next.[42]

The "high water mark" in the Supreme Court's protection of religious liberty and free exercise was the 1972 *Yoder* decision above.[43] Ball says that after *Yoder*, the Court "never again maintained this degree of protection" of religious liberty.[44] *Yoder* had laid down a four-part test for free exercise cases: (1) the person making the claim would have to demonstrate "a sincere and truly religious claim"; (2) the person would have to show that the governmental action "was truly injurious to religious practice"; (3) if the latter showing was made, the state would have the burden of showing that its action was needed because of a "compelling public interest" (this is the most rigorous standard in constitutional law that the state has to meet to justify its actions); and (4) if the state could demonstrate a compelling public interest, it would have to show that it has no alternative means to its action that would be "less burdensome to religious liberty."[45]

Ball writes that in opposing the rights of the Amish to decide for religious reasons not to send their children to secondary school, the state of Wisconsin was an early propagator of the view—so troublingly prevalent today—that there should be a sharp distinction between the freedom to believe and to act

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39. MANIFESTO, *supra* note 21, at 213.

40. William B. Ball, *Religious Liberty: New Issues and Past Decisions*, *in* A BLUEPRINT FOR JUDICIAL REFORM 331 (Patrick B. McGuigan & Randall R. Rader eds., 1981) [hereinafter *Religious Liberty*].

41. *Litigating Everson*, *supra* note 18, at 226.

42. *See generally* MERE CREATURES OF THE STATE, *supra* note 2.

43. William B. Ball, *First Amendment Issues*, *in* THE AMISH AND THE STATE 254–55 (Donald B. Kraybill ed., 2nd ed. 1993) [hereinafter *First Amendment Issues*]. *But see* Jesse Choper, *The Supreme Court, 1988 Term*, 57 U.S.L.W. 2227 (Oct. 18, 1988) (quoting the prominent constitutional scholar Jesse Choper as using the term "high-water mark" in reference to this case).

44. *Id*.

45. *First Amendment Issues, supra* note 43, at 257.

upon those beliefs.[46] This results in a reduction of religious liberty to just the freedom to worship.[47]

Some "constitutional conservatives," such as Judge Robert H. Bork and Walter Berns, tried to make the curious argument that *Yoder* represented an establishment of the Amish religion. Ball hotly disputed this, saying that it was very much like the frequent leftist claim that "if government accommodates religious exercise, it thereby violates the Establishment Clause."[48] He says that such an argument would have portentous implication for free exercise.[49] It meant that the First Amendment would really afford no protection for even the most outrageous applications of statutory law.[50] He indicates that Bork and Berns' perspective may have been due to their excessive willingness to defer to legislative bodies.[51] This, in turn, was probably due to their concern about stemming judicial excess. The problem, Ball says, is that religious minorities like the Amish could never have been able to influence legislative bodies to change the law in a way acceptable to them.[52] Indeed, we see the religious liberty problems that Ball points out as starting to arise only a decade later as the Court began to turn away from the *Yoder* test.

What Ball called the "downward trend" in religious liberty and free exercise on the Court began a decade later in *United States v. Lee*,[53] wherein the Court rejected a claim by an Amish businessman that his religion forbade him from paying the employer's portion of Social Security taxes for the other Amish working for his lumber finishing company. Then came *Goldman v. Weinberger*,[54] where the Court upheld the U.S. Air Force's refusal to allow an Orthodox Jewish officer to wear a yarmulke when in uniform and held that the Free Exercise Clause applies less strictly to members of the military than to civilians. Ball says that the Court entirely ignored the four-part *Yoder* test in making its decision.[55] Later in the same term, the Court handed down *Bowen*

46. William B. Ball, *Building a Landmark Case:* Wisconsin v. Yoder, *in* ALBERT N. KEIM, COMPULSORY EDUCATION AND THE AMISH: THE RIGHT NOT TO BE MODERN 121,122 (Albert N. Keim ed., 1975) [hereinafter *Building a Landmark Case*].

47. *Id*. at 121.

48. MERE CREATURES OF THE STATE, *supra* note 2, at 75.

49. *Id*.

50. *Id*.

51. *Id*.

52. *Id*. at 74–75.

53. *See* United States v. Lee, 455 U.S. 252 (1982).

54. *See* Goldman v. Weinberger, 475 U.S. 503 (1986).

55. *First Amendment Issues*, *supra* note 7, at 260.

v. Roy,[56] where it held that an American Indian family's free exercise of religion was not violated by the U.S. Government's demand that they get a Social Security number for their infant daughter so they could take part in the Aid to Families with Dependent Children program. The parents had claimed that to do so would "rob the spirit" of their daughter.[57] Next came another case involving American Indians, *Lyng v. Northwest Indian Cemetery Protective Association*,[58] where the Court brushed aside a Free Exercise Clause claim that the fact that a national forest area had long been used as a site for Indian religious ceremonies should preclude U.S. Government logging and road-building operations.

The decisive turning point in free exercise jurisprudence came with the Court's *Employment Division v. Smith*[59] decision. Ball writes that the new test for Free Exercise cases that the Court laid down in *Smith* had the effect, constitutionally speaking, of "[s]ending a shock wave through the country."[60] It scrapped the compelling public interest test of *Yoder* and said that if a law is of general application and did not single out a particular religion, it must be upheld—regardless both of religious objections and whether the interest the state was seeking to further was truly compelling or not. Ball's assessment was that "the *Smith* decision leaves the exercise of religion largely at the mercy of government."[61] He said that its "immense danger" consisted in the fact that government rarely singles out different religious bodies or groups to impose a particular burden on, but that "almost all laws that threaten religious freedom are religiously neutral laws of general application."[62] *Smith* has stood as the ruling precedent for free exercise cases since it was decided in 1990.

Ball took particular note of the fact that the Court's majority in *Smith* was spearheaded by Justice Antonin Scalia, another serious Catholic constitutional thinker like Ball, who most people would think would be sympathetic to religious liberty claims. In fact, what Scalia did in the opinion for the Court was to ignore all the Court's precedents that went opposite to his ruling and tried to contend that a case like *Yoder* was strictly a parental rights case "onto which religion was merely piggy-backed."[63] As the legal counsel for the Amish in *Yoder*, Ball wrote that religious liberty was what that case was all

56. Bowen v. Roy, 476 U.S. 693 (1986).
57. *Id*. at 695.
58. Lying v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).
59. Employment Div. Dept. of Human Res. v. Smith, 494 U.S. 872 (1990).
60. MERE CREATURES OF THE STATE, *supra* note 2, at 103.
61. *Id*. at 103–04.
62. *First Amendment Issues*, *supra* note 3, at 263.
63. MERE CREATURES OF THE STATE, *supra* note 2, at 106.

about; it was actually parental rights that was piggy-backed.[64] The result was to "thrust the free exercise clause to the back of the constitutional bus."[65]

Another way in which Ball says the Court's decisions—before *Smith* and going back to the earlier public school religion cases concerning the Establishment Clause (*Illinois ex rel. McCollum v. Board of Education*,[66] *Engel v. Vitale*,[67] and *Abington School District v. Schempp*[68])—have affronted free exercise is that students seeking religious expression opportunities have been denied them so the "special preferences" of another group—not a very large one in these cases, by the way—would be "accommodated."[69] He argues that if you have the case of a religious child raised to believe that the Bible is God's word and he is in public schools where it is not treated that way, a religious liberty problem arises because it becomes difficult for him to maintain his faith in such a context.[70] More broadly, a significant portion of the public that is not secularist-oriented "[is] deprived of religious expression in the public institutions for which their taxes pay."[71] Ball argued that some on the Court have even been willing to permit the infringement of free speech for the sake of upholding their extreme view of religious establishment, such as in *Rosenberger v. University of Virginia*.[72] In that case, the university denied funding to a student publication, even though it provided it to other student opinion journals, because it expressed a religious viewpoint.[73] While the Court held this to be unconstitutional viewpoint discrimination that violated the First Amendment, the minority essentially would have held religious speech—especially if it concerns "religious advocacy" (i.e., "religious conversion and religious observance")—to have been deserving of

64. *Id*.

65. *Id*. at 107. It is curious that despite his insistence that parental rights were the crucial means for vindicating the Amish in *Yoder*, ten years later in his dissent in *Troxel v. Granville*, 530 U.S. 57, 91–92 (2000), Scalia was unwilling to view parental rights as enforceable by the courts, seemingly because he did not believe that they can make decisions on the basis of unenumerated rights. By his placing of parental rights in the category of "substantive due process" in the opinion, it appeared that he believed that the problem presented is that to enforce unenumerated rights would open the door to unrestrained discretion. What, in effect, he was saying was that the courts could never have recourse to natural law in their decision-making unless a principle of natural law was spelled out in the black-letter Constitution.

66. Illinois *ex rel.* v. Bd. of Educ., 333 U.S. 203 (1948).

67. Engel v. Vitale, 370 U.S. 421 (1962).

68. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963).

69. *Religious Liberty*, *supra* note 40, at 346.

70. *Building a Landmark Case*, *supra* note 47, at 122.

71. *Religious Liberty*, *supra* note 40, at 343.

72. Rosenberger v. Univ. of Va., 515 U.S. 819 (1995).

73. *See generally id*.

less protection than other types of speech.[74] If Ball singled out Justice Scalia for strong criticism for the *Smith* decision, he commended him for criticizing the dissent in this case for the very point of its viewing religious speech as deserving no more constitutional protection than sexually explicit material and commercial speech.[75]

Ball contended that what the Court has done is adopt a secularist view of both religious liberty and establishment.[76] The Justices "more and more render decisions *ad hoc* on the basis of secular utility."[77] He seemed to suggest that the Court, in some sense, had effectively established an official "religion" of secularism. Ball suggests that "the widespread imposition in the public schools of secular humanist programs" runs up against the Establishment Clause, even though the Court has not wanted to address this.[78] He reminds us that the Court declared "Secular Humanism" to be a religion in *Torcaso v. Watkins*, even while it has studiously avoided examining how its teachings and perspectives pervade public education and other public institutions.[79]

Ball identified other issues of religious liberty that were emerging for religious institutions at the time he was writing. As far as religious schools are concerned, he believed that any attempts to require state licensing of schools (which are seen as ministries by some churches), certification of teachers, and mandated curriculum, teaching methodology, and textbooks were violations of free exercise.[80] The same could be true of the application of discrimination laws to religious entities, especially when they are loosely or broadly written without limiting provisions (as those of some states are). For example, a Catholic seminary might be compelled to hire a woman as an instructor despite canon law prohibitions, or a Jewish day school could not refuse to hire someone of another faith to teach, or a Lutheran congregation could not refuse to hire as a pastor someone of another faith.[81] The attempt to assert National Labor Relations Board jurisdiction over religious entities was

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74. William Bentley Ball, *Religion and the Court 1995: A Symposium* 28, FIRST THINGS (Dec. 1995), https://firstthings.com/article/1995/12/002-religion-and-the-court-a-symposium.

75. *Id.* at 29.

76. *Religious Liberty, supra* note 40, at 341. *Crèche-Menorah Case*, *supra* note 16, at 199; *Church State Game*, *supra* note 17.

77. MERE CREATURES OF THE STATE, *supra* note 2, at 8.

78. William Bentley Ball, *The Byzantine World of Religious Jurisprudence* 49–50, FIRST THINGS (April 1996), https://firstthings.com/article/1996/04/002-the-byzantine-world-of-religous-jurisprudence (reviewing JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES). *See also Religious Liberty*, *supra* note 40, at 345.

79. *Id*. at 49.

80. *Religious Liberty*, *supra* note 40, at 335–38.

81. *Id.* at 340.

another troublesome subject, which Ball had direct legal involvement in as counsel for parishes in the Archdiocese of Philadelphia. This could—and did, in that case—put the state's law on a collision course with church or canon law.[82]

Ball sets out what he believed was the appropriate constitutional response—one that is faithful to a historically correct meaning of the religion clauses—to the above types of cases. In the matter of aid to religious educational institutions—either to the institutions or to the parents of the students in the institutions—Ball says the following:

> There is only one theory of defense [of such aid] compatible with religious liberty, and this is as follows: (a) there is a right, guaranteed by the "Free Exercise Clause" of the First Amendment, to have a child's education in a religious school; (b) there is a parental right, protected by the Constitution, to choose the form of education one desires for one's child; (c) most parents today are oppressed by excessive taxation and inflation and find it most difficult to exercise those rights without some form of economic accommodation to them by government; (d) the programs are beneficial to children; and (e) while they entail aid to religious institutions in only an indirect and minimal way the resulting "Establishment Clause" considerations are vastly outweighed by the "Free Exercise Clause" considerations. In other words, government is constitutionally obligated to make accommodations to Free Exercise and parental choice.[83]

Actually, Ball advocates the compelling public interest test above as a constitutional standard to protect not just religious institutions and aid programs to religious schools but mediating structures generally (e.g., the family, churches, voluntary associations of different kinds, even "neighborhood, racial and ethnic subgroups") from the longhand of government.[84] Writing in 1983, he sees "taking place . . . a war to obliterate mediating structures" from a role to address human needs—not by "conscious design," but as a result of a pattern that typically develops starting with "a totally innocent presumption of governmental competency" that over time results in hostility "when the assumption of superiority is questioned."[85]

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82. *Mere Creatures of the State*, *supra* note 2, at 94–97.

83. William Bentley Ball, *Between Persons and the State*, 4 CHRISTIAN LEGAL SOC'Y. Q. no. 1, 1983, at 8, 31.

84. *Id.* at 5.

85. *Id.*

Government should be permitted to interfere with these mediating structures only if it can show a compelling public interest.

As can be seen above, many of the religious freedom issues that Ball wrote about—and was involved in litigation about—concerned religious schools or the freedom of parents to make their own educational choices for their children. Most of what he addressed concerning parental rights involved parental educational rights and often these were tied up with religious beliefs. Unsurprisingly, Ball touted the early landmark Supreme Court decision of *Pierce v. Society of Sisters*.[86] A well-known passage from the Court's unanimous opinion in that case, which involved a constitutional challenge to an Oregon statute that required all children to attend public schools, provided the title of his only authored book: "The child is not the *mere creature of the state;* those who nurture him and direct his destiny [i.e., his parents] have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[87] The Court seemed to affirm what Christianity and Judaism traditionally taught: that the parents, not the state or anyone else, are the primary educators of their children.[88] As Ball also said, "The Supreme Court has repeatedly held the parental right in education is primary."[89]

The last point about parental rights leads us to the final subject to consider about Ball's constitutional thought: the role of the natural law in constitutional decision-making. Parental rights are pertinent here because these rights appear nowhere in the black-letter Constitution. They are unenumerated rights, which are often associated with natural rights and hence natural law. They were also protected in the English common law tradition that stood behind American law, and itself reflected natural law. Prominent jurists and constitutional thinkers such as Robert H. Bork, Antonin Scalia, and William J. Rehnquist strongly opposed looking to the natural law (i.e., they did not claim that there was no natural law, but just that it should not affect public policy and judicial decision-making).[90] Ball had noteworthy exchanges with Bork about this.[91]

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86. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

87. *Id.* at 535 (quoted in MERE CREATURES OF THE STATE, *supra* note 2, at 13).

88. MERE CREATURES OF THE STATE, *supra* note 2, at 13.

89. William B. Ball, *Opting Out of Reading Class in Tennessee: The Only Possible Outcome* 24, EDUC. WEEK (Dec. 3, 1986), https://edweek.org/ew/articles/1986/12/03/opting-out-of-reading-class-in-tennessee-the-only-possible-outco.html?qs=opting+out+of+reading+class+in+tennessee.

90. William Bentley Ball, *Natural Law, the Power of Courts, and the Strange Case of Annie Stumpf*, 1 CATH. SOC. SCI. REV. 14, 19 (1996) [hereinafter *Strange Case of Annie Stumpf*].

91. William Bentley Ball, *The Tempting of Robert Bork: What's a Constitution Without Natural Law?*, CRISIS MAG. (June 1, 1990), http://www.crisismagazine.com/1990/the-tempting-of-robert-bork-whats-a-constitution-without-natural-law [hereinafter *Tempting of Robert Bork*]. Hadley Arkes, Russell

Ball believed that judges were "justified in ignoring the positive law in favor of direct appeals to natural law," but only rarely.[92] He agreed with Bork that protections specifically accorded persons by state and federal constitutions were abundant and as a rule "should be enforced according to their originally intended meanings," but there could sometimes be exceptions to this.[93] As Ball put it, the will of the people cannot be viewed as the ultimate source of rights, as Bork—and for that matter, the leading utilitarian philosopher Jeremy Bentham—believed.[94] To be sure, Bork believed that courts are "free to void bad laws," but he thought they "could never do so on a ground rooted only in moral principles rather than located within our Constitution's wording"—in other words, on the basis of natural law.[95] Ball said that this basically included the notion of substantive due process, which has had an on-again, off-again history in the Court and that figures such as Bork and Justice Hugo Black strongly opposed. Positive law that goes against "fundamental liberties or natural rights" is in violation of due process.[96] As important as procedural rights are, they alone are no guarantee that such natural rights will be upheld.[97] Indeed, Ball points out that the acknowledgement of a substantive dimension of due process by the Supreme Court first appeared in 1819 and made reference to the Magna Carta.[98] Its roots are actually in the common law.[99] Ball emphasized that the recognition of natural law more generally was firmly grounded in the American constitutional tradition.[100] For example, Ball says that as early as 1810 (the John Marshall Court) the Supreme Court held that judges could have recourse to principles of natural justice outside of the Constitution and over the course of its history it has spoken about these with such terms as "a transcendent order," "certain immutable principles of justice," "rights 'implicit in the concept of ordered liberty,'" and "rights 'so rooted in the traditions and conscience of our people as to be ranked fundamental.'"[101] Ball understood that the concern of Bork and others with courts having recourse to natural law was that judges would act arbitrarily,

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Hittinger, William Bentley Ball & Robert H. Bork, *Natural Law and the Law: An Exchange*, FIRST THINGS (May 1992), http://www.firstthings.com/article/1992/05/004-natural-law-and-the-law-an-exchange.

92. *Id*. at 17.
93. *Strange Case of Annie Stumpf*, *supra* note 90, at 17–18.
94. *Tempting of Robert Bork*, *supra* note 91, at 7.
95. *Id*. at 8.
96. Arkes, *supra* note 91, at 13.
97. *Id*.
98. *Id.*
99. *Id*. at 12.
100. *Tempting Robert Bork*, *supra* note 91, at 3.
101. *Id.*

simply reading their own conception of "natural law" into cases to achieve the outcomes they desire.[102] As mentioned above, judicial arbitrariness and "result-oriented jurisprudence" was certainly a concern of Ball's as well. He responded, however, that the abuse of judicial power in such a manner has been at the hands of legal positivist judges, not those committed to upholding the natural law. As Ball put it, the Court's declaring that a right of privacy was the basis for permitting abortion in 1973 was not a statement of natural law but of "Unnatural Law."[103] Ball insists that the way to restrain judicial power is not to deny the Supreme Court the power to have recourse to the natural law, but "to install in it justices who espouse the moral principles of our tradition"—that is, who respect and uphold the *true* natural law.[104]

CHARLES E. RICE

Probably the main topics that Rice wrote about were religion and the Constitution, human life issues, and natural law. We discuss each of these, focusing on his analysis and commentary about the decisions of the Supreme Court and what he said about the place of the natural law in the American constitutional background and the Court's decision-making.

In one of his early books, Rice critically discussed at length the Supreme Court's decisions of the early 1960s banning prayer in public schools.[105] He set out what he saw as the particularly troubling aspects of those decisions. First, he saw them as representing "a dogmatic interdiction against governmental conduct or sponsorship of religious exercise" that was "rigid" and would be difficult to limit.[106] He noted, for example, that right after the decisions a suit was brought—there were others in later years—to remove "under God" from the Pledge of Allegiance.[107] The Court brushed aside the initial suit by giving a kind of secular justification for the phrase, saying it had

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102. *Id*; *see* Arkes, *supra* note 91.

103. *See* Arkes, *supra* note 91.

104. *Tempting of Robert Bork*, *supra* note 91. Legal scholar David F. Forte strongly agrees with Ball's assessment when he says that it has been the legal positivists on the Court since World War II who have fashioned the most sweeping exercise of judicial power in American history. He also asserts that the historical background shows that adherence to natural law is actually the most reliable way to limit judicial excess. David F. Forte, *Natural Law and the Limits to Judicial Review*, CATHOLIC SOCIAL SCIENCE REVIEW, 42–47 (1996).

105. CHARLES E. RICE, THE SUPREME COURT AND PUBLIC PRAYER: THE NEED FOR RESTRAINT 1–2 (1964) (citing Engel v. Vitale, 370 U.S. 421, 424–25, 430 (1962)); *see* School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223, 225–26 (1963).

106. *Id*. at 19.

107. *Id*.

lost its religious meaning.[108] Indeed, Rice's prediction that all kinds of even miniscule public expressions of religion would be challenged as a result of these school prayer precedents has been proven to be true. Certainly, what Ball wrote about, as seen above, shows the extent to which the Court continued to remove religion from any connection with public life and institutions in the country. Second, Rice said that the decisions squarely required—outright, and for the first time—that government has to be neutral between theistic and non-theistic religions, such as Ethical Culture and Secular Humanism, whereas previously it merely had to act impartially with regards to theistic sects (i.e., no-sect preference).[109] Rice predicted in the mid-1960s what Ball said later had happened: that these decisions would "have the effect of raising agnosticism to the rank of the official public religion of the United States."[110] Finally, Rice said that they laid the legal groundwork for further court cases that would challenge the constitutionality of policies that were previously hardly questioned, such as the tax advantages of churches and employing military chaplains.[111] Indeed, those challenges and others came, and while such things have so far been upheld, their future status is in no sense guaranteed.

Rice explained how in the school prayer cases the Court acted contrary to this historical and constitutional background. He recounts in considerable detail the official recognition and endorsement of religion in the United States from colonial times to the early years of the Republic to the actions of American leaders and decisions and statements of the Court itself up to the post-World War II period.[112]

Rice rejected as completely infeasible the entire notion of neutrality between belief and unbelief that the Court mandated.[113] He says, "In the nature of things . . . governmental favor of one side or the other, the theistic or the non-theistic, cannot be avoided in logic or practice."[114] He illustrates this with

108. *Id. See The Pledge of Allegiance Cases,* BECKET RELIGIOUS LIBERTY FOR ALL, http://www .becketfund. org/the-pledge-of-allegiance-cases-2000-current (last visited July 26, 2016).

109. *Id*. at 19–20.

110. *Id.* at 21.

111. *Id.* at 20–21.

112. *Id*. at 23–61. In a later book, Rice says that while the First Amendment's purpose was to require Congress to maintain neutrality, specifically, among theistic sects—nothing is mentioned about the states—"it could encourage a belief in a generalized Christianity or at least in theism." CHARLES E. RICE, BEYOND ABORTION: THE THEORY AND PRACTICE OF THE SECULAR STATE 64 (1979) [hereinafter *BEYOND ABORTION*].

113. *Id*. at 21; *BEYOND ABORTION*, *supra* note 112, at 63–64.

114. *Id*. at 18.

the example of the teacher in the public school classroom.[115] If a student asks him about whether there is a God and the teacher says there is, he is aligning himself with theism.[116] If he answers that there is not, he aligns himself with atheism.[117] If he says that he doesn't know or that he cannot answer whether there is or isn't because the state does not permit him to, Rice says that he aligns the state on the side of agnosticism because it holds as a matter of policy that God's existence is unknown or unknowable. This effectively means that the state embraces a religious perspective, agnosticism, which Rice emphasizes is a non-theistic religion.[118] In the final analysis, then, the state is not neutral at all.

Rice further says that even such subjects as justice and human rights cannot truly be talked about in a neutral fashion—and these are such ubiquitous concerns in different contexts in the world that it is unreasonable to believe that students in a school, especially as they advance through the grades, would not ask about these.[119] One of the obvious questions that would come up is what the sources of these are.[120] If the teacher says God, he is advancing theism.[121] If he says that it cannot be God because He doesn't exist, he advances atheism.[122] If he says they are rooted in a source other than God, he is saying that such fundamental things do not involve God and this implicitly expresses an atheistic or agnostic position.[123] If he says the public school, as representing the state, cannot take a position on the question, this is essentially agnosticism. Again, neutrality is simply impossible.[124]

Writing thirty-five years later, Rice echoed Ball in saying that what the Court had done with its church-state jurisprudence was to create an "implied establishment of secularism."[125] What this has meant is that, as Ball also said, constitutional decisions—like the shaping of public policy in general, as well as the making of personal choices—are made according to a "secular, utilitarian" standard.[126] As far as public school students are concerned, what

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115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 78–79.

119. *Id.*

120. *Id.*

121. *Id.* at 80.

122. *Id.*

123. *Id.*

124. *Id.* at 79–80.

125. CHARLES E. RICE, COMMON TRUTHS: NEW PERSPECTIVES ON NATURAL LAW 303 (Edward B. McLean ed., 1st ed. 2000) [hereinafter COMMON TRUTHS].

126. *Id.*

this conveys to them is that moral relativism rules and also the state is the arbiter of morality.[127] Even though the Court and the political culture more generally have acted in the name of individual freedom, if rights are understood as just coming from the state that is also the sole source of law, the state can just as easily take them away.[128] So legal positivism is spawned by moral relativism; as long as the established political process has been used to bring forth law, it is valid and there is nothing more to it.[129] This sounds like Ball's taking to task the reduction of due process just to procedural norms. In each case, no higher principles beyond human making are considered. Rice takes note of Justice Oliver Wendell Holmes's famous comment that truth is just "the majority vote of the nation that could lick all the others."[130] This perspective, of course, provides no sure grounds for determining if a human law is unjust.[131] Rice mentions the irony in all this. The freedom of the individual is supposedly the paramount concern, but what is really promoted is *individualism* that downplays man's social nature and obligations and abstracts him from his rightful place in the community.[132] It, coupled with the secularism and relativism above, which were advanced partly by the 1960s Supreme Court decisions on religion, have both helped to bring about "[t]he moral collapse of American culture" and cause the destruction of genuine individual freedom, which "must be grounded in truth."[133] Rice refers to Pope St. John Paul II's teaching that "[t]he denial of objective truth ultimately reduces law to a function of raw, totalitarian power."[134] He quotes a noteworthy statement that appears in two of John Paul's encyclicals: "a democracy without values [i.e., that does not follow moral truth] easily turns into open or thinly disguised totalitarianism."[135]

Relativism, secularism, positivism, and individualism led to the assault on human life in abortion and other areas and the accompanying upheavals in sexual morality and the family beginning in earnest in the 1960s. The Supreme Court played perhaps the central role in this with such decisions as *Roe v.*

127. *Id.* at 302.
128. *Id.* at 301.
129. *Id.* at 298.
130. *Id.*
131. *Id.* at 298–99.
132. *See generally id*. at 300–01.
133. *Id.* at 300–02, 310.
134. *Id.* at 312.
135. *Id.* at 313. (quoting Pope St. John Paul II, *Veritatis Splendor* 101 (1993). The statement also appears in Pope St. John Paul II, *Centesimus Annus* 46 (1991)).

Wade and *Doe v. Bolton*.[136] As mentioned, the subject of human life issues was one of the other major areas of Rice's writing that we are examining. His first book on the topic, especially as it concerns the law, was *The Vanishing Right to Live* (1969).[137] In it, he closely examined the state of each of a full range of life issues as developments had occurred in American society and law over the decade of the 1960s.[138] The issues that particularly, up to that time, had involved the Supreme Court and constitutional law, were contraception, sterilization, and capital punishment.[139] This of course was before the Court's *Wade* and *Bolton* abortion decisions.[140] In talking about capital punishment in the book, Rice also critiqued the Court's decision-making on criminal justice matters.[141]

On contraception, the only Supreme Court decision up to that time was *Griswold v. Connecticut*,[142] which established the right of married couples to use contraceptives (even though the Connecticut statute that forbade it was not enforced against married couples, but in the case was applied against operatives of a Planned Parenthood clinic—who had sought a test case to challenge the state statute's constitutionality—for *dispensing* contraceptives). The Court invalidated the statute on the grounds that its enforcement would have involved an interference with the marital relationship.[143] The Court said that would have been forbidden by a right of marital privacy, which it said was found in a penumbra or emanation from specified rights in the Bill of Rights.[144] While Rice, in a later book, seemed to question the notion of a penumbra—even wondering what it means—he does indicate agreement with the decision and the constitutional principle enunciated for the very reason of the statute's sanctioning interference into marriages in order to obtain evidence.[145]

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136. *See* Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

137. CHARLES E. RICE, THE VANISHING RIGHT TO LIVE: AN APPEAL FOR A RENEWED REVERENCE FOR LIFE (1969) [hereinafter VANISHING].

138. *See generally id*.

139. *Id*. at 105.

140. The book consists mostly of chapters on each of the following life or life-related issues: artificial insemination, abortion, euthanasia, suicide, capital punishment, contraception, sterilization, and homosexuality.

141. *See generally id*. at 87–107.

142. Griswold v. Connecticut, 381 U.S. 479 (1965). There had actually been two other cases that had been brought to the Supreme Court to challenge contraception prohibitions during the quarter-century before *Griswold*: Poe v. Ullman, 367 U.S. 497 (1961); Tileston v. Ullman, 318 U.S. 44 (1943), but the Court refused to hear them on standing grounds.

143. *See* VANISHING, *supra* note 137, at 164.

144. Griswold, 381 U.S. at 484.

145. *Id*; *see* BEYOND ABORTION, *supra* note 112, at 84.

Rice commented about the Court's two decisions on compulsory sterilization earlier in the twentieth century. In *Buck v. Bell*, the Court upheld a Virginia statute that mandated the eugenic sterilization of feeble-minded inmates in certain institutions.[146] Justice Holmes' opinion for the Court brushed aside the claim that the statute violated equal protection because it reached only the institutionalized feeble-minded and not those who were not institutionalized—he seemed to suggest that was at least a good start to eventually sterilize all the feeble-minded—and (apparently referring to Carrie Buck's mother and her daughter who was conceived as a result of rape) said, "Three generations of imbeciles are enough."[147] He also said that the forced sterilization was a small sacrifice expected of Miss Buck for the sake of the public welfare.[148] Actually, the historical evidence later showed that she was not feeble-minded, and probably her mother and daughter also were not.[149]

In *Skinner v. Oklahoma*,[150] the Court invalidated Oklahoma's statute authorizing the compulsory sterilization of certain habitual convicted felons. Skinner had been in prison for a time for stealing chickens and then later for armed robbery.[151] The Court stopped the state's attempt to have him sterilized because it viewed its classification of which categories of offenses could subject a prisoner to sterilization as arbitrary, and so it violated equal protection.[152] It did not say that the Constitution outright forbade compulsory sterilization laws.[153]

Rice does not make a constitutional evaluation of either of these cases. He speaks mostly about what the law in general should do. He points out how eugenic sterilization laws, such as the one in the *Buck* case, came out of the eugenic movement of the late nineteenth and early twentieth centuries.[154] He says that the basic theory of that movement—that heredity is responsible for criminal activity, poverty, mental deficiency, illness, and social depravity—lacks scientific foundation, so "[c]ompulsory sterilization for eugenic

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146. Buck v. Bell, 274 U.S. 200 (1927).

147. *Id.* at 207–08; *see* VANISHING, *supra* note 137, at 147–48.

148. Buck, 274 U.S. at 207.

149. *See Carrie Buck Revisited and Virginia's Apology for Eugenics,* EUGENICS, http://exhibits.hsl.virginia.edu/eugenics/5-epilogue (last visited July 29, 2016). *See also* J. David Smith, *Carrie Buck (1906–1983)*, ENCYCLOPEDIA VIRGINIA, http://www.encyclopediavirginia.org/Buck_Carrie_Elizabeth_1906-1983 (last visited July 29, 2016).

150. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

151. *Id*. at 537.

152. *Id*. at 545-46.

153. VANISHING, *supra* note 137, at 143.

154. *Id*. at 148.

purposes is little more than an exercise in witchcraft."[155] It is also impractical because it would require tracking down the carriers of genetic defects, not just the defective people, and "they could not be identified with precision."[156] It would thus not only pose "administrative problems," but also involve extending compulsory sterilization to a substantial number of people and so be an "oppressive" policy.[157] He says that sterilization for eugenic purposes—whether compulsory or voluntary—should simply be outlawed.[158] As far as sterilization as a punishment for crime is concerned, if its aim is to stop the criminal from having offspring who it is thought will then become criminals—which seems to be the case when applied to habitual criminals—it is really eugenic sterilization and so should not be permitted.[159] Rice doubts that sterilization would serve as a deterrent to further crime—including sex offenses—by the convicted person.[160] He says that whether the possibility of punishment by sterilization could deter others from turning to crime is debatable.[161] The pertinent issue would be due process, both procedural and substantive.[162] One could not be forcibly sterilized except after all legal procedures have been followed (the procedural dimension), and then the question would be whether this kind of a punishment could be constitutionally acceptable at all (the substantive dimension).[163] He says that the latter is difficult to determine. If capital punishment is constitutionally acceptable (which the Court held capital punishment constitutionally acceptable years after Rice's book appeared) then it would be hard to say that sterilization would not be; on the other hand, it is perhaps equivalent to maiming and so would seem to be a constitutionally prohibited "cruel and unusual punishment."[164] Rice concludes that while punitive compulsory sterilization in theory could constitutionally be imposed for certain classes of criminals (so long as the classification is reasonable), its shortcomings as a punishment, as seen with what was said about deterrence, would make it imprudent to actually impose it.[165]

155. *Id*. at 150.
156. *Id*. at 149.
157. *Id.* at 148–50.
158. *Id.* at 153.
159. *Id*.
160. *Id*. at 144.
161. *Id*. at 144-45.
162. *Id*. (He suggests that he thinks, like Ball does, that the notion of substantive due process is valid).
163. *Id*.
164. *Id*. at 145.
165. *Id.*

At the time Rice wrote *The Vanishing Right to Live*, the Court had not yet decided its leading capital punishment cases. He tied the subject in with the criminal justice decisions that had been so significant a part of the era of Chief Justice Earl Warren. Rice says, "The Supreme Court . . . has played a significant role in insulating criminals from the consequences of their acts . . . the rights of criminal defendants have been inflated to the point where the state is increasingly unable to perform its basic duty of protecting . . . its citizens."[166] While being excessively concerned about criminals' rights, the Court has been influenced by sentimentality and "subordinated" the rights of law-abiding people.[167] He seems to believe that what motivated the Warren Court, at least in part, was its concern about equal justice for the rich and poor. Its response was wrong, however: "Unfortunately, the Supreme Court . . . contrived to give poor defendants the same loopholes as the rich, rather than attempting to close the loopholes for all persons."[168] He is blunt about the result: "Judicial interpretations [were] responsible to a great extent for the soaring crime rate" of the 1960s.[169] He floated a very controversial proposal to undo the damage; possibly amending the Fifth Amendment right against self-incrimination, at least to the point of requiring defendants to answer questions from a judge in the courtroom in the presence of the jury.[170] Rice linked up his criticism of the Warren Court's criminal justice rulings with the capital punishment issue. He says that a symptom of "the decline of personal accountability" has been "the trend away from capital punishment."[171] He says in light of this, "We should . . . put aside the thought of eliminating [the death penalty]," but it should "be reserved for deliberate and willful murder done with premeditation or in the course of committing a felony, treason . . . and wartime sabotage or espionage."[172] This would mean that capital punishment could only be applied to "exceptional cases."[173] Still, "the right and power of the state to impose the ultimate sanction would be recognized and preserved."[174] He believed that having the death penalty would both serve as a deterrent and would deepen respect for the sanctity of innocent human life

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166. *Id.* at 3.
167. *Id.* at 4.
168. *Id.* at 104.
169. *Id.* at 101.
170. *Id.* at 104–05.
171. *Id.* at 4.
172. *Id*. at 104-05.
173. *Id*. at 105.
174. *Id*. at 105.

by "the cultivation of a community abhorrence of murder as the detestable crime of crimes."[175]

Thirty-two years later, after the promulgation of Pope St. John Paul II's encyclical, *Evangelium Vitae*, which taught that the death penalty ought not be imposed "except in cases of absolute necessity . . . when it would not be possible otherwise to defend society."[176] Rice explicitly changed his position on capital punishment. He said that the encyclical taught that "retributive and general deterrent reasons are no longer sufficient to justify use of the death penalty" and that John Paul had "made obsolete" Rice's and others' previous argument that it "promoted respect for innocent life by stigmatizing murder as the crime of crimes."[177]

From 1973 on, Rice wrote trenchant criticisms of the Supreme Court on abortion. Besides explaining how the Court ignored the massive biological evidence available even in 1973 indicating the life and humanity of the unborn, he discussed how the decisions went counter to the legal developments of over a hundred years in the United States. The particularly jarring point about *Wade* and *Bolton* is that the Court said, in effect, that even if the unborn child was a human being, he is not legally a person. Rice emphasized that this is what the Court had said about slaves in the infamous *Dred Scott* decision and was the same principle that Nazi Germany used to justify the extermination of the Jews.[178] He said that it also was a gross misinterpretation of the Fourteenth Amendment, which precluded the denial of legal personhood to any human being.[179] Rice called the abortion decisions "the inevitable result of our national acceptance of secularism, relativism, and the contraceptive mentality."[180] Writing in the mid-1980s, he said that the Court could very easily "pacify many of its critics" by allowing what he called "increasingly irrelevant restrictions on surgical abortions" since surgical abortion was

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175. *Id.* at 104–05.

176. Pope St. John Paul II, *Evangelium Vitae* ¶ 56 (1995) (Explaining that with the modern penal systems, the cases that would meet this standard would be "very rare, if not practically non-existent." It indicated that concern for human dignity and giving the criminal the chance to change the behavior and be rehabilitated (i.e., to encourage him to repent of his sin and be reconciled to God) were the reasons for this teaching).

177. Charles E. Rice, *Correspondence: Avery Cardinal Dulles and His Critics: An Exchange on Capital Punishment*, FIRST THINGS (Aug. 2001), http://www.firstthings.com/article/2001/08/correspondence-46.

178. Charles E. Rice, FIFTY QUESTIONS ON ABORTION, EUTHANASIA, AND RELATED ISSUES 23 (1986) [hereinafter FIFTY QUESTIONS ON ABORTION]; Dred Scott v. Sandford, 60 U.S. 393 (1857).

179. Charles E. Rice, *The Culture of Death, the Higher Law, and the Courts, in* COURTS AND THE CULTURE WARS 45, 55 (Bradley Watson ed., 2002) [hereinafter *Culture of Death*].

180. FIFTY QUESTIONS ON ABORTION, *supra* note 178, at 31.

gradually being replaced by abortifacient drugs and other "do-it-yourself abortions."[181] While there are substantial numbers of very early abortions by contraceptives—pills and the IUD—that act as abortifacients,[182] his assessment about this lessening the resort to surgical abortions and making restrictions on the latter less controversial was obviously overly optimistic. Rice also set out the options for overturning the Court's abortion decisions, if it would not at some point reverse itself (which it's fair to say does not currently seem likely): removing abortion cases from the Court's jurisdiction, Congressional legislation such as the Human Life Bill of the 1980s, and a constitutional amendment.[183] In any event, he thought the crucial point was to restore the personhood of the unborn child.[184] Rice never mentions the possibility of executive non-enforcement, in the manner of Andrew Jackson's successful stance against the Supreme Court under Chief Justice John Marshall in the *Cherokee Indian Cases*.[185]

In his very late writing, Rice turned to the Supreme Court's first decisions on same-sex "marriage" (he died before the *Obergefell v. Hodges*[186] decision, which declared it a right under the equal protection clause). The Court's first two cases, in 2013, were *Hollingsworth v. Perry*[187] and *United States v. Windsor*.[188] The former upheld a lower court's invalidation of the results of California's Proposition 8 referendum that had amended the state's constitution to define marriage as a union between a man and a woman.[189] The latter decision declared unconstitutional a section of the federal Defense of Marriage Act (DOMA) that excluded a same-sex partner from the definition of "spouse" as used in various federal statutes.[190] The Court did not decide *Hollingsworth* on the merits—it said that the petitioners did not have standing to bring the case after the state of California refused to defend Proposition 8

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181. *Id*.

182. *See* Williams F. Collins Jr., *Birth Control Pill: Abortifacient and Contraceptive*, PROLIFE OBGYNS (2013), http://www.aaplog.org/position-and-papers/oral-contraceptive-controversy/birth-control.
-pill-abortifacient-and-contraceptive.

183. FIFTY QUESTIONS ON ABORTION, *supra* note 178, at 35.

184. *Id*. at 31–37.

185. *See* Cherokee Nation v. Georgia, 30 U.S. 1 (1831); *see also* Worcester v. Georgia, 31 U.S. 515 (1832).

186. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

187. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

188. United States v. Windsor, 133 S. Ct. 2675 (2013).

189. Hollingsworth, 133 S. Ct. at 2660.

190. CHARLES E. RICE, CONTRACEPTION AND PERSECUTION 21–22 (2014) [hereinafter CONTRACEPTION AND PERSECUTION].

in federal court—and just upheld the federal district court's decision.[191] Rice skewered the *Windsor* decision, however, on both jurisdictional and substantive grounds.[192] He said that in no way did the Court have the jurisdiction to take up the case since there was no case or controversy, the traditional requirement to even bring a case into court.[193] So, it was not even justiciable.[194] Rice quotes the dissenting Justice Scalia as saying there was absolutely no precedent the Court could cite to allow it to do this.[195] The federal courts, unlike certain state courts, have no authority to issue advisory opinions.[196] On the merits, Rice did not believe the Court interposed the federal government into an area where it historically and constitutionally had no authority, the "promotion and regulation" of marriage—if he had lived to see *Obergefell*, he certainly would have concluded differently about that decision—because it does have the power to define what a term like "spouse" means in a federal statute, subject to constitutional limitations.[197] Where the Court grossly overreached in the merits was in its claim that Congress enacted DOMA out of malice for same-sex couples and persons with same-sex attraction with the intent of denigrating them.[198] As Scalia noted, the Court went completely contrary to a settled principle of constitutional interpretation that a statute may not be struck down on the basis of a supposedly "illicit"—Scalia's term—legislative motive.[199] Moreover, while DOMA deferred to state definitions of marriage, the *Windsor* Court created confusion about this.[200] One thinks that perhaps with this it laid the groundwork for the federalizing of the definition of marriage in *Obergefell*, and Rice indeed indicates that he expected that a decision like the latter would come soon.[201] Nonetheless, Rice said that the Court's effective issuing of an advisory opinion was actually the thing "more dangerous to the rule of law" than what it said on the merits about DOMA in *Windsor*.[202] It was "an astonishing seizure of power."[203]

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191. *Id.* at 21.
192. *Id*. at 22.
193. *Id*. at 22–23.
194. *Id*.
195. *Id*.
196. *Id.*
197. *Id.* at 28.
198. *Id*. at 29.
199. *Id*. at 26.
200. *Id.*
201. *Id.* at 28–9.
202. *Id*. at 22.
203. *Id.* at 23.

Rice writes that besides reflecting the growth of individualism, relativism, secularism, and a contraceptive ethic, the abortion decisions—and he would no doubt have added such other decisions as the ones on same-sex "marriage"—were a result of long-term constitutional and political developments.[204] From the Civil War onward—due to statutory changes, constitutional amendments, economic developments, and war—political and governmental power became more centralized in Washington.[205] The Supreme Court not only accommodated these changes but reinforced and solidified them with constitutional decisions interpreting the Commerce Clause, General Welfare Clause, and Fourteenth Amendment.[206] Particularly troublesome with respect to the latter have been: the Court's incorporation doctrine—he outright calls it "fraudulent"—which has gradually applied almost the entire Bill of Rights to the states; its interpreting the general language of the Bill of Rights as if it requires something like detailed statutory restraints on government; and its egalitarian interpretation of the Equal Protection Clause.[207] He gives an unsettling assessment of the state of the Constitution generally, saying that both the separation of powers and federalism are "moribund as a guarantor [sic] of liberty . . . "[208] The reality is that "the right to life and other personal rights are dependent, for their existence as well as protection, on the dictates of unelected Supreme Court Justices, practically unrestrained by anything except their own wills."[209] Ultimately, this is because the great project of the Constitution "could not survive the collapse of its moral and cultural foundation."[210] This means that Rice saw a symbiotic relationship between the Court and culture; while on the one hand, as stated above, its decisions helped bring about undesirable cultural change and on the other those decisions themselves were the result of cultural changes and could only have happened in light of those changes.[211] As a specific example of the former, Rice says that the secularism he said above the Court officially embraced—most explicitly with the *Torcaso* decision—directly paved the way for the abortion decisions a dozen years later. As he puts it:

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204. *Id.* at 46.
205. *Culture of Death*, *supra* note 179, at 52.
206. *Id.* at 52.
207. *Id.* at 51–52.
208. *Id.* at 53.
209. *Id.*
210. *Id.* at 53.
211. *Beyond Abortion*, *supra* note 112, at 66.

> By 1961 [the year of that decision], our public philosophy had become thoroughly positivistic, but a lingering deference to God held matters in check. However, when the state declared its official indifference to God, the dam was breached. Thereafter, the court would treat such issues as abortion only in secular and wholly amoral terms.[212]

The latter refers to the secular, utilitarian standard that both he and Ball said the Court adopted for its constitutional decision-making.

With regard to his belief about a sound notion of constitutional decision-making, Rice addressed two central questions: faithfulness to the intentions of the Founding Fathers ("original intent") and—a subject he wrote at length about—the role of natural law. Rice makes clear that he agrees with interpretivists, who hold that judges are bound to follow original intent.[213] If the meaning of a particular constitutional provision is not clear, judges are still "bound to try to discover and apply that intent at least in its core principles" (e.g., the Founders' concern about the Constitution advancing ordered liberty).[214] He refers to both Judge Bork and the famous nineteenth-century Supreme Court Justice Joseph Story as providing the means to do this. Bork said that courts need to look at what the words of the Constitution meant to "reasonable men" when it was ratified, and they can go to both its text and many "secondary materials" (such as the records of the 1787 Constitutional Convention and the debates about the Constitution at the time).[215] Story said that when the meaning of the wording is clear, that is the determiner by itself.[216] When there is ambiguity or doubt that arises because of other sources or when specific words seem incongruous with the intention of the whole document, then a further effort to discern the meaning is needed. Whatever interpretation results must always foremost be attentive to the "nature and objects . . . scope and design" of the document, and any ambiguous wording must conform to that and not depart from the literal meaning of the words.[217] Following Story's approach, if judges ever "made" the law, as opposed to

212. *Id*. at 60.

213. CHARLES E. RICE, 50 QUESTIONS ON THE NATURAL LAW: WHAT IT IS AND WHY WE NEED IT 103–04 (rev. ed., 1999) [hereinafter 50 QUESTIONS].

214. *Id.* at 104.

215. *Id.*

216. *Id*. at 106.

217. *Id.* at 105–06 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (5th ed., 1891)).

interpreting or declaring what was already there, it was essentially by accident.[218]

To be sure, constitutional provisions have to be adapted in some sense to contemporary circumstances, but in doing so Rice says that care must be taken not to go against "the plain meaning of the text and structure of the Constitution."[219] The Supreme Court may not act in a manner that in any way alters the Constitution and its meaning.[220]

In discussing natural law and constitutional decision-making, Rice first emphasized the natural law basis of the Constitution. He makes reference to the great constitutional scholar of the first half of the twentieth century, Edward S. Corwin, and his famous *Harvard Law Review* article, "The 'Higher Law' Background of American Constitutional Law" (1928), wherein Corwin asserts that principles of natural law, not popular consent, were the fundamental basis for the recognition of the Constitution's "supremacy" in American political life.[221] Corwin said that the natural law was distinctly embodied in the Ninth Amendment, which refers to unenumerated rights that come from "principles of transcendental justice."[222] Rice refers to several eminent legal sources and developments that profoundly influenced the thinking of the Men of '76 and our Founding Fathers, such as: Sir Edward Coke and his opinion in *Dr. Bonham's Case* ("when an Act of parliament is against common right and reason . . . the common law will . . . adjudge such Act to be void") and his *Institutes*, which stressed natural law; Sir William Blackstone's *Commentaries on the Laws of England*, where he asserted "the supremacy of the 'law of nature,'" saying that "no human laws are of any validity if contrary to this;" James Otis' pamphlet, *Rights of the British Colonies*, which made the case against the Mother Country's taxation of the colonies and said, "The common good of the people is the Supreme law . . . of nature;" and Alexander Hamilton, himself a Founder, who said that human laws may not offend "the means necessary to preserve the essential rights of any society" and "[t]he sacred rights of mankind . . . written . . . by the hand of Divinity itself . . . can never be erased or obscured by mortal power."[223] Rice says that many provisions of the Constitution embody and express natural

218. *Id.* at 107 (quoting JAMES P. MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT 114–15 (1990)).

219. COMMON TRUTHS, *supra* note 125, at 114.

220. *Id.* at 114–15.

221. *BEYOND ABORTION*, *supra* note 112, at 38.

222. *Id.* (quoting EDWARD S. CORWIN, THE HIGHER LAW BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 4 (1957)).

223. *Id.* at 39–41.

law principles, such as the Fifth and Fourteenth Amendments' prohibition against depriving people of life, liberty, or property without due process of law; the Ninth Amendment's declaration, referred to above, that the enumeration in the Bill of Rights of specific rights does not "deny or disparage others retained by the people;" and Article One, Section Ten's prohibition against ex post facto laws and laws impairing the obligation of contracts. Also, as noted above, the Fourteenth Amendment sought to ensure that the rights under the law would extend to all human beings.[224]

Rice tells us that the question about the role of the natural law in American constitutional jurisprudence goes back to the first decade of the Supreme Court, in the case of *Calder v. Bull*.[225] There was a famous debate in the opinions in that case between Justices Samuel Chase and James Iredell. The case concerned whether a legislative action concerning a civil, as opposed to a criminal, matter violated the Constitution's prohibition against ex post facto laws.[226] Chase said that even if the Constitution had not had a specific prohibition, such a law would be invalid.[227] Following the great common law writers and the colonial thinking above, he said that there are "certain vital principles in our free Republican governments," which would negate "an apparent and flagrant abuse of legislative power," and that an enactment "contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."[228] Iredell said that as long as an enactment was within "the general scope" of a legislature's "constitutional power, the court cannot pronounce it to be void" because it judges it to be "contrary to the principles of natural justice" since "[t]he ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject. . . ."[229] While Rice says that even though Chase's views predominated in late eighteenth-century jurisprudence,[230] as time went on—probably because of the trends discussed above, which Rice says had their distant roots in Enlightenment thinking[231]—Iredell's position "prevailed in American culture and law."[232] Rice made clear that the recovery of both Western culture and Western law requires a recovery of the natural

224. *Culture of Death*, *supra* note 179, at 54–55.
225. *Id*. (quoting Calder v. Bull, 3 U.S. 386, 387–89 (1798)).
226. *Culture of Death*, *supra* note 179, at 56.
227. *Id*.
228. *Culture of Death*, *supra* note 179, at 56 (quoting Calder v. Bull, 3 U.S. 386, 387–89 (1798)).
229. *Id.* (quoting Calder v. Bull, 3 U.S. 386 at 398–99).
230. *Culture of Death, supra* note 179, at 56.
231. COMMON TRUTHS, *supra* note 190, at 296–301.
232. CONTRACEPTION AND PERSECUTION, *supra* note 119, at 51.

law tradition—a tradition that hearkened back even to the pre-Christian era—which stood behind them.[233]

How did Rice propose that natural law should shape American constitutional interpretation? As noted above, judges must follow original intent as well as it can be discerned and may not employ *their own conception* of the natural law in their decision-making (or any facsimile of it, such as a notion of substantive due process that proclaims ersatz rights, like abortion, that in fact have no true natural law basis).[234] Also, the embodiment of natural law principles in the Constitution was mentioned. Judges surely may not effectively amend the Constitution by their decisions, but if there truly was an unjust law that would seem to be constitutional, they could and should then have recourse to the natural law and invalidate it on the grounds that it is contrary to natural law.[235] The Constitution, he says, must be understood as simply the highest human law, and so like any human law—remembering the teaching of St. Thomas Aquinas—must conform to the natural law.[236] So Rice says that if, say, a constitutional amendment were adopted that affronted the natural law—he gives the examples of an amendment that would reinstitute slavery or authorize the killing of the members of a particular race or religion or seizing of property without legal process—the Court could rightfully strike it down.[237] In fact, Rice says that a judge would have a *duty* to do this.[238] He suggests that while judges take an oath to uphold the Constitution, as a human being he is bound even more basically to "the laws of nature and nature's God."[239] He also says that the landmark *Brown v. Board of Education* school desegregation decision may have been an example of where an outright recourse to natural law to end segregation would have been justified, even if one accepted the argument that the Fourteenth Amendment permitted segregated public schools.[240] Rice makes clear, however, that the outright

233. COMMON TRUTHS, *supra* note 190, at 305.

234. 50 QUESTIONS ON THE NATURAL LAW, supra note 190, at 115.

235. *Id.* at 115–16.

236. *Id.* at 116.

237. 50 QUESTIONS ON THE NATURAL LAW, *supra* note 129, at 213.

238. *Id.* at 120.

239. *See* THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

240. It is interesting that to support the position that the Fourteenth Amendment permitted such school segregation, Rice cites the famous legal scholar Alexander Bickel's 1955 Harvard Law Review article. Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955). What Rice does not mention is that Bickel also concluded from his extensive research–he first did this research when he served as law clerk for Justice Felix Frankfurter when the Court was considering the *Brown* case—is that the framers of the Amendment intended to leave open for a later time a further

reliance on natural law in constitutional decision-making would be "very limited"—"[o]nly rarely would a judge be entitled or obliged to rely on supraconstitutional principles."[241]

To check any tendency of Supreme Court justices to resort to a false notion of natural law or for them to continue to read their own predilections into the Constitution, Rice seems to suggest that the Privileges or Immunities Clause of the Fourteenth Amendment—which was "virtually nullified" by the Court in the *Slaughter House Cases*—should be resurrected.[242] Correspondingly, the incorporation doctrine, which we noted he criticized and believed has played a large role in such judicial abuse, should be reversed.[243] He was also critical of how after the *Slaughter House Cases* the Court transformed the Due Process Clause from a guarantee of procedural rights into "a substantive restriction on state legislation."[244] As noted above, Rice did not oppose the notion of substantive due process—and possibly saw it, to some degree, along with the Ninth Amendment, as a further way that natural law precepts were embodied in the Constitution—but he perhaps underscored with this comment his insistence that the Privileges or Immunities Clause needs to be brought back into force. Many legitimate rights were covered under it and it would help to check the Court from acting with abandon to concoct the ersatz rights mentioned. He perhaps could see a substantive dimension of due process, but not in the open-ended, heavily resorted-to fashion that came to characterize constitutional decision-making at different periods in the Court's history—including in recent decades.

Rice says that perhaps the most fundamental problem with the American frame of government and American law, and that perhaps gave rise to the decline of the natural law principles embodied in the Constitution and the accession of positivism, was that it lacked an authoritative moral interpreter of that natural law.[245] Instead of such an interpreter, external to the state, which would be turned to in order to determine how the natural law would apply to particular situations, "it was left to the people to decide."[246] What that, in fact, came to mean was that those manning governmental institutions decided how

development of the meaning and application of the Amendment, so that it actually could have been legitimately interpreted to prohibit governmentally imposed segregation.

241. 50 QUESTIONS ON THE NATURAL LAW, *supra* note 213, at 117, 121.

242. *Id.* at 112 (*see generally* The Slaughter House Cases, 83 U.S. 36 (1873)).

243. *Id.*

244. 50 QUESTIONS ON THE NATURAL LAW, *supra* note 213, at 112.

245. *BEYOND ABORTION*, *supra* note 112, at 49.

246. *Id.*

natural law would apply, and in time that came down to the Supreme Court.[247] So an agency of the state becomes its own interpreter of the natural law, making its own decision about which moral principles are to restrain it and how.[248] As he says, however, "If the State is its own interpreter of the natural law, it is not really subject to it at all."[249] Rice concludes that the only answer to this problem is, in a certain sense, a Catholic answer: "Since the natural law is the law of God and since Christ is God, it would be appropriate for [the] supralegal arbiter of the natural law to be the Vicar of Christ on earth," that is the Pope.[250] In saying this, Rice does not suggest that the Catholic Church should become the established religion of the United States; he says it would be "a moral recognition, not a legal establishment."[251] As far as I know, he never went into detail about how this might work. One wonders if maybe he had in mind something like public decision-makers, including judges, consulting authoritative papal teaching documents like encyclicals when necessary. Like the nineteenth-century American Catholic political thinker, Orestes Augustus Brownson, Rice sees this fatal flaw in the Founding design—the failure to recognize this role of the papacy—as resulting from the Protestant notion of private judgment.[252] Regarding public questions, as stated above, this meant that the "people's government" would be the final arbiter.[253] Both Brownson and Rice stated that this has critical implications for sustaining rightful civil authority.[254] Rice says, "The system worked for a time because it drew upon the capital inherited from pre-Reformation Catholic Christendom,"[255] but then began to descend into the turmoil that he discusses. Interestingly, unlike Ball, Rice does not stress simply trying to ensure that Supreme Court justices be appointed who would be intellectually and morally well-enough formed to know what true natural law principles are—even if ensuring this would be possible—and be so committed to upholding original intent and judicial restraint that, even if they had to resort to natural law in their decision-making, they would not act arbitrarily. Perhaps he did not think that would be enough to overcome this fundamental weakness.

247. *Id*. at 49–50.

248. CONTRACEPTION AND PERSECUTION, *supra* note 190, at 54.

249. *Id*.

250. *BEYOND ABORTION*, *supra* note 112, at 55.

251. CONTRACEPTION AND PERSECUTION, *supra* note 190, at 55.

252. *Id*. at 54.

253. *Id*.

254. *Id.* at 54 (citing Oretes A. Brownson, *The Higher Law,* BROWNSON'S Q. REV. (Jan. 1851)).

255. CONTRACEPTION AND PERSECUTION, *supra* note 190, at 54.

As we consider the constitutional jurisprudence of Ball and Rice, we certainly—and not surprisingly—see many common themes, even while there were certain different emphases and topics that each chose to focus on. Ball's writing tended to analyze Supreme Court opinions in the areas of his concern. While Rice certainly also did that, he aimed to provide a more general commentary about constitutional questions and typically discussed the Court's jurisprudence in a broader legal, cultural, and moral context. Ball discussed the particulars and the factual questions of different cases much more than Rice did, which perhaps reflected his long experience as a courtroom lawyer and lead counsel for important constitutional cases. Ball's concern was mostly the religion clauses of the First Amendment and parental educational rights, while Rice wrote more about human life issues and closely related family issues. Rice sharply criticized the incorporation doctrine of the Court, whereas the fact that Ball did not mention it suggests that he might have not agreed with Rice or, at least, that he did not see it as the large problem in established constitutional jurisprudence that Rice did. In fact, his mention of the abundant rights guaranteed by the federal and state constitutions makes one wonder if he would simply have disagreed with Rice about incorporation. In the context of his discussion of the life issues, Rice also made a critique of the Court on criminal justice matters and equal protection, which was not part of Ball's focus. Ball did not speak about the need to turn to the Church—the papacy—as the authoritative interpreter of the natural law as Rice did. While Rice undoubtedly believed this necessary, he did not make the point as Ball did that the best way to secure a sound application of natural law principles in constitutional decision-making—when this is called for—is simply to appoint judges knowledgeable about and committed to the true natural law.

In spite of these things, there is overwhelming agreement in their constitutional thought. Both believed in interpretivist jurisprudence—that the original intent of the Constitution had to be upheld—but rejected the notion that it meant a narrow reading of explicitly guaranteed rights such as religious liberty, or that it somehow precluded the notion of unenumerated rights, or that there could not be sensible, rational adaptation to changed circumstances. Both also believed that natural law was central to the American political, constitutional, and legal background, so it was part of "original intent." Both, of course, excoriated legal positivism as undermining our true constitutional understanding and creating legal turmoil, and essentially believed that legal positivism, and not reliance on natural law, has led to judicial arbitrariness. Both upheld the notion of substantive due process, although the sense is that Rice tended to think that the way to ensure that constitutional liberties, even if unenumerated, are upheld and the pitfalls of the incorporation doctrine

avoided is to resurrect the Privileges or Immunities Clause. Still, Rice seemed essentially to concur with Ball that the problem with substantive due process is not the notion per se—which can be a way of enunciating legitimate unenumerated or natural law based rights—but the fact that positivistic jurists have used it to depart from natural law. Both believed that the Supreme Court and American courts generally should have outright recourse to natural law principles in constitutional decision-making, although it is clear that they thought that this would not have to be done often. Beyond the fact that various constitutional provisions explicitly embody natural law principles, they believed that the Constitution makes clear that it means to encompass unenumerated rights (i.e., with the Ninth Amendment) and many of these can be explicitly found in the common law background or jurisprudential thought (i.e., as enunciated by the Cokes, Blackstones, et al.) behind the Constitution. So a direct appeal by judges to natural law—that is, having to go outside even of that natural law laden background—would seldom have to occur. While Ball does not mention anything like this, to illustrate the supremacy of the natural law over even the highest expression of the positive law, in the American context— the Constitution—and how the courts' highest duty must be to it, Rice asserts that even a constitutional amendment that affronted the natural law could be struck down by the Supreme Court. Both Ball and Rice indicated that in its decisions on the First Amendment religion clauses, the Court has in effect established secularism or agnosticism as the official religion of the United States, with the result that it has made secular utility the main constitutional standard for judging.

In short, what the great Catholic constitutional thinkers William Bentley Ball and Charles E. Rice provided is a constitutional jurisprudence that deeply respects the American Founding and the legal tradition it embraced. As such, it recognizes the intrinsic place of the natural law in it. It also gives a realistic assessment of how the Constitution does not spell out in black-letter fashion all that is meant to be part of it. So while fervently committed to the interpretivist idea and upholding original intent, this does not mandate a kind of "narrow" constitutional jurisprudence that refuses to acknowledge unenumerated rights or gives an unduly limited interpretation of explicitly stated ones. It also leaves open the need—and recognizes as legitimate—for courts to directly appeal to natural law principles in their decision-making, but only in the seldom-encountered situation where nothing specifically in the Constitution or its background can be pointed to as a basis for addressing it. It is thus a constitutional jurisprudence that at once satisfies the need to uphold original intent, ensures the protection of the full range of legitimate rights, secures true justice at least to the extent the law is able, and avoids judicial

arbitrariness that is faithful both to the American constitutional tradition and the true nature of man.