

BOOK REVIEW

THE SECOND AMERICAN REVOLUTION, by John W. Whitehead. Elgin, Illinois: David C. Cook Publishing Company, 1982, pp. 253.

Introduction

Christian fundamentalism is America's fastest growing political, social, and religious movement.¹ Yet, most Americans have little knowledge of the fundamentalist orientation toward the political state, its laws, and its legal institutions. John W. Whitehead's book, *The Second American Revolution*,² attempts to provide a coherent statement of that orientation.

The Second American Revolution seeks to function as a fundamentalist manifesto. The Foreword, by fundamentalist "guru" Francis A. Schaeffer, alludes to the book's far-reaching goals:

If there is still an entity known as "the Christian church" by the end of this century, operating with any semblance of liberty within our society here in the United States, it will probably have John Whitehead and his book to thank. For this book lays the foundation and framework for fighting the tyrannical, secularist, humanistic power, which has separated our country from its Judeo-Christian base and now dominates this nation and its courts.³

Whitehead, through simple language and clear presentation, offers his readers an explanation of what is wrong with contemporary legal institutions and advice on how to rid society of those ills. The increase in political and social visibility of fundamentalist groups⁴ indicates that

1. The "fundamentalist phenomenon" became the subject of national press coverage only recently. Yet, the contemporary fundamentalist movement has its roots in the mid-1960's. See, e.g., G. CLABAUGH, THUNDER ON THE RIGHT: THE PROTESTANT FUNDAMENTALISTS (1974); R. CLOUSE, R. LINDER, & R. PIERARD, PROTEST AND POLITICS (1968).

2. J. WHITEHEAD, THE SECOND AMERICAN REVOLUTION (1982).

3. Schaeffer, *Foreword* to J. WHITEHEAD, THE SECOND AMERICAN REVOLUTION 13 (1982). Schaeffer is the best known of the fundamentalist writers. In 1981, his *A Christian Manifesto* sold approximately 300,000 copies. See Woodward, *Guru of Fundamentalism*, NEWSWEEK, Nov. 1, 1982, at 88. In many respects, *A Christian Manifesto* and *The Second American Revolution* make similar historical arguments to support the claim that America is properly a Christian state. See *infra* notes 15, 33 & 55. See also McCulley, Book Review, 25 J. CHURCH & ST. 354 (1983).

4. Although the fundamentalist movement has become more visible recently, it is difficult to assess accurately the popularity and influence of the fundamentalist voice. On the size of the weekly audience for broadcast religion, for example, Professor William Martin

many fundamentalists are acting on the advice of activists like Whitehead.⁵ Thus, the significance of Whitehead's book lies in the social context that flavors the meaning of his words.

The fundamentalists have displayed their political and social activism in the courts and legislatures of both state and federal government. At the federal level, fundamentalists and their New Right allies have alternately pushed for a constitutional amendment that will put prayer back in the public schools or legislation that will have the same effect by prohibiting federal courts from enforcing the "school prayer" decision.⁶ They also have sought to diminish a woman's right to abortion on demand through similar congressional action.⁷ In the federal courts, fundamentalists have challenged laws mandating that their religious schools, which are not formally affiliated with a church, pay un-

cites the following media accounts: "In an August, 1980, series on the 'electronic church,' the *New York Times* quoted Armstrong's figure of 130 million without challenging it, though the *Times* did note that some estimates for individual ministers, including Falwell, appeared to be inflated. Earlier in the year (January 21, 1980), the *Times* had credited four television ministers with a total audience of 47 million. The *Wall Street Journal* said on July 11, 1980, that 'every week television evangelists like Oral Roberts, Pat Robertson, and Jerry Falwell reach an estimated 128 million viewers.' *U.S. News & World Report* referred in its September 15, 1980, issue to 'TV gospel shows beamed to 50 million viewers each week by evangelists such as Falwell, Robertson and [James] Robison.' In a December 8, 1979, story, United Press International estimated that 'about 115 million persons listened to at least one religious radio show and about 40 million watch at least one religious TV show each week.' An article in the October 6, 1980, edition of *New York* magazine not only set the membership of the electronic church at 130 million but also asserted that 'contributions to teleministries may be measured in the billions'—a figure far above the \$500 million that newspapers and magazines usually attribute to the fund-raising enterprise of all radio and television ministries combined. The same article credited Rex Humbard with 'playing to an audience of 100 million worldwide.'" Martin, *The Birth of a Media Myth*, ATL. MONTHLY, June 1981, at 7. Professor Martin, however, notes that these figures are grossly exaggerated. He argues that "the average weekly audience for the top ten programs is considerably smaller than . . . 13,767,000 cumulative viewers." *Id.* at 11. Consequently, Professor Martin concludes "that the impact—political or otherwise—of teleministries . . . is based more on organization, dedication, and diligence than on overwhelming numbers." *Id.* Also supportive of the conclusion that "right wing evangelical organizations" are not as politically influential as media reports suggest is Seymour Martin Lipset and Earl Raab's analysis of the 1980 elections. Lipset & Raab, *The Election and the Evangelicals*, COMMENTARY, Mar. 1981, at 25.

One should not, however, underestimate the fundamentalists' influence. No matter which data base is used, several million Americans do tune in to broadcast religion. Additionally, mainstream politicians—both liberal and conservative—pay some attention to fundamentalists. Conservatives, including Representative Jack Kemp and Senator Paul Laxalt, have met with Francis Schaeffer. See Woodward, *supra* note 3, at 88. Even liberal Senator Edward Kennedy recently addressed Reverend Jerry Falwell's Liberty Baptist College. See *N.Y. Times*, Oct. 4, 1983, at A17, col. 1.

5. For example, Francis Schaeffer and Jerry Falwell advance arguments similar to the one made by Whitehead. See *infra* notes 14, 15, 33 & 55 and accompanying text.

6. These efforts have failed at least temporarily, but only because of the Senate's filibuster rule. See Isaacson, *Setback for the New Right*, TIME, Sept. 27, 1982, at 12-13.

7. See *id.* at 12.

employment taxes.⁸ Similarly, fundamentalists have opposed federal regulations that prohibit the granting of tax exemptions to schools whose religious practices conflict with the national policy against racial discrimination.⁹ At the state level, they have enacted legislation that will deregulate fundamentalist Christian schools.¹⁰ In conjunction with these efforts, fundamentalists have gone to court to have state laws regulating their schools declared unconstitutional under the religion clauses of the First Amendment.¹¹

Despite this activism, most fundamentalists act out of a gut level sense of what is right and wrong. Through his book, John Whitehead has provided a conceptual framework to legitimize those gut level reactions. In view of the impact fundamentalists have on the modern state, Whitehead's conceptual framework, based on the "Christian Idea," is worthy of description.

I. The Christian Perspective

The "Christian Idea" is that government should be guided by the teaching of the Bible. According to Whitehead, "Christians are called to apply God's revelation to all areas of life and to all disciplines."¹² Thus, the standard of right and wrong is based entirely on the Bible, not on the laws of the state.

In light of this "Christian Idea," the fundamentalists' primary criticism of the modern state is that its laws are derived from man, not God. This state of affairs has been labeled "humanism" by the fundamentalists. Whitehead defines humanism as "the fundamental idea that men and women can begin from themselves without reference to the Bible and, by reasoning outward, derive the standards to judge all matters."¹³ Its danger is that "[t]here are no standards that cannot be eroded or replaced by what seems necessary, expedient, or even fash-

8. See, e.g., *United States v. Grace Brethren Church*, 457 U.S. 393 (1982).

9. See, e.g., *Bob Jones Univ. v. United States*, 468 F. Supp. 890 (D.S.C. 1978), *rev'd*, 639 F.2d 147 (4th Cir. 1981), *aff'd*, 461 U.S. 574 (1983); *Goldsboro Christian Schools, Inc. v. United States*, 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd mem.*, 644 F.2d 879 (4th Cir. 1981), *aff'd*, 103 S. Ct. 2017 (1983). See also *infra* text accompanying notes 60-61.

10. Alabama and North Carolina have recently passed legislation that effectively deregulates fundamentalist schools while Idaho and Colorado have declined to adopt measures that would have subjected those schools to state regulation. The fundamentalists have also sought to enact deregulatory legislation in Pennsylvania, Maine, and Nebraska. See Devins, *Fundamentalist Schools vs. The Regulators*, WALL ST. J., Apr. 14, 1983, at 28.

11. See Devins, *A Fundamentalist Right to Education?*, THE NAT'L L.J., Feb. 21, 1983, at 13.

12. J. WHITEHEAD, *supra* note 2, at 27.

13. *Id.* at 38.

ionable at the time.”¹⁴

Whitehead’s thesis, which he claims is based on both history and practicality, is that the Bible should serve as the foundation for American thought and decisionmaking. As an historical matter, Whitehead states that:

In seeking independence from Great Britain the colonists declared to the world their belief in a personal, infinite God—“their Creator”—who endowed them with “certain unalienable” or absolute rights. To the men of that time, it was self-evident that if there was no God there could be no absolute rights. . . . [T]he American colonists knew very well that if the unalienable rights they were urging for were not seen in the context of Judeo-Christian theism, they were without content.¹⁵

As a practical matter, Whitehead contends that “whenever a culture establishes its institutions upon the teachings of the Bible, it is able to have freedom in society and government.”¹⁶

The Christian view is that law and morality exist as a single inseparable entity based on the Bible. For the fundamentalists, the rise and widespread acceptance of humanism has resulted in “the non-Christian’s usurpation of the cultural mandate against the terms of the Bible.”¹⁷ Consequently, Whitehead concludes that “our government has also become a religion and is already involved in bitter conflict with the religion of Christ. Obviously, Christianity and the new state religion of America cannot peacefully coexist.”¹⁸

II. A Christian Analysis of the Contemporary State and Its Legal Institutions

Whitehead’s criticisms of the modern state are blunt and severe. As an operating principle, Whitehead contends that: “When a state claims divine honors, there will always be warfare between Christ and Caesar, for two rival gods claim the same jurisdiction over man. It is a conflict between two kingdoms, between two kings, each of whom

14. *Id.* Francis Schaeffer similarly comments: “Humanism, with its lack of *any* final base for values or law, always leads to chaos.” F. SCHAEFFER, *A CHRISTIAN MANIFESTO* 29 (rev. ed. 1982).

15. J. WHITEHEAD, *supra* note 2, at 32. Jerry Falwell, in specifying the primary areas of disagreement between the humanist liberals and religious conservatives, notes: “It is not the religious conservatives in this country who have politicized the Gospel. It is the liberal in the church and in the government who has turned the basic moral values that were the foundation of this country into political issues. Until recently, most people agreed that abortion is murder, that homosexual practice is perversion and that pornography is the exploitation of women and men.” Falwell, *The Maligned Moral Majority*, *NEWSWEEK*, Sept. 21, 1981, at 17. See also F. SCHAEFFER, *supra* note 14, at 31-40.

16. J. WHITEHEAD, *supra* note 2, at 23-24.

17. *Id.* at 27.

18. *Id.* at 18.

claims ultimate and divine powers.”¹⁹ In relating this proposition to contemporary American society, Whitehead alleges that “we are involved in the same head-to-head confrontation in the United States today. The state—the federal bureaucracy and the courts—have [sic] become the modern divinity.”²⁰ Whitehead thus concludes that “[t]he humanistic consensus is interested in eliminating Christianity, because individual Christians have an absolute standard by which to judge the system.”²¹ Examples of America’s deviation from its biblical origins are the legalizing abortion and euthanasia, developing test tube babies, recognizing gay rights, teaching evolution, and prohibiting prayer, Bible reading, and posting the Ten Commandments in public schools.²²

The failure of the modern state, according to Whitehead, is “[t]he failure of Christianity to influence society.”²³ Thus, instead of being a country whose operations are grounded in its biblical heritage, America is “saturated with a new system of arbitrary absolutes, a philosophical relativism that changes with opinion but that demands submission to its arbitrary will of the moment.”²⁴

Whitehead blames the judiciary for the humanistic transformation of American society. The principal source of this transformation is the Supreme Court’s recognition of an individual’s fundamental right to privacy.²⁵ Whitehead claims that this privacy right “places man at the center with no other reference point. First, God is set aside, then others (for example, the unborn child), until, in the end, everything is seen in utilitarian terms.”²⁶ Related to this development has been an alteration in the structure of legal analysis, from a biblically based common law

19. *Id.*

20. *Id.*

21. *Id.* at 40.

22. Similarly, the Reverend Jerry Falwell labels secular humanism a “satanic influence.” According to Falwell, secular humanism “challenges every principle on which America was founded. It advocates abortion-on-demand, recognition of homosexuals, free use of pornography, legalizing of prostitution and gambling, and free use of drugs, among other things.” Krauthammer, *The Humanist Phantom*, THE NEW REPUBLIC, July 25, 1981, at 20.

Mel Gabler, founder of the ultraconservative Educational Research Analysis, labels public schools as “government seminaries” of secular humanism. *Id.* at 21. Consequently, his organization advises public school officials not to purchase textbooks influenced by such humanistic features as situation ethics, evolution, negations of Christianity, and sexual freedom. See generally A. SHUPE & W. STACEY, BORN AGAIN POLITICS AND THE MORAL MAJORITY 29-45 (1980).

23. J. WHITEHEAD, *supra* note 2, at 41.

24. *Id.* at 41-42.

25. See *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). Ironically, the fundamentalists make use of these “privacy” decisions in arguing that their schools should not be regulated by the state—contending that parents have a fundamental right to direct the upbringing of their children.

26. J. WHITEHEAD, *supra* note 2, at 115.

system to the current system of legal positivism based on precedent.²⁷

Whitehead argues in favor of the common law system of law advanced in Blackstone's *Commentaries*,²⁸ summarizing Blackstone's thinking as follows:

Blackstone, a Christian, believed that the fear of the Lord was the beginning of wisdom. Thus he opened his *Commentaries* with a careful analysis of the law of God as revealed in the Bible. He defined law as a rule of action, which is prescribed by some superior, and which the inferior is bound to obey.²⁹

Law, as Whitehead interprets Blackstone, is God-made, not judge-made. Accordingly, the judiciary's role is to make known and validate the unwritten common law, not to create its own man-made law.³⁰

Whitehead is particularly critical of contemporary legal education for its fostering of humanistic values. On this subject, he contends that the culture is producing legal technicians who have little appreciation for the broader aspects of the law. Today the law student . . . is instructed to become a legal technician in every area of business: contracts, corporations, and commercial transactions. He also may become an analytical expert in courtroom tactics, but he often works with little consideration of what the public looks for in the courtroom: justice.³¹

Whitehead also attributes the "humanization" of law to the case method of instruction commonly used at law schools. In his opinion, that form of instruction inevitably leads to a system of legal positivism and the belief that laws are merely what the judges say they are. Whitehead thus rejects the common perception that the basic principles and doctrines of the legal system are the product of an evolving process of judge-made law.³²

According to Whitehead, our legal system's reliance on precedents has resulted in a shift in constitutional interpretation by the courts. He argues that "with the substitution of sociological jurisprudence for the Judeo-Christian base, the doctrine of judicial review has become a tyrannous device. It places the entire government under the authority of the Supreme Court"³³ To demonstrate this point, Whitehead contrasts the perspective of John Marshall, the Court's first Chief Jus-

27. *Id.* at 54.

28. W. BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* (London 1807-1822).

29. J. WHITEHEAD, *supra* note 2, at 31.

30. *Id.* at 54.

31. *Id.* at 44.

32. *Id.* at 54.

33. *Id.* See also F. SCHAEFFER, *supra* note 14, at 41-51, 81-82. The Reverend Jerry Falwell is also alarmed by the "humanistic" courts' interference with traditional Judeo-Christian values: "The government [has been] encroaching upon the sovereignty of both the Church and the family. The Supreme Court had legalized abortion on demand. . . . Most Americans were shocked, but kept hoping someone would do something about all this moral

tice, with that of Donald E. Santarelli, an associate deputy attorney general in the Nixon Administration. Marshall wrote, in *Osborn v. United States Bank*,³⁴ that:

Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are mere instruments of the law, and can will nothing. . . . Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect . . . to the will of the law.³⁵

Directly contradicting Marshall's view, Santarelli commented that:

The Constitution is flexible. . . . Your point of view depends on whether you're winning. . . . The Constitution isn't the real issue in this; it's how you want to *run the country*, and achieve national goals. The language of the Constitution is not at issue. It is what you can interpret it to mean in the light of modern needs. In talking about a "Constitutional crisis" we are not grappling with the real needs of running the country but are using the issues for the self-serving purpose of striking a new balance of power. . . . Today, the whole Constitution is up for grabs.³⁶

These conflicting views regarding the scope of judicial review in the constitutional scheme have been labeled "interpretivism" and "noninterpretivism."³⁷ Interpretivism signifies the view that constitutional interpretation should be based solely on the actual language of the Constitution. Noninterpretivism connotes the view that the Constitution is a living document whose meaning can be gleaned from its purpose and from events surrounding its drafting. Whitehead argues that the Constitution is biblically based; thus, strict construction is preferred because it is apt to further Judeo-Christian values.³⁸ Whitehead also suggests that the noninterpretivistic approach results in humanistic judge-made law. Echoing some of Whitehead's views, Judge Robert Bork has commented:

There may be a conventional morality in our society, but on most issues there are likely to be several moralities. They are often regionally defined, which is one reason for federalism. The judge has no way of choosing among differing moralities or competing moralities except in accordance with his own morality.³⁹

Whitehead's view on the propriety of interpretivistic constitutional discussion is reflected in his discussion of Supreme Court decisions that

chaos." E. DOBSON & E. HINDSON, *THE FUNDAMENTALIST PHENOMENON: THE RESURGENCE OF CONSERVATIVE CHRISTIANITY* 188 (J. Falwell ed. 1981).

34. 22 U.S. (9 Wheat.) 738 (1824).

35. *Id.* at 866.

36. *The Talk of the Town*, *THE NEW YORKER*, Apr. 28, 1973, at 34.

37. See generally J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

38. J. WHITEHEAD, *supra* note 2, at 54.

39. Bork, *The Struggle Over the Role of the Court*, *NAT'L REV.*, Sept. 17, 1982, at 1138.

impact on religious freedom.⁴⁰ Typical of this interpretivistic analysis is Whitehead's discussion of Court decisions pre-dating the growth of humanism.⁴¹

The court's function was to arrive at a just result, but in terms of the higher law. Thus, the courts were not obliged to enforce a law that was unjust in terms of the Bible

This is well illustrated by a series of Supreme Court cases in the late nineteenth century, in which congressional acts against bigamy were upheld. Those laws were aimed at the practice of polygamy then current among Mormons. Underlying the Court's approval of this legislation was the fact that polygamy was contrary to Christian moral standards. The Court's decisions were thus premised upon what was right or wrong according to its reference point in the Bible.⁴²

One of these Court opinions went so far as to say that "[t]he term 'religion' has reference to one's views of his relations to his Creator"⁴³ Whitehead makes use of similar reasoning to criticize a series of Supreme Court decisions in the 1960's relating to the conscientious objector status of Vietnam draft resisters. Most disturbing to Whitehead is the decision in *United States v. Seeger*,⁴⁴ in which the Court defined religion as all sincere beliefs "based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."⁴⁵ In *Seeger*, the Judeo-Christian God did not serve as a reference point for religious belief. Thus, according to Whitehead, the *Seeger* decision signifies that "belief or disbelief in the Christian view of God is no longer relevant in defining religion under the First Amendment."⁴⁶

Whitehead closes his analysis of recent religion clause decisions by concluding that the Supreme Court has effectively secularized the First Amendment. Of particular concern to him is the 1980 decision in

40. It must be noted that Whitehead *assumes* that the meanings of the terms in the Constitution are grounded in biblical mores. In other words, Whitehead feels that American jurisprudence ought to conform to Christian values.

41. Whitehead does not attribute the advent of humanism to a specific event. He suggests that humanism began to spread after the release of Darwin's *Origin of the Species* in 1859 and after the end of the American Civil War in 1865. J. WHITEHEAD, *supra* note 2, at 36. On the subject of the American legal system, Whitehead posits that humanistic legal positivism started to grow when "Christopher Langdell, dean of the Harvard Law School, began to apply Darwinian thought to legal education . . . [through] the 'case method' of teaching law." *Id.* at 46. Whitehead contends that humanistic thought became more pervasive in the early part of the century during the *Lochner* era. *Id.* at 119-20. See *Lochner v. New York*, 198 U.S. 74 (1905).

42. J. WHITEHEAD, *supra* note 2, at 87-88.

43. *Davis v. Beason*, 133 U.S. 333, 342 (1890).

44. 380 U.S. 163 (1965).

45. *Id.* at 176.

46. J. WHITEHEAD, *supra* note 2, at 108.

Stone v. Graham.⁴⁷ In that case, the Court struck down a Kentucky law requiring the posting of the Ten Commandments in public school classrooms. The Court held that the Ten Commandments were "plainly religious" and may "induce the school children to read, meditate upon, perhaps to venerate and obey, the Commandments."⁴⁸ Whitehead views this decision as signifying that "the First Amendment can allow only 'secular' activity in the public schools of America" for "if they [the Ten Commandments] were taken seriously, in the Christian sense, they would be against the law."⁴⁹

Whitehead rejects the development of the modern humanistic state. In particular, he objects to the recognition of the right to privacy, which permits abortions,⁵⁰ and the right to die, which permits euthanasia.⁵¹ The perceived shift from biblical revelation to humanism, for Whitehead, already has led to moral corruption and ultimately will lead to the demise of individual liberty in the modern state.

III. The Christian Response

In an attempt to formulate a plan of action to combat humanism, Whitehead argues that:

It is time to shed the naive idea that the modern humanistic state exists to perpetuate good government. . . . It is also time to discard the idea that Christians can simply go about their business, neither looking to the left nor to the right. Every true Christian is in some way on an eventual collision course with the modern technological state, and he should be prepared for it.⁵²

According to Whitehead, "[p]rotest is *our* most viable alternative at this time in history."⁵³

Whitehead believes that this Christian protest ought to manifest itself in both lawful and unlawful behavior. On one hand, Whitehead encourages mainstream activity such as letter writing, participation on local school boards, voting, and speaking out intelligently on social issues.⁵⁴ On the other hand, Whitehead writes of the "duty to disobey the state."⁵⁵ For him, "[c]itizens have a *moral* obligation to resist un-

47. 449 U.S. 39 (1980) (per curiam).

48. *Id.* at 42.

49. J. WHITEHEAD, *supra* note 2, at 110.

50. *Id.* at 121-24.

51. *Id.* at 138-39.

52. *Id.* at 145-46.

53. *Id.* at 156 (emphasis added).

54. *Id.* at 166.

55. *Id.* at 151 (quoting F. SCHAEFFER, *supra* note 14, at 93). Francis Schaeffer similarly contends that "[i]f a law [is not grounded in the Judeo-Christian tradition and consequently] is wrong, you must disobey it." F. SCHAEFFER, *supra* note 14, at 66 (emphasis omitted). Schaeffer bases his theory of civil disobedience on Samuel Rutherford's *Lex Rex*. See F.

just and tyrannical government."⁵⁶ But unlike Martin Luther King, Jr., who felt that an individual must accept state prescribed punishment for his civil disobedience,⁵⁷ Whitehead advocates a much more disruptive form of protest. For example, he postulates that:

The Supreme Court cannot execute its own decisions. The entire system depends on people following what the Court says. The time may have come when a local community or state may have to disobey the Supreme Court or other Federal and state agencies that act contrary to the principles of the Bible.⁵⁸

Accordingly, Whitehead concludes his book by calling for "a revolution promulgated to be a total assault on the humanistic culture. A Second American Revolution founded upon the Bible in its totality. In this, and only this, is there hope for the future."⁵⁹

IV. Relevance of *The Second American Revolution*

The theory of judicial decisionmaking advanced in *The Second American Revolution* is a broadside critique of conventional wisdom and jurisprudence. Whitehead advocates both the suppression of "non-Christian" thought⁶⁰ and the displacement of the contemporary secular state.⁶¹ Thus, Whitehead's vision of "Christian America" is directly opposed to the values embodied in the freedoms of religion, expression, and association—values that are generally perceived as the cornerstones of American democracy.⁶² Additionally, Whitehead argues that constitutional analysis should be predicated upon a literal interpretation of the Bible;⁶³ he advocates the substitution of the "biblically" based common law system for precedent based decisionmaking.⁶⁴ Finally, Whitehead demands that legal arguments be based on what is biblically "right" and thus surreptitiously calls for the abandonment of the adversary system of justice.⁶⁵

SCHAEFFER, *supra* note 14, at 99-109. For a critique of Schaeffer's analysis, see McCulley, *supra* note 3.

56. J. WHITEHEAD, *supra* note 2, at 154 (emphasis original).

57. King, *Letter from Birmingham Jail* (1963), reprinted in 8 ANNALS OF AMERICA 143 (1968).

58. J. WHITEHEAD, *supra* note 2, at 158.

59. *Id.* at 180.

60. See *supra* note 46 and accompanying text.

61. See *supra* note 52 and accompanying text.

62. As Justice Jackson stated: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

63. See *supra* note 42 and accompanying text.

64. See *supra* notes 28-29 and accompanying text.

65. See *supra* note 31 and accompanying text.

An examination of case law has no place in a critical analysis of Whitehead's thesis, for his thinking is alien to the values underlying American jurisprudence. Whitehead's debunking of our legal system derives from the two basic premises that the founding fathers intended America to be a "Christian" state *en perpetuo*⁶⁶ and that a "Christian" state is the most desirable form of government.⁶⁷ A critique of *The Second American Revolution* then must focus on the accuracy of those premises.

Whitehead's notion that his thinking reflects the "true" American perspective is fundamentally flawed for two reasons. First, Whitehead's historical analysis is inaccurate. Second, history is only one factor in constitutional interpretation; so even if Whitehead's historical premise is accurate, his conclusions are still wrong.

The scholarly debate over the Framers' intent in drafting the Constitution and Bill of Rights is legion.⁶⁸ Yet, "[b]y the time of the drafting . . . , opinions in favor of general religious liberty and disestablishment of official churches were widespread. The principal debate was over how far disestablishment should go and whether such disestablishment implied total separation of religion and government or merely separation of government from any particular church."⁶⁹ According to Mark DeWolfe Howe, the theory upon which the Constitution was based

excluded much more than religion from the competence of government, for it contained at its center the concept of inalienable rights—the thesis, that is, that the law of nature renders wholly void any turning over of private liberty or immunity to the rule of public authority. The principal function of a bill or declaration of rights was to define the areas of personal autonomy wherein the writ of government could not run. Within such protected areas of immunity, private liberties would freely grow and flourish.⁷⁰

Whitehead's contention that "Christian" values were intended to permeate American government is thus contrary to the spirit of liberty which underlies the Constitution.

Whitehead's belief that America was designed to be a "Christian" state is probably based on the fact that during the Revolutionary War

66. See *supra* note 15 and accompanying text.

67. See *supra* note 16 and accompanying text.

68. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 816-19 (1978); CONGRESSIONAL RESEARCH SERVICE, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 912-13 (1972).

69. Hitchcock, *The Supreme Court and Religion: Historical Overview and Future Prognosis*, 24 ST. LOUIS U.L.J. 183, 183-84 (1980). See also Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1057-60 (1978).

70. M. HOWE, *THE GARDEN AND THE WILDERNESS* 18 (1965).

era most Americans were Christians,⁷¹ and American courts continued to follow the Christian influenced common law.⁷² In fact, many of the original states had established Protestant Christianity as the official state religion.⁷³ Yet, there was a substantial non-Christian population at this time,⁷⁴ and several states had enacted anti-establishment provisions.⁷⁵ More significantly the Framers of the Constitution believed in equality of opportunity among religions and religious thought.⁷⁶

Whitehead's historical premise, therefore, appears inaccurate. Additionally, even if it is accurate, history is not the controlling factor in constitutional adjudication. According to Arthur Miller, "the Constitution is an evolving institution and . . . the Supreme Court's decisions have had the effect of updating a document drafted in far different times for far different problems."⁷⁷ Laurence Tribe likewise states:

[I]n the end it is the *text* [of the Constitution] that invites a collaborative inquiry, involving both the Court and the country, into the contemporary contents and demands of freedom, fair-

71. Joseph Story wrote: "[A]t the time of the adoption of the Constitution . . . the general if not universal sentiment in America was, that Christianity ought to receive encouragement from the state *so far as was not incompatible with the private rights of conscience, and the freedom of religious worship.*" 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 726 (reprint ed. New York 1970) (emphasis added).

72. Professor Howe notes: "[Jefferson] had always been uncomfortably aware of the closeness of the affiliation between Christianity and the common law and had developed an ingenious and learned argument against the assertion that Christianity is part of the common law On the whole, however, Jefferson's effort had little effect on the decision of cases in American courts administering the common law. The judges found it very easy to repeat the old maxim and to find reasons (or other grounds) for discrediting the endeavor of Jefferson." M. HOWE, *supra* note 70, at 27-28.

73. See, e.g., *id.* at 41: "In the remarkable constitution which South Carolina adopted in 1778 it was stated that 'the Christian Protestant religion shall be deemed . . . the established religion of this State.'" *But cf.* 3 THORPE, FEDERAL AND STATE CONSTITUTIONS 1889 (1909) (Massachusetts anti-establishment provision).

74. See S. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 360-84 (1972); B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 249-52 (1967).

75. Virginia's Act for Establishing Religious Freedom, for example, stated that "forcing [a man] to support this or that teacher . . . is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern, or whose powers he feels most persuasive to righteousness." M. HOWE, *supra* note 70, at 2 (citing 12 HENING, STATUTES AT LARGE 84-85 (1823)).

76. See G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 427-28 (1969).

77. Miller, *Notes on the Concept of the "Living" Constitution*, 31 GEO. WASH. L. REV. 881, 881 (1963). Paul Freund similarly refers to the Constitution as "[a] work of art in its capacity to respond through interpretation to changing needs, concerns, and aspirations." Freund, *New Vistas in Constitutional Law*, 112 U. PA. L. REV. 631, 645-46 (1964); see also Hyman & Newhouse, *Standards for Preferred Freedoms: Beyond the First*, 60 NW. U.L. REV. 1 (1965); McKay, *Stability and Change in Constitutional Law*, 17 VAND. L. REV. 203 (1963); Van Loan, *Natural Rights and the Ninth Amendment*, 48 B.U.L. REV. 1 (1968).

ness, and fraternity. The text does so through majestic generalities that plainly summon judges and lawmakers alike to a task which simply cannot be understood as the deciphering of an ancient scroll⁷⁸

This perception—that the Constitution is a “living” document—has always been shared by the courts. In 1819, Chief Justice John Marshall contended that the Constitution was “intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”⁷⁹ In 1821, Marshall similarly characterized the Constitution as “framed for ages to come, and . . . designed to approach immortality, as nearly as human institutions can approach it.”⁸⁰ Today, the Constitution has “evolved” to include a right of privacy that guarantees women the right to obtain an abortion,⁸¹ a right to equal protection under the laws that insures a free education to the children of illegal aliens,⁸² and a right to due process of law that prohibits a public school from suspending a student without a hearing.⁸³

John Whitehead is dissatisfied with the evolution of constitutional law. Yet, even if some jurists have improperly extended the rule of law, constitutional interpretation must respond to contemporary needs.⁸⁴ The Constitution was drafted in sufficiently general terms to allow such interpretation. Additionally, “[t]he cautious development of unenumerated constitutional rights permits the Court to react to the novel social, political, and economic demands placed upon the Constitution.”⁸⁵ Just as stomach pumping designed to obtain evidence is “conduct that shocks the conscience” and thus is violative of the due process clause,⁸⁶ John Whitehead’s model of Christian supremacy is too repugnant to contemporary pluralistic concerns for that model to be justified solely on historical grounds.

Once the historical bubble that underlies Whitehead’s thesis is burst, Whitehead’s argument becomes a normative advocacy of the virtues of and the necessity for Christian life in a Christian state.⁸⁷

78. L. TRIBE, *supra* note 68, at 566 (emphasis original).

79. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

80. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 387 (1821).

81. *Roe v. Wade*, 410 U.S. 113 (1973).

82. *Plyler v. Doe*, 457 U.S. 202 (1982).

83. *Goss v. Lopez*, 419 U.S. 565 (1975).

84. *See generally* R. McCLOSKEY, *THE AMERICAN SUPREME COURT* (1960).

85. *Van Loan*, *supra* note 77, at 37.

86. *Rochin v. California*, 342 U.S. 165, 172 (1952).

87. In addition to the inadequacy of Whitehead’s historical analysis, Whitehead does not discuss issues that do not correspond with his thesis; these issues, however, are pertinent to an understanding of the fundamentalist movement.

Whitehead repeatedly points out that we need to return to the Bible because “[w]ords have meaning only in terms of their reference point.” J. WHITEHEAD, *supra* note 2, at 181. Yet, what is most striking about Whitehead’s book is its total omission of any discussion of the current controversy over fundamentalist Christian schools. This issue centers on the

America, however, is not and should not be subject to totalitarian rule—whether it be under the auspices of the Ayatollah Khomeini or John W. Whitehead.⁸⁸

Whitehead demands that the American legal system “return” to its Christian roots. If this proposition were adopted, however, a great many of the advances made by religious groups over the past fifty years would be undercut.⁸⁹ This assumption seems realistic in light of the fact that Whitehead supports court decisions such as the Mormon po-

fundamentalists’ willing exodus from mainstream society. In other words, fundamentalist educators are seeking to isolate themselves from society, not to change it. *See generally* Devins, *State Regulation of Christian Schools*, 10 J. LEGIS. 351 (1983).

The Christian school issue has taken shape both in the courts and in the legislatures. *See* Devins, *supra* note 10. In courts, fundamentalist Christian educators claim that a constitutionally unjustifiable stranglehold is being placed on their religious liberty by state laws and bureaucracies. The issues in these cases center on efforts by state educational agencies to license private schools, as well as to prescribe course offerings and teacher qualifications in those schools. In state legislatures, fundamentalists are seeking to have legislation enacted that will effectively deregulate their schools. *See supra* notes 10-11 and accompanying text.

Whitehead purposely bypasses discussion of this issue. He cannot claim ignorance of it, however, since he has defended the fundamentalists in court. *See infra* note 95 and accompanying text. Apparently, Whitehead felt it best to omit discussion of an issue which suggests that the fundamentalists want to isolate themselves from the rest of society.

88. This analogy is extreme. Yet, *The Second American Revolution* is so narrowly focused that Whitehead has opened himself up to this type of criticism. In other writings, Whitehead takes a more reasonable approach and urges that Christians must actively participate in society if they want Christian values to be an integral part of the social order. *See, e.g.*, Whitehead, *The Boston Tea Party 1982?*, CHRISTIANITY TODAY, Nov. 12, 1982, at 28. He has also recognized that America is a pluralistic country. *See generally* J. WHITEHEAD, THE NEW TYRANNY (1982).

89. Whitehead apparently defines religion as belief in the Judeo-Christian God. Thus, so-called “fringe” religious groups such as the “Moonies” and “Hare Krishnas” would not be protected by the Constitution’s free exercise or establishment clauses. Additionally, under Whitehead’s scheme, religious liberty protections would not be extended to established Eastern religions such as Taoism, Buddhism, and Confucianism.

Whitehead’s narrow definition of religion has been rejected both by the courts and by most fundamentalist attorneys. The prevailing view pertaining to the definition of religion was recently explicated in a concurring opinion by Judge Goldberg in *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310, 317-18 (5th Cir. 1977): “One person’s heresy can be another’s religion. It is extremely important that religion be defined in such a manner that labeling does not become the touchstone of constitutional analysis. . . . Religions can have abhorrent principles; most religious practices are benign, benevolent and beneficent. But we should not judge a religion by its practices. One era’s spiritual error is another’s heralded religion.” In a similar vein, Laurence Tribe contends that “all that is arguably religious should be considered religious in a free exercise analysis.” L. TRIBE, *supra* note 68, at 828. This contention is also supported by a number of Supreme Court decisions. For example, in *United States v. Ballard*, 322 U.S. 78, 86 (1944), the Court held that “the truth or verity of . . . religious doctrines or beliefs” could not be considered by a judge or jury without violating the free exercise clause. Likewise, in *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953), the Court held that “it is no business of courts to say what is a religious practice or activity for one group is not religion under the protection of the First Amendment.”

lygamy cases,⁹⁰ which limited the freedoms of religious minorities, and criticizes decisions such as the draft resister cases,⁹¹ which expanded the reach of religious liberty protections. Ultimately, Whitehead wants American society to become monotheistic. For him, permissible and impermissible behavior ought to be judged according to a literal interpretation of the Bible. Constitutional analysis would be derived from select pulpits instead of from the courts. Under this regime, for example, there could be no objection to the persecution of religious groups whose practices were not consistent with the terms of the Bible. As Paul Kauper, one of this nation's strongest advocates for religious liberty, contends in his *Religion and the Constitution*:

It is not the business of the churches—and here let me speak particularly of the Christian churches—to seek to make a Christian state out of the nation or to Christianize the law. State, government, and law are necessarily secular in character. The positive law and the institutions of government are concerned not with correct belief but with overt conduct related to good order, peace, justice, freedom, and community welfare. Churches transgress their proper function when they attempt to impose their own peculiar moral beliefs derived from religious insight upon others who do not share these beliefs and insights. It is imperative that in our pluralistic society no church seek the sanction of law for its own moral conceptions unless they are translatable into moral values and social policy appropriate to the purposes of the secular community. Churches are tempted to seek legislative sanction for their moral insights and thereby to impose their will upon the whole community. This leads them to ignore the fact that secular government is concerned with moral motivation only insofar as it relates to overt conduct prejudicial to the interests and values served by the law. They tend to disregard the freedom of those whose moral attitudes are totally different.⁹²

In many frightening ways, Whitehead's "ideal" world is similar to the "secular" world that he is trying to abolish. For Whitehead, the "secular" world denies Christian values and thus must be overcome. But the "Christian" world proffered by Whitehead similarly would deny non-Christian values; it would involve a closed system opposed to either the toleration or respect of minority views.

90. See *supra* notes 42-43 and accompanying text.

91. See *supra* notes 44-46 and accompanying text.

92. P. KAUPER, RELIGION AND THE CONSTITUTION 83-84 (1964). Regarding the beliefs of Christian fundamentalists, Peter Skerry aptly notes: "The curious tendency of today's fundamentalists 'to have it both ways' constitutes the essence of the historical relationship between fundamentalists and American society. They have always been a unique group of traditionalists, in that their beliefs include a long established commitment to the least traditional of all societies. They have long had to deal with the dilemma that their future as well as their past is bound up with the fate of the one nation that, as de Tocqueville first noted, was born modern." Skerry, Book Review, COMMENTARY, May 1982, at 98-104.

Contradicting Whitehead's argument, fundamentalist attorneys have stressed in court the importance of religious pluralism and the concomitant respect due to divergent religious perspectives.⁹³ For example, Internal Revenue Service efforts to deny tax exempt status to private schools whose religious practices are inconsistent with federal policies have been criticized as follows:

[T]he danger posed by the revenue procedure is that it may effectively impose severe economic pressures on all religions to follow a federally approved dogma. Unless a church stays in step with federal policy it will lose its tax exemption. Such application of the law will inevitably lead the government to favor those religious organizations that parrot federal policy over those that do not. The indirect effect of this will be to impose a federal presence upon religion contrary to the fundamental premise of the religion clauses of the first amendment.⁹⁴

John Whitehead is himself quite familiar with this "religious pluralism" argument. In fact, he made effective use of the argument in *State v. Nobel*,⁹⁵ a significant Christian school lawsuit.

The apparent conflict between Whitehead's legal argument and his political advocacy is reminiscent of the Nazi efforts to march in Skokie, Illinois. The Nazis argued in court that America's respect for divergent and conflicting thought—as exemplified in the protection afforded by the First Amendment's Freedom of Speech and Association Clauses—guaranteed them the right to speak out against that very same protection.⁹⁶ This type of inconsistency, however, does not justify disregarding or making light of the associational freedoms of the Nazis or the religious freedoms of individuals such as Whitehead. Whitehead, like anyone else, ought to be able to speak his mind and practice his religion—as long as his activities do not interfere with the rights of others to do the same. As Justice Jackson put it, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."⁹⁷

93. See Devins, *Fundamentalist Schools and the Law*, Christian Sci. Monitor, Sept. 22, 1982, at 23, col. 1; see generally Devins, *State Regulation*, *supra* note 87; Devins, *supra* note 10; Devins, *supra* note 11.

94. Neuberger & Crumplar, *Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration*, 48 FORDHAM L. REV. 229, 273 (1979).

95. No. S-7-91-0114-A, slip op. Michigan District Court, Allegan City, (Dec. 12, 1979) (Michigan teacher certification law held unconstitutional under First Amendment Free Exercise Clause).

96. See *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

97. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)

Unfortunately, Whitehead's thesis of Christian supremacy is opposed to those pluralistic concerns that require a careful analysis of his views.⁹⁸ For this reason, *The Second American Revolution* is ultimately dissatisfying.

Neal Devins*

98. James E. Wood, Jr., editor of *The Journal of Church and State*, reached an identical conclusion in his discussion of modern day fundamentalist beliefs and practices: "By confusing moral absolutes with public policy, anyone who dissents is identified with immorality and is in conflict with the will of God. The pluralism of America's faiths, not to mention the almost 80 million persons who remain without any religious affiliation, is ignored as well as the essential safeguards of a free society. The religious vision of the nation held by the New Religious Right may be in harmony with America's theocrats, past and present, but it is out of character with the founding of this nation and the guarantees of the First Amendment." Wood, *Religious Fundamentalism and the New Right*, 22 J. CHURCH & ST. 409, 420 (1980).

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