BETWEEN LAW AND CONSCIENCE: *Jones v. Van Zandt* AND THE CONSTITUTIONAL OBLIGATION OF OBEDIENCE

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Article VI of the U.S. Constitution states categorically that "the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land."[1] In congruence with this clause, several decisions of the U.S. Supreme Court have reaffirmed the sovereignty of the federal government in cases involving issues ranging from state sovereignty to personal actions. Yet, the Court's decision in *Jones v. Van Zandt* was unique in its assertion that a citizen under the authority of the Constitution was bound to uphold it even if it interfered with his moral code.[2] Though the decision was made in a case involving a runaway slave and an abolitionist, the obligation of obedience transcended its original context and has been applied in a myriad of constitutional issues ever since. It was not until the 1950s when the Court, under the leadership of Chief Justice Earl Warren, began reappraising the jurisprudence of the *Jones* decision and, thus, redefining federal sovereignty in a manner that took into consideration issues of personal conscience.[3]

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1. U.S. CONST. art. VI.
2. 46 U.S. (5 How.) 215, 223-25 (1847).
3. Editors, Calif. L. Rev., *Foreward*, 58 CALIF. L. REV. 1, 2 (1970).

INTRODUCTION

Among the most enduring questions within human society is whether citizens owe their foremost allegiance to the laws of their community, or to their own ethical sensitivities. Laws are not merely limits upon behavior that allow communities to function; they are the essence of a society's moral character, in the guise of prescribed cures for perceived ills. Yet, if such adherence violates a citizen's intimate code of conduct to a degree in which civil disobedience seems the sole option, are they obligated to obey it? Thus, a potent query arises: by what measure can a governing authority conclude with full conviction that either noncompliance was warranted, or merely a personal whim was acted upon?

At the heart of every governmental system is the necessity of obedience.[4] In order to effectively function in the interests of its citizens, a sovereign authority must administer the law with both diligence and equity. However, stability and order cannot be maintained without the uniformed adherence of its people to the law. But how fixed is this obligation? Under the terms of *any* social contract is there a mandate that a citizen must obey unjust laws? How far down the path of legally sanctioned discrimination, degradation, and/or murder is one expected to go in the cause of country? Can a duty to nationalism exonerate Confederate Captain Henry Wirz from his role in the deaths of thousands of Union soldiers at the Andersonville prison camp during the Civil War?[5] Or, the people of Cambodia who willingly contributed to "the killing fields" under the rule of Pol Pot and the Khmer Rouge?[6] Or, German citizens who participated in their Fuehrer's 'Final Solution'—the systematic slaughter of millions of Jews, homosexuals, Gypsies and Slavic peoples, and political dissidents?[7]

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4. *See* J.A. Buchanan, *A National League to Educate*, *in* LAW OBSERVANCE 97, 101 (W.C. Durant ed., 1929).

5. Kenneth S. Freeman, *Punishing Attacks on United Nations Peacekeepers: A Case Study of Somalia*, 8 EMORY INT'L L. REV. 845, 870 (1994).

6. Daniel Kemper Donovan, *Joint U.N.-Cambodia Efforts to Establish a Khmer Rouge Tribunal*, 44 HARV. INT'L L.J. 551, 551-55 n.1 (2003).

7. Richard W. Sonnenfeldt, *Remarks*, 27 CARDOZO L. REV. 1609, 1612 (2006).

Within American history it can be demonstrated that behind every popular confrontation against discriminatory law a strong undercurrent of moral dissent was duly present. For example, it was active protest against unjust laws that brought an end to both chattel slavery and the legal subjugation of women.[8] It was student demonstrations during the 1960s that raised public awareness of the atrocities of war that ultimately ended U.S. involvement in Vietnam.[9] Moreover, it was the bellow of outraged citizens who, upon learning their president had systematically violated the Constitution that he had twice sworn to "preserve, protect and defend," forced him to resign in disgrace in August 1974.[10] In short, as argued by Justice William O. Douglas in his 1970 book, *Points of Rebellion*: "The First Amendment was designed so as to permit a flowering of man and his idiosyncrasies."[11]

Thus, the most pertinent question becomes: at what point does the right to redress grievances with the government, as expressed in the First Amendment of the U.S. Constitution, give way to recognition of its sovereignty and the obligation to obey it, as expressed in the Supreme Law Clause of Article VI?[12]

This was the constitutional quandary posed to the U.S. Supreme Court in the case of *Jones v. Van Zandt* (1847).[13] At its core was the fervency of abolitionism and the contention that ending the immorality of slavery superseded its protection under federal law and, thus, demanded disobedience.[14] Presented with a choice between law and conscience, the

8. U.S. CONST. amend. XIII; U.S. CONST. amend. XIX; Jennifer K. Brown, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175, 2175 (1993); Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 9 (1995).

9. *See generally*, TODD GITLIN, THE SIXTIES: YEARS OF HOPE DAYS OF RAGE 291-93 (1993).

10. *See, e.g.*,THEODORE H. WHITE, BREACH OF FAITH: THE FALL OF RICHARD NIXON 35, 435 (1975).

11. WILLIAM O. DOUGLAS, POINTS OF REBELLION 11 (1970).

12. U.S. CONST. art. VI; U.S. CONST. amend. I.

13. 46 U.S. 215 (1847).

14. Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1581 n.153 (1997); Peter J. Riga, *The American Crisis Over Slavery: An Example of the Relationship Between Legality and Morality*, 26 AM. J. JURIS. 80, 84 (1981).

Court, writing through Justice Levi Woodbury, ruled in favor of not only a citizen's obligation to the Constitution regardless of personal conviction, but also included a description of federal sovereignty similar to the social contractarian theory of "negative freedom."[15] Though later Court decisions redefined the perameters of such central authority, it has not retreated from this principle.[16]

Thomas Hobbes and His Theory of Political Obedience

In his book *Leviathan*, the 17th-century English political philosopher Thomas Hobbes argued that man created societies to save himself from his own worst behavior.[17] It was his contention that "during the time [when] men live without a common [p]ower to keep them all in awe, they are in that condition which is called Warre [sic]; and such a warre [sic], as is of every man, against every man."[18] Furthermore, under such conditions, if human beings were left to their own code of behavior mere existence would be "solitary, poore [sic], nasty, brutish, and short."[19] Thus, governments and the laws dictated by them were created out of a need for order and stability, and the guaranteed way to achieve it was by a trade off: citizens sacrificed a portion of their personal autonomy to secure a sovereign authority in return for a guarantee of social stability.[20] Once this governmental structure was established, so long as citizens acted within laws created for the common good, they were free to conduct their personal business as they saw fit.[21]

The nature of social existence was to protect the entire community at the expense of the individual.[22] Thus, the importance of a written law was neither in what it entailed, nor its specificity, but that it be an effective deterrent to deviant

15. *Van Zandt*, 46 U.S. at 229-31; Phillip Birdwell, *The Philosophical Dimensions of the Doctrine of Unconscionability*, 70 U. Chi. L. Rev. 1513, 1529 (2003).

16. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 552 (1995).

17. Thomas Hobbes, Leviathan 117 (Richard Tuck ed., Rev. Student ed. 1996).

18. *Id.* at 88.

19. *Id.* at 89.

20. *Id.* at 123.

21. *Id.* at 148.

22. *Id.* at 120.

behavior.[23] According to Hobbes, the law had to be made known to the public, for its full practice depended upon "those, that have means to take notice of it."[24] Once realized, ignorance of the law was inexcusable, for "every man that hath attained to the use of Reason, is supposed to know, he ought not to do to another, what he would not have done to himself."[25] When all citizens accepted these edicts and, in turn, they were applied without favor, the law stood as the quintessence of the community's values.[26]

Within the framework of the Hobbesian social contract, therefore, law and justice were simultaneously compatible and incompatible. When all agreed upon the necessity of a law they complemented one another; but, when a law was blatantly discriminatory, then the aim of one was not the goal of the other. Whereas law was set into a comprehensible and durable format, morality was elusive and troubled by multiple and often conflicting interpretations. As one demands solution and stability, the other seeks equity and accountability. Though both historians and political theorists have argued that the benefits of law are best defined by their fundamental fairness,[27] the reality is that they are centered upon social control. Thus, conflict between the two is often virulent and devastating, and a solution is wrought by brute aggression rather than intellectual merit.

Other political thinkers contended that law was not legitimate unless it benefitted each individual citizen. In his book *The Spirit of the Laws*, Baron de Montesquieu argued this premise: "[I]n a free state, every man, considered to have a free soul, should be governed by himself."[28] Consistent with

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23. *Id.* at 185.

24. *Id.* at 187. In 1816, former president Thomas Jefferson advocated a policy in which no person "should ever acquire the rights of citizenship until he could read and write." THOMAS JEFFERSON, WRITINGS 1387 (Merrill D. Peterson ed., 1984).

25. HOBBES, *supra* note 17, at 202. This is consistent with the decree of Jesus Christ, "So in everything, do unto others what you will have them do unto you." Matthew 7:12.

26. HOBBES, *supra* note 17, at 239.

27. *See* Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 843-44 (1978); J. Michael Veron, *Due Process and Substantive Accountability: Thoughts Toward a Model of Just Decisionmaking*, 38 LA. L. REV. 919, 933-34 (1978).

28. MONTESQUIEU, THE SPIRIT OF THE LAWS 159 (Anne Cohler et al. eds. trans., 1989).

this theory, society was comprised of coexisting individuals who have, of their own free will, donated a portion of their personal liberty for the safety of the group; therefore, if the law did not protect the individual, it was not legitimate. Within this context law and morality were consistent.[29] Yet, dissent on moral grounds is a concerted and conscious effort to undermine the authority of what is perceived to be an unjust law and, thus, its effectiveness. Hobbes wrote that the purveyors of such "seditious doctrines" failed to recognize "that the measure of Good and Evill [sic] actions, is the Civill [sic] law."[30] For law to be an instrument of good it must also hold the mantle of authority, which was weakened by distrust of its legitimacy.

This leads back to the question: can social justice be achieved under a Hobbesian construct of government? On the surface, seemingly, these two ideas are incongruent; yet, under specific circumstances the two complement one another well. According to social contract theory, once the two parties have agreed to its terms, the law was applicable to all citizens involved in its institution. As such, it was the duty of *all* citizens to be mindful of misapplication of the law and, concurrently, to redress such issues to their government.[31] Once advised, the government was obligated under the social contract to correct the problem in order to achieve political stasis. In this manner dissent and absolute sovereignty under the social contract were compatible. Yet, for this theory to be viable, again, *all* citizens had to be diligent in its enforcement.

Law, Conscience, and the Constitution

The death knell of a civilization is the impotence of its government. Once people lose faith in their political institutions,

29. As Montesquieu argued, "The formalities of justice are necessary to liberty." *Id.* at 602. This was the argument used by William Lloyd Garrison when he lit a copy of the Constitution on fire and called it "a covenant with death and an agreement with Hell." David M. Potter, The Impending Crisis 1848-1861, at 48 (Don E. Fehrenbacher ed., 1976).

30. Hobbes, *supra* note 17, at 223.

31. *See* U.S. Const. amend. I. This notion is embodied in the Constitution's First Amendment.

the viability of the sovereign authority ceases to be a relevant force. As defiance of its edicts increases the bond that once held a people together disintegrates. It is a principle the Framers knew very well from their readings of history, especially Edward Gibbon's *The Decline and Fall of the Roman Empire*, a popular publication of the time.[32] President George Washington understood this, which is why he actively challenged those at the forefront of the 1794 Whiskey Rebellion—any sign of weakness by the new federal government would be enough to bring it down.[33] Therefore, in the administration of power the rule over one by another is a necessity. For any society to flourish a sovereign authority must be defined and recognized by the citizens as such, or the result will be anarchy.[34]

The Federalists' intention in framing a new governing document to replace the unworkable Articles of Confederation was to institute a sovereign authority with the power to forcefully maintain order in a disintegrating Union;[35] therefore, the Constitution itself had little to say about the legitimacy of human conscience as a determinate of social order. In Federalist 37, James Madison argued that past attempts at rectifying law and morality had been "a history of factions, contentions, and disappointments; and may be classed among the most dark and degrading pictures which display the infirmities and depravities of the human character."[36] Alexander Hamilton's argument in Federalist 15 focused upon the need for a strong sovereign power, for during the era in which the nation was governed by the Articles, it had reached "the last stage of national humiliation."[37] During the ratification debates this fact did not go unnoticed by Anti-Federalists who, on December 18, 1787, published their protest in the *Pennsylvania Packet and Daily Advertiser* in which they argued

32. EDWARD GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE (1900).

33. STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 463 (1993).

34. Thomas Baty, *Can An Anarchy Be A State?*, 28 AM. J. INT'L L. 444, 444 (1934); Albert H. Horton, *Importance of the* Law, LEGAL CHATTER, Jan. 1938, at 4.

35. THE FEDERALIST No. 1, at 1, 4 (Alexander Hamilton) (Terence Ball ed., 2003).

36. THE FEDERALIST No. 37, at 174 (James Madison) (Terence Ball ed., 2003).

37. THE FEDERALIST No. 15, at 65 (Alexander Hamilton) (Terence Ball ed., 2003).

that, under the Articles, "the rights of conscience were held sacred," and, in contrast, one of the salient flaws of the Constitution was that it left this right "insecure."[38]

Upon reading the Constitution, it is clear which side of the debate the document favored. The Necessary and Proper Clause of Article I, Section 8, enabled the Congress to pass any needed legislation to both meet the needs of the citizens and to maintain public adherence to the Constitution.[39] This power was premised on the fact that future controversies and crises could be anticipated, but not predicted; therefore, it was necessary to guarantee to the legislature an ability to act under such circumstances.[40] Madison argued in Federalist 44 that "[w]ithout the substance of this power, the whole Constitution would be a dead letter."[41] However, the Anti-Federalist writer Brutus warned that if granted through ratification, such a clause would provide a potent central government with "a power to make laws at discretion."[42]

The Supremacy Clause stated that, once ratified, the Constitution was "the supreme Law of the Land."[43] This was yet another tool utilized in order to thwart popular challenges to the document's authority. Hamilton's rationale was thus: "If individuals enter into a state of society the laws of that society must be the supreme regulator of their conduct."[44] Thus, the Federalists sought to thwart any threats to the legitimacy of the Constitution by establishing it as the final legal authority of the nation. Yet, the Anti-Federalist writer The Impartial Examiner argued that if "this [C]onstitution should be adopted, here the sovereignty of America is ascertained and fixed in the federal body at the same time that it abolishes the present independent sovereignty of each state."[45]

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38. MURRAY DRY, THE ANTI-FEDERALIST: AN ABRIDGEMENT 220 (Herbert J. Storing ed., 1985).

39. U.S. CONST. art. I, § 8.

40. *See* Thomas B. McAffee, *The Federal System As Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17, 46-47 (1998).

41. THE FEDERALIST No. 44, at 219 (James Madison) (Terence Ball ed., 2003).

42. DRY, *supra* note 38, at 134.

43. U.S. CONST. art. VI.

44. THE FEDERALIST No. 33, at 151 (Alexander Hamilton) (Terence Ball ed., 2003).

45. DRY, *supra* note 38, at 281.

It is not difficult to detect sanctioned injustice within America's governing document. Article I, Section 2 of the U.S. Constitution mandated that slaves—or for that matter anyone who did not meet the proper criterion as "Persons"—were to be counted as "three-fifths" of a person for the purpose of determining the representational apportionment of the states in the federal legislature.[46] Article IV, Section 2, without specifically using the term "slave," protected the master's right to his bondage property.[47] Also, the Framers severely limited active citizen participation within the government for fear of social retribution.[48] As originally written, the Constitution did not allow the people themselves to determine either the members of the Supreme Court, the Senate, or the chief executive, by devising legal safeguards against any individual or group of citizens who sought to use the government to achieve an undue public influence.[49]

Thus, when the Framers gathered in Philadelphia, Pennsylvania in the summer of 1787, they were not seeking to make American society equitable: their mission was to hold a deteriorating union together before violent domestic uprising could overthrow it.[50] In making this choice, the necessity of Union trumped the notion of individual rights of conscience, for the possibility of the latter depended solely upon the establishment of the former.[51] However, just because the law is used to achieve order does not preclude the influence of morality and justice. During the initial five years of Reconstruction following the Civil War, many laws were passed and three amendments to the Constitution were ratified in an attempt to provide citizenship rights to freed black

46. U.S. CONST. art. I, § 2, cl. 3.

47. *Id.* at art. IV, § 2, cl. 3.

48. THE FEDERALIST No. 51, at 254 (James Madison) (Terence Ball ed., 2003) ("It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part.").

49. *See* U.S. CONST. art. I, § 3, cl. 1 (prescribing that U.S. Senators be elected by state legislatures), art. II, § 1, cl. 2 and 3 (prescribing that the President be elected by the electors), art. II, § 2, cl. 2 (prescribing that the President appoint Supreme Court justices).

50. *See* PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 187-88 (1st ed. 1997).

51. *Id.* at 193-94.

slaves.[52] In 1920, women were allowed to vote in federal elections because the states ratified the Nineteenth Amendment.[53]

Federal Sovereignty and its Precedent

In the six decades prior to its majority opinion in the *Jones* case, affirming federal sovereignty over and above state law,[54] the United States Supreme Court instituted a significant body of legal precedent that established central government sovereignty as sought by the Federalists.[55] Embodied by the Supremacy Clause of Article VI, laws and treaties rendered under authority of the Constitution, "shall be the supreme Law of the Land."[56] Alexander Hamilton argued in Federalist 33 that this was consistent with the political needs of every society, and that laws by their nature inferred a pronouncement of supremacy "over those societies, and the individuals of whom they are composed."[57] Therefore, it is reasonable that, in terms of the rule of law and in the expectation of constructing "a more perfect union,"[58] when in conflict with one another the Framers intended that obedience to the federal Constitution was an obligation that superseded personal conscience.

The U.S. Supreme Court under the leadership of both John Jay[59] and Oliver Ellsworth[60] guardedly considered federal sovereignty issues within its initial edicts. Among the legal

52. *See* U.S. Const. amend. XIII, § 1 (prohibiting slavery in the U.S. except for purposes of punishment); U.S. Const. amend. XIV, §§ 1, 2 (stating that all persons born or naturalized in U.S. are citizens and the whole number of persons in U.S. are counted for representation); U.S. Const. amend. XV, § 1 (stating that no U.S. citizen shall be denied the right to vote on account of race, color, or servitude).

53. *Id.* at amend. XIX.

54. Jones v. Van Zandt, 46 U.S. 215, 229-30 (1847).

55. *See* Marbury v. Madison, 5 U.S. 137, 180 (1803); Ware v. Hylton, 3 U.S. 199, 284 (1796); Chisholm v. Georgia, 2 U.S. 419, 464 (1793).

56. U.S. Const. amend. VI.

57. The Federalist No. 33, at 151 (Alexander Hamilton) (Terence Ball ed., 2003).

58. U.S. Const. pmbl.

59. *See* Richard Dean Burns & Richard D. Yerby, *John Jay: Political Jurist*, 13 J. Pub. L. 222, 222 (1964) (stating that John Jay was Chief Justice of the U.S. Supreme Court and dedicated Federalist who supported a strong central government and a powerful Supreme Court).

models the bench contemplated was the concept of judicial review, specifically in *Chisholm v. Georgia*.[61] In the Court's decision, Justice James Wilson, writing for the majority of the Court, stated: "[T]he Constitution ordained and established by those people; and, still closely to apply the case, in particular by the people of Georgia, could vest jurisdiction or judicial power over those States and over the State of Georgia in particular."[62] Concurrently, in a decision that furthered the process of state subordination to federal power, the Court affirmed the supremacy of federal treaties over those negotiated individually by the states in *Ware v. Hylton*.[63] The Court ruled that treaties "being sanctioned as the supreme law, by the [C]onstitution of the United States, which nobody pretends to deny to be paramount and controlling to all state laws, and even state constitutions, wherefoever they interfere or disagree."[64]

Under the leadership of Chief Justice John Marshall, the Court established a form of sovereignty based upon the consistency of the law in a series of decisions ranked among its most imperative, the first being *Marbury v. Madison*.[65] In a unanimous decision, the Judiciary Act of 1789 was invalidated while, concurrently, the Court asserted its right of judicial review over federal government legislation.[66] Chief Justice Marshall firmly declared the principle of federal sovereignty in his opinion: "[A] law repugnant to the constitution is void; and . . . courts, as well as other departments, are

60. *See* Henry M. Shepard, *Oliver Ellsworth*, 2 CHI. L. TIMES 109, 115-16 (1888) (stating that Oliver Ellsworth supported the Constitution, was appointed a delegate to the Connecticut Convention, and strongly supported judicial supremacy).

61. 2 U.S. 419, 463-64 (1793) (stating that the Constitution can exercise judicial power over the states).

62. *Id.* at 464.

63. 3 U.S. 199, 284 (1796) (stating that federal treaties are supreme to all state law and state constitutions). This case was argued before the Court by future Chief Justice John Marshall who, upon his appointment to the Court, became an ardent supporter of federal sovereignty. *See* Symposium, *Chief Justice John Marshall and Federalism*, 16 ST. JOHN'S J. LEGAL COMMENT. 351, 353, 356 (2002).

64. *Ware*, 3 U.S. at 281, 284.

65. 5 U.S. 137, 180 (1803); *see also* Samuel R. Olken, *Chief Justice John Marshall and the Course of American Constitutional History*, 33 J. MARSHALL L. REV. 743, 759-60 (2000) (showing Chief Justice Marshall's view of judicial sovereignty).

66. *Marbury*, 5 U.S. at 138.

bound by that instrument."[67] This authority was expanded to include state legislation in the Court's pronouncement in *Fletcher v. Peck*, when it declared a Georgia statute overturning land grants in the Yazoo Valley unconstitutional.[68] The Court stated

> [T]he state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.[69]

This is the clause in the opinion that established the Court's fundamental right of judicial review of state legislation.[70]

The first blanket statement of federal sovereignty was issued in the case of *McCulloch v. Maryland*, in which the Court declared a Maryland state law that mandated a tax upon the Second Bank of the United States, a federal government institution, unconstitutional.[71] Citing the Necessary and Proper Clause of Article I, Section 8, the Court held that the state's power to tax was subordinate to both the Constitution and the federal government created by it.[72] Chief Justice Marshall wrote:

> [T]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.[73]

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67. *Id.* at 180; *see also* Olken, *supra* note 65, at 761.

68. 10 U.S. 87, 107, 139 (1810).

69. *Id.* at 139.

70. *See* Joseph M. Lynch, *Fletcher v. Peck: The Nature of the Contract Clause*, 13 SETON HALL L. REV. 1, 9, 15 (1982).

71. McCulloch v. Maryland, 17 U.S. 316, 422, 436 (1819); *see also* R. Kent Newmyer, *John Marshall,* McCulloch v. Maryland, *and the Southern States' Rights Tradition*, 33 J. MARSHALL L. REV. 875, 923 (2000) (stating that McCulloch v. Maryland is the source of national authority and one of two landmark decisions on the nature of sovereignty).

72. *McCulloch*, 17 U.S. at 329-30.

73. *Id.* at 436.

In short, this triumvirate of U.S. Supreme Court decisions set into stone the Hobbesian notion of a supreme sovereign authority coupled with an obligation of obedience based upon law in which dissent would find scant legal recourse.

With special attention to the issue of slavery, in the decade prior to the decision in *Jones*, the Court under the leadership of Chief Justice Roger Brooke Taney instituted strong precedent for federal government sovereignty.[74] Of these numerous cases, however, two stand out as crucial to the timbre of the *Jones* pronouncement. The first is the Court's decision in *Groves v. Slaughter*, in which it reaffirmed the federal government's jurisdiction over the slave trade and, by inference, sovereignty over all legal parameters of the issue itself.[75] Justice Smith Thompson wrote in his opinion: "[T]he constitution is mandatory upon the legislature, and that they have neglected their duty in not carrying it into execution, it can have no effect upon the construction of this article."[76] The second case is *Prigg v. Pennsylvania*, which was specifically cited by Justice Levi Woodbury in the *Jones* opinion.[77] In *Prigg,* the Court held that state laws that impeded full enforcement of Fugitive Slave laws, especially Article IV, Section 2, were unconstitutional.[78] Its rationale was premised upon the inflammatory nature of the issue itself, coupled with a statement of federal sovereignty. Furthermore, speaking through Justice Joseph Story, the Court declared:

> Historically, it is well known, that the object of this clause [Article IV, Section 2] was to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slaveholding states; and, indeed, was so vital to the preservation of their do-

74. Jones v. Van Zandt, 46 U.S. 215, 230-31 (1847); *see also* Alfred L. Brophy, *Let Us Go Back and Stand Upon the Constitution: Federal-State Relations in Scott v. Sandford*, 90 COLUM. L. REV. 192, 202 (1990).

75. 40 U.S. 449, 449-50 (1841).

76. *Id.* at 450, 496.

77. *Jones*, 46 U.S. at 223-29.

78. Prigg v. Pennsylvania, 41 U.S. 539, 540, 672-73 (1842).

> mestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed.[79]

Thus, the blunt truth was recognized that with regard to the Framers, when they were faced with a choice between a Union of the sovereign states and the eradication of slavery, they chose the former over the latter.[80] The southern states would never have ratified a document without specific protections of the "peculiar institution" and, as a consequence, those who harbored an animus against it had to submerge their private judgments and support the document for the greater good of the country.[81] Furthermore, in the decades that followed, the Court served as the final arbiter of the nation's governing document not only by adhering to a strict doctrine of federal sovereignty, but by applying it to issues of conscience regarding the slavery controversy. Upon meticulous scrutiny of the Court's pronouncements leading up to the *Jones* decision in 1847, it is clear that obedience to the law as written was of greater significance to the longevity and stability of the Union than opinions of personal ethics. The vital problem under this decision was that to ardent abolitionists the idea of thwarting their notions of morality for the sake of Union was contemptible.[82]

The Jones v. Van Zandt Decision

The case itself involved a runaway slave named Andrew, owned by Kentucky plantation owner Wharton Jones, who had fled bondage twice into Ohio with the aid of abolitionist John Van Zandt.[83] Plaintiff's counsel constructed his argument solely upon the Fugitive Slave Act of 1793, of which Sections 3 and 4 were cited in their entirety.[84] The defendant

79. *Id.* at 611.

80. *See* Louisa M. A. Heiny, *Radical Abolitionist Influence on Federalism and the Fourteenth Amendment,* 17 Temp. Pol. & Civ. Rts. L. Rev. 155, 158-59 (2007).

81. *See* G. Randal Hornaday, *Forgotten Empire: Pre-Civil War Southern Imperialism,* 36 Conn. L. Rev. 225, 244-46 (2003).

82. *See* David A. J. Richards, *Abolitionist Political and Constitutional Theory and the Reconstruction Amendments,* 25 Loy. L. A. L. Rev. 1187, 1188-93 (1992).

83. *Jones,* 46 U.S. at 215-17.

84. *Id.* at 216-19, 223.

had been clearly aware that the slave in question was Jones's lawful property and that he had acted without due consideration of such rights of ownership.[85] It was also made clear that the defendant had admitted that his actions were guided by personal moral conscience as it was, according to Van Zandt, "a Christian act to take slaves and set them at liberty."[86] Furthermore, it was added into evidence that when the case was heard before the Seventh Circuit[87] and District Court of Ohio, a state hostile to slavery, the outcome had been decided in favor of the plaintiff.[88]

Defense counsel—which included future Chief Justice Salmon Chase and William Seward, the future Secretary of State[89]—boldly sacrificed statute law and court precedent, and chose instead to deconstruct the plaintiff's case in order to reveal flaws in both their opponent's argument and circuit court procedure.[90] The defense attempted to clarify the elements of the crime and to call into question the legitimacy of the original verdict.[91] Along this line of strategy, the circuit court had been remiss in that it had instructed the jury that it was neither "necessary to prove that the defendant [had] intentionally placed the colored persons in question out of view, for the purpose of eluding the search of the master or his agent," nor "that the persons alleged to be harboured or concealed by him were fugitives from labor, within the meaning of the act of Congress."[92] Chase then challenged the consistency of the 1793 Fugitive Slave statute with both the Northwest Ordinance of 1787—which had banned the prac-

85. *Id.* at 217.

86. *Id.* at 219-20.

87. In 1847, at the time of *Jones v. Van Zandt*, Ohio was in the Seventh Circuit Court of Appeals, it has since been moved to the Sixth Circuit Court of Appeals. *See, e.g., id.* at 220.

88. *Id.* at 220; *see also* Stephen Middleton, *Salmon Portland Chase: Reluctant Antislavery Reformer: Comment on Frederick Blue's* From Right to Left, 21 N. KY. L. REV. 23, 29 (1993).

89. *Jones*, 45 U.S. at 223; *see also* William M. Wiecek, Somerset*: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86, 135 (1974); Marie Carolyn Klinkhamer, *Lincoln's Attorney General*, 41 U. DET. L.J. 507, 508 (1964).

90. *Jones*, 45 U.S. at 220-23.

91. *Id.*

92. *Id.* at 221.

tice of slavery by federal law in territories covered under the act—and the constitution itself.[93]

Justice Levi Woodbury, writing for the Court, first declared that any judgment rendered by the bench must be consistent with the Constitution, and that the salient issue of the case was not the legitimacy of slavery, but "the concealment of another's property, under knowledge that it belongs to another."[94] Woodbury reinforced this point when he began the majority opinion by quoting Article IV, Section 2, of the Constitution:

> "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."[95]

The applicable statute stated that:

> any person who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, his agent or attorney, when so arrested pursuant to the authority herein given or declared, or shall harbour or conceal such person, after notice that he or she was a fugitive from labor.[96]

The abolitionist argument of defendant Van Zandt, according to the Court, had no basis in the law, for the protection of slavery "was not repugnant to the constitution."[97] The individual states maintained their own laws, but preconditioned

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93. *Id.* at 222-23.

94. *Id.* at 227-28. Justice Woodbury stated:

> Whatever may be the theoretical opinions of any as to the expediency of some of those compromises, or of the right of property in persons which they recognize, this court has no alternative, while they exist, but to stand by the constitution and laws with fidelity to their duties and their oaths. Their path is a strait [sic] and narrow one, to go where that constitution and the laws lead, and not to break both, by traveling without or beyond them.

Id. at 231.

95. *Id.* at 223-24 (quoting U.S. CONST. art. IV, § 2).

96. *Jones*, 45 U.S. at 224.

97. *Id.* at 229-31. In this passage, Justice Woodbury is citing *Prigg v. Pennsylvania*'s assertion that the recognition of slaveholders' property rights of their slaves had "constituted a fundamental article, without the adoption of which the Union could not have been formed." *Prigg*, 41 U.S. at 611.

under the premise that such statutes must, at all times, conform to the federal charter.[98] Therefore, the Court upheld the right of Jones to his chattel property and ruled that the fine of $500 on Van Zandt was legitimate punishment for the offense.[99]

With regard to the Constitution, Justice Woodbury wrote that a citizen's duty was to "not interfere to impair or destroy it."[100] Moral considerations as to the status of the slave, Andrew, did not warrant a consideration, for the fundamental constitutional right of a slave owner, as protected by Article IV, Section 2, made such contentions moot. For, according to Justice Woodbury, it was "the clear right of every man at common law to make fresh suit and recapture of his own property within the realm."[101] Furthermore, in the opinion of the Court, "intermeddling with what belongs to another"—i.e. harboring fugitive slaves from their masters—was an immoral act.[102] Thus, issues of personal conscience were not consistent with the Constitution and the Court was not going to consider them. Justice Woodbury's majority opinion in *Jones* essentially reiterated Hobbes's theory of law espoused in *Leviathan*, that citizens must obey the law even if it violates their personal conscience.[103]

THE OBLIGATION OF OBEDIENCE AND HUMAN CHATTEL SLAVERY

The Court's majority decision in the *Jones* case was not unforeseen. It had not refashioned the law merely to appease slaveholding interests; to the contrary, the Court had firmly restated the law as written within Article VI of the Constitu-

98. *Jones*, 45 U.S. at 231; *see also* Fletcher v. Peck, 10 U.S. 87, 139 (1810).

99. *Jones*, 46 U.S. at 231.

100. *Id.* at 230.

101. *Id.* at 229.

102. *Id.* at 225.

103. Thomas Hobbes, THE LEVIATHAN 172 (Prometheus Books 1988) (1651) ("Therefore, though he that is subject to no [Civil] Law, sinneth in all he does against his Conscience, because he has no other rule to follow but his own reason; yet it is not so with him that lives in a Commonwealth; because the Law is the publique [sic] Conscience, by which he hath already undertaken to be guided. Otherwise in such diversity, as there is of private Consciences, which are but private opinions, the Common-wealth must needs be distracted, and no man dare to obey the Soveraign [sic] Power, farther than it shall seem good in his own eyes.").

tion.[104] In the purview of the Framers, the protection of human chattel slavery was a necessity for Union—a point reiterated by the Court in *Prigg v. Pennsylvania*.[105] This general statement was not only borne out of the Supremacy Clause of Article VI, but also by several others within the Constitution itself that protected the acquisition and maintenance of property,[106] commerce and trade,[107] and the rights of citizens who were defined as "persons,"[108] as well as the exclusion of all non-persons.[109] Thus, the *Jones* decision was a climax of the American nation's dual identity: a nation one-half slave and one-half free. As precedent, the *Jones* decision provided a basis for a set of decisions that demanded obedience to the cause of the Union while, simultaneously, tearing that fragile unity to shreds.

The first of these cases was *Strader. v. Graham*,[110] in which the salient constitutional issue was not the definition of the Supremacy Clause, but an explanation as to the boundaries between state and federal sovereignty: does a law rendered under a previous government retain the force of law when a new authority is adopted; and if not, if it is incorporated into a state constitution approved under that new sovereign state, does it retain full jurisdiction?[111] The case concerned three slaves who were hired out by their master and later escaped into Ohio—a state carved out of the Northwest Territory under the Ordinance of 1787—in 1841.[112]

The plaintiff's argument was that the Northwest Ordinance of 1787 had abolished slavery in the territory from which the state of Ohio had been forged; therefore, not only did the states themselves possess the prerogative to abolish

104. *See* U.S. CONST. art. VI.

105. *Prigg*, 41 U.S. at 563-64.

106. *See* U.S. CONST. amend. V.

107. *See Id.* at art. I, § 8, cl. 3.

108. *See generally id.* at. art. I, § 2, cl 3, *repealed by id.* at amend. XIV.

109. *Id.* at art. I, § 2, cl. 3.

110. 51 U.S. 82 (1850).

111. *See Id.* at 94, 96 (explaining the relationship between Ohio and the Northwest Ordinance of 1787 as well as the context of Ohio's self-imposed continuation and preservation of certain portions from the Northwest Ordinance of 1787).

112. *Id.* at 92-94.

it, but also federal law could not supersede it.[113] On the other hand, defense counsel contended that in temporary circumstances in which residency was necessary, such condition "conferred no right to freedom," under the 1787 Northwest Ordinance or the Constitution: only laws made under the sovereign authority of the Constitution were legitimate.[114] Apart from the Supremacy Clause of Article VI, several decisions made under the Marshall Court concerning sovereignty supported the defense's position.[115] Most importantly, ac-

113. *Id.* at 88 ("[I]f a master voluntarily hire[d] his slave to a citizen of a non-slaveholding State, to perform service and labor in such non-slaveholding State, and if he in fact send the slave there for that purpose, the slave becomes free"). Plaintiff contended only that states possessed the authority to determine the status of slavery, utilizing precedent rendered by the state supreme courts of Kentucky and Virginia who had prevented freedom by state law, as well as Indiana and Ohio who had instituted laws to prevent the practice. *Id.* at 91-91, 93-94. Plaintiff also cited to court precedent from Louisiana in support of his claim. *Id.* at 87 (citing Frank v. Powell, 11 La. 499, 500 (1838) and Smith v. Smith, 13 La. 441, 444 (1839)). The Missouri Supreme Court ruled similarly, stating that a slave that was hired out to work in a state that prohibited slavery "would doubtless entitle a slave to freedom." *Id.* (quoting La Grange v. Chouteau, 2 Mo. 20, 22 (1828)).

114. *Id.* at 90. However, it must be noted that many of the Framers of the Constitution and many prominent members of the early American judiciary relied on, and sometimes quoted, Blackstone's *Commentaries* as accepted legal authority. *See* Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 745-46, 753-59 (1976). For example, Justice Joseph Story quoted Blackstone concerning the common law right to reposes property in support of the notion that slave owners could seize and repossess their slaves. *Prigg*, 41 U.S. at 613 (1842). Additionally, during the debates over the Constitution's ratification, both Federalists and Anti-Federalists either alluded to or specifically cited such legal and political authorities as Blackstone, Montesquieu, and Plato. *See* THE FEDERALIST No. 84, at 418 (Alexander Hamilton) (Terence Ball ed., 2003) (relying on the political legal theory espoused by Blackstone); THE FEDERALIST No. 43, at 212 (James Madison) (Terence Ball ed., 2003) (relying on the political legal theory espoused by Montesquieu); THE FEDERALIST No. 49, at 246 (James Madison) (Terence Ball ed., 2003) (relying on the political legal theory espoused by Plato); LETTER II OF BRUTUS (Nov. 15, 1787), *reprinted in* ALEXANDER HAMILTON, JAMES MADISON, AND JOHN JAY: THE FEDERALIST WITH LETTERS OF "BRUTUS" 454 (Terence Ball ed., 2003) (relying on the political legal theory espoused by Montesquieu); LETTER XI OF BRUTUS (Jan. 31, 1788), *reprinted in* ALEXANDER HAMILTON, JAMES MADISON, AND JOHN JAY: THE FEDERALIST WITH LETTERS OF "BRUTUS" 503 (Terence Ball ed., 2003) (relying on the political legal theory espoused by Blackstone)." It was this case that allowed slavery to be highly regulated in some colonies and abolished in others. *Prigg*, 41 U.S. at 611-12. When American independence was granted in 1783, the American colonies continued this tradition, as stated in the Articles of Confederation. ARTICLES OF CONFEDERATION of 1781, art. II.

115. *See, e.g.*, McCulloch v. Maryland, 17 U.S. 316, 405 (1819), *superseded by constitutional amendment*, U.S. CONST. amend. XVI ("[T]he government of the Union, though limited in its powers, is supreme within its sphere of action.")

cording to the Court's decision in *Jones v. Van Zandt,* which was interpreted to mean that even if a citizen perceived human chattel slavery to be a moral wrong, citizens were still constitutionally obligated to abide by the law or suffer its prescribed punishments.[116]

Chief Justice Taney, writing for the majority, stated the plaintiff's argument was without merit, for the Northwest Ordinance of 1787 had been nullified by the Constitution when Louisiana was admitted as a state.[117] Though the Court agreed the matter at hand was for the state courts to decide, it also made clear that the Constitution had been adopted by popular consent. Therefore, the state laws and edicts must be consistent with the Constitution—the supreme law of the land—and not a previous governing document, such as the Articles of Confederation.[118] As such, the Court held that when the states that carved out of the Northwest Ordinance had entered the Union, they then placed themselves under the jurisdiction of the federal government and accepted the Constitution as sovereign.[119] As the tenets of the Northwest Ordinance were not adopted by the Constitution, they were not enforceable as law.[120] The ordinance "cannot now be the source of jurisdiction," for the Constitution was *the* supreme law of the land.[121]

The irony of *Strader* was that, by allowing a lower court ruling to stand, the Taney Court had further strengthened the sovereignty of the federal government. By restating what Article VI already made clear, in a single blow the Court crippled the states' ability to abolish human chattel slavery. In

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Accordingly, all laws made under a prior authority were subject to nullification unless consistent with the Constitution. *Fletcher*, 10 U.S. at 139 (claiming the right of judicial review of state and local legislative acts). Therefore, state and local power was inherently inferior to federal government authority and, even if the 1787 Northwest Ordinance remained a legitimate act, it would still be under the authority of the Constitution and the central government created from it. *Id.*

116. Jones v. Van Zandt, 46 U.S. 215, 229 (1847).

117. *Strader*, 51 U.S. at 95.

118. *See id.* at 96. Chief Justice Taney rejected as irrelevant the thrust of Plaintiff's argument, that "the judgment of the State court was erroneous in deciding that these negroes were slaves." *Id.* at 93.

119. *Id.* at 94-95.

120. *Id.* at 95.

121. *Id.* at 97.

tandem, the Supreme Court's 1859 decision in *Ableman v. Booth* was an assertion of federal jurisdictional sovereignty over state courts.[122] "Because the decision had reaffirmed, at the expense of the states, the final authority of the central government, the southern states were appalled by it; and because it upheld pro-slavery statutes within the body of the Constitution . . . northern abolitionists condemned it."[123]

The Court unanimously asserted that the sovereignty of the United States Supreme Court was complete, for "[i]f the judicial power exercised in this instance has been reserved to the States, no offense against the laws of the United States can be punished by their own courts, without the permission and according to the judgment of the courts of the State."[124] The Court further stated that the Constitution provided for the uniformity of judicial precedent, which would be ruined if the states claimed primacy over federal jurisdiction.[125] Used as support for this statement was the Supremacy Clause of Article VI, which was either referred to or quoted directly on several occasions within the text. Another constitutional principle cited by Taney was the Necessary and Proper Clause of Article I, Section 8, in which Congress had seen fit to "carry into execution the powers vested in the judicial department."[126] By doing so, the Supreme Court had been

122. 62 U.S. 506 (1858).

123. Michael J. C. Taylor, *"A More Perfect Union":* Ableman v. Booth *and the Culmination of Federal Sovereignty*, 28 J. SUP. CT. HIST. 101, 107-08 (2003).

124. *Ableman*, 62 U.S. at 514. Taney made reference to this ideology within the text of the majority opinion:

> And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.

Id. at 516.

125. "There can be no such thing as judicial authority, unless it is conferred by a Government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the State." *Id.* at 515. The issue of initial contention was whether a state court had the right to "supervise and annul the proceedings of a commissioner of the United States." *Id.* at 513. More serious was the second charge: the Wisconsin State Supreme Court had exercised authority over the proceedings and judgment of a District Court that was beyond its sphere of influence. *Id.*

126. *Id.* at 521-22.

empowered to exercise its authority as it deemed useful within the confines of the law.

At the heart of the Court's assertion of definitive authority over constitutional matters was Chief Justice Taney's reading of Article III, in which judicial power included oversight of "every legislative act of Congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the Constitution."[127] The uniformity of law, being indispensable for effective government, requires one arbitrator to possess the final authority—which Chief Justice Taney argued was vested in the judiciary.[128] To reinforce this point, the Court reasserted the primary premise of its opinion in *Jones v. Van Zandt*: that citizens under the Constitution must obey the law, even if doing so was counter to their personal conscience.[129]

Though the ratification of the Thirteenth Amendment on December 6, 1865[130] ended the practice of slavery, with the exception being cases of punishment,[131] the constitutional obligation of obedience, as stated in Article VI and reinforced by several Supreme Court decisions, remained intact.[132] Afterwards, the jurisprudence of sovereignty was applied effectively on issues of conscience involving the actions of organized labor and personal loyalty to the country.[133] Associate Justice Owen J. Roberts explained that, in doing so, "the Court is not construing the words of the Constitution,

127. *Id.* at 520.

128. *Id.* at 520-21 ("[I]f such controversies were left to arbitrament [sic] of physical force, our Government, State and National, would soon cease to be Governments of laws, and revolutions by force of arms would take the place of courts of justice and judicial decisions.").

129. 46 U.S. 215, 217, 219-20, 231 (1847). Within the text of the *Ableman* decision itself, Taney stated: "Now, it certainly can be no humiliation to the citizen of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it." *Ableman*, 62 U.S. at 525.

130. U.S. CONST. amend. XIII., *as found in* U.S.C. preamble LXVI (enacted on Dec. 6, 1865 (2006).

131. U.S. CONST. amend. XIII.

132. U.S. CONST. art. VI; Haywood v. Drown, No. 07-10374 slip op. at 6-7, 12-13 (U.S. May 26, 2009); Maryland v. Louisiana, 451 U.S. 725, 747 (1981).

133. *See* Pollock v. Williams, 322 U.S. 4, 23, 25 (1944); *see also* United States v. Kozminski, 487 U.S. 931, 942-43 (1988) *superseded by statute*, 18 U.S.C. 1589.

but enforcing the principles on which it rests."[134] The legal repercussions of these decisions retained their power for more than six decades until national calamities forced their reexamination by the Court.

The Obligation of Obedience and Organized Labor

Within a representative democracy there is strength in numbers. Popularity has always been the base of power in American politics, as it is a crucial element that motivates the legislature to pass laws, or convinces the executive to sign or veto legislation.[135] In a presidential contest, the size of the candidate's support base determines the extent of possible fundraising and general competitiveness in caucuses and primary contests. Therefore, it is logical to assume that the larger the number of citizens participating in a protest or association, the larger the political muscle that can be exercised in the struggle for their specific cause.

However, the U.S. Supreme Court was the one branch designed by the Framers to be insulated from the whims of popular opinion.[136] A justice's charge is to render an interpretation based solely upon the law itself, without fear of popular retribution or favor to any specific interest group or government official.[137] To achieve this insulation, the Framers guaranteed the independence of the federal judiciary to the degree that were but two ways in which decisions of the Court could be overturned: 1) the Court could revisit a constitutional issue in a contemporary case and reverse their previous decision; or, 2) the Legislative Branch could pass, by a two-thirds vote in both houses, coupled with the ratification of two-thirds of the individual states, a constitutional amendment.[138] In Federalist 78, Alexander Hamilton defended

134. Owen J. Roberts, The Court and the Constitution: The Oliver Wendell Holmes Lectures 6 (1951). (Discussing federal sovereignty in the tax code).

135. *See generally,* Laura Bailey, *Public opinion lights the fire for politicians to adopt anti-smoking ban*, University of Michigan News Service (Jan. 12, 2012), http://ns.umich.edu/new/releases/20154-public-opinion-lights-the-fire-for-politicians-to-adopt-anti-smoking-bans.

136. The Federalist No. 78, at 381 (Alexander Hamilton) (Terence Ball ed. 2003).

137. *Id.* at 381-82

138. U.S. Const. art. V.

such judicial aloofness as "not with a view to infractions of the constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humours in the society."[139]

When the Thirteenth Amendment was ratified, something curious occurred: the nation abolished a form of bondage that applied to one specific race of people (human chattel slavery) in favor of another that enslaved all (wage slavery).[140] Though the Framers sanctioned the former out of a necessity for union, they had not considered the latter in any meaningful way.[141] In order to protect themselves from what they viewed as the profiteering whims of entrepreneurs, workers established unions in order to bargain collectively, or to penalize through strikes and picketing.[142] These acts indicate that citizens believed the relationship between business-owner and worker must be more equitable; and, that if the law would not intervene they would have to force matters. When legal issues inevitably made their way to the U.S. Supreme Court, there was a lack of noteworthy precedent. At that point, the Court had based their decisions upon the intent of the Framers in a loose fashion in order to determine how to deal with what Justice David Brewer deemed a "public nuisance."[143]

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139. THE FEDERALIST NO. 78, at 382 (Alexander Hamilton) (Terence Ball ed., 2003). The Anti-Federalist writer "Brutus" objected to the independence of Supreme Court justices: "there is no power above them . . . . There is no authority that can remove them, and they cannot be controuled [sic] by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven." XV Essay *of Brutus* (Mar. 20, 1788), *reprinted in* ALEXANDER HAMILTON, JAMES MADISON, AND JOHN JAY: THE FEDERALIST WITH LETTERS OF "BRUTUS" 524-25 (Terence Ball ed., 2003).

140. Tobias Barrington Wolff, *The Thirteenth Amend and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 981-83(2002) (discussing the Thirteenth Amendment's prohibition of slavery only to be replaced with wage slavery).

141. Susan L. Boyd, *A Look Into the Constitutional Understanding of Slavery*, ASHLAND UNIVERSITY (Apr. 1995), http://www.ashbrook.org/publicat/respub/v6n1/boyd.html.

142. *See generally, Frequently Asked Questions*, AFL-CIO AMERICA'S UNION MOVEMENT, http://www.aflcio.org/aboutus/faq/ (last visited Feb. 28, 2012); *Strikes & Unions*, THE GREAT DEPRESSION IN WASHINGTON STATE, http://depts.washington.edu/depress/strikes_unions.shtml (last visited Feb. 28 2012).

143. *In re Debs*, 158 U.S. 564, 582, 587 (1895) (explaining that obstruction of a highway was a "public nuisance" that interfered with interstate commerce and the transportation of post office mail, subjecting it to abatement by the government) *abrogated by* Bloom v. Illinois 391 U.S. 194 (1968); Gerard N. Magliocca, *Why Did*

The Court did not have to look far. Justice Stephen Johnson Field had led the way with a laissez-fair approach to federal jurisprudence in matters of business and its relationship with labor.[144] Consistent with the Federalist vision of the United States as a commercial empire, coupled with the constitutional protections of property and commerce, it was clear that the Framers had meant the law to protect business.[145] As stated by Justice Field in his dissenting opinion in the *Slaughter-House Cases*:

> And it is to me a matter of profound regret that its validity is recognized by a majority of this court, for by it the right of free labor, one of the most sacred and imprescriptible rights of man, is violated. . . . [G]rants of exclusive privileges, such as is made by the act in question, are opposed to the whole theory of free government, and it requires no aid from any bill of rights to render them void. That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal, and impartial laws.[146]

Furthermore, those who hindered free trade were challenging the sovereignty of the Constitution itself. At this point the obligation of obedience as put forward in the *Jones* decision became relevant, for its doctrine dominated the legal landscape for six decades.[147]

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the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century? 94 MINN. L. REV. 102, 133 (2009) (explaining that the view of the Framers was that states, not the federal government, were the greatest threat to property rights).

144. *See* Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases,* 109 YALE L.J. 643, 663 (2000); *see also* The Slaughterhouse Cases, 83 U.S. 36, 88, 90, 92-3, 97, 101-02 (1872) (Field, J. dissenting) (explaining that all persons have "the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons").

145. *See* THE FEDERALIST No. 11 at 47-49 (Cambridge Univ. Press, Terence Ball ed., 2003) (discussing the commercial potential and power of America); *see also* U.S. CONST. art I, § 9.

146. 83 U.S. at 110-11 (Field, J., dissenting).

147. *Van Zandt*, 46 U.S. at 231 (explaining how the Constitution is the supreme law of the land, and does not allow duly enacted federal laws to stand if they are repugnant to the Constitution.); Paul Finkelman, *The Color of Law*, 87 NW. U. L. REV. 937, 975-76 (1993) (reviewing Andrew Kull, THE COLOR-BLIND CONSTITUTION (1992)) (explaining that the Supreme Court, under the leadership of Chief Justice Taney, consistently upheld the Fugitive Slave Laws of 1793 and 1850 in favor of slave owners for almost six decades based on obedience to the Constitution, which did not require that blacks be considered United States citizens. During this period,

A model example is the Court's unanimous opinion in the case of *In Re Debs*, which had grown out of the nationwide Pullman Strike of 1894 by the American Railway Union (ARU).[148] Beginning in Chicago as the result of a substantial pay decrease ordered by the company's president, George Pullman, the strike expanded throughout the country until President Grover Cleveland ordered federal troops to break it up, citing the 1890 Sherman Anti-Trust Act.[149] For his role in instigating the strike, ARU president Eugene V. Debs was convicted of contempt of court and sentenced to six months in prison; however, he sought relief to the U.S. Supreme Court with a writ of habeas corpus.[150] Justice Brewer, writing for a unanimous Court, rebuffed Debs' request, stated that under the law union members held no fundamental right to obstruct commerce under any circumstances.[151] In doing so, the Court substantiated its assertion with a statement of constitutional sovereignty reminiscent of the *Jones* decison:

> [W]e hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty.[152]

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the only case to be decided in support of slavery abolitionists was Norris v. Crocker, 54 U.S. (13 How.) 429 (1851)).

148. In re Debs, 158 U.S. at 566-67.

149. Magliocca, *supra* note 143, at 131 & n.142; ALLAN NEVINS, GROVER CLEVELAND: A STUDY IN COURAGE 611 (1934); Sherman Act ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1-7 (2004)); Proclamation No. 366 (July 8, 1894).

150. NEVINS, *supra* note 149, at 611-628; *In re Debs*, 158 U.S. at 572-73.

151. *In re Debs*, 158 U.S. at 581-82. In its decision, the Court reasoned:

> The difference between a public nuisance and a private nuisance is that the one affects the people at large and the other simply the individual. The quality of the wrong is the same, and the jurisdiction of the courts over them rests upon the same principles and goes to the same extent. Of course, circumstances may exist in one case, which do not in another, to induce the [C]ourt to interfere or to refuse to interfere by injunction, but the jurisdiction, the power to interfere, exists in all cases of nuisance.

Id. at 592-93.

152. *Id.* at 599. *Compare* In re Debs, 158 U.S. at 599 (stating that all citizens of the United States are subject to the sovereignty of the federal government), *with Jones v. Van Zandt*, 46 U.S. 215, 231 (stating that even the Supreme Court is subject to the Constitution of the United States).

With this statement, the Court effectively incorporated federal sovereignty into the Laissez-faire constitutionalism of Justice Field and, in doing so, made plain its intent to protect free-market capitalism against all elements that threatened it.

Until the advent of President Franklin Roosevelt's New Deal, the Court readily enforced the doctrine of federal sovereignty in a variety of labor union cases. In *Loewe v. Lawlor*, the Court reaffirmed the doctrine of the Sherman Anti-Trust Act regarding interference with trade.[153] The Court repeated its claim of sovereignty: "[T]he Federal Government had full power over interstate commerce and over the transmission of the mails, and, in the exercise of those powers, could remove everything put upon highways, natural or artificial, to obstruct the passage of interstate commerce, or the carrying of the mails."[154] A case involving "yellow-dog contracts"—defined by Associate Justice William O. Douglas as an employment agreement that "required an employee to promise that, while employed, he would not become or remain a member of any labor organization"—again brought the vigor of federal sovereignty to the fore.[155] The Court, in its opinion in *Coppage v. Kansas*, stated:

> [W]hen a party appeals to this Court for the protection of rights secured to him by the federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced by the state, and upon these matters this Court cannot, in the proper performance of its duty, yield its judgment to that of the state court.[156]

Until the passage of the 1914 Clayton Anti-Trust Act, which recognized the legitimacy of labor unions and their right to strike, boycott and picket,[157] there was little legal re-

153. U.S. 274, 300-304, 309 (1908) (the Court, looking at other decisions based on the Sherman Act, adopted a similar stance based on the decisions in those cases).

154. *Id.* at 303.

155. WILLIAM O. DOUGLAS, AN ALMANAC OF LIBERTY 118 (1954).

156. 236 U.S. 1, 15 (1915).

157. Clayton Act, ch. 323, § 7, 38 Stat. 730, 731–32 (1914) (current version at 15 U.S.C. § 18 (2006)).

course opened to the unions in their quest of conscience for economic justice.[158]

Once laissez-faire jurisprudence was established in precedent, the Court further defined labor law in a manner that undercut the unions. In *Allgeyer v. Louisiana*, the Court ruled that the Due Process Clause guaranteed the right of contract between employer and employee that, once entered into, could not be broken by federal or state law.[159] The Court further defined the limits of governmental policing power toward business in *Lochner v. New York*: "[T]he freedom of master and employe[e] to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with without violating the Federal Constitution."[160] Furthermore, in *Adair v, United States*, the Court held that there was no discernible legal relationship between membership in a union and interstate commerce protected by the Due Process clause of the Fifth Amendment; therefore, the freedom to contract was constitutionally sacrosanct.[161]

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158. *See generally* Randall Marks, *Labor and Antitrust: Striking a Balance Without Balancing,* 35 AM. U. L. REV. 699, 704-05 (1986) (discussing how the Supreme Court "thwarted meaningful collective bargaining and union organizing" and acknowledging Congress's response of passing the Clayton Act hailed by some union supporters as the "Magna Carta of labor").

159. 165 U.S. 578, 589 (1897). The rationale behind the freedom to contract was explained by Justice William O. Douglas:

> The *Constitution* provides that no person shall be deprived of "property" or of "liberty" without due process of law. Those rights, it was said, prevented government from compelling either an employer "to accept or retain the personal services of another" or an employee "to perform personal services of another." Thus it was held that employer and employee had an "equality of right," which government could not constitutionally disturb.

DOUGLAS, *supra* note 155, at 118.

160. 198 U.S. 45, 64 (1905). However, Justice Oliver Wendell Holmes, Jr. disagreed with his colleague and in his dissenting opinion stated:

> [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel, and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Id. at, 75-6 (Holmes, J., dissenting).

161. Adair v. United States, 208 U.S. 161, 178 (1908).

THE OBLIGATION OF OBEDIENCE AND PERSONAL CONSCIENCE

The Supreme Court has been dealing with the repercussions of the *Jones* decision ever since that decision was handed down over 160 years ago. Though the political entropy of the 1850s was certainly not the product of it, the philosophical quandary that dominated antebellum America was defined within its premise that between law and conscience a citizen must adhere to the former over the latter.[162] Its basic premise provided legitimacy to one side of the conflict, while undermining the other. Though not cited specifically by abolitionists, they ridiculed such a notion of complete obedience to the law as the embodiment of tyranny.[163] Abolitionist William Lloyd Garrison rebuked this notion as repulsive to that "which is the imperative duty of every man who fears God and regards man."[164]

It lay at the heart of "Bleeding Kansas."[165] Washington, D.C. was in turmoil following the passage of the Kansas-Nebraska Act, which delegated the decision of whether to allow slavery in the new territories to the citizens of the territories themselves.[166] Many opposed the measure on the grounds that it encouraged the spread of slavery throughout the country.[167] Upon its passage, abolitionist William Lloyd Garrison declared the "dissolution of the Union must first precede the

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162. *See* Jones v. Van Zandt, 46 U.S. 221, 231 (stating that even the Supreme Court has no alternative to following the Constitution and laws, no matter what theoretical opinions may exist about those laws, thereby implying the Constitution reigns over individual conscience).

163. *See e.g.*,Letter from William Lloyd Garrison to J. Miller McKim (Oct. 4, 1851), *in* 4 THE LETTERS OF WILLIAM LLOYD GARRISON: FROM DISUNIONISM TO THE BRINK OF WAR 1850-1860, 90-92 (1975) (quoting P.W. Hall, THOUGHTS AND INQUIRY ON THE PRINCIPLES AND TENUR OF THE REVEALED AND SUPREME LAW, SHEWING THE UTTER INCONSISTENCY AND INJUSTICE OF OUR PENAL STATUTES, AND THE ILLICIT TRAFFIC AND PRACTICE OF MODERN SLAVERY. . .WITH SOME GROUND OF A PLAN FOR ABOLISHING THE SAME. TO WHICH IS ADDED A LETTER TO A CLERGYMAN ON THE SAME SUBJECT 304 (London, J. Ridgway, 1792)).

164. Letter from William Lloyd Garrison to J. Miller McKim, *supra* note 163, at 90-91.

165. Louise Weinberg, Dred Scott *and the Crisis of 1860*, 82 CHI.-KENT L. REV. 97, 113-14 (2007) (stating that the violence that ensued following the passage of the Kansas-Nebraska Act is known as "Bleeding Kansas").

166. Kansas-Nebraska Act, ch. 59, 10 Stat. 227 (1854).

167. William A. DeGregorio, THE COMPLETE BOOK OF U.S. PRESIDENTS 204-05 (1984).

abolition of slavery."[168] When the act passed in both houses of Congress by large margins, a group of abolitionists organized the New England Emigration Aid Society, whose goal was to place 20,000 abolitionist settlers in the new territory and, by sheer numbers, claim it as a free state.[169] But once the news was published, southerners created their own organizations whose purpose was to pinpoint the position of abolitionist settlers and purge them from the territory.[170] What occurred when the two groups met was bloody confrontation that set the stage for the American Civil War.

It was the conflict between law and conscience that initiated heated debates over John Brown's actions at Harper's Ferry, Virginia on October 18, 1858.[171] On the day of Brown's execution, church bells pealed in many northern towns and villages in sympathy.[172] After attending Brown's funeral in New York, abolitionist Wendell Phillips spoke at Music Hall before the Congregational Society and encouraged others sympathetic to the cause to "go thou and do likewise."[173] In turn, William Lloyd Garrison proposed that Brown's execution day be "a day for a general public expression of sentiment with reference to the guilt and danger of slavery."[174] However, on December 8, 1858, at Boston's Faneuil Hall, a rally was held that featured several pro-union speakers such as Edward Everett and Caleb Cushing, both of whom condemned Brown's actions.[175] On the Senate floor, Andrew Johnson of Tennessee chastised the hypocrisy of his colleagues: "Senators disclaim the acts of John Brown in one

168. Letter of William Lloyd Garrison to Samuel J. May, *supra* note 163, at 390.

169. Kerry Abrams, *The Hidden Dimensions of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1386 n. 166 (2009); DAVID M. POTTER, THE IMPENDING CRISIS 1848-1861, 199-200 (Harper & Row, 1976).

170. *See* POTTER, *supra* note 169 at 199-200.

171. *See Id.* at 211 (the conflict between law and conscience being the issue of human slavery).

172. *Id.* at 378.

173. WENDELL PHILLIPS, 1 SPEECHES, LETTERS, AND LECTURES 303 (Lee and Shepard, 1891).

174. Letter of William Lloyd Garrison to Oliver Johnson (Nov. 1, 1859), *in* 4 THE LETTERS OF WILLIAM LLOYD GARRISON: FROM DISUNIONISM TO THE BRINK OF WAR 1850-1860, 661 (Louis Ruchames ed., Cambridge, MA, The Belknap Press of Harvard University Press 1975).

175. *Sympathy with the South: Great Union Demonstration in Boston, New York Daily Times*, 9 December 1859, at 8.

breath, and in another they hold out apologies and excuses for the man . . . he is not my god, and I shall not worship at his shrine."[176] To both sides the abolitionist was a symbol: to slavery's conscientious objectors, Brown was an example of selfless devotion to the holy cause, while to those who appealed to the law he represented anarchy.[177]

As demonstrated by its history, entropy within the American political system has often been based upon the "either/or" choice between the safety and stability provided by the law, or serenity and satisfaction of fulfilling personal conscience. This dilemma has only grown since the *Jones* decision and the U.S. Supreme Court has not been immune from it. In example, during the "Red Scare" of the late-1940s and early-1950s, the Court made inconsistent rulings concerning the fate of Communists and their sympathizers.[178] This is seen in Justice Frankfurter's dissent in *Dennis v. United States*:

> To recognize the existence of a group whose views are feared and despised by the community at large does not even remotely imply any support of that group. To take appropriate measures in order to avert injustice even towards a member of a despised group is to enforce justice. It is not to play favorites.[179]

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176. Cong. Globe, 36th Cong., 1st Sess. 105 (1859) (statement of Sen. Andrew Johnson). Senator Johnson received numerous letters of support for his anti-Brown speech. One letter written by Joseph E. Bell stated Brown supporters were "only fit to grace the walls of a prison or a madhouse." Letter of Joseph E. Bell to Andrew Johnson (8 Feb., 1860), *in* 3 THE PAPERS OF ANDREW JOHNSON: 1858-1860, 417 (1972).

177. *See* Potter, *supra* note 169, at 378-384.

178. *Compare* Dennis v. United States 339 U.S. 162, 164-65, 172 (1950) (stating that a member of the Communist Party could receive a fair and impartial trial even though the jury consisted of government employees who, at that time, were subject to Executive Order 9835, 12 Fed. Reg. 1935, which provided standards for their discharge upon reasonable grounds for belief they were disloyal to the government in opposition to Petitioner's argument that government employees would be afraid to acquit him—a communist—because of the risk of being discharged from their job if they did so), *and* Rogers v. United States, 340 U.S. 367, 375 (1951) (holding that a person who had admitted to being a Communist Party member was required to divulge further incriminating information concerning her coconspirators against her objection because doing so would only raise a "mere imaginary possibility" of increasing the danger of prosecution), *with* Morford v. United States, 339 U.S. 258, 259 (1950) (reversing the conviction of a Communist Party member because he was denied the opportunity of providing evidence that four jury members were biased against him because they were government employees).

179. *Dennis*, 339 U.S. at 184 (Frankfurter, J., dissenting).

Yet, in a unanimous per curiam opinion in *Morford v. United States*, the Court restated the premise of *Dennis*, and lent its support for the authority of congressional committees to compel witnesses to reveal Communist affiliation when it refused to review contempt convictions against two film writers.[180] Furthermore, in *Rogers v. United States*, Chief Justice Fred Vinson wrote on behalf of the Court to uphold the constitutionality of the 1940 Smith Act, which made illegal any act or speech that advocated or conspired to violently overthrow the United States Government—a decision made specifically to uphold the conviction of U.S. Communist Party leaders who were indicted in 1948 for "conspiring to advocate seditious acts."[181] Over a decade later, Justice William O. Douglas concluded that this national fear of Communism, heightened by the actions of Senator Joseph McCarthy, triggered "a black silence of fear" that had, in turn, caused the nation "to jettison some of our libertarian traditions."[182]

Within five years following the confirmation of Earl Warren as Chief Justice in 1953, the Court had either undermined or overturned several previous edicts made specifically to impede the civil rights of Communist Party members. For example, in the case of *Kent v. Dulles*, the Court ruled that the Department of State could not refuse a person the "freedom of movement solely because of their refusal to be subjected to inquiry into their beliefs and associations."[183] In *Engel v. Vitale*, the Court ruled that the use of public schools to encourage prayer was "a practice wholly inconsistent with the Establishment Clause" due to its intrusive nature upon the conscience of the individual.[184] The Court further stated, "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look

180. 339 U.S. 258, 259 (1950).
181. 340 U.S. 367, 375 (1951).
182. WILLIAM O. DOUGLAS, POINTS OF REBELLION 6 (1970).
183. 357 U.S. 116, 130 (1958).
184. 370 U.S. 421, 424 (1962).

to for religious guidance."[185] The Court, in the case of *Edwards v. South Carolina*, held that the "Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views."[186] Finally, in *Welsh v. United States*, the Court ruled that an individual may qualify for a draft exemption as a contentious objector on moral grounds, as well as religious belief—both of which were issues of personal ethics.[187]

These decisions by the Court call into question the obligation of obedience to national law, especially in matters of personal conscience. From the *Morford* decision in 1950 to the *Welsh* decision two decades later, the Court ran the gamut between upholding the persecution of political beliefs thought to be harmful to the nation, to upholding and protecting the value of individual morality. Justice Hugo Black, in his 1968 book, *A Constitutional Faith*, explained the shift in these terms: "Punishment for an overt, illegal act is one thing, but punishment of a person because he says something, believes something, or associates with others who believe the same thing is forbidden by the express language of the First Amendment."[188] Yet, these examples demonstrate the wide crevasse between obligation to one self or one's community and, thus, the magnitude of the choice to obey either the constitution or the edicts of his own principles.

Therefore, the question becomes: What is the true historical significance of the *Jones* decision? The most obvious conclusion would be that it provided a bedrock tenet for the

185. *Id.* at 435.

186. 372 U.S. 229, 237 (1963).

187. 398 U.S. 333, 333 (1970). The Court stated:

> What is necessary for a registrant's conscientious objection to all war to be "religious" is that this opposition to war stems from the registrant's moral, ethical, or religious beliefs about what is right and wrong and these beliefs be held with the strength of traditional religious convictions.
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> . . . .
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> . . . But very few registrants are fully aware of the broad scope of the word "religious" . . . , and accordingly a registrant's statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption.

Id. at, 339-41.

188. HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 50-51 (1968).

constitutional protection of slavery, as evidenced by the Court's pronouncement in the *Dred Scott* case.[189] A second possibility would be its use as fundamental doctrine in support of federal sovereignty, as stated by the Court in *Ableman v. Booth.*[190] However, when expanded beyond legal precedent into philosophical terms, by restating an essential article of social contract theory—that without obedience to sovereign authority ordered society would not be possible—the Court created a significant conundrum involving civil versus moral obligation that went well beyond the scope of the law. As such, the definition of its parameters has become among the most significant of legal debates, and the pursuit of limits is ongoing. Yet, is an equitable solution to this dispute realistic—in the same manner as what the Framers faced when they debated the concept of "a more perfect union" versus a perfect one?

CONCLUSION

For human beings to meaningfully reside within a social framework, there must be a standard of conduct, coupled with the expectation of punishment for deviance. In short, as James Madison wrote in Federalist 51, "If men were angels, no government would be necessary."[191] In the pursuit of justice, law must be the central point of the solution, for it demands both consistency and equity in its enforcement; therefore, without it the results shall be fleeting.

Yet, without a moral bearing within each individual citizen, a sense of right and wrong that demands a challenge to unjust edicts, a civilization has no spirit. The human ability to envisage is the powerful elixir from which innovation

189. *Scott v. Sandford,* 60 U.S. (19 How.) 393, 426, 448-51, 498 (1857). (Campbell, J., concurring) (quoting *Somersett's Case*, explaining that "slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law. . ."), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

190. 62 U.S. 506, 524 (1859) (explaining the sovereignty of the Constitution, unto which all states voluntarily subjected themselves upon entrance into the Union, and which all state and federal officers are sworn to uphold) (1859).

191. THE FEDERALIST No. 51 at 269 (James Madison) (2003); FRANÇOIS-MARIE AROUET VOLTAIRE, *Republican Ideas*, in POLITICAL WRITINGS 207 (David Williams ed. & trans., Cambridge Univ. Press, 1994) (1777).

originates. In turn, morality is not immune from such progress, for the power of reflection is the source of change in ethical perception, as well as the motivator for actions taken. Thus to limit unhindered contemplation, and the intensity of its conviction, is to place a stranglehold upon human intellectual progress. For that reason, as Justice William O. Douglas wrote in his 1961 book, *A Living Bill of Rights*: "The American ideal holds that governments cannot afford to shackle freedom to think and freedom to speak since these are the mainsprings of mankind's achievements."[192]

When the U.S. Supreme Court was caught in the midst of an escalating controversy regarding slavery it sought a solution within the perimeters of the law, as was its charge. In turn, the Court concluded in *Jones v. Van Zandt* that national stability was of greater value than personal ethics.[193] However, in taking a firm stand on the constitutional obligation of obedience, it failed to take into serious consideration the nature of social change wrought through personal reflection. As dissent over issues of social equity, political association, and the morality of war grew over time, the bench was forced to grapple with the repercussions of that decision. As such, the issue remains: When does the right to redress grievances with the government give way to the requirement to obey it? Then again, can an issue of such magnitude ever be resolved?

192. WILLIAM O. DOUGLAS, A LIVING BILL OF RIGHTS 24 (1961).

193. *See* 46 U.S. 221, 231 (1847) (explaining the necessity of abiding by the Constitution).