THE IMPACT OF DARWINIAN EVOLUTION UPON MODERN JUDICIAL PHILOSOPHY AND INTERPRETATION

Most people erroneously view evolution as merely a scientific or biological issue. However, in actuality, evolution is a worldview issue. Darwinian evolution impacts one's worldview like few other concepts. In the late 1980's, Dr. Henry Morris wrote a book entitled *The Long War Against God* in which he showed that evolution is the seed bed or foundation of the major anti-God movements and philosophy's of our day.[1] Here, Morris revealed evolutionary assumptions behind Communism, Nazism, Racism, Atheism, New Age, and Secular Humanism. Morris' insights help explain why evolution is so protected in our society in spite of its scientific inadequacies. The theory's protectors understand that if evolution collapses, then so do all of these other "isms" that are built upon evolution.

Evolution has had a far-reaching impact upon the American legal system by influencing how jurists view and interpret the United States Constitution. Yale University Political Science Professor Fred Cahill explains this nexus as follows:

> The appearance in the mid-nineteenth century of the concept of evolution was an event of transcending importance to the development of American Jurisprudence…This involved…a shift…from the rationalistic, deductive pattern, characteristic of the pre-Darwinian period, to the empirical, evolutionary approach…that is followed…today.[2]

In other words, there exists a connection or relationship between the advent of the theory of evolution on the one hand and how judges interpret our Constitution on the other hand. The purpose of this chapter is to explain this relationship.

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[1] Henry Morris, *The Long War against God: The History and Impact of the Creation/Evolution Conflict* (Grand Rapids: Baker, 1989).

[2] Fred Cahill; cited in John Whitehead, *The Second American Revolution* (Westchester, Ill: Crossway, 1982), 46.

We see the effects of this relationship all around us as courts frequently render decisions that have no basis in the text of the Constitution. Examples include banning the Ten Commandments from being posted in the public schools and other public places, the Ninth Circuit court's ruling that the Pledge of Allegiance is unconstitutional, and the Massachusetts Supreme Court's ruling that created out of thin air a constitutional right for homosexuals to marry. Most Americans are instinctively aware that such decisions are out of step with how courts have traditionally functioned. However, very few are able to put their finger on the root of the problem. This chapter will attempt to show that decisions of this nature are merely the ripened fruit of evolution's impact upon judicial interpretation beginning around the year 1870.

THE FOUNDING FATHERS' ORIGINAL VISION

However, the magnitude of these sweeping changes will go unappreciated without a point of reference. Unless we first understand the role that our founding fathers originally envisioned for the judicial branch of government in contrast to the power that the courts wield today, we can never fully comprehend the way evolution has changed the way jurists approach the Constitution. Thus, it is necessary to spend a few moments establishing the original design that the founders had for our government's judicial branch. When all of the evidence is considered, it is apparent that the founders intended the judicial branch of government to play a humble and impotent role in America's governance.

According to the framers, the function of federal judges was not to create law but rather to simply find the law as expressed in the Constitution itself and apply it when adjudicating matters that came before them. Thomas Jefferson articulated this judicial philosophy when he said that we must, "Carry ourselves back to the time when the Constitution was adopted, recollect the spirit in the debates, and instead of trying what

meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed."[3] John Marshall, America's third Chief Justice of the United States Supreme Court, described his judicial philosophy in the same way. He explained:

> To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance nor extended to objects not comprehended in them nor contemplated by its framers, is to repeat what has already been said more at large, and is all that can be necessary.[4]

Scholar G. Edward White summarizes the view prevalent during the Marshall era that judges were mere finders of the law rather than its creators. He notes, "The only power that judges had, under Marshall's view, was their professional power; their technical expertise enabled them to be better 'finders of the law' than other persons."[5] In other words, a judge's specialized legal training gave him greater insight than an ordinary person concerning how to discover authorial intent rather than to see notions in the constitutional text independent and regardless of authorial intention.

Joseph Story also expressed a similar conservative judicial philosophy. Story, who sat on the Supreme Court during the Marshall era, was one of our most prolific justices not only in terms of decisions that he authored but also because of his influential commentary on the Constitution. In the preface of this commentary, Story explained:

> The reader must not expect to find in these pages any novel views and novel constructions of the Constitution. I have not the ambition to be the author of any new plan of interpreting the theory of the Constitution, or of enlarging or narrowing its powers, by ingenious subtleties and learned doubts…Upon subjects of government, it has always appeared to me that metaphysical refinements are

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[3] Thomas Jefferson, *Writings of Thomas Jefferson*, Albert Bergh, ed. (Washington D.C.: Thomas Jefferson Memorial Association, 1904), Vol. XV, p. 449, in a letter from Jefferson to Justice William Johnson on June 12, 1823.

[4] John Marshall in *Ogden v. Saunders*, 6 L. Ed. 606, 647 (1827).

[5] G. Edward White, "Reflections on the Role of the Supreme Court," 63 *Judicature* 162, 163 (1970).

> out of place. A constitution of government is addressed to the common sense of the people, and never was designed for trials of logical skill, or visionary speculation.[6]

Story further explained, "The first and fundamental rule in the interpretation of all instruments, is to construe them according to the sense of the terms, and the intention of the parties."[7] In a speech to the American Bar Association in 1985, then Attorney General Edwin Meese quoted the following from Justice Story:

> In construing the Constitution of the United States, we are in the first instance to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole and also viewed in its component parts. Where its words are plain, clear and determinate, they require no interpretation…Where the words admit of two senses, each of which is conformable to general usage, that sense is to be adopted, which without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design of the instrument.[8]

Of course, advocates of original intention do not naively suggest that in a changing world the Constitution would never need to be updated from time to time. Rather, original intent advocates simply point out that such changes are to come about through the amendment process rather than the judiciary. According to the Constitution itself, the amendment process is the proper mechanism to be used when the Constitution was in need of updating. This process, spelled out in Article V of the Constitution, specifies the method that is to be employed when society deems it necessary to alter or change the text of the Constitution. By calling for a two thirds super majority approval in both houses or a two thirds approval of the state legislatures in order to simply propose a constitutional amendment, and by calling for a three fourths approval of the state

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[6] Joseph Story, *Commentaries on the Constitution of the United Sates,* 3rd ed. (Boston, 1858), viii.

[7] Ibid., 1:283, 400.

[8] Joseph Story; cited in Edwin Meese, III, Address to American Bar Association, 1985; adapted in "Toward a Jurisprudence of Original Intention," *Benchmark* Vol. II, no. 1, (January-February 1986): 10.

legislatures or state ratifying conventions in order to ratify a constitutional amendment, Article V makes the amendment process deliberately cumbersome by placing the power to change the Constitution in the hands of the elected representatives of the people.

This way, if the people disapproved of the manner in which the Constitution was being altered, the people could make their will known by voting against their representatives during the next election cycle. Thus, the founders wisely and skillfully placed the awesome power of changing the Constitution in the hands of those directly accountable to the people. The furthest thing from the founders' minds was to allow such an alteration to our nation's governing document to be placed in the hands of those insulated from the people. According to George Washington:

> If, in the opinion of the people, the distribution or modification of the Constitutional powers be at any particular wrong, let it be corrected by an amendment the way the Constitution designates. But let there be no change by usurpation; though this may in one instance be the instrument of good, it is the customary weapon by which free governments are destroyed.[9]

Samuel Adams similarly explained:

> …that people alone have an incontestable, unalienable, and indefensible right to institute government and to reform, alter, or totally change the same when their protection, safety, prosperity, and happiness require it. And the federal Constitution, according to the mode prescribed therein, has already undergone such amendments in several parts of it as from *experience* has been judged necessary.[10]

The framers simply expected the judiciary to follow the ordinary language of the Constitution when adjudicating matters. They never expected the courts to take upon themselves the awesome power of amending the Constitution from the bench, thereby circumventing the process outlined in Article V of the Constitution.

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[9] George Washington; cited in John Eidsmoe, *Christianity and the Constitution* (Grand Rapids: Baker Book House, 1987), 392-93.

[10] Samuel Adams, *The Writings of Samuel Adams*, Harry Alonzo Cushing, ed. (NY: G.P. Putnam's Sons, 1904), Vol. IV: 388.

That the framers saw the judiciary as a rather impotent body that never had the potential of posing any real threat to democracy can also be seen in the structure of the Constitution itself. For example, Article III of the Constitution, which enumerates the power of the judiciary, "is the shortest and least specific of the constitutional provisions establishing the three branches of government."[11] The framers obviously "spent far less time–and debate" when enumerating the powers of the judiciary than when deciding upon the powers of the executive and legislative branches of government.[12] Historian David Barton explains:

> As in many documents, the Constitution lists the most important aspects first, progressing to those of lesser consequence; following the preamble, Article I describes the Congress, Article II the Presidency, and Article III the Judiciary. Not only does the order of listing reveal their relative position of importance, the amount of detail provided by each branch also reflects its relative importance. The Legislature (Article I) received 255 lines of print while the Presidency (Article II) required only 114 lines. The judiciary (Article III) merited a mere 44 lines.[13]

The framers were so non-threatened by the judicial branch of government that they had no problem assigning members of the federal judiciary a life term to be terminated only by impeachment. Such life tenure stands in stark contrast to the limited terms that could only be fulfilled after voter approval given to members of the legislative and executive branches of government. The framers were obviously far more fearful of the threat that the executive and legislative branches posed to democracy than they were of the threat posed by the judiciary. It is for reasons such as these that Alexander Hamilton depicted the judiciary as the branch of government that posed the least

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[11] Linda R. Monk, *The Words We Live By* (NY: Stonesong Press, 2001), 90.

[12] Ibid.

[13] David Barton, *The Myth of Separation*, 5th ed. (Aledo, TX: Wallbuilder Press, 1992), 221.

dangerous threat to democracy in *Federalist 78*.[14] Hamilton's point was for citizens to remain unconcerned about the judiciary's threat to democracy since the judiciary sourced little power anyway.

Even the founders themselves who served as members of the first Supreme Court recognized that the court was designed to inhibit it from wielding great power in the affairs of the nation. For example, John Jay, who became the court's first Chief Justice "refused a second nomination as chief justice because he thought the office lacked prestige."[15] Thus, Jay looked upon the role of Chief Justice of the United States Supreme Court as a virtual dead end job.

This perceived impotency of the judiciary is also evidenced by the fact that prior to 1935, the Supreme Court never even had its own building independent of the building that housed the legislative branch. The court instead met in either "a committee room of the new Capitol building," "the Senate's former chambers on the ground floor," or "upstairs in the newly vacated Senate chambers."[16] The Senate's former chambers on the ground floor where the court met "…was so dark and dank that the *New York Tribune* referred to it as a 'potato hole.'"[17] Historians Marshall and Manuel comment that during these years, "An idle passerby might wander in and find two or three onlookers and a court clerk and several men who had given up trying to find work and felt grateful for a warm place to sit on a cold day…one could not tell that he had entered the highest

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[14] The *Federalist Papers* were written by John Jay, Alexander Hamilton, and James Madison for the purpose of explaining the intent of the Constitution to the state of New York in the hope that New York would vote to ratify the Constitution.

[15] Monk, *The Words We Live By*, 94.

[16] Ibid. See also Newt Gingrich, *Rediscovering God in America: Reflections on the Role of Faith in Our Nation's History* (Nashville, TN: Integrity, 2006), 86-87.

[17] Monk, *The Words We Live By*, 94.

courtroom in the land."[18] Interestingly, the United Sates Supreme Court never even met on a full time basis until the Eisenhower administration. In sum, when all of these historical details are considered, it is apparent that the founders designed a rather humble and impotent role for the judicial branch of government by purposely curtailing its powers.

EVOLUTIONARY CHANGES

However, this previously described political structure was soon to be shaken at its very core with the coming of Darwin and the dawning of his theory of evolution. Most historians who specialize in this area point to 1870 as the water shed year concerning when a shift in judicial philosophy and interpretation began to take root in American law schools. There are three important legal theorists that need to be identified in order to understand exactly who were the culprits behind this shift in judicial philosophy.[19] The three men responsible are Columbus Langdell (1826–1906), Roscoe Pound (1870–1964), and Oliver Wendell Holmes (1841–1932). Langdell became the Dean of Harvard Law School in the 1870's. Although not an immediate successor, Pound was Langdell's eventual successor as dean. Homes, a law student at Harvard, took the principles espoused by Langdell and Pound to a thirty-year career on the United States Supreme Court.

These three men introduced a radically different approach to constitutional interpretation than the previously described method espoused by the founders and

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[18] Peter Marshall and David Manuel, *From Sea to Shining Sea* (NJ, Fleming H. Revell Co., 1986), 197-98.

[19] David Barton, *Original Intent: The Courts, the Constitution, and Religion* (Aledo, TX: Wallbuilders Press, 1996), 228-29; Eidsmoe, *Christianity and the Constitution*, 394; Herbert W. Titus, "God, Evolution, Legal Education, and Law," *Journal of Christian Jurisprudence* (1980): 11-48; Whitehead, *The Second American Revolution*, 46-52.

America's earliest jurists. It is important to understand that this shift began in academia. Abraham Lincoln said it best when he noted that, "The philosophy of the school room in one generation will be the philosophy of government in the next."[20] Thus, many of the aberrant legal decisions of today are merely the logical outcome of a shift in legal educational philosophy that began around 1870.

This new approach to constitutional interpretation is known as legal positivism. In essence, the legal positivist maintains that the proper role of the judiciary is not the application of the Constitution's original understanding when adjudicating legal controversies as the framers believed. Rather, the function of a judge is to study the needs, wants, and desires of a changing society and to continually reinterpret the Constitution in order to keep up with an ever-changing society. In other words, in legal positivist thinking, the role of a judge is not to discern the intent of the framers in order to apply such intent in the resolution of cases. Rather, the role of a judge is to engross himself in societal concerns and to use his decisions to guide the evolution of the law and the Constitution in order to fulfill these concerns.

Why was this radical shift embraced by legal academia beginning in the year 1870? Something very significant had happened just eleven years earlier in the field of biology in the year 1859. This was the year that Darwin published his *Origin of Species* promoting evolution. Thus, by the year 1870, Darwin's ideas had been in circulation for eleven years. Darwin's beliefs had begun to influence not just the fields of science and biology but other academic disciplines as well, including the legal field.

It is critical to understand that Darwinian evolution brings with it a particular anthropology or doctrine of man. Darwinism teaches that although man did evolve upward from the lower species, this evolutionary trajectory has not stopped. Modern man

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[20] Stephen K. McDowell and Mark A. Beliles, *America's Providential History* (Charlottesville, VA: Providence, 1988), 79.

continues to evolve upward. In other words, Darwinism assumes a continuing upward ascent of man. Thus, the legal positivist builds upon these evolutionary presuppositions. He assumes that as man continues to evolve upward or progress, it is necessary for him to have a Constitution that also continues to evolve, change, and progress along with him rather than remain static, immutable, or stationary.[21]

Under legal positivism, who has the power to evolve the document upward? While the Constitution's framers gave the power to alter the Constitution to the people's elected representatives, the legal positivist ascribes this power to the judiciary. Thus, the Constitution began to be thought of as a "living and breathing document." Although this phrase certainly sounds more attractive than the alternative of viewing the Constitution as a lifeless, dead document, what does this phrase actually mean? The phrase "living and breathing document" simply means that the Constitution now has the ability to take on a meaning independent of the document's original authors. The judge is now free to fuse the document with a new meaning never contemplated by the instrument's original designers. Thus, the Constitution began to be viewed as no longer containing a fixed set of principles but rather understood as something that evolved from one generation to the next.

Therefore legal positivism resulted in a complete shift in the role of the judge. While the founders designed a system of government that made the judge a finder rather than a creator of the law, the legal positivist reverses this formula by allowing the judge the power to continually alter the document in order to keep up with an ever-evolving society. Rather than studying the authorial intention behind the Constitution's literal words, Judges became students of where they thought that society was evolving toward so that they could reinterpret the document to keep up with society's vacillations.

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[21] Barton, *Original Intent*, 228; Eidsmoe, *Christianity and the Constitution*, 391.

Consequently, legal positivism became the entrenched paradigm that is taught in most law schools even up to this very day. Positive law is also the dominant philosophy embraced, either consciously or subconsciously, by most modern and contemporary jurists and lawyers.

Lest the reader think that I am seeing more behind this evolutionary worldview than what is actually there, consider the following quotes from representative legal thinkers. Notice how frequently they use the term "evolution" as they describe their own judicial philosophy. In a 1985 address to the American Bar Association, Supreme Court Justice William Brennan noted:

> The genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time…[this] *evolutionary process* is inevitable and, indeed, it is the true interpretive genius of the text (italics added).[22]

Probably the leading exponent of legal positivism in the world today is Harvard law professor Laurence Tribe. Tribe's influence is evidenced by the fact that he is routinely cited in Supreme Court opinions. In the preface of his textbook on constitutional law, Tribe explains:

> The constitution is an intentionally incomplete, often deliberately indeterminate structure for the participatory *evolution* of political ideas and governmental practices…The highest mission of the Supreme Court, in my view, is not to conserve judicial credibility, but in the Constitution's own phrase, 'to form a more perfect union' between right and rights within that charter's necessarily *evolutionary* design (italics added).[23]

Yale law professor Alexander Bickel similarly notes:

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[22] William J. Brennan, Jr., "The Constitution of the United States: Contemporary Ratification," Teaching Symposium, Georgetown University, Washington, D.C., October 12, 1985, p. 39, 51; cited in Eidsmoe, *Christianity and the Constitution,* 399-400.

[23] Laurence Tribe, *American Constitutional Law* (Mineola, NY: Foundations, 1978), iii-iv.

> The function of justices…is to immerse themselves in the tradition of our society and of kindred societies that have gone before, in the history and in the sediment of history which is law, and…in the thought and the vision of the philosophers and poets. The justices will then be fit to extract 'fundamental presuppositions' from their deepest selves, but in fact from the *evolving* morality of our tradition (italics added).[24]

The central point in these representative citations from legal positivists is that the founders gave us a deliberately ambiguous document so that the judge could morph the text's language one direction or the next depending upon the perceived evolutionary path of society. Such an interpretive methodology is, of course, a radical departure from the earlier cited interpretive view of Justice Marshall from the founding and pre-Darwinian era. Marshall contended, "…that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended."[25] Conservative legal scholar John Eidsmoe summarizes this clash of worldviews when he observes:

> Underlying the disagreement over interpretation of the Constitution is a confrontation between the two world views–the creationist, absolutist, Newtonian views of the Framers, versus the evolutionist, relativist, Darwinian views of most legal scholars today.[26]

In sum, the original founding design for America's governance was to place the power to alter the Constitution in the hands of the people's elected representatives rather than in the hands of the life-tenured-federal judiciary. However, the advent of evolution and the theory's incorporation into legal thought radically changed the role of

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[24] Alexander Bickel, *The Least Dangerous Branch*, 236; cited in Eidsmoe, *Christianity and the Constitution*, 395.

[25] John Marshall in *Ogden v. Saunders*, 6 L. Ed. 606, 647 (1827).

[26] John Eidsmoe, "Creation, Evolution and Constitutional Interpretation," *Concerned Women* 9 (Sept. 1987): 7; cited in Morris, *The Long War against God*, 308.

the judge by vesting him with the power to amend the Constitution from the bench, in circumvention of Article V, in order to keep up with an ever upward evolving society.

SOCIETAL IMPACT

It is tempting to read this information and confine it to a mere academic discussion. The reader may be thinking that all of this is interesting information although it has little impact upon daily life. In actuality, the advent of Darwinian legal positivism has remade our culture from top to bottom. In fact, the influence of positive law is the number one culture war issue facing the country today. There are four ways in which legal positivism has altered the cultural landscape.

Transfer of Authority

First, there has been a shift in authority away from the constitutional text to the mind of the interpreter. There has been an enthroning of the interpreter in the sense that the authority in the realm of constitutional law is no longer the static text but rather the mind of the judge. Former Attorney General Edwin Meese was one of the few men in public life who not only understood this phenomenon but also had the moral courage to speak out against it. Because of his understanding and courage, Meese was viewed as a threat to the legal positivist paradigm, which explains why he was consistently vilified by the political and cultural left throughout his tenure as Attorney General during the Reagan Administration. According to Meese, "under the old system the question was *how* to read the Constitution; under the new approach, the question is *whether* to read the Constitution."[27]

This shift in authority from the text to the interpreter is also illustrated by juxtaposing two quotations from two Supreme Court Justices, each of whom advocated

[27] Meese, "Toward a Jurisprudence of Original Understanding," 6.

differing approaches to constitutional interpretation. Justice Felix Frankfurter, who represented the traditional school of constitutional interpretation declared, "The ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."[28] By contrast, Justice Charles Evan Hughes, who represented the legal positivist school of interpretation, asserted, "We are under a Constitution, but the Constitution is what the judge says it is."[29] Hughes statement has become a trite refrain routinely employed by most of today's legal scholars.

If Hughes statement is true, then we are no longer governed by the Constitution but rather by the latest Supreme Court opinion. Thus, the month of June has turned into "nervous time." June is the month when Supreme Court opinions are published and released to the public. It is an anxious time since we do not know exactly which way the judges have morphed the language of the Constitution. Until we read the decisions, we do not know which rights that we once enjoyed no longer exist or which rights now exist that formerly did not exist.

Undermining Inalienable Rights

Second, legal positivism has taken the whole notion of inalienable rights and put it under tremendous stress. Inalienable rights are rights that all Americans possess because God granted them. Because God, and not man or the state, gave these rights, no government can take them away. Such immutability is due to the fact that God, rather than the state, is the original grantor of these rights.

This notion of inalienable rights is not the thinking of some right wing lobbying group. Rather, it is a concept that is clearly expressed in the Declaration of Independence, which says, "We hold these truths to be self-evident, that all men are

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[28] *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491-492 (1939).

[29] Charles Evans Hughes; quoted by Craig R. Ducat and Harold W. Chase, *Constitutional Interpretation* (St. Paul: West Publishing Co., 1974, 1983), 3.

created equal, that *they are endowed by their creator with certain unalienable rights*, that among these are life, liberty and the pursuit of happiness (italics added)." Thus, the function of government is to protect these rights. Government has no right to take these rights away since they were never given by the state but rather emanate from the creator.

What has legal positivism done to the reality of inalienable rights? If the Constitution keeps changing based upon where society is evolving, then one day these rights could be present and the next day, with the stroke of a pen, they could disappear. For example, prior to the *Roe v. Wade* decision, American unborn children had a right to life. Then one day, with the stroke of a pen from the *Roe* court, that right disappeared. Consequently, roughly forty million unborn children have died since that infamous decision. If legal positivism is true and everything is in a state of evolutionary flux, then legal positivism will naturally react against the concept of inalienable rights since such rights are characterized by fixity and stability. The two worldviews are going in opposite directions. Inalienable rights are going in the direction of fixity due to their grounding in a changeless God while Darwinian positivism is going in the direction of endless change.

Thus, legal positivists are not known for their concern for human rights. Positivist Oliver Wendell Holmes stated, "I see no reason for attributing to man a significance different in kind from that which belongs to a baboon or a grain of sand."[30] Similarly, legal positivists have little concern or understanding of inalienable rights. Former Clinton Administration Attorney General Janet Reno stated, "You are part of a *government that has given its people more freedom*…than any other government in the history of the world" (italics added).[31] Here, the leading law enforcement official during

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[30] Oliver Wendell Holmes; cited in Richard Hertz, *Chance and Symbol* (Chicago: University of Chicago Press, 1943), 107.

[31] Speech by Attorney General Janet Reno, Newark, New Jersey, May 5, 1995. Quoted in James Bovard, "Waco Must Get a Hearing," *Wall Street Journal*, May 15, 1995; cited in James Bovard, *Freedom in Chains: The Rise of the State and the Demise of the Citizen* (New York: St. Martin's Press, 1999), 2.

the Clinton administration indicates that rights emanate from government, when the Declaration of Independence clearly states that rights emanate from God. If Reno is correct in asserting that freedom is a gift from government rather than a gift from God, then one day government can give freedom and the next day government can take freedom away. However, if freedom is inalienable since it is anchored in God, then there is nothing that government can do to take freedom away. Thus, one can see the way that positive law has eroded the concept of inalienable rights, as even the highest law enforcement agent in the Clinton Administration apparently did not have a firm grasp of this foundational concept.

Shift in Legal Education

Third, legal positivism has brought sweeping changes to American legal education. For one thing, positive law has made the thinking of the founding fathers irrelevant and obsolete. John Dewey expressed such a sentiment when he noted, "The belief in political fixity, of the sanctity of some form of state consecrated by the efforts of our fathers and hallowed by tradition, is one of the stumbling blocks in the way of orderly and direct change."[32] Dewey's point is that we are holding up evolutionary progress and upward ascent to the extent that we anchor ourselves to the beliefs of our founding fathers. Because the framers represented an earlier generation, they were less evolved and less enlightened than we are. Therefore, if we lean too heavily on their insights we are actually retrogressing or devolving. Why return to a less evolved era?

In this sense, the past perspectives of the founders are perceived as obstacles to progress in the present. Theologian Wayne Grudem notes the relationship between an evolutionary worldview and the discarding of the insights of former generations. He says, "…if human beings are continually evolving for the better, then the wisdom of earlier

[32] John Dewey; cited in Barton, *Original Intent*, 228.

generations…is not likely to be as valuable as modern thought."[33] Therefore, legal positivists are quick to point out the absurdity of shackling enlightened 21st century humanity to the under-evolved and undeveloped legal principles of the 18th century that are reflected in the United States Constitution.

I learned this lesson the hard way as a first year law student. During that time, I often raised my hand in class and attempted to make arguments based upon the views of the founders. In my naiveté, I thought that this is what lawyers were supposed to do. One day one of my professors retorted, "Mr. Woods, why do you keep trying to anchor us to the 18th century?" Although this may seem like a strange question to the uninitiated, the question makes perfect sense to someone following a legal positivist paradigm. After all, if humanity is evolving upward for the better, why return to a bygone era that did not have the same evolutionary development, insights, and benefits that we now enjoy?

Because the founders are considered to be lower on the evolutionary chain than us, the positivist often deprecates and dismisses them as dead, oppressive, European males. For example, constitutional law professor and "Democratic presidential candidate Barack Obama described the U.S. Constitution as having 'deep flaws' during a September 2001 Chicago public radio program adding that the country's Founding Fathers had 'an enormous blind spot' when they wrote it. Obama also remarked that the Constitution 'reflected the fundamental flaw of this country that continues to this day.'"[34] Along these same lines, some public schools have omitted civics, western civilization, and constitutionalism in order to instead focus on multiculturalism where American students often graduate with a greater knowledge of foreign cultures in comparison to

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[33] Wayne Grudem, *Systematic Theology* (Grand Rapids: Zondervan, 1994), 287.

[34] David A. Patten, "Obama: Constitution is 'Deeply Flawed,'" online: www.Newsmax.com, accessed 25 August 2009, 1.

their own.[35] This marginalization of the ideas of the founding fathers in American education has been expedited in recent years through the influence of historical revisionism, which places under a magnifying glass the imperfections of the framers while simultaneously suppressing any good that they accomplished. For example, sociologist Paul Vitz discovered that ever since public education became federalized under the Carter Administration, the Christian character and conduct of the founders began to be omitted from public school textbooks.[36]

In addition to trivializing the wisdom of the founders, evolutionary positive law has also altered the landscape of American legal education by dismissing and marginalizing the once influential *Commentaries on the Laws of England* (1765–1769) authored by William Blackstone. Most people today have never even heard of Blackstone's commentaries. Sadly, I went all the way through my undergraduate career as a Political Science major and then law school without even knowing what Blackstone's commentaries were. However, if an American went to law school or practiced law sometime between 1760 and 1870, he was steeped in Blackstone's commentaries. In 1799, Judge Iredell commented on the significance and influence of these commentaries when he said, "For nearly thirty years it [Blackstone's Commentaries] has been the manual of almost every law student in the United States, and its uncommon excellence has also introduced it into the libraries, and often to the favorite reading of private gentlemen."[37] The premise behind Blackstone's commentaries is that the creator has revealed fixed principles in nature and Scripture. Therefore, the function

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[35] William Grigg, *Freedom on the Altar* (Appleton, WI: American Opinion, 1995).

[36] Paul Vitz, *Censorship: Evidence of Bias in Our Children's Textbooks* (Ann Arbor, MI: Servant Books, 1986), 131-55.

[37] Justice Iredell; cited in Barton, *Original Intent*, 217.

of human law is to cooperate or operate in harmony with these fixed principles rather than operate in rebellion against them. Blackstone explained:

> Thus, when the Supreme Being formed the universe, and created matter out of nothing, he imposed certain principles upon that matter, from which it can never depart, and without which it would cease to be…If we farther advance, from mere inactive matter to vegetable and animal life, we shall find them governed by laws, more numerous indeed, but equally fixed and invariable…Man, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependent being…no human laws should be suffered to contradict the laws of nature and the law of revelation.[38]

However, despite the influence that these commentaries wielded over legal education for over a century, the dawning of Darwinian legal positivism eventually caused them to be discarded. Such discarding has been so comprehensive that few today, even in the legal community, understand what these commentaries are or once contributed to American jurisprudence. Blackstone's commentaries had to be eliminated in legal positivism's march to dominance since these commentaries develop legal principles from the fixed dictates of God while Darwinian positive law teaches all law must be kept in a state of flux in order to keep up with an ever-evolving society. As described earlier, it is because of this same conflict between divine fixity and constant evolutionary change that the notion of inalienable rights has also suffered under the prism of positive law.

In addition to rendering obsolete not only the views of the founders but also the once influential Blackstone's commentaries, evolutionary positive law also introduced the case law method into American legal education. Prior to the rise of legal positivism, law schools focused their students' attention on the original sources of law, such as the text of the Constitution. The case law method spends more time analyzing

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[38] Sir William Blackstone, *Commentaries on the Laws of England*, ed. Wayne Morrison (Philadelphia: Robert Bell Union Library, 1771; reprint, London: Cavendish Publishing Limited 2001), 38-39, n. 10; 42.

what court holdings have said about the Constitution rather than in studying the constitutional text itself. The case law method would be the equivalent of going to seminary and spending all of your time studying what various commentators and theologians have said about the Bible while spending little time actually studying the biblical text.

In a typical constitutional law class, students study case after case analyzing what judges have said about the Constitution and comparatively little time studying the actual document. While the case law method may seem strange to someone outside the legal profession, this method is consistent with positive law. If the function of a judge is to evolve the document upward, then the latest Supreme Court opinion is on equal if not greater par than the Constitution itself. Thus, what is really important is not the Constitution but how the latest judicial opinion has amended the document.

Pat Robertson well captures the case law approach's emphasis upon judicial decisions and corresponding de-emphasis on the text of the Constitution. Robertson, who is not only the son of a United States senator but also a presidential candidate himself, described his own experience with the case law method during his legal training:

> I spent three years getting my law degree at Yale Law School. From the moment I enrolled, I was assigned huge, leather-bound editions of legal cases to study and discuss. I read what lawyers and judges, professors, and historians said about the Constitution. But never once was I assigned the task of reading the Constitution itself…[39]

This sad state of affairs continues in the vast majority of law schools throughout the country today. Seldom do students receive a lecture or an assignment on the text of the Constitution. Moreover, bar examinations dedicate scant attention to the constitutional text and instead test mostly on various Supreme Court holdings interpreting the text.

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[39] Pat Robertson, *America's Dates with Destiny* (Nashville: Thomas Nelson, 1986), 95.

Furthermore, this departure from the original legal sources created by the founders has been expedited by the advent of postmodern deconstructionism. In other words, with the entrenchment of legal positivism and the case law method at the academic levels of the legal profession, it became common for legal scholars to excuse their lack of attention given to constitutional authorial intent under the guise that the intent of the framers was unknowable. The following remark from Justice Brennan reflects such an assertion:

> It is arrogant to pretend that from our vantage we can gauge accurately the intent of the framers on application of principle to specific contemporary questions. All too often sources of potential enlightenment such as records of the ratification debates provide sparse or ambiguous evidence of the original intention…And apart from the problematic nature of the sources, our distance of two centuries cannot but work as a prism refracting all we perceive.[40]

Brennan's point is that even if we wanted to get back to the ideas of the founders, we do not have the ability to do so since the applicability of their writings to contemporary matters is sparse. Even when we do read the founders we do not read them accurately since we do so through a twenty-first century lens. Brennan's statement, which typifies the mindset of postmodern deconstruction, has been vigorously challenged by conservative judge and scholar Robert Bork, who claims that the application of the intent of the framers to contemporary matters can be known through the constitution itself, the records from both the constitutional and ratifying conventions, newspaper accounts covering these conventions, the *Federalist* and *Anti-Federalist Papers*, acts of the first congress and other branches of government interpreting the Constitution, founding era scholarly treatises expounding upon the Constitution's meaning, and the founders' own

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[40] William J. Brennan, Jr.; cited in Eidsmoe, *Christianity and the Constitution*, 398-99. For a rebuttal of Brennan's argument see Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (NY: The Free Press, 1990), 161-67.

voluminous writings.[41] Brennan's statement also does not sit well with the average Bible believing Christian who argues that he can discern God's will by reading the Bible, which was recorded in another language, from another culture, and written two thousand years ago or more. Thus, it seems absurd to say that modern judges cannot travel backward a mere two hundred years, in the same language, and from the same culture in order to ascertain the intent of the framers.[42] In sum, evolutionary legal positivism has altered American legal education by dismissing the ideas of the founders and Blackstone's commentaries and through the introduction of the case law method.

Threatening Democracy

Fourth, legal positivism has threatened our democratic, republican form of government. The positive law paradigm has placed the power to amend the Constitution not in the hands of the branch of government that is directly accountable to the people as outlined in Article V but rather in the hands of the unelected, life tenured federal judiciary. This new framework has made the latest Supreme Court opinion just as important or perhaps more important than the original document itself. Consequently, legal positivists have redefined the terms "Constitution" and "constitutional convention." Eidsmoe explains:

> One constitutional law professor declared, with the approval of most of his colleagues, that the Constitution is more than the written document signed in 1787; rather, the various decisions of the Supreme Court are part of the Constitution, and these along with the written document are the true 'Constitution' of the land. It has even been said that the Supreme Court sitting in session is a 'continuous constitutional convention.'[43]

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[41] For a rebuttal of Brennan's argument see Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990), 161-67.

[42] Ibid., 164.

[43] Eidsmoe, *Christianity and the Constitution*, 397.

Obama's nominee to the Seventh Circuit Court of Appeals, Judge David Hamilton, expressed this positivist mind set when he indicated "his decisions as a federal judge can 'amend' the U.S. Constitution by adding 'footnotes' to it."[44]

Such a scenario threatens America's democratic ideals because it places the awesome power of amending the Constitution in the hands of nine life tenured, unelected justices. Only five of these nine justices need to agree with one another in order to hand down a majority opinion. Thus, the expression "With five votes we can do anything" became a famous judicial quip amongst positivists.[45] Because these justices are appointed for a life term, they are completely insulated from the electorate and thus totally unaccountable to the people for the decisions that they render. At any time, these five justices can circumvent the democratically controlled amendment process and alter America's most deeply cherished constitutional protections. This method of altering the Constitution reverses the founders' design, which envisions the amenders of the Constitution being held directly accountable to the people during the next election cycle for any Constitutional alterations that they make. Thus, if five, life tenured, unelected judges alter the Constitution in a way that is unagreeable to the people, there is no political recourse against these decision makers through the ballot box.

Such a system does not comprise a democracy, or even a republican form of government, but rather an oligarchy. The English word oligarchy is derived from the Greek word *oligos,* which means "few." Under an oligarchical form of government just a few people rule the masses. America's current judiciary resembles an oligarchy because it places the authority of guiding the evolutionary progress of the Constitution and thus

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[44] Christopher Neefus, "Senate to Vote Thursday on Appeals Court Nominee Who Said Judges Can Amend the Constitution with Judicial 'footnotes,'" online: www.CNSNews.com, accessed 18 November 2009, 1.

[45] Owen M. Fiss, "Objectivity and Interpretation," in *Interpreting Law and Literature: A Hermeneutic Reader*, ed. Stanford Levinson and Steven Mailloux (Evanston, Ill: Northwestern, 1988), 244.

the power to amend the Constitution in the hands of five unelected and unaccountable philosopher kings. Ironically, the influence of legal positivism has transformed the judiciary from, according to Alexander Hamilton's words in *Federalist 78*, the least dangerous branch of government into government's most dangerous branch. Thomas Jefferson warned that the judiciary had the potential of transforming into such an oligarchy when he said:

> You seem…to consider judges as the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men, and not more so…and their power the more dangerous as they are in office for life, and not responsible, as the other functionaries are to the elective control. The Constitution has erected no such single tribunal…[46]

In sum, Jefferson's fear of a judicial oligarchy has become a reality in our day because legal positivism has given justices permission to depart from authorial intent in order to guide the evolutionary progress of the Constitution. As long as justices are constrained by the plain meaning of the Constitution's language, the power to change the Constitution remains within the jurisdiction of the democratically controlled amendment process. However, once the judiciary departs from the Constitution's plain language, the Constitution, in the words of Jefferson, becomes "a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please."[47] In so doing, the amendment power shifts to an unelected oligarchy.

The following words of University of Texas Law Professor and federal appellate court nominee Lino Graglia best sum up the current crises in constitutional interpretation:

> …judicial usurpation of legislative power has become common and so complete that the Supreme Court has become our most powerful and important instrument

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[46] Jefferson, *Writings of Thomas Jefferson*, Vol. XV, p. 277, September 28, 1820.

[47] Ibid., Vol. XV, p. 213, a letter to Judge Spencer Roane on September 6, 1819.

> of government in terms of determining the nature and power of American life. Questions literally of life and death (abortion and capital punishment), of public morality (control of pornography, prayer in the schools, and government aid to religious schools), and of the public safety (criminal procedure and street demonstrations), are all, now, in the hands of judges under the guise of constitutional law. The fact that the Constitution says nothing of, say, abortion, and indeed, explicitly and repeatedly recognizes the capital punishment that the Court has come close to prohibiting, has made no difference.
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> The result is that the central truth of constitutional law today is that it has nothing to do with the Constitution except that the words 'due process' or 'equal protection' are almost always used by the judges in stating their conclusions. Not to put too fine a point on it, constitutional law has become a fraud, a cover for a system of government by the majority vote of a nine-person committee of lawyers, unelected and holding office for life.[48]

In conclusion, far from being confined to a mere academic discussion, Darwinian legal positivism has wrought horrific cultural changes in the following four ways. It has shifted authority in the interpretive process, destroyed inalienable rights, altered the philosophical direction of legal education, and even threatened democracy itself.

ILLUSTRATIONS OF EVOLUTIONARY LEGAL POSITIVISM

In order to cement the notion of evolutionary law in our minds, let us examine a few examples of positive law in action. Legal positivism's role in swaying constitutional interpreters away from pursuing authorial intent can best be illustrated by observing the following recent judicial decisions. In each case, the Supreme Court rejected the intent of the framers in order to guide the evolutionary progress of the Constitution and society.

Death Penalty

In his concurring opinion in the 1972 case *Furman v. Georgia*, Justice Brennan argued that capital punishment as it was then practiced in the United States was

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[48] Lino A. Graglia, "Judicial Review on the Basis of 'Regime Principles': A Prescription for Government by Judges, *South Texas Law Journal*, Vol. 26, No. 3 (Fall 1985), pp. 435-52, at 441.

cruel and unusual punishment in violation of the Eighth Amendment and was therefore unconstitutional. Arguing that capital punishment violates the Constitution is a virtually impossible case to make if one is concerned about the intent of the founding fathers. First, capital punishment was routinely practiced at the time of the Constitution's writing. In other words, the very society that ratified the Constitution and the Bill of Rights consistently practiced capital punishment. Second, the very Congress that adopted the Eighth Amendment also passed the Fifth Amendment. By indicating that the Federal government may take life as long as due process is first afforded, the Fifth Amendment expressly recognizes capital punishment.

However, Brennan did not base his argument upon the intent of the framers but rather upon the notion that an evolving society had matured beyond the barbaric and under-evolved procedure of capital punishment. Therefore, the Constitution had to be reinterpreted to keep up with an evolving society. Brennan reasoned that the Constitution must be interpreted according to an "evolving standard of decency."[49] Brennan's ambition to guide the evolutionary progress of the Constitution is evidenced through his use of this phrase. Brennan borrowed this phrase from an earlier case, *Trop v. Dulles*, in which Chief Justice Earl Warren contended that the State Department could not take away someone's citizenship on the grounds that he deserted from the armed forces during World War II. Warren based his decision on the notion that the words of the cruel and unusual clause of the Eighth Amendment "…are not precise and that their scope is *not static*. The amendment must draw its meaning from the *evolving* standards of decency that mark the *progress* of a maturing society" (italics added).[50]

Brennan's opinion in *Furman* expressly demonstrates his pursuit of guiding the evolutionary progress of the Constitution at the expense of its authorial intent. In

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[49] *Furman v. Georgia*, 408 U.S. 238, 269-70 (1972).

[50] *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Brennan's mind, the intent of the framers on the constitutionality of capital punishment was irrelevant. Rather, what mattered most was where society should be evolving toward on a particular issue and how the Constitution needed to be reinterpreted to keep up with this evolutionary trajectory. In other words, even though capital punishment was regularly practiced during the founding era, it constitutes cruel and unusual punishment in light of the enlightened and evolved standards of today.

Brennan's opinion also illustrates the oligarchical mentality fostered by legal positivism. Despite Brennan's personal opinion that an enlightened society has evolved beyond the necessity of capital punishment, public opinion polls consistently demonstrate that the practice of capital punishment enjoys the overwhelming support of the American people. Although the *Furman* court's decision to ban capital punishment on constitutional grounds was later reversed,[51] Brennan's concurrence in the case illustrates the legal positivist mentality. To the legal positivist, it does not matter what the founders intended or even what the text says. Rather, what really matters is the upward ascent of society and how the Constitution should be reinterpreted to keep up with this ascent. The then judge takes on the responsibility of altering the document rather than the people's elected representatives.[52]

Abortion

Legal positivism's influence also finds ample illustration in the infamous *Roe v. Wade* decision.[53] This case guaranteed women the constitutional right to procure an abortion. Like the previously described issue of capital punishment, it is nearly impossible to argue that the Constitution supports a right to have an abortion if this issue

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[51] *Gregg v. Georgia*, 428 U.S. 153 (1976).

[52] For a more expansive discussion on the relationship between positive law and the constitutionality of the death penalty, see Eidsmoe, *Christianity and the Constitution*, 391-92.

[53] *Roe v. Wade*, 410 U.S. 113 (1973).

is analyzed from the perspective of original intent of the framers. Interestingly, any reference to abortion or privacy cannot be found within the text of the Constitution.

Moreover, although the *Roe* court also found a constitutional right to obtain an abortion on the basis of the word "liberty" found in the Fourteenth Amendment, the authorial intent of Fourteenth Amendment has nothing to do with abortion. The Fourteenth Amendment was passed in 1868 in the post-Civil War era in order to guarantee certain rights to recently emancipated slaves. In fact, the authorial intent of the Fourteenth Amendment argues strongly against using this amendment as a means of justifying a constitutional right to acquire an abortion. The very states that ratified the Fourteenth Amendment in 1868 had either passed or were in the process of passing laws prohibiting abortion.

However, Justice Blackmun, in writing for the majority, was able to find such a right by seizing the opportunity of guiding the evolutionary progress of the Constitution. Because society had matured or progressed to the point where "reproductive freedom" should be honored, the Constitution needed to be reinterpreted in order to keep up with this new societal value. Blackmun borrowed the right to privacy language from a case handed down a few years earlier called *Griswold v. Connecticut*.[54] In *Griswold*, the court struck down a state law restricting access to contraceptives. The court reached its decision on the grounds that such laws violated the constitutional right to privacy. Since the Constitution does not explicitly mention the right to privacy, where did the *Griswold* court base the existence of such a right? The court found it within the "penumbras" of the Bill of Rights. A penumbra is a shadow. In other words, despite the fact that the word privacy nowhere appears in the actual wording of the Bill of Rights, the court "discovered" the right to privacy within the shadows cast by the Bill of Rights. In *Roe*,

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[54] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

the court ruled that state laws restricting access to abortion are unconstitutional. Blackmun based this decision on the privacy language from *Griswold*. Blackmun reasoned that procurement of an abortion falls within the purview of the right to privacy.

In sum, Blackmun and the *Roe* court were able to guide the evolutionary progress of the Constitution so that it would guarantee a woman's constitutional right to an abortion only by trampling upon the intention of its framers. Because no such right to privacy expressly exists in the text of the Constitution, Blackmun had to manufacture such a right from the shadows of the Bill of Rights. If the right to privacy and the right to procure an abortion are so clear, then why did it take our judicial system nearly two hundred years to discover these rights? Moreover, Blackmun found the right to an abortion in the liberty clause of the Fourteenth Amendment only by ignoring the historical context in which the amendment was written. Finally, *Roe* again illustrates the oligarchical method of decision-making created by legal positivism. *Roe* attempted to resolve one of the most controversial issues of our time, the question of when life begins, through the unaccountable judiciary rather than through the democratically controlled legislative process.

Public School Prayer and Bible Reading

A final illustration of positive law is found in the Supreme Court's decision to remove prayer[55] and Bible reading[56] from the public school classrooms in the early 1960's since such activities supposedly abridged the prohibition against establishing a religion found in the First Amendment. Like the previously described issues of capital punishment and abortion, the argument that prayer and Bible reading are unconstitutional simply cannot be made on the grounds of the framers' intent. One can only make such an

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[55] *Engle v. Vitale*, 370 U.S. 421 (1962).

[56] *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963).

argument by conveniently ignoring the legislative activities of the first congress, which was comprised of those who wrote and adopted the Constitution and the Bill of Rights. This first congress passed the Northwest Ordinance, which was signed into law by President Washington. Article III of the Northwest Ordinance says, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[57] Apparently, the framers of the First Amendment believed that schools and educational institutions were the proper place to encourage religion and morality.

Any fair minded reading of American history demonstrates that our founding fathers had no problem with the generic principles of Christianity being expressed in government as long as one Christian denomination was not favored over another. Based upon the legislative activities of those who framed the First Amendment, it would seem that they understood the prohibition against the establishment of a religion as forbidding only government-sponsored denominationalism. The framers would have been perfectly comfortable with governmental sponsoring of the general principles of Christianity that were applicable to all Christian denominations. After all, it was those who wrote the First Amendment that also placed government-subsidized chaplains into the congress and the military. We might ask ourselves why so many of our older public buildings from the founding era are inscribed with Scripture verses and other Christian sentiments if our founding fathers designed a Constitution that illegalized such a practice?

However, in the early 1960's, the justices again took the opportunity of guiding the evolutionary ascent of the Constitution so that the primitive practices of voluntary prayer and Bible reading would be found unconstitutional. The fact that the court majorities perceived these practices as antiquated is evidenced by the *Schempp*

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[57] *Documents of American History*, Henry S. Commager, ed., 5th ed. (NY: Appleton-Century-Crofts, Inc., 1949), 131.

court's willingness to rely on expert testimony indicating that psychological damage could be inflicted on a child if portions of the New Testament were read without explanation.[58] The court reasoned that because society had evolved toward multicultural pluralism embracing many faiths and religious traditions, the preeminence of Christianity within the public schools had to be dethroned.

Once again, in the pursuit of its evolutionary agenda, the court ignored the intention of the Constitution's founders. By banning voluntary prayer in public schools, the *Engel* court made the radical move of overturning a long-standing tradition in American educational history. Interestingly, the court did so without citing a single precedent. Yet a court following established precedent from previous courts is one of the cornerstones of American jurisprudence. Legal scholars call this time honored principle *stare decisis,* which means, "Let precedent stand." Interestingly, a year later, even the *Schempp* court called attention to the non-existence of any precedent cited in *Engel* when it noted, "Finally, in *Engel v. Vitale*, only last year, these principles were so universally recognized that the court, *without the citation of a single case*…reaffirmed them" (italics added).[59]

In sum, the preceding facts demonstrate how severely the court violated the original intent of the framers in order to guide the evolutionary progress of the Constitution so that it would prohibit the archaic and psychologically harmful practice of voluntary prayer and Bible reading in public schools. The oligarchical nature of these decisions should again be emphasized since public opinion polls routinely demonstrate that the type of practices banned in *Engel* and *Schempp* continue to enjoy the widespread support of the American people. In conclusion, these three legal illustrations of recent court holdings demonstrate how Darwinian legal positivism routinely results in judges

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[58] *School District of Abington Township v. Schempp*, 374 U.S. 203, 209 (1963).

[59] *School District of Abington Township v. Schempp*, 374 U.S. 203, 220-21 (1963).

taking matters into their own hands by amending the Constitution from the bench against the express wishes of both the founding fathers and the American people. Conservative Supreme Court justice Anthony Scalia best summarizes the entire matter when he notes:

> What secret knowledge, one must wonder, is breathed into lawyers when they become members of this court, that enables them to discern that a practice which the text of the Constitution does not clearly proscribe, and which our people have regarded as constitutional for 200 years, is in fact unconstitutional?…Day by day, case by case, [the court] is busy designing a Constitution for a country I do not recognize.[60]

GLOBALISM: THE NEXT EVOLUTIONARY LEAP

Where is the Darwinian dominated Supreme Court headed? If legal positivists have already altered the text of the Constitution in order to nearly ban capital punishment, give us abortion on demand, and ban Bible reading and prayer from the public schools, then what is next on the horizon? What will the next evolutionary leap look like? It would appear that things are moving in the direction of globalism or one world government. Globalism constitutes the next vertical leap in social Darwinism.

In fact, social Darwinists themselves declare that globalism is the pinnacle or zenith of the evolution process. Donald Keys observes that, "humanity is on the verge of something entirely new; a further evolutionary step unlike any other; the emergence of the first global civilization."[61] According to Ferencz and Keyes:

> Despite all of the contemporary stresses and strife, an objective analysis of the historical record will show that humankind is experiencing a continuous–though wobbly–movement toward a more cooperative world order…We have seen that humankind is not simply moving in a vicious killing circle; it is on an upward

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[60] Justice Anthony Scalia's dissenting opinion in *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 711 (1996).

[61] Donald Keys, *Earth at Omega: Passage to Planetization* (Boston: Branden Press, 1982), iii.; cited in David Noebel, *Understanding the Times* (Manitou Springs, CO: Summit Press, 1991), 865.

> climb toward completing the governmental structure of the world. We are inspired by our great progress toward planethood.[62]

In fact, I was on a ride at a well-known amusement park recently that illustrates this evolutionary mentality. The ride started at the ground floor and then spiraled upward several stories. As the tram traveled upward, the paintings on the walls that the tram passed by changed. The pictures started with molecules and atoms, and then became lower animal forms, and then higher animal forms, and then cave men, and then illiterate and war-like humans, and then eventually they became linguistically and technologically sophisticated people. When the tram finally reached the top floor to let the passengers out, a large sign read "welcome to the new global village."

If what has been argued thus far is correct and that the court has been following, either consciously or subconsciously, an evolutionary trajectory or paradigm, then there should be a consistent trend toward globalism in recent Supreme Court decisions. This trend in fact is exactly what has happened. This globalist trend can be discerned through the juxtaposition of two recent Supreme Court cases. In a 1986 case called *Bowers v. Hardwick*,[63] the high court considered whether a state anti-sodomy statute violated the United States Constitution. The court ruled that because there is nothing in the text of the Constitution that forbade such a statute and because such anti-sodomy laws were on the books at the time the Constitution was written and ratified, such a statute was constitutional. The court even indicated that although it thought that the law was silly, they had no right to strike it down since it was within the purview of the American Constitution and history.

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[62] Benjamin Ferencz and Ken Keyes, *Planethood* (Coos Bay, OR: Vision Books, 1988), 33, 141.; cited in Noebel, *Understanding the Times*, 864-65, 69.

[63] *Bowers v. Hardwick*, 478 U.S. 186 (1986).

Less than two decades later in a 2003 case called *Lawrence v. Texas*,[64] the identical set of facts came before the court. This time the court ruled that the state anti-sodomy statute was unconstitutional. Rather than basing its decision on our own Constitution, history, and traditions as the *Bowers* court had done, the *Lawrence* court based its decisions upon foreign sources of law, including the European Court of Human Rights. In other words, the court determined that the anti-sodomy statute was out of step with world opinion.

When these two decisions, both *Bowers* and *Lawrence*, are compared, there is an obvious trend in the law away from our own Constitution, culture, history, and traditions in favor of foreign sources of law. Of course, some observers are alarmed by this trend since many of the rights that we take for granted in the United States of America, such as freedom of speech and religion as well as the right to bear arms, are not respected throughout the world. If the court is now going to consider foreign sources of law when settling matters that come before it, will these other cherished rights also begin to disappear? While this notion of consulting foreign sources of law to solve our own constitutional disputes may seem strange to the average citizen, it is completely consistent with the evolutionary positive law paradigm. If the Supreme Court is reinterpreting the Constitution to keep up with the evolutionary ascent of society and the zenith of evolution is globalism, then it stands to reason that more globalist concepts should show up in court holdings.

CONCLUSION

Far from being simply a biological theory, evolution has introduced far-reaching worldview implications into the fabric of our culture and world. As this chapter

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[64] *Lawrence v. Texas*, 539 U.S. 558 (2003).

has argued, beginning in 1870, evolution has literally re-fashioned, for the worse, the American legal system. This understanding furnishes evolution's opponents with an additional incentive to bring this theory to its knees. Should this monumental feat ever be accomplished, not only will it liberate the fields of biology and science from a pernicious influence, but it will also rescue from the dark ages many social disciplines, including the American legal system and Constitutional interpretation.