Enthroning the Interpreter: Dangerous Trends in Law and Theology - Part III

The previous articles demonstrated that use of a literal hermeneutic in order to ascertain authorial intent is foundational to proper legal and biblical interpretation. The next two articles will expose a drift away from these bedrock principles in both fields. Over the course of the previous century and a half, American jurisprudence has experienced a progressive movement away from seeking authorial intent through what the author has plainly stated. Although this trend is not necessarily discernible in all facets of legal interpretation, it is particularly noticeable in the field of constitutional interpretation. While Justice Story's previously mentioned classical approach to constitutional interpretation called for seeking the meaning of the Constitution based upon the plain language of its drafters, modern constitutional interpretation places the ability to determine the Constitution's meaning almost exclusively within the subjective discretion of the interpreter. Thus, the end result is that the field of constitutional interpretation has undergone a radical shift in authority from the objective constitutional text to the subjectivity of the interpreter's mind.

Legal Positivism: Its Origin and Essence

When did such a shift away from Justice Story's time honored objective approach to the Constitution begin? Historians have traced it to the following three individuals: Christopher Columbus Langdell (1826-1906), Roscoe Pound (1870-1964), and Oliver Wendell Holmes

(1841-1932).[1] All three were influential in the legal community. Langdell was dean of Harvard Law School. Pound served as a professor at four different law schools and also served as the Dean of the law schools at Harvard and the University of Nebraska. Holmes was appointed to the United States Supreme Court in 1902. By utilizing their spheres of influence within the legal profession, these men each played strategic roles in institutionalizing what is known as legal positivism. Langdell first introduced this dangerous trend in constitutional interpretation at Harvard Law School in the 1870's. Pound followed in this tradition when he subsequently became dean at Harvard. Holmes brought legal positivism into the fabric of American judicial decision-making following his appointment to the nation's highest court.

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. Rather, it is to study the needs, wants, and desires of a changing society and to reinterpret the Constitution in order to fulfill these societal needs, wants, and desires. A basic presupposition of legal positivist thinking is the belief in Darwinian evolution ultimately resulting in man's continued upward evolutionary ascent.[2] In other words, just as man evolved from the animal species, he continues to evolve and "progress." Thus, as man continues to evolve, it is necessary to have a Constitution that also continues to evolve and change along with him.[3] Therefore, legal

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[1] David Barton, *Original Intent: The Courts, the Constitution, and Religion* (Aledo, TX: Wallbuilders Press, 1996), 228-29; John Eidesmoe, *Christianity and the Constitution* (Grand Rapids: Baker Book House, 1987), 394.

[2] Barton, *Original Intent*, 228; Eidesmoe, *Christianity and the Constitution*, 391.

[3] This incorporation of evolutionary theory into legal thinking illustrates how evolution has become intertwined with numerous academic disciplines, which are not necessarily related to the sciences. Examples of such academic disciplines include Law, History, Economics, Political Science, Psychology, Anthropology, Theology and Sociology. For an exposition of how evolution impacts these disciplines see Henry M. Morris, *The Long War Against God: The History and Impact of the Creation/Evolution Conflict* (Grand Rapids: Baker Book House, 1989)

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.

This evolutionary mentality is commonly found in modern legal decisions. For example, in *Trop v. Dulles*, Chief Justice Earl Warren contended that the State Department could not strip a man of his citizenship because he deserted from the armed forces in World War II. Warren based his decision on the grounds that the cruel and unusual clause of the 8th Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[4] Justice Brennan picked up on this theme in his concurrence in *Furman v. Georgia*.[5] In that case, Brennan maintained that although capital punishment was practiced at the time that the 8th Amendment was adopted, the practice of capital punishment still violated the 8th Amendment's prohibition against cruel and unusual punishment because this clause must be interpreted according to the "evolving standard of decency." In other words, even though capital punishment was regularly practiced during the founding era, it is cruel and unusual punishment in light of the enlightened and evolved standards of today.

Thus, jurists adhering to legal positivism ceased from viewing the Constitution as containing a set of fixed legal principles. Rather, they viewed it as a "living and breathing" document that evolved from one generation to the next. In legal positivist thinking, the role of a judge is not to

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and David A. Noebel, *Understanding the Times* (Manitou Springs, CO: Summit Press, 1991). Understanding evolution's influence not only in the sciences but also in numerous other disciplines helps one understand why challenges to evolutionary thinking are so vigorously resisted by academics of all varieties.

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

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

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. Professor Alexander Bickel explains:

> 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.[6]

Bickel continues:

> Courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government.[7]

If the role of a justice is to guide the evolution of the Constitution rather than derive the intent of the founding fathers, then the true authority in the interpretive process is the mind of the justice rather than the text itself. Such a radical shift in authority from the text to the interpreter is dramatically illustrated in the following quote from Edwin Meese:

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[6] Alexander Bickel; quoted in Eidesmoe, *Christianity and the Constitution*, 395.

[7] Ibid.

> Under the old system the question was *how* to read the Constitution; under the new approach, the question is *whether* to read the Constitution.[8]

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 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."[9] 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."[10]

Legal Positivism's Impact on Legal Education

The influence of legal positivism had a profound impact upon the philosophy under girding American legal education. As legal positivism became more influential, the opinions of the founding fathers began to be perceived as irrelevant. In some instances, the beliefs of the founders were considered hindrances to the successful evolution of society. John Dewey expressed such a sentiment when he noted:

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[8] Edwin Meese, III, Address to American Bar Association, 1985; adapted in "Toward a Jurisprudence of Original Understanding," *Benchmark* Vol. II, no. 1, (January-February 1986): 6.

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

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

> 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.[11]

The 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.

In addition, William Blackstone's *Commentaries on the Laws of England* (1765-1769), with their emphasis on basing human law upon what the creator had revealed through the law of nature and the Scriptures,[12] began to be discarded in American legal education. Prior to the advent of legal positivism, Blackstone's *Commentaries* had enjoyed great influence within American legal education. In 1799, Justice Iredell noted:

> 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.[13]

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[11] John Dewey; quoted in Barton, *Original Intent*, 228.

[12] Sir William Blackstone, *Commentaries on the Laws of England*, ed. Wayne Morrison (Philadelphia: Robert Bell Union Library, 1771; reprint, London: Cavendish Publishing Limited 2001), Vol. 1: 29, 39.

[13] Justice Iredell; quoted in Barton, *Original Intent*, 217.

Perhaps the most significant impact of legal positivism upon American legal education was the introduction of the case law method of studying law. 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. However, the case law approach focused the attention of law students more on what judicial authorities have said about the Constitution rather than on studying the text of the Constitution itself. The case law approach's emphasis upon judicial decisions and corresponding de-emphasis on the text of the Constitution is captured in the following statement by Pat Robertson as he reflected upon his own 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…[14]

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.

Furthermore, 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 the 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:

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

> 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.[15]

Legal Positivism's Impact on American Democracy

This above described shift in authority from the text to the interpreter in the area of constitutional interpretation has also had a significant impact upon America's democratic institutions. Because of the prevailing influence of legal positivism, the judiciary now has a new found ability to guide the evolutionary progress of the Constitution. As a result, many legal scholars have arrived at new definitions of "Constitution" and "constitutional convention." Historian and constitutional attorney John Eidesmoe explains that some scholars have indicated:

> 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.'[16]

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[15] William J. Brennan, Jr.; quoted in Eidesmoe, *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.

[16] Eidesmoe, *Christianity and the Constitution*, 397.

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. 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.

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 (ὀλίγος), 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 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…[17]

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[17] Thomas Jefferson, *Writings of Thomas Jefferson*, Albert Bergh, ed. (Washington D.C.: Thomas Jefferson Memorial Association, 1904), Vol. XV, p. 277, September 28, 1820.

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."[18] In so doing, the amendment power shifts to an unelected oligarchy. The following words of Professor 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 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.

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

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

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.[19]

Legal Positivism Illustrated

The Death Penalty and Cruel and Unusual Punishment

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. For example, mention has already been made of Justice Brennan's concurring opinion in *Furman v. Georgia.*[20] In this case, Brennan maintained that capital punishment violated the 8th Amendment's prohibition against cruel and unusual punishment. Brennan reasoned that his clause must be interpreted according to the "evolving standard of decency." Brennan's opinion in this case expressly demonstrates his pursuit of guiding the evolutionary progress of the Constitution at the expense of its authorial intent. His ambition to guide the evolutionary progress of the Constitution is evidenced through his use of the phrase "evolving standard of decency."

Brennan's discarding of the Constitution's authorial intent is demonstrated by the fact that 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

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[19] 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.

[20] *Furman v. Georgia*, 408 U.S. 238, 269-80 (1972).

capital punishment. Moreover, the very Congress that adopted the 8th Amendment also passed the 5th Amendment. By indicating that the Federal government may take life as long as due process is first afforded, the 5th Amendment expressly recognizes capital punishment. In addition, Brennan's opinion illustrates the oligarchical mentality fostered by legal positivism. Despite Brennan's personal opinion that 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.

Privacy and Abortion

Legal positivism's influence also finds ample illustration in the infamous *Roe v. Wade*[21] decision. This case guaranteed women the constitutional right to procure an abortion. Interestingly, any reference to abortion or privacy cannot be found within the text of the Constitution. 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.

Blackmun borrowed the right to privacy language from a case handed down a few years earlier called *Griswold v. Connecticut*.[22] 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 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*, the

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

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

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.

The *Roe* court also found a constitutional right to obtain an abortion on the basis of the word "liberty" found in the 14th Amendment. However, the authorial intent of 14th Amendment has nothing to do with abortion. The 14th Amendment was passed in 1868 in the post-Civil War era in order to guarantee certain rights to the recently emancipated slaves. In fact, the authorial intent of the 14th 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 14th Amendment in 1868 had either passed or were in the process of passing laws prohibiting abortion.

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 on the intention of its framers. Because no such right to privacy exists in the text of the Constitution, Blackmun had to manufacture such a right from the shadows of the Bill of Rights. Moreover, Blackmun found the right to an abortion in the liberty clause of the 14th 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.

Separation of Church and State

A final illustration of legal positivism can be found in the cases striking down voluntary public school prayer and Bible reading in 1962 and 1963. *Engle v. Vitale*[23] represented the first time in American history that the Supreme Court used the separation of church and state doctrine to illegalize the long standing American tradition of opening the public school day with the voluntary recitation of a prayer. At issue in *Engle* was the practice of the New York public schools in having their students recite a short, 22 word, innocuous, non-denominational prayer that merely acknowledged dependence upon God. The words of the prayer were as follows:

> Almighty God, we acknowledge our dependence upon Thee, and we beg thy blessings upon us, our parents, our teachers, and our country.

A similar case came before the court a year later called *School District of Abington Township v. Schempp*.[24] The issue in this case involved voluntary Bible reading in the public schools. This practice involved one of the students reading the Bible without comment from a version of his or her choice with no additional instruction given. Once again, the Supreme Court used the separation of church and state doctrine to strike down this long-standing American tradition.

In these cases, 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* 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

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

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

without explanation.[25] Once again, in the pursuit of its evolutionary agenda, the court ignored the intention of the Constitution's founders. Such a neglect of authorial intent becomes apparent through the observation of several facts.

First, the court based its ruling on the "wall of separation of church and state" from the 1st Amendment's prohibition of a state establishment of religion. However, it is odd for the court to base its ruling on this "wall of separation of church and state" language considering the fact that none of these words appears in the actual language of the text of the 1st Amendment. The religion clauses of the 1st Amendment simply say, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise there of." Interestingly, in 1958, one jurist commented on this conspicuous absence when he noted:

> Much has been written in recent years concerning Thomas Jefferson's reference in 1802 to 'a wall of separation between church and state...' [It] has received so much attention that one would almost think at times that it is to be found somewhere in our Constitution.[26]

Interestingly, the words "Separation of Church and State" actually come from a letter that Thomas Jefferson wrote to the Danbury Baptist Association in 1802 rather than from the 1st Amendment itself. It is strange to connect Jefferson's words in this letter to the 1st Amendment considering the fact that Jefferson was out of the country serving as America's ambassador to France at the time that the Constitution was debated, ratified, and adopted.[27] In fact, the

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[25] Ibid., 209.

[26] *Baer v. Kolmorgen*, 181 NYS 2d. 230, 237.

[27] *Reynolds v. United States*, 98 U.S. 145, 163 (1878).

separation of church and state language was not connected to the 1st Amendment's prohibition of a state establishment of religion until the *Everson v. Board of Education* case in 1946.[28]

Second, the court assumed that Jefferson's "wall of separation of church and state" was intended to prohibit the practice of Christian principles in government. However, this historical analysis is suspect for several reasons. For example, Jefferson was not opposed to religious practices in the public square. Not only did he praise the use of the local courthouse in his hometown for religious services, but he also introduced a resolution for a day of prayer and fasting while serving in the Virginia General assembly.[29] As President, Jefferson also supported and signed into law a treaty with the Kaskaskia Indians that provided a stipend from the federal treasury to support a missionary to minister to the Kaskaskia Indians.[30] Furthermore, the 1802 letter that the court cited to prove that Jefferson advocated "a wall of separation between church and state" is taken out of context. In writing to the Danbury Baptists, Jefferson used this expression to assure them that the federal government would not interfere with their private free exercise of religion. The letter had nothing to do with government sponsored religious activity.[31] In other words, Jefferson used the phrase "wall of separation of church and state" as a one way

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[28] *Everson v. Board of Education*, 330 U.S. 1 (1946). Earlier courts that cited Jefferson's 1802 letter in full did not connect the wall of separation of church and state to the 1st Amendment's establishment clause. *See Reynolds v. United States*, 98 U.S. 145 (1878).

[29] David Barton, *The Myth of Separation*, 5th ed. (Aledo, TX: Wallbuilder Press, 1992), 175.

[30] Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (Grand Rapids: Baker, 1988), 38-39.

[31] Barton, *The Myth of Separation*, 41-42.

wall. The wall prevented the government from interfering with Christianity rather than preventing Christianity from influencing government.

Third, regarding the issue of religious practices in public schools, the court confidently asserted that the framers would have been opposed to such a practice. However, the court conveniently ignored 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 North West 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.[32]

Apparently, the framers of the 1st Amendment believed that schools and educational institutions were the proper place to encourage religion and morality. Based upon the legislative activities of those who framed the 1st 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 1st Amendment that also placed government-subsidized chaplains into the congress and the military.

Fourth, the court applied the 1st Amendment's prohibition of a government-established religion to religious activity taking place at the state level. Such an application contradicts the

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

express wording of the religion clauses of the 1st Amendment, which say, "*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise there of." The 1st Amendment places the prohibition of establishing a religion on Congress rather than upon the state governments. However, it is worth noting that the court was able to apply the 1st Amendment to the activities of state governments because fifteen years earlier the *Everson* court had made the 1st Amendment applicable to the states through the due process clause of the 14th amendment. Legal scholars call this legal maneuver the doctrine of incorporation.

Fifth, the court followed the precedent set by the *Everson* court in using the 14th Amendment as the vehicle for making the 1st Amendment's religion clauses applicable to the states. However, the 14th Amendment has nothing to do with religion. Historically speaking, the 14th Amendment was passed in 1868 in the post-Civil War era in order to guarantee certain rights to the recently emancipated slaves. Moreover, an attempt was made to allow the 1st Amendment to become applicable to the states through the vehicle of the 14th Amendment at the time the 14th Amendment was framed. Yet the very Congress that formed the 14th Amendment voted down all attempts to link the 1st Amendment and the 14th Amendment together in this manner.[33] Thus, for the *Engel* and *Schempp* courts to make the 1st Amendment applicable to the states through the vehicle of the 14th Amendment not only ignores the 14th Amendment's historical context, but it also contradicts the intent of those who drafted it.

Sixth, by banning voluntary prayer in public schools, the *Engel* court made the radical move of over turning a 340-year-old tradition in American educational history. The court did so without citing a single precedent. Yet following established precedent 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, the *Schempp* court called attention to the non-existence of any precedent cited in *Engel* when it noted:

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[33] *McCollum v. Board of Education*, 333 U.S. 203, 218-219, n.6 (1948).

> 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.[34]

Seventh, the *Engel* and *Schempp* courts seemed to have followed more of a legislative philosophy rather than a judicial philosophy. It is interesting to observe that eight of the nine justices on the 1962-63 Supreme Court arrived on the court with an extended history of political rather than judicial experience. Barton observes:

> …Chief Justice Earl Warren had been the governor of California for ten years prior to his appointment to the court; Justice Hugo Black had been a U.S. Senator for ten years prior to his appointment; Justice Felix Frankfurter had been an assistant to the Secretary of Labor and a founding member of the ACLU; Justice Arthur Goldberg had been the Secretary of Labor and ambassador to the United Nations; Justice William Douglas was chairman of the Securities and Exchange Commission; all the justices except Potter Stewart had similar political backgrounds. Justice Potter Stewart, having been a federal judge for four years prior to his appointment, was the only member of the court with extended federal constitutional experience before his appointment. Interestingly Justice Potter Stewart was the only justice who objected to the removal of prayer on the basis of precedent. He alone acted as a judge: the rest acted as politicians.[35]

In sum, the preceding facts demonstrate how severely the court violated the original intent of the framers of the Constitution 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

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

[35] Barton, *Myth of Separation*, 148.

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 wide spread support of the American people.

Conclusion

This article has gone to great lengths to describe the abandonment of traditional hermeneutical principles in the field of constitutional interpretation. While traditional interpretive principles rested authority in the text rather than the interpreter, the advent of legal positivism has shifted the authority in the opposite direction. Today, the true power concerning what the Constitution means rests exclusively with the interpreter, who is the judiciary. Unfortunately, the story does not end there. A similar trend appears to be well under way in the area of evangelical biblical interpretation. An analysis of this disturbing trend will be the subject of the next journal article.