# THE EVOLUTIONARY WORLDVIEW AND AMERICAN LAW

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Evolution is the nineteenth century's number one contribution to Western thought.

By this I do not mean evolution merely as a scientific model. In a broader sense I refer to evolution as a philosophy, an ideology, a religion, or a comprehensive world view. In this sense, evolution has transformed Western thought. As Richard Hofstadter says in Social Darwinism in American Thought,

> Many scientific discoveries affect ways of living more profoundly than evolution did; but none have had a greater impact on ways of thinking and believing. In this respect, the space age does not promise even remotely to match it.(1)

To be sure, evolution did not transform Western thought overnight. Evolution did not originate with Charles Darwin's *Origin of Species* in 1859. Darwin's grandfather, Erasmus Darwin (1739-1802) had formulated theories of evolution, as had the French naturalist Jean Lamarck (1744-1829); and in fact, evolutionary thought can be found in ancient Rome, Greece, and Babylon. Darwin's contribution was to systematize evolutionary thought into a scientific model and to popularize it for the Western world.

And Darwin did not overwhelm an unwilling world with the brilliance of his reasoning or the weight of his evidence. Louis Agassiz of Harvard, the leading geologist, biologist, and zoologist of the time, lectured extensively refuting Darwin's theories, and other leading scientists of the day such as Louis Pasteur similarly opposed Darwin(2); but their arguments were ignored as the Western world eagerly jumped on Darwin's evolutionary bandwagon. As John Hallowell says,

> The popularity of Darwin's theory is to be accounted for, at least in part, by the fact that it suited the times in which it was formulated, it confirmed many individuals in believing what they already wanted to believe.(3)

Darwinism was the capstone of a gradual intellectual shift from the God-centered worldview of the Middle Ages and the Reformation to the man-centered worldview of today. Europe in the days of Luther and Calvin, Protestant and Catholic alike, would have turned a cold shoulder to evolutionary thought. The Pilgrims and Puritans who settled New England would have been repelled by Darwin. But the Enlightenment, while not totally unchristian, provided avenues for humanistic thought. And the Enlightenment had an influence in America, although that influence was considerably less than in Europe and was greatly tempered by two great religious revivals; the First Great Awakening of the 1740s and the Second Great Awakening around 1800. But during the 1800s the rise of Unitarianism, Transcendentalism, and other movements in American thought cooled the biblical Christianity of an earlier era, so that by 1853 America was ready for a major intellectual shift.

For thousands of years, Western thought had regarded truth as objective, absolute, and unchanging. But Georg Wilhelm Freidrich Hegel (1770-1831) undercut this view by treating truth as a changing process. According to the Hegelian dialectic, in each age there is a central idea, called the thesis. In opposition to the thesis there arises a contrary thought, called the antithesis. In the conflict between thesis and antithesis, the best of both emerge and combine as the synthesis. This becomes the thesis of the next age, another antithesis arises in opposition to it, another synthesis, and so on. Truth is an ever-changing, ever-upward process. After Hegel's death, his followers splintered into various camps, including the "left Hegelians" who went beyond Hegel into various forms of radicalism including Marxism, and the "Right Hegelians" who tried to reconcile the Hegelian dialectic with Christianity.(4)

As a whole, though, Hegelian thought constituted a frontal attack upon Christianity by regarding truth as a changing, evolving process.

The work of August Comte (1798-1857) was another influential force. Comte is sometimes called the father of modern science and the father of modern sociology, though others compete for these titles, but he is the undisputed father of positivism. Positivism is the belief that the only really meaningful or knowable truth is that which can be empirically verified, that is, that which can be verified through the five senses. Positivism does not necessarily reject God; rather, it relegates God to the limbo of unverifiable and therefore meaningless propositions. Such values as liberty, justice, equality, and the like are likewise regarded as unverifiable and meaningless.(5)

Combine Hegel's concept of truth as an evolving process with Comte's view of truth as only that which can be empirically verified, and we have come a long way from the classical Christian view of truth as absolute and unchanging and understood through divine revelation aided by the God-given facility of human reason. Add to this the "great chain of being" idea popular in America in the early 1800s that views man and nature as part of one great chain of being, the transcendentalist view that sees the spark of divinity within each human being, and the general American faith in upward mobility or human progress, and we find that by the middle of the nineteenth century, America -- at least, the American intellectual community -- was ready for a major paradigm shift from a God-centered worldview to a man-centered worldview. One thing held men back: the fact that man was created by God. How can a creature be greater than his Creator? This sobering realization forced men, intellectually at least, to kneel before the throne of God.

Darwin gave the Western world a way of explaining origins that did not have to involve God -- not a satisfactory explanation in my opinion, but an explanation nevertheless. In this way evolution was Western man's declaration of independence from God.

It is questionable whether Darwin ever imagined that his work would have such far-reaching implications. Possibly he himself never fully comprehended the extent to which evolution would become a central tenet of the humanistic worldview. But another man realized it quickly, and he immediately went to work. As Huntington Cairns explains,

> Herbert Spencer, in his autobiography, has related how, in the last days of 1857, at about the age of 37, when he was collecting, revising and publishing a number of essays, he was impressed with the kinship and connections between the ideas of his various articles. Suddenly there came to him the thought that the concrete sciences at large -- astronomy, geology, biology, psychology and sociology -- should have their various classes of facts presented in subordination to the universal principle of evolution. Clearly, it seemed to him, these sciences form a connected and unified aggregate of phenomena; and clearly, therefore, they should be arranged into a coherent body of doctrine. Thereafter, he set himself to the formidable task of composing the volumes which would relate all departments of knowledge, which he believed were separated only by conventions, to the theory of evolution . . . . For the next forty-odd years Spencer carried out his plan of demonstrating the universal application of this formula.(6)

While Spencer's name is not very well known today, he was a major force in the latter half of the nineteenth century, and he influenced many who in turn have influenced our thinking today. Hofstadter says, "In the three decades after the Civil War it was impossible to be active in any field of intellectual work without mastering Spencer . . . The generation that acclaimed Grant as its hero took Spencer as its thinker."(7) According to Henry Holt,

> Probably no other philosopher . . . ever had such a vogue as Spencer had from about 1870 to 1890. Most preceding philosophers had presumably been mainly restricted to readers habitually given to the study of philosophy, but not only was Spencer considerably read and generally talked about by the whole intelligent world in England and America, but that world was wider than any that preceded it.(8)

As a result, according to Huntington Cairns, "Nineteenth-century social thought, after the formula of the theory of biological evolution, was dominated by a theory of cultural evolution."(9)

**ECONOMICS**

Spencer (1820-1903) is best known today for his economic theories, described as laissez faire capitalism and often called Social Darwinism. Unlike Biblical capitalism, which stresses initiative, industry, and private property, but which also stresses compassion and moral responsibility, Social Darwinism taught that the marketplace is a tooth-and-claw struggle in which survival of the fittest is the governing principle. It is the duty of a businessmen to

drive his weaker competitors out of business, because in so doing he improves the quality of american business and advances the human race.

During that era of big business, many captains of industry shared Spencer's vision. Andrew Carnegie, the steel industrialist, describes in his autobiography how he had become despondent upon losing his faith in Christianity and the Bible, until he read Darwin and Spencer:

> I remember that light came as in a flood and all was clear. Not only had I got rid of theology and the supernatural, but I had found the truth of evolution. "All is well since all grows better," became my motto, my true source of comfort. Man was not created with an instinct for his own degradation, but from the lower he had risen to the higher forms. Nor is there any conceivable end to his march to perfection. His face is turned to the light; he stands in the sun and looks upward.(10)

Railroad magnate James J. Hill echoed a similar thought: "The fortunes of railroad companies are determined by the law of the survival of the fittest."(11) And John D. Rockefeller added, "The growth of a large business is merely a survival of the fittest . . . The American Beauty rose can be produced in the splendor and fragrance which bring cheer to its beholder only by sacrificing the early buds which grow up around it."(12)

It is largely because of this tooth-and-claw distorted version of capitalism that free enterprise is looked upon with some disfavor in many circles today.

**THEOLOGY**

Of all academic disciplines, theology might seem the most likely to be insulated from evolutionary thought. Yet the influence of evolution upon the study of the Bible is as clear as in any other field.

Jews and Christians have traditionally believed that the first five books of the Old Testament, Genesis through Deuteronomy, were written by Moses under divine inspiration. They have regarded God's law as given to Moses on Mt. Sinai, and they have viewed Israel's history as the struggle of the faithful to maintain the purity of God's revelation against the apostate and pagan forces that warred against it.

During the nineteenth century an alternative view arose. It is often called the documentary hypothesis, the Graf-Wellhausen theory (after its two principle architects), or, more commonly, the JEDP theory. The view holds that the Pentateuch was the work of four different authors whose names are unknown but who are identified by the letters J, E, D and P: "J", who always referred to God as Jehovah or Yahweh; "E", who always referred to God as Elohim; "D", who wrote the initial version of Deuteronomy; and "P", a priest who lived sometime after the Babylonian exile (605-539 B.C.) and who edited and redacted the works of J, E, and D and put the Pentateuch in substantially its present form.

The evidence for this theory is sadly lacking, and it is probably less popular today than it was fifty years ago. It does not seem to occur to these people that Moses, writing under the inspiration of the Holy Spirit over a long period of time and in different places and with different themes and purposes in mind, might have used more than one name for God. In fact, there are good reasons for the different usages: "Jehovah" is God's name; "Elohim" is the plural form of a generic word for god. One might use the word "elohim" for pagan gods, but one would never call a pagan god Jehovah.

Herbert F. Hahn, who shares the views of the liberal critics, forthrightly acknowledges that the JEDP theory is based upon evolutionary thought. He writes,

> . . . this conception did not grow merely from an objective reading of the sources. In a larger sense, it was a reflection of the intellectual temper of the times. The genetic conception of Old Testament history fitted in with the evolutionary principle of interpretation prevailing in contemporary science and philosophy. In the natural sciences, the influence of Darwin had made the theory of evolution the predominant hypothesis affecting research. In the historical sciences and in the areas of religious and philosophical thought, the influence after Hegel had substituted the notion of "becoming" for the idea of "being" . . . In every department of historical investigation the conception of development was being used to explain the history of man's thought, his institutions, and even his religious faith. It was not strange that the same principle should be applied to the explanation of Old Testament history.(13)

Concerning Julius Wellhausen, one of the principle architects of the Graf-Wellhausen theory, Hahn says,

> He consciously based his exposition on the evolutionary view of history. . . . From the evolutionary point of view, which assumed that development invariably took place from lower to higher forms, it was inconceivable that the nomadic ancestors of the Israelites could have held the lofty, monotheistic conceptions ascribed to Abraham.(14)

Translation: Abraham could not have believed in the one Jehovah as Genesis describes him as believing, because Abraham was still too much of a cave-man! He hadn't evolved to the point of monotheism, so he simply believed in a large pantheon of gods as the other pagans of the time believed. By the time of Moses and the exodus from Egypt, Abraham's descendants had evolved to the point where they could believe in their God as greater than all the others but still one among many. Only when we get to the Babylonian exile do the children of Israel truly become monotheistic.

This view depends not on evidence but on evolutionary faith. As Hahn says,

> . . . the history of Israel's religion no longer appeared as a continual struggle to maintain an ideal system established at the beginning; instead, it took on the character of gradual growth from the simple to the complex, with the Levitical institutions as the climax of the whole development. . . . The evolutionary conception proved of great value in ordering and explaining various phenomena of this sort which had puzzled earlier scholars. Now the characteristic ideas and institutions of each age could be understood as parts of the continuous process of development through which Israel's religion had gone.(15)

It is not surprising that evolution would influence such wide and diverse areas of human thought. One's beliefs about the nature of physical reality will affect one's beliefs about spiritual reality. One's beliefs about the nature and origin of the universe affects one's beliefs about the nature and origin of man. These in turn affect one's beliefs about God, His laws, His actions in history, His relationships with man, His provisions for man, His demands upon man, and His plan for the future. It is impossible, or at least intellectually unsound, to neatly separate thought into categories of the "religious" and "secular," for each has a profound effect upon the other.

**LAW**

For thousands of years, Jewish, Christian, and classical pagan thinkers had regarded law as the outworking of the will of God. Jews and Christians alike believed that God had spoken on Mt. Sinai and that Moses had recorded His laws. Classical Greek and Roman thinkers such as Sophocles, Plutarch, and Cicero spoke of the law of God. Theologians from Augustine to Aquinas to Luther and Calvin spoke of the law of God as revealed in Scripture and in the law of nature. English thinkers such as Blackstone and Locke expressed essentially the same view; and when Jefferson wrote in the Declaration of Independence of the "Laws of Nature and of Nature's God," he used language that all Americans from the sternest Puritan to the most radical Deist could accept. At the time this nation was founded, a consensus existed that human law is or should be man's attempt to follow the will of God as revealed by God through Scripture or through nature. And since God does not change, His law does not change either, although the application of His law may vary from one circumstances to another.(16)

Just as the evolutionary worldview has challenged the Christian worldview in every other field of academic discipline, so it has arisen to challenge the Christian view of law. The alternative view is generally known as legal positivism. It made its debut at the Harvard Law School in the 1870s under Harvard's dean, Christopher Columbus Langdell, and it reigns virtually unchallenged in most law schools today. Combining elements of the Hegelian dialectic (truth is a changing process), Comte's positivism (the only meaningful truth is that which can be empirically verified), Darwin and Spencer (the evolutionary view of man and the world), legal positivism can be summarized in five basic tenets:

(1) There is no higher law of God; or, if there is, it is irrelevant for the legal system today.

(2) Man is the source of law; law is law because the highest human authority, the state, has said it is law and has the power to enforce it.

(3) Since man is the source of law and man is an evolving animal, the law which man creates must evolve as well.

(4) Somebody must guide the evolution of law, since God isn't guiding it, and the persons best qualified to guide the law through their written decisions guide the evolution of law.

(5) The best and most "scientific" way to study law is to read the decisions of judges. After all, the true source of law is the mind of the judge, and the best way to study the mind of the

judge is to read the decisions he has written. Hence the study of law at most law schools today consists primarily of the reading of cases. This is called the case-law method of legal study, and it was pioneered by Dean Langdell of Harvard in the 1870s. Prior to that time the study of law consisted primarily of reading of statutes and classical and modern works of jurisprudence such as Blackstone's Commentaries, and apprenticing oneself to a successful lawyer and learning his ways. Some of America's greatest lawyers, including Clarence Darrow, Abraham Lincoln, and Chief Justice John Marshall, studied law the "old" way without ever going to law school, and their careers and reputations do not appear to have suffered too much as a result.

Oliver Wendell Holmes, Jr., a Harvard law graduate and Harvard law professor and an Associate Justice of the Supreme Court from 1902 to 1932, was probably the best-known exponent of legal positivism. Several of his statements clearly show the nature of legal positivism:

> For my own part I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. . . .
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> . . . for legal purposes a right is only the hypostasis of a prophecy -- the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it -- just as we talk of the force of gravitation accounting for the conduct of bodies in space. . . .
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> No society has ever admitted that it could not sacrifice individual welfare to its own existence. . . .
>
> The prophecies of what the courts will do in fact and nothing more pretentious, are what I mean by the law. . .(17)

Legal principles, Holmes believed, were not based upon divine principles or upon God-given human rights; rather, they are based on "deep-seated preferences."(18) Man is simply a complex animal, more complex than any ape but not of any greater intrinsic value than an animal.

Jerome Frank, a noted judge and law professor, summarized the view of legal positivism well:

> There is no rule by which you can force a judge to follow an old rule or by which you can predict when he will verbalize his conclusion in the form of a new rule, or by; which he can determine when to consider a case an exception to an old rule, or by which he can make up his mind to accept one or another old rule to explain or guide his judgment. His decision is primary, the rules he may happen to refer to are incidental.
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> The law, therefore, consists of decisions, not of rules. If so, then whenever a judge decides a case he is making law.(19)

This evolving view of law, in which the judge controls the evolutionary process in the name of humanity, is rooted squarely in evolutionary thought. Holmes wrote to Sir Frederick Pollock in 1894 that no writer in English except Charles Darwin had done so much as Herbert Spencer to affect our whole way of thinking.(20) It is not surprising, then, that this evolutionary worldview affects our way of looking at law and even the Constitution as well.

President Woodrow Wilson argued for an evolutionary interpretation of the Constitution in his book The New Freedom. He noted, first, that the Constitution was framed in terms of a Newtonian worldview:

> . . . in every generation all sorts of speculation and thinking tend to fall under the formula of the dominant thought of the age. For example, after the Newtonian Theory of the Universe had been developed, almost all thinking tended to express itself in the analogies of the Newtonian Theory and since the Darwinian Theory has reigned amongst us, everybody is likely to express whatever he wishes to expound in terms of development and accommodation to environment.(21)

By the Newtonian Theory, he means the worldview of Sir Isaac Newton, which saw the universe in terms of unchanging, absolute, God-ordained laws: the laws of mathematics, the laws of motion, of physics, chemistry, and the like, and also the moral laws that govern mankind. Wilson continued:

> . . . the Constitution of the United States had been made under the dominion of the Newtonian theory. You have only to read the papers of The Federalist to see that fact written on every page. They speak of the "checks and balances" of the Constitution, and use to express their idea the simile of the organization of the universe, and particularly of the solar system, how by the attraction of gravitation the various parts are held in

> their orbits; and then they proceed to represent Congress, the Judiciary, and the President as a sort of imitation of the solar system.
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> They were only following the English Whigs, who gave Great Britain its modern Constitution. Not that those Englishmen analyzed the matter, or had any theory about it; Englishmen care little for theories. It was a Frenchman, Montesquieu, who pointed out to them how faithfully they had copied Newton's description of the heavens.
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> The makers of our Federal Constitution read Montesquieu with true scientific enthusiasm. They were scientists in their way -- the best way of their age -- those fathers of the nation. Jefferson wrote "the laws of Nature" -- and then by the way of afterthought -- "and of Nature's God." And they constructed a government as they would have constructed an orrery -- to display the laws of Nature. Politics in their thought was a variety of mechanics. The Constitution was founded on the law of gravitation. The government was to exist and move by virtue of the efficacy of "checks and balances."

Except for his reference to Jefferson's phrase as an "afterthought" (it was a direct quote from Blackstone), Wilson has stated the Framers' views correctly. They viewed the world in Newtonian terms of fixed, absolute laws, and in so doing their views were fully compatible with those of biblical Christianity. As I have demonstrated in my book Christianity and the Constitution (Grand Rapids: Baker, 1987, 1990), the vast majority of the Founding Fathers were professing orthodox Christians. Even those few who probably were not Christians, like Jefferson and Franklin, strongly believed in a God who governs the universe according to His laws.

And the Founding Fathers fully intended that the Constitution should be interpreted according to the unchanging principles that were in effect when it was written. The recent call for jurisprudence of original intent, issued so forthrightly by Attorney General Edwin Meese at the meeting of the American Bar Association in 1985, , would have found the Framers nodding in strong agreement. In fact, not knowing of the rise of evolutionary humanism and legal positivism over the intervening two centuries, they would have wondered why it is even necessary to articulate points that are so self-evidently true.

The Founding Fathers clearly believed in jurisprudence of original intent. James Madison, whom many call the father of the Constitution, wrote:

> [If] the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a faithful exercise of its powers.

His views were echoed by Thomas Jefferson:

> The Constitution on which our Union rests, shall be administered by me according to the safe and honest meaning contemplated by the plain understanding of the people of the United States, at the time of its adoption.

And George Washington, Chairman of the Convention and first President thereafter, warned,

> 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 in 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.

But while Wilson correctly understood the views of the Founding Fathers, he concluded that they were wrong in their Newtonian view of the Constitution:

> The trouble with the theory is that government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton. . . . No living thing can have its organs offset against each other, as checks, and live. On the contrary, its life is dependent upon their quick co-operation, their ready response to the commands of instinct or intelligence, their amicable community of purpose. . . . Living political constitutions must be Darwinian in structure and in practice. Society is a living organism and must obey the laws of Life, not of mechanics; it must develop.
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> All that progressives ask or desire is permission -- in an era when "development," "evolution," is the scientific word -- to interpret the Constitution according to the Darwinian principle; all they ask is recognition of the fact that a nation is a living thing and not a machine.

When Attorney General Meese delivered his call for a return to jurisprudence of original intent at the ABA meeting in 1985, he touched off a storm of protest. Among the sharpest and most visible was the reply of Associate Justice William Brennan, the most eloquent member of the Court's liberal bloc. Speaking at a symposium at Georgetown University later in 1985, Justice Brennan declared that "the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone." Rather, each generation must reinterpret the Constitution for itself "through an evolutionary process [that] is inevitable and, indeed, it is the true interpretive genius of the text."

This was not the first time Justice Brennan had used the evolutionary concept for constitutional interpretation. In Furman v. Georgia, 408 U.S. 238 at 299 (1972), the Court considered a capital punishment case. Nine separate opinions were written in the case, five of which concluded that capital punishment, as applied in that situation, was unconstitutional. The various justices gave differing opinions for reaching their conclusions, but Justices Brennan and Marshall concluded that capital punishment today violates the Eighth Amendment prohibition against "cruel and unusual punishment." How could this be when the authors of the Eighth Amendment clearly believed in capital punishment and stated their belief in concurrently passing the Fifth Amendment? Borrowing a phrase from former Chief Justice Earl Warren, Brennan and Marshall wrote "that the words of the 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." Brennan added, "The evolution of this punishment evidences, not that it is an inevitable part of the American scene, but that it has proved progressively more troublesome to the national conscience." In other words, even though capital punishment was not cruel and unusual by the primitive and barbaric standard of 1789, it is cruel and unusual by the enlightened and human standard of today!

This evolutionary interpretation is not limited to the liberal bloc. Four ears later, in 1976, the Supreme Court considered another capital punishment case in Gregg v. Georgia, 428 U.S. 153. By a 5-4 vote, the majority upheld capital punishment. Brennan and Marshall dissented, again arguing the evolving standard of decency. But the majority, noting the number of states that had adopted capital punishment laws, concluded that society had not yet evolved to the point at which capital punishment could be said to be cruel and unusual. Note that the basic evolutionary interpretation is not disputed by the majority or the minority; the argument is over how far we have progressed on the evolutionary scale!

The evolutionary model of constitutional interpretation rests upon American faith and hope that change is progress, and the evolution of American law will always be in an upward direction toward greater recognition of human rights and human dignity. The abortion battle is a case in point. While resting the case for abortion "rights" on an ephemeral right of privacy that supposedly hovers somewhere around the due process clause of the Fourteenth Amendment or, even more vaguely, somewhere in the "penumbra" of the Constitution, the more honest of abortion advocates forthrightly admit that the so-called right to an abortion rests upon a very strained interpretation of the Constitution -- especially if original intent makes any difference. But the evolutionary approach gives the Constitution breathing room to expand and encompass more and more rights as time goes on (except, of course, the rights of unborn children).

But what if this evolutionary faith in upward progress is wrong? What if the world isn't inevitably getting better? What if history moves in cycles, sometimes upward and sometimes downward? What if the Bible is correct in teaching that man was created in an ideal state and that he has degenerated since the Fall? What if, as premillennial Christians believe, the world is getting worse and will continue to get worse until and through he Tribulation? Don't the signs of the times -- the savagery of modern weaponry, the crime rate, the rise of Satanism, acid rock, violence in our movies and television, the increase of child abuse, etc. -- indicate that we are moving toward a new age of barbarism?

In such an age, an "evolving standard of decency" is no firm basis on which to rest human rights. The same court that can use an evolving standard to abolish capital punishment, can also use an evolving standard to approve death by torture and other atrocities as acceptable under the "evolving standard of decency" that marks the progress of a mature, broad-minded, tolerant and decadent society. And the same court that can read into the Constitution new rights that aren't really there (such as the right to an abortion or the right to engage in homosexual conduct) can also read out of the Constitution rights that are there (such as the right to own firearms, or to own property, or to freely exercise one's religion). No, the only firm basis for protecting human rights is the timeless standard of the Constitution as interpreted according to the original intent of the Founding Fathers, men who drafted the Constitution according to the timeless principles of the Word of God.

God's Word provides a firm basis for believing in human rights and human equality, for it teaches that man is created in the image of God (Genesis 1:27). Evolutionary theory undermines that belief and opens the door to totalitarianism and racism -- not that evolutionists are inevitably totalitarian or racist, most of them are not; but evolution undermines the basis for

believing in human equality and human rights. If man is the result of a naturalistic evolutionary process, what is the basis for believing in human rights? Did ape-men have rights? If so, where did those rights come from? What basis does the evolutionist have for believing that man has any more rights than an ape, or an amphibian, or an amoeba?

And if man is the result of a natural evolutionary process, how can we be sure that some races haven't evolved further than others? In fact, in the famous Scopes trial of 1925, the textbook John Scopes used to teach evolution to his students contained blatant racism! H.L. Mencken didn't see fit to tell the American public about this, nor did the American Civil Liberties Union which financed Clarence Darrow's defense of Scopes. But on page 196 of Hunter's A Civic Biology, the text Scopes used, the following language appears:

> The Races of Man. -- At the present time there exist upon the earth five races or varieties of man, each very different from the other in instincts, social customs, and, to an extent, in structure. These are the Ethiopian or negro type, originating in Africa; the Malay or brown race, from the islands of the Pacific; the American Indian; the Mongolian or yellow race, including the natives of China, Japan, and the Eskimos; and finally, the highest type of all, the Caucasians, represented by the civilized white inhabitants of Europe and America.

Nor can evolutionists escape the plain language of Adolph Hitler in Mein Kampf:

> If nature does not wish that weaker individuals should mate with stronger, she wishes even less that a superior race should intermingle with an inferior one. Why? Because in such a case her efforts, throughout hundreds of thousands of years, to establish an evolutionary higher stage of life, may thus be rendered futile.

Lon L. Fuller correctly notes that "It is no wonder that for the seventy-five years prior to Hitler's rise in power the positivist philosophy of law achieved a standing in Germany that it had achieved nowhere else. The German scholars considered it scientific, and thought that, in contrast, Anglo-Saxon law was a mess."

It is reassuring to remember that Jefferson and the Founders of this nation rested their faith in human equality and human rights squarely upon the biblical doctrine of creation:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.

The positivist view of law leads to judicial tyranny, not only in Nazi Germany but also in the United States. For if judges are not bound by the plain wording of the Constitution, interpreted according to the intent of those who wrote and ratified it, their judicial power knows no bounds. As Attorney General Meese warned the ABA,

> It was not long ago when constitutional interpretation was understood to move between the poles of "strict construction" and "loose construction." Today, it is argued that constitutional interpretation moves between interpretive review" and "non-interpretive review." As one observer has pointed out, under the old system the question was how to read the Constitution; under the new approach, the question is whether to read the Constitution. . . .
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> The result is that some judges and academics feel free (to borrow the language of the great New York jurist, Chancellor James Kent) to "roam at large in the trackless fields of their own imaginations."

The further result is that these same judges and justices wield enormous and virtually unchecked power. Far from being the "least dangerous branch" of government, as Alexander Hamilton described the judiciary, the federal judiciary has become the most powerful and important branch of government, having a virtual veto over anything any other branch or level of government may do. The result is government by the majority vote of a nine-person committee of lawyers, unelected and holding office in effect for life.

Some liberal scholars have forthrightly argued that judges and justices should wield such power. The late Alexander Bickel, Professor of Constitutional Law at Yale, wrote:

> The function of Justices . . . is to immerse themselves in the tradition of our society and of kindred societies that have gone before, in history and in the sediment of history which is law, and . . . in the thought and the vision of the philosophers and the 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.

So judges are to study tradition, history, the philosophers, and the poets. Not the Constitution? Not the Federalist? Not Blackstone's Commentaries? Not the Bible?

And why should judges wield such power? Why not mechanics, or farmers, or businessmen, or legislators, or clergymen? Here is Professor Bickel's answer:

> 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.

s to following the "ways off the scholar" in pursuing the ends of government, I am tempted to reply with William F. Buckley, Jr., that I would rather be governed by the first one hundred names in the Boston telephone book than by the Harvard faculty. But I will content myself with the words of Robert Bork, who served as the Alexander Bickel Professor of Law at Yale as well as serving as a federal judge:

> Other than to heave a wistful sigh, I will pass by this vision of a judge's life without comment.

**RECLAIMING OUR CONSTITUTION**

What can be done to return our nation to the rule of law under the Constitution? Of all of the branches of government, the judiciary is probably the hardest to influence. To some extent the Founders intended it that way. They wanted the judiciary to be somewhat independent of the political process, so the judges would make their decisions based upon principles of right and wrong rather than political popularity or expediency. Governor Morris, who drafted most of the final wording of the Constitution, strongly favored life tenure for appellate judges because "Those who are charged with the important duties of administering justice should, if possible, depend only on God." The problem is, too many judges today do not depend on God. In fact, it could be said that many judges think they are gods!

Nevertheless, there are steps we can take:

(1) We can support law schools with a Christian mission, such as Regent University in Virginia, Simon Greenleaf School of Law in California, and Cumberland School of Law and Jones School of Law both of Alabama, as they seek to train a new generation of lawyers with a distinctive vision of law.

(2) We can support Christian groups on secular law school campuses, such as the Christian Legal Society and the Rutherford Institute, and the conservative Federalist Society, as they work within the secular law school community for Christian and/or conservative constitutional values.

(3) We can support groups like the Rutherford Institute, the Christian Legal Society, the National Legal Foundation, the Home School Legal Defense Association, Concerned Women for America, Eagle Forum, the American Family Association, Focus on the Family, the National Center for Constitutional Studies, and many others as they work to influence our nation for conservative Biblical values.

(4) We can work for the appointment or election of judges who believe in jurisprudence of original intent. Again, it is much more difficult to evaluate the philosophy or ideology of judges than it is for candidates for other offices. Many conservative and liberal groups rate candidates for legislative offices according to how they vote on key issues; a group might take ten key issues, list how each legislative offices according to how they vote on key issues; a group might take ten key issues, list how each legislator voted, and rate each legislator 80% liberal, or 40% conservative, or however he stacks up. It is much more difficult to rate judges, because no two judges vote on the same issues; each judge has his own caseload. To help people vote intelligently on the election or retention of judges, it is essential that people start examining the general record of judges and let the public know the judges' record. Again, no two judges vote on the same issues; but the fact that Judge Hanson convicted 76% of the drunk driving defendants in his courtroom last ear while Judge Smith convicted only 38% of the drunk driving defendants in his courtroom, says something about their performance in office

(5) A constitutional amendment providing that "This Constitution shall be interpreted strictly according to the intent of those who framed and ratified it" might help to restore jurisprudence of original intent. The problem is that this amendment would be interpreted by the same judges who have used the evolving standard in the past, but it might cause some judges to temper their activism.

(6) Article III, Section 2, Clause (2) of the Constitution provides that, except for a few cases involving original jurisdiction, the Supreme Court shall have appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make." Many are unaware that Congress has the authority to limit the appellate jurisdiction of the Supreme Court. This does not violate the constitutional separation of powers; it is one of the checks and balances the Framers of the Constitution wisely placed upon the Supreme Court. In the early decades of our constitutional history Congress limited the Court's appellate jurisdiction with some frequency, but Congress has not done so since Reconstruction. The Framers intended this check to be used, and the current flag-burning controversy might provide an appropriate occasion to use it.

These remedies may help curb the power of the Supreme Court, but they will not avert the danger of tyranny in general. For only God's law can limit the authority of man's law. Unless there exist a higher authority by which the law of man must be judged, man is his own judge, and the state (the highest expression of humanity in the pagan view) can do no wrong.

As Hallowell says,

> It is a short step from the conception of law as the product of the will of the state, whether the state be conceived as an instrument for the satisfaction of human desires (utilitarianism) or whether conceived as the personification of the good life (idealism) o the notion that law is the command of the stronger . . . Since the will of the state has no reality apart from the will of individuals who act in the name of the state the identification of the law with the will of the state amounts in practice to the identification of the law with the will of those who act in the name of the state. . .
>
> From this point of view every decision is a correct one. There can be no such thing as an incorrect decision or an unjust one. It is not the content of a decision that makes it law but the source from which it emanates. . . Ultimately the basis of law is fear and force rather than consent and justice. . .
>
> As an augury of things to come realistic jurisprudence certainly suggests that tyranny is an inevitability. For the only way out of the intellectual and moral anarchy underlying the realist's conception of the law is tyranny. If force alone, as Justice Holmes believed, is the only possible arbiter of our "deep-seated preferences", if moral judgments are nothing more than expressions of individual taste or preference, and if law, as Jerome Frank declares, is simply what men arbitrarily declare it to be, then we have no choice but to submit our differences to the arena of force. In that arena it is not the best reason that will prevail but the mightiest fist.

Liberty within the constraints of God's law, or tyranny under the oppression of man's law: That, ultimately, is the choice God gives to us. Which we choose depends largely upon whether we accept a creationist or evolutionary worldview.

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